

LEGAL ADVISORY

NOVEL CORONAVIRUS DISEASE (COVID-19) PANDEMIC: HANDLING EMPLOYMENT & CONTRACTS TODAY & THE DAY AFTER IN KENYA

The Morning After By Christine De Luca

*Let none wake despondent: one way
or another we have talked plainly,
tested ourselves, weighed up the sum
of our knowing, ta'en tent o scholars*

.....

*We are a citizenry of bonny fighters,
a gathered folk; a culture that imparts,
inspires, demands a rare devotion.
no backtracking; that each should work
and play our several parts to bring about
the best in (Kenya), an open heart.*

INTRODUCTION

On or about 11th March 2020, the World Health Organization (WHO) declared **COVID-19**, the disease caused by the novel corona virus known as "SARS-CoV-2", a **global pandemic** and thereby set in motion an unprecedented era in the history of the Modern World.

The rise and spread of the Covid-19 pandemic has had a global impact, where the human toll has been significant, and the economic cost is expected to be exponential. We are at the infancy of the pandemic and its full cost is yet unknown

Possible vaccines and some specific drug treatments are under investigation. They are being tested through clinical trials. WHO is coordinating efforts to develop vaccines and medicines to prevent and treat COVID-19.

In the foregoing, we find our clients deeply concerned both on a personal and professional level. Accordingly, to assist our esteemed clients and partners navigate these trying times; we have taken the liberty on preparing a basic advisory on legal issues that may arise for businesses as a result of the COVID-19 pandemic.





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Here-in-below, we look at the possible effects of the pandemic on contractual relationships and how to address them to ensure business continuity.

A. LEGAL ENVIRONMENT

Some of the Statutes and Regulations that will be most relevant to persons and businesses in Kenya at this time include:

1. *The Constitution of Kenya, 2010* - supreme law of the Republic of Kenya that binds all persons and all state organs.
2. *The Employment Act, 2007* - governs the employer-employee relationship by defining and declaring fundamental rights and duties of employer and employees, provides basic conditions of employment and provides for mechanisms to resolve disputes arising in employment.
3. *The Companies Act, 2015* - provides for laws to govern and reorganize businesses in Kenya by making it easier for entities to establish a presence and operate.
4. *The Public Health Act, Chapter 242 of the Laws of Kenya* - makes provisions for securing and maintaining health in Kenya. As read together with *The Public Health (Prevention, Control and Suppression of COVID-19) Regulations, 2020*.
5. *The Public Order Act, Chapter 56 of the Laws of Kenya* - makes provisions for the maintenance of public order and for connected purposes. As read together with the *Public Order (State Curfew) Order, 2020*.
6. *The Preservation of Public Security Act, Chapter 57 of the Laws of Kenya* - makes provision for preservation of public security, which includes but is not limited to, defense of the territory and people of Kenya, securing fundamental rights and freedoms of the individual amongst others.
7. *The Penal Code, Chapter 63 of the Laws of Kenya* - provides for express criminal penalty.
8. *The Fair Administrative Action Act, 2015*

NOTE that the Government will not enact laws to interfere with private contracts. Any laws it will enact will be to ameliorate the situation generally. Dealing with employees or contracts will be the sole responsibility of each business.



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B. EFFECT OF THE PANDEMIC ON COMMERCIAL CONTRACTUAL RELATIONSHIPS

Governments the world over have launched unprecedented public health and economic responses to the COVID-19 pandemic. This has in turn had major effects on small and large businesses, demand and supply chains, global financial markets, imports and exports among others. It appears that for the moment and for the foreseeable future, contractual obligations or at least some parts thereof may prove impossible for parties to perform.

Businesses are likely to be exposed to a heightened risk of legal implications arising across their supply chain. The pandemic will ultimately impact almost every sector due to supply chain issues and suppressed demand resulting from uncertainty, travel restrictions and general disruption to 'business as usual'.

In particular, contractual parties may seek to delay and/or avoid performance (or liability for non- performance) of their contractual obligations and/or terminate contracts, either because COVID-19 has legitimately prevented them from performing their contractual obligations, or because they are seeking to use it as an excuse to extricate themselves from a bad deal.

Parties may also cite the pandemic as a basis for renegotiation of prices or other key contractual provisions due to shifts in supply and demand.

The spread of COVID-19 may also trigger conflict with other legal obligations, such as employers reconciling the steps, they need to take to ensure business continuity with their duty of care towards their employees.

I. LEGAL REMEDIES UNDER THE LAW OF CONTRACT

The law offers a limited range of remedies, for avoiding contractual obligations, where a contract becomes difficult or impossible to perform. Two such remedies are:

1. the common law doctrine of frustration; and,
2. the *force majeure* clause included in contracts.

1. Frustration

At common law the doctrine of frustration will operate to terminate a contract automatically when a subsequent event occurs, which is:

- (i) unexpected;
- (ii) beyond the control of the parties; and,
- (iii) makes performance impossible or renders the relevant obligations radically different from those contemplated by the parties at the time of contracting.



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- The thresh-hold at which an epidemic or pandemic, or events associated with them, can trigger the frustration argument, is when they render performance impossible or illegal or “radically different”. Given the dramatic impact of the Covid-19 pandemic, there would appear to be scope for the doctrine of frustration to apply in many cases, depending on all the circumstances.
- A party might seek to argue that one or more of the following established grounds operate to found a claim that a contract has been frustrated by the COVID-19 pandemic:
 - (i) ***Temporary unavailability*** – a person (or object) that is essential for performance of the contract is temporarily unavailable. This would most obviously frustrate a contract, where the contractual terms dictate that it was to be performed only at, or within a specified time period, and that the time of performance was the essence of the contract.
 - (ii) ***Failure of a specific source*** – if the subject matter of the contract is to be obtained from a specific source, which becomes unavailable due to no fault of either party. For example, this could arise if goods are extracted from a particular crop which fails due to drought or disease; or where goods are to be imported from a particular country, where import is prevented by factors beyond the parties’ control; such as, war, natural disasters, or prohibition of export.
 - (iii) ***Impossible method of performance*** – if the contract provides a method of performance which becomes impossible. NOTE: the courts have held that a contract will not be frustrated where performance is possible by a different method, and the difference between the two methods of performance is not sufficiently fundamental.
 - (iv) ***Illegality*** – if the contract becomes illegal as a result of changes in law. This could be relevant in light of the emergency legislation introduced to deal with the pandemic.

Given the scale and impact of the virus globally, it is possible to see how parties might seek to make the above arguments. Ultimately, whether a party would be successful before the courts would depend on the facts of each case, including as to whether in the particular circumstance’s performance is rendered impossible or radically different from what the parties intended.

- It is important to keep in mind that the courts have tended to apply the doctrine of frustration narrowly, emphasising that it is not likely to be invoked to allow a contracting party to escape what turns out to be a bad bargain.

The **effect of frustration is automatic termination of the contract**, if the argument is successful.



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2. *Force Majeure*

Given the limited applicability of the doctrine of frustration, parties will often include a *Force Majeure clause* in their contracts. Such clauses excuse one (or both) parties to a contract, from performance of their obligations following the occurrence of unexpected events or circumstances which are outside of that party's control.

- A typical *Force Majeure clause* will provide that a party is excused where it is prevented, hindered or delayed from performing its obligations due to the occurrence of an event beyond the reasonable control of the parties.
- *Force Majeure clauses* are designed to help insulate companies from the shock of the unforeseen. In grappling with the unpredictability of the current pandemic, it seems we are indeed facing, for the moment, a force to be reckoned with, where the legal liabilities have yet to be revealed.
- The contract may include a list of such events, by way of example or exhaustively; for example, an act of god, war or conflict. It may well include a pandemic, typically by reference to classification by the World Health Organisation (WHO) (such as the COVID-19 classification).
- Other common categories of *Force Majeure* events that may be triggered by the COVID-19 crisis, in particular circumstances, include changes in law or regulation, acts of governmental authorities, the restriction or suspension of licences and permits, and delays in transportation or communication.
- A general blanket provision for events beyond a party's control could trigger the clause even if it is not covered by any of the specific categories listed.

What is covered will therefore depend on the precise drafting of the clause. Courts may look to the specific wording of the clause, and depending on the jurisdiction and governing law, may interpret that language strictly.

Whether a party would be successful before the courts will ultimately depend on; the impact of the pandemic on the performance of the contractual obligations, the precise wording of the contract and the *Force Majeure clause*, as to whether the relevant triggering event must "prevent" performance or meet the lower standard of "hinder" or "delay". Given the fact-specific nature, this is likely to result in disputes.

- For example, the ripple effects in a *Force Majeure* situation can be significant when it comes to supply chains as each party is reliant on the performance of the party before them in the chain. *Force Majeure* "impairs the ability of the subsequent parties to perform." Therefore, if Party A is impaired, Party B may have a *Force Majeure* argument, as would Party C, all the way down through the supply chain to the sale of finished products.



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- A change in economic or market circumstances which makes the contract less profitable or performance more onerous is not generally regarded as sufficient to trigger a *Force Majeure clause*. So, if, despite the pandemic, both parties remain able to fulfil their contractual obligations, the situation will not be one of *Force Majeure*.
- If, however a party is prevented from performing, because of emergency legislation introduced to deal with the pandemic, this may well lead to a valid claim of *Force Majeure*.

Depending on how it is drafted, **successful reliance on a *Force Majeure clause* may have some of all of the following consequences:**

- (i) Entitlement to suspend performance while the *Force Majeure* event continues.
- (ii) Non-liability for the non-performance or delay in performance while the *Force Majeure* event continues.
- (iii) Extensions of any deadlines under the contract while the *Force Majeure* event continues (for example, to allow for completion of a project).
- (iv) An express or implied obligation to mitigate, whereby the party seeking to rely on the *Force Majeure clause* must show that it has taken all possible steps to avoid the *Force Majeure* event or the impact of its consequences.
- (v) A right to terminate the contract if the *Force Majeure* event continues for a specified period.

Force Majeure is also referred to as Act of God or Casus fortuitus.

II. EFFECTS OF THE PANDEMIC ON OTHER CONTRACTUAL PROVISIONS

The pandemic may also give rise to attempts by parties to invoke other contractual provisions, such as:

1. **Price adjustment clause** - parties may seek to adjust all or part of the contract price for a commodity due to increased costs; such as increased supply chain strain, as a result of the virus.
2. **Limitation or exclusion clause** - parties may increasingly seek to rely upon limitation or exclusion clauses, especially in the absence/inapplicability of a *Force Majeure clause*, to limit or exclude liability for non-performance.
3. **Change of law clause** - a party could rely on a “change of law” clause in a contract, entitling either party to terminate or renegotiate the contract, where a change in the applicable law makes it impracticable or impossible for a party to perform its contractual obligations.
4. **Material adverse change clause** - found in some contractual agreements which allow a party to refuse to proceed if certain events occur after the contract date. Whether events related to the pandemic will amount to a



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material adverse change will depend on the terms of the clause and the specific circumstances. It may be possible to invoke a MAC clause if events have taken an unexpected turn, after the contract was entered into, which has had a dramatic impact in the particular circumstances of the transaction. Given the extreme circumstances resulting from the COVID-19 pandemic globally, this may be an available argument, but it will all depend on the circumstances and the interpretation.

III. CONTRACT TERMINATION

Where a contract has become uneconomic or undesirable as a result of the pandemic, a party may wish to limit its losses by terminating the contract. In these circumstances, it will be important to consider the express termination provisions under the contract and the entitlement to terminate under common law as a result of a party's breach.

1. **Express Termination as provided in the contract** - The right to terminate under an express termination clause depends on the exact wording of the provision in question. Is there, for example, a right for one or both parties to terminate on notice and without cause, or are there specific termination rights for one or both parties that are triggered in the circumstances that have arisen (outside of the *Force Majeure* or MAC clauses), if so, then the entitlement to terminate will be clear.
 - The termination clause may also specify particular consequences of termination. For example, it may provide for the return (or retention) of any advance payments, and may include a liquidated damages provision or a limitation or exclusion clause as discussed above under section D.
2. **Termination under Common Law** - even where a contract contains express termination provisions, a party may be entitled to terminate under common law as a result of another party's breach. There will be a right to terminate if a party is in repudiatory breach of contract; that is, if the effect of the breach is to deprive the innocent party of substantially the whole benefit of the contract or has clearly demonstrated an intention not to perform the contract in some essential respect.

C. EFFECT OF THE PANDEMIC ON EMPLOYMENT CONTRACTS

Due to the negative effect on businesses, we expect to see the following legal issues now arising with respect to employment contracts:

I. SALARY REDUCTIONS

An employer cannot unilaterally change the terms and conditions of an employee's engagement where such a change is detrimental to the employee. If an employer wishes to implement salary reductions, it would need to obtain the employee's written consent.



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- Where an employer unilaterally implements such changes, the employee may succeed in a claim for constructive dismissal.

II. REDUNDANCY

We opine that a number of employers will need to declare certain employees redundant. *The Employment Act 2007* defines "redundancy" as; "The loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment." In Kenya, redundancies are popularly referred to as 'retrenchment'.

- The reasons an employer can rely on in a redundancy exercise include;
 - (i) Work reorganization
 - (ii) Business transfer issues
 - (iii) Poor demand of products
 - (iv) Services of the employee being superfluous
- *The challenge here will be successfully showing that the services of the employee are now superfluous.*
- *Section 40(a) and 40(b) of the Employment Act, provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union.*
- The proper procedure for redundancy as per the *Employment Act* must be followed noting that redundancy is a process not an event. Therefore, the following must be done:
 1. Where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the **reasons for, and the extent of, the intended redundancy not less than a month prior to the date** of the intended date of termination on account of redundancy;
 2. Where an employee is not a member of a trade union, **the employer notifies the employee personally in writing and the labour officer;**
 3. The employer has, in the selection of employees to be declared redundant had **due regard to seniority in time and to the skill, ability and reliability of each employee** of the particular class of employees affected by the redundancy;
 4. **The employer has** where leave is due to an employee who is declared redundant, **paid off the leave in cash;**
 5. The employer has paid an employee declared redundant **not less than one month's notice or one month's wages in lieu of notice;**



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6. The employer has paid to an employee declared redundant; **severance pay at the rate of not less than fifteen days pay for each completed year of service.**
- Further, in the event of redundancy, the associated tax implications of any payouts would also need to be considered.

III. TERMINATION/DISMISSAL

Section 35(1) of the Employment Act 2007 provides that termination of employment can be initiated by either of the parties to a contract of employment.

- Lawful termination of employment under common law includes:
1. **Termination of employment by agreement** - when the employer and employee agree to bring a contract of employment to an end in accordance with an agreement. For example, with a contract of apprenticeship; where the period of training expires, then the contract will obviously come to an end.
 2. **Automatic termination** - a contract of employment may be terminated automatically in circumstances such as death or loss of business of the employer.
 3. **Termination of employment by the employee/resignation** - this happens when an employee due to material breach of the contract by the employer decides to resign from his/her employment. Alternatively, the employee may resign for any other personal or professional reason.
 4. **Termination of employment by an employer** - an employer may also terminate the employment contract of an employee but there is a need to comply with the provisions of the law and the contract relating to termination. A contract of employment may be terminated by an employer on the following grounds:
 - (i) Gross Misconduct (*Employment Act Section 44(3)*)
 - (ii) Physical incapacity
 - (iii) Poor performance
 - (iv) Employer's operational requirements/retrenchment.
 - (v) By mutual agreement between the employer and the worker (*Industrial Training Act, section 13 (1) (a)*)
 - (vi) By the employer when the employee dies before the expiration of the period of employment
 - (vii) By the employer if the worker is found by medical examination to be unfit for employment. Due to sickness or accident the employee becomes unable to carry out his or her work (*Employment Act, section 41(1)*).



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- From the foregoing, it is evident that termination because of the COVID-19 pandemic may be challenging unless it is based on III (2) above; that is, loss of business of the employer. The employer must prove this convincingly and conclusively.

IV. LEAVE

The *Employment Act* provides for rights and duties in employment, which include; annual leave, maternity leave, sick leave, housing, water, food, medical attention and so forth. More importantly, we shall discuss annual and sick leave during this pandemic. The Act provides the following LEAVES.

1. ANNUAL LEAVE

Section 74 of the Employment Act 2007 provides that the Employer shall keep a written record of all employees employed by him of an employee's annual leave entitlement, days taken and days due. This means that the obligation to know how many leave days the employee has lies squarely on the employer.

Section 28 provides that an employer may, with the consent of the employee divide the minimum annual leave entitlement under *subsection (1)(a)* into different parts to be taken at different intervals. This means that you may engage an employee to agree that their annual leave days be taken during this pandemic rather than later.

2. SICK LEAVE

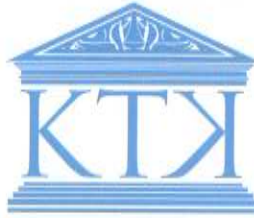
In case an employee is affected by the virus and is in isolation, the law provides that an employee is entitled to sick leave of not less than seven (7) days with full pay and thereafter to sick leave of seven (7) days with half pay, subject to production by the employee of a certificate of incapacity to work, signed by a duly qualified medical practitioner or a person acting on the practitioner's behalf in charge of a dispensary or medical aid centre.

IVb. FURLOUGH

Though not in our Statutes, US has developed the employment practice called FURLOUGH in which in extra-ordinary situations, employees take leave of absence without pay. This is a new tool that employers in Kenya can take recourse to. Both Employer and Employee have to reach a mutual agreement to this situation with promise of return to work when the pandemic ends or is under control.

V. REDUCTION OF WORK HOURS

Should an employer be forced to adopt reduction of work hours and should such reduction in work hours be associated with a pay reduction, the express consent of the employee will have to be sought and obtained.



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VI. PLACE OF WORK

The Employment Act requires that employment contracts should state the place of work and it is likely that many existing employment contracts have place of work provisions. Where employees opt or are instructed or requested to work from home or remotely from work because of the outbreak, they are likely to be in breach of this provision under their employment contracts. To avoid any legal issues in the future, we would advise that employers enter into temporary agreements/addendums with their employees allowing for the work from home protocols associated with the mitigation of the spread COVID-19. **This pandemic has forced companies to re-think of what an office is: is it the physical or need to work irrespective of locus?**

D. GENERAL MATTERS RELATING TO THE PANDEMIC IN KENYA

1. **Curfew** - The Government has imposed a 7.00pm to 5.00am curfew for all persons within the borders of Kenya. The law provides penalties for breaches of the curfew.
2. **Closure of the courts** - The Chief Justice confirmed the closure of courts. The Judiciary scaled down court activities that saw suspension of open court hearings across the country. Only matters under certificate of urgency may be filed at this time.
3. **Closure of all land offices and registries** - In compliance with the Presidential Directive on COVID-19, the Ministry of Lands and Physical Planning scaled down its operations. Consequently, all lands registries countrywide were closed for twenty-eight (28) days effective 17th March 2020. This also applies to the Department of Survey in Ruaraka.
4. **Fiscal and monetary stimulus packages** - On 25th March 2020, the President announced various temporary reductions in taxes to cushion individuals and businesses during the pandemic. Some examples of this reductions include reduction of VAT from 16% to 14% and reduction of PAYE from 30% to 25% and removal of PAYE entirely for persons earning less than KES 24,000/=.
 - The Governor of the Central Bank of Kenya has allowed the Cash Revenue Ratio to move to 4.25% from 5.25% to afford additional liquidity of KES 35 Billion to commercial banks to directly support borrowers. Notably, the CBK lending rate has dropped to 7.25% from 8.35% meaning loans to borrowers will attract reduced interest rates.



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E. CONCLUSION

In the present climate, it is of utmost importance that businesses react as fast as possible to mitigate the impact and other risks occasioned by the pandemic and to prepare the organization for the development of the pandemic and the possible scenarios that development will bring. Thereby, being ready to face the challenges and risks and ensure continuity of operations and production through the pandemic.

In 1660, the English Scientist and polymath, *Robert Hooke (1635-1703)* discovered that displacement of materials under a load was proportionate to the force. Under the Law of Elasticity thus established by his theories, an object returns to its original position once the load is removed. This return to original form presupposes the fluidity and elasticity of the object.

In this day of COVID-19 pandemic, companies have to adopt the Law of Elasticity such that when the pandemic is under control or ended, they revert to the situations ante. This therefore demands that companies employ their best legal tools to navigate its contracts, both business and employment.

Our advise above, gives you the legal tools to negotiate, re-negotiate and even void the contracts. It also enables you to enter into fresh contracts with your employees, suppliers, debtors and creditors. This can be achieved by Mutual Agreement, Litigation or Arbitration.


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April 9, 2020.