

AN OVERVIEW OF THE LEGAL IMPLICATIONS OF COVID-19 ON PERFORMANCE OF CONTRACTUAL OBLIGATIONS IN ETHIOPIA

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Abstract

Since the first COVID-19 case was confirmed, the government of Ethiopia has taken measures to contain the spread of the virus, and thereby, ease the socio economic impact of the pandemic. Although these emergency measures were swift, as time went, they remain short lived due to various reasons. Businesses are forced, inter alia, to cut back production and service delivery, lay off employees temporarily, lack working capital making it difficult to continue operating. Businesses are especially challenged to meet their contractual obligations and keep their commercial relations worthy. As a result, this article overviews the effects of COVID-19 pandemic on the performance contractual obligations and shows the legal relief adopted in Ethiopian law to escape the liabilities of resulted damage. To that effect, the article employs doctrinal research method and hence, assesses domestic laws, books, journal articles, web information, and foreign jurisprudences. Thus, it argues that the COVID-19 pandemic affects the performance of contractual obligations but parties may use force majeure or if not, vary contractual terms to save themselves from the pitfalls of the current pandemic.

Keywords: Contractual obligations, COVID-19, Force majeure, Variation of contracts

INTRODUCTION

The Novel Coronavirus (COVID-19) is an infectious respiratory virus that spread from person to person.¹ The virus was first identified in an investigation during an outbreak in Wuhan, China in December 2019.² Although health officials are still tracing the exact source of this new coronavirus, early hypotheses link it to a seafood market in Wuhan, China from where it has spread around the globe hitting the majority of countries. Deeply concerned by the alarming

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¹ World Health Organization(WHO), *Coronavirus: An Overview* (July 23, 2020), https://www.who.int/health-topics/coronavirus#tab=tab_1.

² Center for Disease Control and Prevention(CDC), *What You Should Know About COVID-19 to Protect Yourself and Others* (July 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf>.

level of spread and severity, on March 11, 2020, the World Health Organization (WHO) declared the COVID-19 outbreak a global pandemic.³ At the present (on July 21, 2021), the virus has spread to all continents and more than 192,281,847 people are infected in nearly 220 countries.⁴ The virus has led to more than 4,134,016 deaths globally so far.⁵ In Africa, the first COVID-19 case was confirmed on 14 February, 2020 in Egypt.⁶ In Sub-Saharan African countries when it was confirmed in Nigeria.⁷ Since then, it has spread to dozens of African countries within weeks.

In Ethiopia, the first case of COVID-19 was reported on March 13, 2020.⁸ At the time, the government was furious and took swift response. It devised and implemented various strategies to contain the spread of the virus: including people coming from outside the country quarantining for at least 14 days; shutdown of nurseries, schools, and universities; closure of churches and mosques; cancelled public events and meetings; closed international flight routes; and imposed travel restrictions, mandatory quarantine procedures, and lockdowns.⁹ On April 16th 2020, the government passed a State of Emergency Proclamation which was lasted for five months.¹⁰ The approval of the Proclamation was brought with the enactment of State of Emergency Proclamation No.3/2020 Implementation Regulation.¹¹ The government had issued different directives and protocols such as Directive No. 64/2020: Tax Debt Remittance to Mitigate the Impact of COVID-19 on taxpayers),¹² COVID-19 Workplace Response Protocol,¹³

³ World Health Organization(WHO), *Archived: WHO Timeline-COVID-19* (July 23, 2020), <https://www.who.int/news-room/detail/27-04-2020-who-timeline---covid-19>.

⁴Worldometer(July 21, 2021),<https://www.worldometers.info/coronavirus/countries-where-coronavirus-has-spread/>

⁵ *Ibid.*

⁶ Egypt Today Staff, *Egypt Announces First Coronavirus Infection*, EGYPT TODAY(July 23, 2020), <https://www.egypttoday.com/Article/1/81641/Egypt-announces-first-Coronavirus-infection>.

⁷*Coronavirus: Nigeria Confirms First Case in Sub-Saharan Africa*, BBC NEWS(July 23 2020),<https://www.bbc.com/news/world-africa-51671834>.

⁸ WHO Africa, *First Case of COVID-19 Confirmed in Ethiopia*, WORLD HEALTH ORGANIZATION ETHIOPIA(July 23, 2020)<https://www.afro.who.int/news/first-case-covid-19-confirmed-ethiopia?country=30&name=Ethiopia>.

⁹ Sibhatu Biadgilign and Muluneh Yizgaw,*COVID-19 IN Ethiopia: Current Situation, Missed Opportunities, and the Risk of Health System Disruptions*, 35 PAMJ 1, 1(2020).

¹⁰ State of Emergency Proclamation Enacted to Counter and Control the Spread of COVID-19 and Mitigate Its Impact, Proclamation No. 3 /2020, *Federal NegaritGazetta*, (2020), preamble. The preamble of the proclamation states that the proclamation is meant to create public awareness; strengthen precautionary measures; contain the spread of the disease, and thereby, mitigate the humanitarian, social, economic and political damages which would be caused due to the virus.

¹¹ State of Emergency Proclamation No. 3/2020 Implementation Regulation, Regulation No.466/2020, *Federal NegaritGazetta*, 2020.

¹² Ministry of Finance, Tax Debt Remittance to Mitigate the Impact of COVID 19 on Taxpayers Directive, Directive 64/2020, 2020.

and Directive No 30/2020: A Directive Issued for the Prevention and Control of COVID-19 Pandemic.¹⁴ Different strategies, standards and protocols such as Risk Communication and Community Engagement Strategy for COVID- 19 Outbreak Response,¹⁵ Cleaning and Disinfection Protocol for COVID-19¹⁶ and Quarantine and Border Control Implementation Guideline were also enacted and implemented.¹⁷ Aside to this, the government had created awareness to the public in collaboration with the media, and other appropriate organizations.¹⁸ It also mobilized resources from the community, private institutions and development organizations, and extended social protections for the vulnerable parts of the community.¹⁹

Although several strategies were developed, they were not sustainable or implemented. Gradually, they have loosened and short-lived.²⁰ Regional and local governments also failed to follow and supervise the implementation of these measures.²¹ As well, the people could not stay at home for prolonged periods as the majority of them don't have enough food and other essential items.²² Besides, the perception and awareness of the people to the virus was not to the expected level.²³ Consequently, the number of deaths and infected are increasing each day. On July 20, 2021, the number of confirmed cases and deaths reached 277,877 and 4,359, respectively.²⁴

¹³ Ministry of Labor and Social Affairs, COVID-19 Workplace Response Protocol, 2020.

¹⁴ Ethiopian Public Health Institute, A Directive Issued for the Prevention and Control of COVID-19 Pandemic, Directive Number 30/2020, 2020.

¹⁵ Ministry of Health and Ethiopian Public Health Institute, Risk Communication and Community Engagement Strategy for COVID- 19 Outbreak Response in Ethiopia (RCCE), (2020).

¹⁶ Ministry of Health and Ethiopian Public Health Institute, Cleaning and Disinfection Protocol for COVID –19, (2020).

¹⁷ Ministry of Health and Ethiopian Public Health Institute, Quarantine and Border Control Implementation Guide, (2020). The Ministry of Health and Ethiopian Public Health Institute, for instance developed Standards for quarantine, isolation and treatment centers(2020), Infection prevention and control interim protocols in health caring centers (2020), Quarantine& border control implementation guide(July 2020), Protocol for transporting COVID-19 patients, Protocol health care facility COVID-19 Preparedness and response protocol, etc.

¹⁸ Mekonnen Hailmariam, COVID-19 in Ethiopia, *Assessment of How the Ethiopian Government has Executed Administrative Actions and Managed Risk Communications and Community Engagement*, 13, RISK MANAGMENT AND HEALTHCARE POLICY 2803, 2806(2020).

¹⁹ *Ibid.*

²⁰ Sibhatu Biadgilign, and Muluneh Yigzaw, *supra note 9*, at .1

²¹ *Ibid.*

²² *Ibid.*

²³ *Id.*, at 2.

²⁴ Ethiopian Public Health Institute, *COVID-19 Reported Cases in Ethiopia* (July 20, 2021), <https://covid19.ephi.gov.et/2021/07/>.

Aside to health concerns, the COVID-19 pandemic has affected the overall economic situation of the country.²⁵ The pandemic has, *inter alia*, lowered exports(e.g. flower exports), reduced or delayed imports, depressed tourism, contracted services(transport, restaurants, entertainments), lowered remittance flows, disrupted the wholesale and retail trade, depressed revenue, and increased unemployment in Ethiopia.²⁶ It has created challenge and uncertainties for many, if not all, small and medium enterprises²⁷ mostly in urban areas embedded in food production, export, construction, and service industries.²⁸ Businesses are experienced increasing hardship and difficulty to meet contractual obligations being under pressure to perform contractual obligations but at risk of breaching them.²⁹

In view of these problems and challenges, this article focuses on: 1) to investigate the implications of the COVID-19 on performance of contractual obligations, 2) to determine the legal relief of non-performance of contractual obligations, 3) to appraise whether COVID-19 event constitutes a *force majeure* under law of Ethiopia 4) to determine whether variation of contract can be a way-out to escape liabilities of non-performance resulted due to the COVID-19 pandemic. To this effect, the article employed doctrinal research method. Hence, it has gazed the Ethiopian Civil Code, policies, guidelines and, protocols. It has also considered books, journal articles, web information, observations, and documented knowledge from the lived experience and practices of other countries.

²⁵ See generally African Union Commission and UNDP Regional Service Center Africa, *The Impact of the COVID-19 Outbreak on Governance, Peace and Security in the Horn of Africa* (November 19,2020), https://au.int/sites/default/files/documents/38904-doc-horn_of_africa_regional_brief_vupdated6_-_read-only_4.pdf.

²⁶ Nasir Ababulgu and Hika Wana, *The Horrors of COVID-19 and the Recent Macro economy in Ethiopia*, JOURNAL OF KNOWLEDGE ECONOMY1, 13(2021). See also United Nations, *Policy Brief: The World of Work and COVID-19*, 2020, p.2. See also Charlene Marie Kalenkoski and Sabrina Wulff Pabilonia, *Initial Impact of the COVID-19 Pandemic on the Employment and Hours of Self Employed Coupled and Single Workers by Gender and Parental Status*, IZADP, 2020, 1, at 1.

²⁷ Alemayehu Geda, *The COVID-19 Damage on the Ethiopian Service Sector: A Supplement Using Google Search Trend “Big data , 11-12 (2020)*.

²⁸ Nasir Ababulgu and Hika Wana, *Supra note 26, at 7. See also AbrihamEbabuEngidaw, Small Business and Their Challenges During COVID- 19 Pandemic in Developing Countries; in Case of Ethiopia*, RESEARCH SQUARE 1, 2(2020). See generally Yohannes Ayele, Habtamu Edjigu and Getaneh Mihret, *Assessing the Impact of COVID-19 on Small-scale Manufacturing Establishments in Ethiopia*, (2021). For instance, in manufacturing establishments, over 95% of them have seen a drop in revenue by 55% on average. 87% of the firms’ sale were decreased. There are firms which have reported lay off workers. Close to 90% of the firms lost demand for their products. 95% of the firms don’t have provision of business loans.

²⁹ Kevin Otieno Onyango, *Non-performance: The Impact of COVID-19 on Contractual Obligations*, 2(2020).

The rest of this article is organized in three sections. Section one attempts to present the actual or potential implications of COVID-19 on performance of contractual obligations. Section two discusses the legal reliefs of non-performance contractual obligations and within that context analyses the concept of *force majeure*, and whether COVID-19 forms *force majeure* under Ethiopian Civil Code. It also presents the possibilities of employing variations of contracts to escape the liabilities of non-performance caused due to the pandemic. Finally, the article ends with concluding remarks.

1. THE IMPACT OF COVID-19 ON PERFORMANCE OF CONTRACTUAL OBLIGATIONS

Beyond the public health concerns and socio-economic impacts, the COVID 19 pandemic has resulted in an unprecedented shock to businesses around the world.³⁰ In many countries, the pandemic has led to a sharp drop in consumer spending, sudden change in revenue, fall in investment, and slump in international trade.³¹ It has forced a significant number of businesses particularly those involved in the manufacture, sale and distribution of goods to be temporarily closed.³²

About the beginning of the outbreak, businesses were challenged managing the impacts on employees and arranging support.³³ Whilst the pandemic subsists, many businesses experienced increasingly hardships which making it difficult for them to meet contractual obligations and protect bottom lines.³⁴ Consequently, businesses in different countries are focusing on their contractual relations: for instance, in Russia, businesses are considering to amend or cancel their contracts³⁵, many Kuwait businesses are unable to fulfil their contractual obligations and are figuring out how they can escape the impacts of the pandemic³⁶, in Kenya,

³⁰ Philip Kotsis and Ahmed Amin, *How COVID-19 is characterized under Kuwait Law*, 1(2020).

³¹ *The Impact of COVID-19 Pandemic on Contracts Regarding the Manufacture, Distribution and Sale of Goods*, SQUIREPAATTONBOOGS, 6(2020).

³² *Ibid.*

³³ Dominic Rebelo and Luisa H. Cetna, *COVID-19 and its Impact on Contractual Relations: How to Mitigate Damages, Renegotiate Your Contracts and Avoid Disputes (Part I)*, 1(2021).

³⁴ KPMG LAW, *COVID-19 and Contractual Obligations*, 1(2020).

³⁵ Julia Zagonek and Pavel Boulatov, *COVID-19: Legal Impact on Contractual Obligations*, WHITE AND CASE, 1 (May 24, 2021).

³⁶ Philip Kotsis and Ahmed Amin, *Supra note 30*, at 1.

businesses could not perform their obligations, and most contracts are at risk of breach.³⁷ Similarly, in Ethiopia, businesses have not escaped the contractual impacts of the pandemic. It disrupts the supply chain, and puts strain on commercial relationships of businesses.³⁸ It puts businesses under increasing risk of failing to meet contractual obligations.³⁹ The situation will worsen the longer the crisis continues.

Given the critical impacts of the pandemic on the performance of contractual obligations (both for existing and new contracts), countries are taking different remedial measures, for instance, the Belgium authorities have adopted a statutory moratorium (law) subsequent to both first and second waves of in the country.⁴⁰ The moratorium enjoins the creditors to stay away from enforcing debts, terminating existing contracts, and initiating bankruptcy proceedings against debtor who fail to perform contractual obligations due to the COVID-19 lockdown.⁴¹ Similarly, the Chinese government has issued force majeure certificates, and insulated companies from claims by foreign companies for non-delivery of products or the non-purchase of product inputs that had been contracted.⁴² In Ethiopia, however, the government did not issue any specific directives or take any measure to ease the impacts of the pandemic on the performance of contractual obligations, except for the Federal Housing Corporation which has declared a 50% reduction of house rent.⁴³ Whatever the circumstances, it is important to think ahead and be in a state of readiness to resolve those contractual challenges and navigate continuous scenarios to protect the future of the business and preserve important commercial relationships.

³⁷ Kevin Otieno Onyango, *Supra note 29*, at 2&3.

³⁸ See Generally Abebe Demsew, *Assessment on impact of COVID-19 on Ethiopian Construction Industry*, 10 IJES 26889, (2020). See also UNITED NATIONS ETHIOPIA, *SOCIO-ECONOMIC IMPACT OF COVID-19 IN ETHIOPIA*, 17(2020).

³⁹ *Ibid.*

⁴⁰ *Belgian Government Imposes Temporary Statutory Moratorium on Creditors' Rights*, LOYENS & LOEFF (July 23, 2020), <https://www.lexology.com/library/document>.

⁴¹ *Ibid.*

⁴² *Sponsored Briefing: Legal effects of Covid-19 on The Business Life*, MORAL AND PARTNERS LAW FIRM (July 23, 2020), at 11, <https://www.legalbusiness.co.uk/co-publishing/sponsored-briefing-legal-effects-of-covid-19-on-the-business-life/>.

⁴³ Zodidi Dano, *Covid-19: Ethiopia's rental body reduces April rent by 50%*, AFRICAN NEWS AGENCY/ANA, (Apr 15, 2020). <https://www.iol.co.za/news/africa/covid-19-ethiopias-rental-body-reduces-april-rent-by-50-46714347>.

2. LEGAL RELIEFS OF NON-PERFORMANCE OF CONTRACTUAL OBLIGATIONS

In the Ethiopian law of contract, the general rule is where a party fails to perform his/her contractual obligations, such failure constitutes a breach of contract and gives rise to liability in favor of the counterparty.⁴⁴ However, this is not necessarily true. There are circumstances in which parties may challenge and be relieved of liabilities of non-performance. There are legal reliefs or defenses to non-performance or delay in the performance of contractual obligations, which could assist in an economic downturn. This includes the doctrine of *force majeure* and variation of contracts. Thus, this section is dedicated to address these basic legal reliefs.

2.1. *Force Majeure*

The concept of *force majeure* (superior force) has its origins in Roman Law.⁴⁵ The Roman Law, with the name of “*vis major*” or “*vis divina*”, designated unenforceable and irresistible events that excused a debtor of performance.⁴⁶ The concept was later adopted by the French Civil Code (Napoleon Code) in 1804 and followed by other civil laws such as those of Quebec and Greece.⁴⁷ Similarly, the concept of *force majeure* has been recognized in international instruments, such as the CISG and the UNIDROIT principles.⁴⁸

Over the years, the concept of *force majeure* relates to supervening unforeseen events that make performance impossible. This includes cases of subsequent impossibilities which are external supervening events occurring after contract formation and are beyond the control of the aggrieved party, i.e. fires, floods, droughts, earthquakes, civil riots, terrorist attacks, etc., which

⁴⁴ Civil Code of The Empire of Ethiopia, Proclamation No 165/1960, *Negarit Gazeta: Gazette Extraordinary*, 1960, Art 1771, (herein after the Civil Code).

⁴⁵ Annerine (AJ) van Schalkwyk, *The Nature and Effect of Force Majeure clauses in the South African Law of Contract*, 2(2018).

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Yohannes Hailu Tessema, *Force Majeure and the Doctrine of Frustration under the UNIDROIT Principle, CISG, PECL and the Ethiopian Law of Sales: Comparative Analysis*, 58 JOURNAL OF LAW, POLICY AND GLOBALIZATION 33, 35(2017).

render the performance of a party's contractual obligations not just excessively onerous as in hardship-type situations, but impossible whether on a temporary or permanent basis.⁴⁹

At present, in civil law jurisdictions, for any event to qualify as *force majeure*, it shall satisfy three elements cumulatively. These include that the event occurred shall be external, unforeseeable and irresistible.⁵⁰ The external element requires the event occurred to be "external" or "outside" the debtors spheres of activities or control, and shall include, for instance, acts of god, acts of war or authority of law.⁵¹ But some jurisdictions qualify, in certain instances, events that are normally internal to the debtors' spheres of activities or control such as employees striking as *force majeure*.⁵² The unforeseeable element, on its behalf, demands the event shall not be foreseeable at the time of formation of the contract.⁵³ If the event could have been seen at time of the contracting, it doesn't constitute force majeure. As well, to constitute *force majeure*, the event shall be irresistible. The event occurred shall render the performance of obligation under the contract impossible, and not merely onerous or burdensome.⁵⁴ It shall also render the impossibility of performance of the contract permanent, not temporary.

Apart from the concept of *force majeure*, in civil law jurisdictions, parties do have a freedom to agree and incorporate a *force majeure* clause in their contract. They can dictate the scope, applications and effect of *force majeure*.⁵⁵ In such cases the *force majeure* clause or the intent of the parties governs whether an event constitutes a *force majeure*. But, later, if the party invoking the *force majeure* clause is at fault in either inducing or avoiding the force majeure event, it will not benefit from the clause. Nonetheless, the latter may exempt certain faults or negligent acts of the parties. In general, in civil law jurisdiction, *force majeure*, both as concept and a clause, produces an effect. It relieved the parties all of liabilities regarding non-performance of an obligation.⁵⁶

⁴⁹ Klaus Peter Berger and Daniel Behn, *Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study*, 6 MCGILL JOURNAL OF DISPUTE RESOLUTION 78, 90(2019-2020).

⁵⁰ MarekKatsivela, *Contracts: Force Majeure Concept or Force Majeure Clauses?*, UNIF. L. REV. 101, 103(2007).

⁵¹ *Id.*, at 104.

⁵² *Ibid.*

⁵³ *Id.*, at 105/

⁵⁴ *Id.*, at 106.

⁵⁵ Dominic Rebelo and Luisa H. Cetna, *Supera note 33*, at 2.

⁵⁶ MarekKatsivela, *supra note 50*, at 102.

2.1.1. *Force Majeure* under the Ethiopian Civil Code

In Ethiopia, the concept of *force majeure* has been recognized under Articles 1792-1794 of the Civil Code. The Code under Article 1792(1) aptly defines *force majeure* as “an occurrence which the debtor could normally not foresee and which prevents him absolutely from performing his obligation.” Thus, in Ethiopia, force majeure stands on two cumulative basic elements:

- 1) The event could not “normally” be foreseen by a debtor at the time of formation of the contract. In the code, the degree to which the event could normally be foreseen will be determined by an average person, and not by individual debtors.⁵⁷
- 2) The event shall prevent the debtor “absolutely” from performing his obligations. The event occurred shall prevent any person from performing contractual obligations.⁵⁸

Accordingly, nether an event which makes performance absolutely impossible but should normally have been foreseen, nor one normally unforeseeable but increases the difficulties and costs of performance of obligations without making it absolutely impossible, are *force majeure* events.⁵⁹ This approach of the Ethiopian Civil Code on *force majeure* is strict and inspired by French Civil Code. However, the Civil Code is different from the French one as it doesn't require events which resulted in non-performance shall be external and so can't be imputed to debtors.⁶⁰

In addition to events which meet the preceding requirements, in Ethiopia there are enumerated events which amount to *force majeure* such as an unforeseeable act of a third party for whom the debtor isn't responsible; an official prohibition preventing the performance of the contract; natural catastrophe such as an earthquake, lightning or floods; international or civil war; or the death or a serious accident or unexpected serious illness of the debtor.⁶¹ The events are not exhaustively illustrated so that any event which meets the requirements of Article 1792(1) may constitute *force majeure*. Therefore, parties who are prevented from performing their obligations

⁵⁷ GEORGE KRZECZUNOWLCZ , FORMATION AND EFFECTS OF CONTRCATS IN ETHIOPIAN LAW, 142(1983).

⁵⁸ *Id*, 142.

⁵⁹ TILAHUN TESHOME, BASIC PRINCIPLES OF ETHIOPIAN CONTRACT LAW, 126 (2nd, 1999).

⁶⁰ GEORGE KRZECZUNOWLCZ, *Supra note 57*, at 142.

⁶¹ Civil Code, Art 1793.

due to such and other *force majeure* situations will be released of the liabilities of non-performance obligations.

Although all of the events which constitute *force majeure* are not enumerated exhaustively, cases such as a strike or lockout of employees, an increase or reduction of raw materials and the enactment of new legislations don't form *force majeure* due to the policy reasons of the country.⁶² But, the parties are still at freedom to agree otherwise and make these events form *force majeure*, and, thereby, release the debtor from liability for the resulting damage.

Furthermore, in Ethiopian law, parties are free to agree to limit their liability.⁶³ They are at freedom to establish their liability at fault only.⁶⁴ In that context, parties are free to incorporate *force majeure* clause in their contract and limit their liability to fault.⁶⁵

2.1.2. Would the COVID-19 Pandemic Fall Within the Concept of *Force Majeure* Under the Civil Code?

To argue whether the COVID -19 pandemic constitutes a *force majeure* event in Ethiopia it is wise initially to distinguish between one) the general evaluation of the pandemic from a political, socio-economic or health-related standpoint, and two) the legal qualification of the pandemic as a *force majeure* event.

Regarding COVID-19, the Director-General of the World Health Organization (WHO) declared the outbreak as pandemic on 30 January 2020.⁶⁶ In his statement, advised “all countries should be prepared for containment, including active surveillance, early detection, isolation and case management, contact tracing and prevention of onward spread of 2019-nCoV infection, and

⁶² TILAHUN TESHOME, *supra* note 59, at 128.

⁶³ Civil Code, Art 1887.

⁶⁴ *Id.*, Art 1887.

⁶⁵ GEORGE KRZECZUNOWLCZ, *Supra* note 57, at 144.

⁶⁶ International Health Regulations Emergency Committee, *Statement on the Second Meeting of the International Health Regulations Regarding the Outbreak of the Novel Coronavirus*, (January 30 2020), <[https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov))>.

to share full data with WHO”.⁶⁷ As well, China has declared COVID-19 as *force majeure* to apply in relation to many commercial contracts signed by its companies.⁶⁸ On February 29, 2020, Bruno Le Maire, the French Minister for economic affairs and finance, had already indicated that, in his view, the COVID-19 epidemic constituted a "*case of force majeure for company*.”⁶⁹

In spite of these declarations and statements, the question whether a *force majeure* event does in fact exist in Ethiopia remains a legal issue as it. It has to be determined by courts in each individual case. Typically, the *force majeure* event is not the pandemic as such, but the factual or legal effects of the public health crisis. Factual effects involve illness or quarantine or even death of key personnel, production facility closures, or interruption of supply chains. Legal effects relate to lockdowns, curfews, travel restrictions and other measures by governments and public authorities which are issued in reaction to the crisis.

Therefore, neither the declaration of the WHO Director-General nor *force majeure* certificates issued by public authorities, in and of themselves, would amount to a legal *force majeure* determination. Rather, they may be taken as an indicative effect for the factual existence of force majeure. But, they may not prejudge a domestic court’s factual evaluation of the COVID-19 situation in a given case. Thus, whether COVID-19 pandemic is a *force majeure* event in Ethiopia shall be determined by considering the requirements specified in the Civil Code. Accordingly:-

- 1) The COVID-19 pandemic must have been unforeseeable /unpredictable at the conclusion of the contract.⁷⁰ The unforeseeable/unpredictability requirement is primarily a question of time and place. Thus, if the contract was signed on or around March 13, 2020 (i.e. the date on which the first case of COVID-19 was declared in the country, it may be argued that it would satisfy the enforceability condition as the pandemic and the governmental lockdown measures could not have been foreseen at the time. However, this is still subject to the views that our courts may adopt.

⁶⁷ *Ibid.*

⁶⁸ Sponsored briefing, *Supra note 42*.

⁶⁹ Emilie Vasseur , David Bakouche , et al, *France: COVID-19 Outbreak: Impact On the Contracts Enforcement and The Role of the Judge*(07 May 2020) <https://www.mondaq.com/france/litigation-contracts-and-force-majeure/929602/covid-19-outbreak-impact-on-the-contracts-enforcement-and-the-role-of-the-judge>.

⁷⁰ Civil Code, Art 1792(1).

Regarding contracts concluded with international parties such as China and/or other countries affected by the pandemic at that time, the date to be retained may be March 11, 2020, the date on which the World Health Organization declared the COVID-19 was a major public health emergency of international concern.

However, there could be doubt with regard to contracts concluded after March 13, 2020 and March 11, 2020 worldwide. On one hand, it may be argued that the spread of the pandemic was public knowledge at the time those contracts were executed and that it was expected that appropriate actions would be taken by the government if the pandemic worsened. On the other hand, although there has certainly been common knowledge of a global pandemic, it may be considered that the unprecedented impact of the COVID-19 on businesses and on the economy at large, could not have been foreseen.

2) The COVID-19 pandemic must prevent parties absolutely from performing obligations.⁷¹ The pandemic must be irresistible/insurmountable. Thus, under this requirement, parties shall primarily determine whether the pandemic was resistible or irresistible. If they found that the pandemic was irresistible, it is important to consider whether the parties could have mitigated the consequences of such pandemic, or whether all reasonable measures were taken to render the predictable resistible. In this regard, analysis shall be made on whether measures could have been taken by the parties to minimize the impact of the Covid-19 and resulting lockdown measures on their business activity; it was actually impossible for the impacted party to fulfil its contractual obligations during the lockdown; and the pandemic was so empowering that its consequences could not be prevented or managed.

Therefore, if the COVID -19 pandemic brought mere difficulty to perform the contract or has made the performance of obligation more onerous, the pandemic will not meet the requirement of irresistibility. As well, the COVID-19 and resulting governmental measures certainly do not satisfy the requirement of irresistibility if performance of the obligation is possible though other mechanisms though time consuming and expensive. Similarly, if parties could have certainly limited its consequences by adopting anticipatory and precautionary

⁷¹*Ibid.*

measures or by implementing alternative practices, the pandemic is not irresistible. The pandemic must be a real obstacle to performance of the contract.

Under Ethiopia laws, parties may rely on a *force majeure* clause to escape liabilities of non-performance affected by COVID-19. Whether a party can rely on *force majeure* clause under the current circumstances will depend first and foremost on whether such a clause was included in the contract. If it is included, then whether the COVID-19 pandemic may be regarded as a *force majeure* event will depend on (i) the actual wording of the clause, (ii) the nature of the party's contractual obligations and (iii) the actual impact of the pandemic on that obligation. A specific reference to an "epidemic" or a "pandemic" will make it easier to succeed on a *force majeure* claim. If the clause does not use such specific language, the party will need to consider whether COVID-19 can be argued to fall under a general catch-all *force majeure* clause. If such wording is included in the contract, noting, however, that as *force majeure* is a creature of contract the Courts will be reticent to expand the agreed definition set out in a contract.

Here, it is important to note that the *force majeure* event need not be COVID-19 itself. It is the consequences of COVID-19 and their impact on a party's ability to fulfill a contractual obligation, which will be relevant to any analysis. Such consequences may happen because of COVID-19 measures such as social distancing, travel restrictions, curfews or a full lock-down which would ordinarily be deemed to be outside a party's control. However, such events must have translated into a physical or legal constraint to the party's ability to perform its obligations and not merely created additional economic hardship for the party. Thus, a party seeking to rely on a *force majeure* clause in their contract should do so with care, because a wrongful claim could result in a finding of contractual breach or repudiation of the contract and could entitle the other party to claim damages or terminate the contract.

Therefore, whether Covid-19 could be considered as a *force majeure* event is not as straightforward as it may appear from the legal perspective. Fulfillment of this requirement will thus depend on each transaction and the courts will, on a contract-by-contract basis, assess whether performance was actually possible in view of the current pandemic and curfew orders.

2.1.3. Jurisprudence on *Force Majeure* of Pandemics in Ethiopia

In Ethiopia, it is worth noting there is relatively little or no jurisprudence on the doctrine of *force majeure*. As far as I am aware, there is no reported case law regarding the operation of *force majeure* clauses in the context of epidemics or pandemics. The courts have generally been reluctant to establish exoneration of liability on the basis of force majeure, whether in terms of tortious or contractual liability. In spite of this, I am of the opinion that the COVID-19 outbreak satisfies the characteristics of *force majeure* given the outbreak contains both natural component, the virus itself, and a government element, such as the curfew measures which make the execution of contracts even more difficult. But, I suggest the situation still needs to account the date and context in which the contract was executed.

Although Ethiopian courts don't hold judgment yet, there are jurisdictions which ruled the COVID-19 pandemic a *force majeure*. In France, that inspired, courts have qualified COVID-19 as *force majeure*. On March 2020, the Colmar Court of Appeal delivered that the COVID-19 pandemic constitutes a *force majeure* event.⁷² In the case concerned, one of the litigants, Mr. Victor G was unable to attend the hearing due to administrative detention as he had been in contact with persons likely infected by the virus.⁷³ Consequently, the Colmar Court of Appeal held that **"these exceptional circumstances, which led to the absence of Mr. Victor G. from today's hearing, constitute a force majeure event, being external, unforeseeable and irresistible, given the time-limit imposed for the ruling and the fact that, within that time-limit, it will not be possible to ascertain that there is no risk of contagion and to have an escort authorized to take Mr. G. to the hearing"**.⁷⁴

Similarly, in German, the Paderborn Regional Court ruled the COVID-19 pandemic *as force majeure* on September, 25, 2020.⁷⁵ The case was brought by a student against an event agency for repayment of a EUR 10,000 deposit which the class had made for the organization of a student ball since the organization of the ball failed due to COVID-10 protection ordinance of

⁷² See <https://www.bakermckenzie.com/en/insight/publications/2020/03/france-decision-declare-covid19-force-majeure>.

⁷³ See <https://www.jdsupra.com/legalnews/france-covid-19-hardship-force-majeure-88108/>.

⁷⁴ *Ibid.*

⁷⁵ See <https://www.lexfutur.ch/en/whats-keeping-us-busy/article/erstes-gerichtsurteil-in-deutschland-zu-covid-19-als-ereignis-hoherer-gewalt-force-majeure/> (September 25, 2020, 3 O 261/20).

the state off North Rhine-Westphalia.⁷⁶ In its decision, the Paderborn Regional Court enjoined the event agency to refund the deposit ruling the COVID-19 pandemic is *force majeure* event.⁷⁷ The court in its reasoning specified “the Corona pandemic and its consequences represent an external event outside the control of the parties. Because there has never been a pandemic of this magnitude before, it was also unforeseeable for the individual. Even with the application of the most reasonably expected care, it was unavoidable for the individual. The corona virus thus constitutes an event falling under the concept of *force majeure*.”⁷⁸

2.2. Variation of Contracts

There are circumstances in which the COVID-19 pandemic may not constitute a *force majeure* event or where the parties fail to incorporate *force majeure* clause of the pandemic in their contracts. As specified in the preceding section, in both cases, the affected parties cannot use the pandemic as a *force majeure* event and seek any relief of non-performance of contractual obligations. But, if the continued performance of contractual obligations has been difficult or has become excessively costly due to the COVID-19 pandemic, parties may still rely on variation of contracts and seek legal relief.

Variation of contracts is all about altering some terms of the contract.⁷⁹ As a concept, variation does not intend to alter the root of the original contract. The original contract continues to exist in an altered form.⁸⁰ It merely qualifies the existing rights and obligations of the contracting parties. Variation is thus different especially from rescission where the alteration does away with the original contract or releases parties for contractual terms in its entirety.⁸¹

2.2.1. Variation of Contracts under the Ethiopian Civil Code

In Ethiopia, as a rule, the Civil Code adopts the principle of non-revision.⁸² A contract remains in force even where the conditions of its performance and the obligations assumed are upset by

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ Look Chan Ho, Novation, *Variation and Rescission – A Question of Intention?* CORPORATE RESCUE AND INSOLVENCY 1, 1(2008).

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² Code, Art 1764(1).

unforeseen upheavals. A party may not be released from his obligation because change of circumstance render his performance more onerous. Theoretically, this is justified since the contracting party presumes business risks and expects the performance of the contract will change due to some economic events while entering into contract.⁸³ But, the Code defeats this rule and allows contractual terms to be altered when the change in the balance of the contract is sweeping and quite unforeseen. The Code, however, grants the contracting parties and not the court to regulate the effects of such changes.⁸⁴ This reaffirms the general rules of formation of the contract which provide that contracts are created or varied by the agreement (mutual consent) of the parties.⁸⁵ As well, it is in line with article 1731(1) which provides the binding effects of contracts on the parties; similarly, courts are prohibited from varying contractual terms through guise of interpretation.⁸⁶

Accordingly, the contracting parties can vary (revise) their contracts affected by unforeseen and unexpected upheavals. The parties can do this in two ways: one, they can avail of such remedy by incorporating the possibilities of unexpected economic changes in their original contract.⁸⁷ Or, second, although the party who is favored by the change would resist, the parties are free to negotiate, and fix the unbalanced contractual terms in a new contract.⁸⁸ In addition, the Code allows contracting parties, in their original or new contract, to divulge the task of varying contractual terms where circumstances which would modify the economic basis of their contract happened.⁸⁹

In spite of the preceding section, courts may vary contractual terms on the grounds of equity plus when the ground is expressly supported by exceptional legal provisions. The first exceptional ground is when there is an inequitable contract between families or other relationship giving rise to special confidence,⁹⁰ excluding other confidential relationships such as superior-inferior relationships. In doing so, however, the court shall take precaution and apply this ground

⁸³ GEORGE KRZECZUNOWLCZ, *Supra note 57*, at 112-113.

⁸⁴ Civil Code, Art 1764(2) and 1763.

⁸⁵ *Id.*, Art 1675 and 1711, and 1731(2).

⁸⁶ *Id.*, Art 1714(2) and 1733.

⁸⁷ *Id.*, Art 1764(2).

⁸⁸ *Id.*, Art 1764(2).

⁸⁹ Civil Code, Art 1765.

⁹⁰ *Id.*, Art 1766.

with great restraint.⁹¹ Secondly, the court may revisit a contract made with an administrative body whose performance is upset by the acts of the government.⁹² The third exceptional ground stands on the interdependence of the respective obligations of the parties. At times, a party's performance of obligations become partially impossible due to *force majeure* events, but the impossibility doesn't constitute grounds for the other party to cancel the contract. As a result, the party will be relieved of paying damage to the extent of the impossibility.⁹³ Pursuant to this, the court varies (reduces) the obligations of the other party proportionately, restoring the balance of the contract.⁹⁴ Lastly, the court may postpone the time of performance of the contract affected by unforeseen event to the maximum of six months, but "...having regard to the position of the debtor and the requirements of justice."⁹⁵ In doing so, the court shall take all necessary cares, and construe the position of the debtor and the requirement of justice with great curiosity.

2.2.2. May Parties Vary their Contracts During the COVID-19 Pandemic?

The impacts of the current COVID-19 pandemic have proved extremely severe. Although measures taken such as social distancing, closure of commercial establishments, and a ban on travel are necessary, they paralyze many business activities and make compliance with contractual obligations unfeasible.⁹⁶ They render the continued performance of the obligations difficult, more expensive or even impossible.⁹⁷ As a result, contracting parties may wonder about the mechanisms that could be invoked to adjust obligations.

In Ethiopia, the rules allow parties to renegotiate and vary their contractual terms when performance of obligation has become difficult or impossible due to COVID-19 pandemic. Thus, the parties, under the concept of variation, may alter some of the terms of their original contract and handle the impacts of the pandemic through different mechanisms. The parties can easily handle the impacts of the pandemic and adjust the obligations they assumed if they have

⁹¹ GEORGE KRZECZUNOWLCZ, *Supra note 57*, at115.

⁹² *Id.*, Art 1767.

⁹³ GEORGE KRZECZUNOWLCZ, *Supra note 57*,at117.

⁹⁴ *Ibid.*

⁹⁵ Civil Code, Art 1770(1&2)

⁹⁶ Anaëlle Idjeri, *Covid-19 and business contracts: What strategy to follow?* SOULIER-ADVOCATS,1 (May 24, 2021) <https://www.soulier-avocats.com/en/covid-19-and-business-contracts-what-strategy-to-follow/>.

⁹⁷ *Ibid.*

incorporated a clause to that effect in their original contract. But, due to different reasons, the parties may not have done this. In such cases, although the parties who are favored by changes of the pandemic rarely agree to the alteration, the parties may sit for renegotiation, and alter certain contractual obligations which have become more difficult or expensive due to social distancing, lockdowns and curfews in their new contract. Instead of regulating the effects of the current pandemic themselves, the parties may provide arbitrators, in advance in the original contract, tasked with revising the conditions of performance contracts impacted by Covid-19 pandemic. Alternatively, they can confide the same task to arbitrators and escape the severe effects of the pandemic, in their new contract, and even after the pandemic has affected the performance of their contractual obligations.

The parties, however, shall give their mutual consent while renegotiating and readjusting the performance of their contractual obligation impacted by COVID-19 pandemic. Otherwise, the new contracts, which are subsequently varied, may not have effect before the law. Moreover, the altered contracts, like their formation, shall be accompanied by consideration of anything of value or forms other money, such as relinquishing of existing rights. In this absence, the new contracts will be ineffective, and neither party can claim breach of the new terms. A party who requires a variation, as rule, must offer the considerations. But, if both contracting parties didn't perform their obligations, both shall offer some form of considerations. Furthermore, the new contract is subjected to the same form of the original contract. The contracting parties shall stick to the previous form while they prepare their new contract.

Aside from variation by themselves, in Ethiopia, contracting parties can even ask the court to order the judicial revision of the contracts whose performances have been changed by the current pandemic. Typically, this works in some exceptional circumstances provided by the law. Hence, judicial revision is avail for parties: one) who have concluded contract with parties whom they are families or do have other relationships giving rise to special confidence, but the condition of its performance has become inequitable due to the current pandemic, two) who entered into a contract with an administrative body, but its performance is excessively expensive or impossible due to acts of governments taken to contain the spread of the virus, and Three) whose performance of obligation is partially impossible because the other party could perform

his obligation affected due COVID-19 measures, but can't cancel or require the cancellation of the contract. The court may alter the time of performance and grant parties a maximum of six months to perform their obligations which has become difficult or impossible due to COVID -19 measures.

CONCLUSION AND THE WAY FORWARD

COVID-19 has certainly created an unprecedented situation wherein businesses are facing many challenges resulting in significant losses if not addressed properly. The government has issued laws and taken regulatory measures to contain the spread of the COVID-19 pandemic and save the business community from a wide range of economic impacts of the virus. These legal and regulatory measures advise businesses to take various precautionary steps and measures to ensure their continuous existence. As such, though government hasn't issued any COVID-19 related legislation on contractual issues, businesses whose performance of contractual obligations becomes impossible or more onerous due to COVID-19, do have available legal and contractual remedies. These include, as specified in the Civil Code, *force majeure* and variation of contracts. Thus, if parties are absolutely prevented from performing their contractual obligation by an event normally not foreseen such as the COVID-19 pandemic at the time of conclusion of the contract, or incorporated a COVID-19 pandemic *force majeure clause* in their contract, may be released from all liabilities regarding non-performance of an obligation. In circumstances where COVID-19 pandemic do not constitute a *force majeure* event, parties may still rely on variation of contractual terms if the continued performance of their contractual obligations has been difficult or has become excessively costly due to the current pandemic.

On the same note, attention should be paid to potential implications that COVID-19 may have on ongoing contractual negotiation which haven't yet resulted in the execution of an agreement. A typical case, for instance, a party may withdraw from the contractual negotiation unilaterally due to COVID-19 related reasons while the other party is relying on a positive outcome of the negotiation. This situation will seriously affect the parties who are in good faith and the business transactions in long run. Thus, the parties shall act in good faith during the negotiation and finalization of the agreement. They shall not rely on the positive outcome of the

negotiation only. The parties shall also act in light of the situation deriving from the COVID-19 emergency and independent of any direct impact on the transaction being negotiated. Business currently negotiating new contracts should pay great attention to the concept of *force majeure* in its present scenario. In this regard, it is advisable for the parties to insert a COVID-19 pandemic or related clause into their contract, as has been practiced in response to the Ebola virus outbreak in West Africa in 2015. In Ethiopia, this has also been affirmed by Article 1887 of the Civil Code which states that “the parties may limit their liability under the contract and provide that they will not be liable unless they commit a fault.” Therefore, contracting parties should go cautiously to the maximum and escape the bad impacts of the COVID-19 pandemic.