

The Effect of the Coronavirus Pandemic on Contractual Obligations in Ethiopia

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Introduction

The response of the Ethiopian federal government to the economic impact of COVID-19 on businesses has so far been to relax tax burden through Tax Relief Directive No. 64/2012. However, tax relief is beneficial only if a business makes income which currently is much harder as the pandemic is disrupting the performance of private contracts. Businesses all over the country are experiencing reduced demand, late payments, depressed revenue and overall disruption in supply chain. Similarly, all members of the public with private contracts i.e. employees, tenants, farmers, homeowners and others face the prospect of defaulting on their obligation. The government has so far refrained from interfering with the terms of contracts. One exception is the Federal Housing Corporation (FHC) in Addis Ababa which has announced a 50% reduction of housing rent due to the pandemic.¹ On the contrary, other countries like Belgium have passed temporary measures to protect debtors affected by the pandemic from creditors by imposing a moratorium on creditors' rights to enforce debts, terminate or dissolve existing contracts and initiate bankruptcy proceedings.²

This blog is not about the merits or demerits of any potential government actions in contracts, rather on the impact of COVID-19 on debtor-creditor relationships as per the preexisting law of Ethiopia and provided there is no contractual provision to deal with such issues. It especially focuses on excuses available for debtors to successfully navigate out of contracts made physically or commercially impossible by the pandemic.

1. Re-negotiation Vs litigation

There are many factors that can be considered to objectively measure and compare different paths to justice i.e. monetary costs, opportunity costs, and intangible costs. In general, monetary costs include items like lawyers' fees, administrative or court fees, and bribes and other unofficial payments that are common in Ethiopia, opportunity costs refer to missed opportunities or lost income that results from the time and energy spent on one activity like litigation, and intangible costs refer to the negative effects on parties emotion, reputation, and ongoing business relationship.

Anyone with a fleeting knowledge of the justice system in Ethiopia can attest that litigation is significantly more expensive than a renegotiation of contracts on all these measurements. For example, official statistics indicate that the average time to get a final decision in the first instance courts is 6 months and a further 1-2 years if the case is dragged through appeals courts. This timeframe does not include the delay that may be caused by the closing of most federal and state courts due to the pandemic. Renegotiation is also much better on opportunity and intangible costs as it allows the parties to control the process and outcome which in turn provides the opportunity to develop win-win solutions or at least mitigate

¹ CGTN News, Ethiopia announces 50% cut in rent due to COVID-19 pandemic, by Nyawira Mwangi -April 10, 2020

² Loyens & Loeff, Restructuring update - Belgian government imposes temporary statutory moratorium on creditors' rights, <https://www.lexology.com/library/document/>, Last visited May 20, 2020, Similarly, the Canadian government relaxed regulations that would ordinarily oblige airlines to issue a refund for cancelled flights, five Canadian airlines

damages. In conclusion, the best option for disputing parties during the current coronavirus pandemic is to find a mutually beneficial solution through renegotiation by drafting new payment terms, extending the time of performance or modification of the debtors' obligation in some other way.

2. Is it possible to legally force the creditor to renegotiate using COVID-19 as a justification?

Generally speaking, there is no legal requirement for the creditor to renegotiate. Our contract law is drafted with the underpinning principle of 'freedom of contracts' which gives everyone the right to use their bargaining power to make an agreement on whatever terms they chose as long as the terms do not violate the law. This principle goes hand-in-hand with the operation of the free market economy which restricts governments from dictating what is fair or equitable in contracts. Accordingly, the Civil Code under the section on 'Variation of Contracts Art. 1763-70' expressly prohibits the courts '...not to vary a contract or alter its terms' even when '...the conditions of its performance have changed and the obligations assumed by a party have become more onerous than he foresaw'.³ In fact, the law guides the parties to handle the effects of unforeseen events like COVID-19 through renegotiation, in the original contract or in a new agreement.⁴ Thus, the parties should not expect much help from the authorities in contract renegotiations. As an exception, Art. 1768 does provide that

'The court may reduce the obligations of one party where the performance by the other party of his obligations has become partially impossible and there is no ground for canceling the contract.'

In addition, courts are given the power to grant a period of grace, not exceeding six months, for a debtor to carry out his obligations under the contract, having regard to the position of the debtor and the requirements of justice.⁵ These terms according to one commentator on the subject mean, firstly, the debtor is in good faith, unlucky, temporarily unable to perform through no fault of his, and must have prospect to improve his condition. Secondly, the creditor must be in a position to wait without being seriously harmed by the period of grace.⁶ Thus, courts will determine on case by case basis when and how much period off grace to give due to the coronavirus pandemic.

3. Can debtors escape liability through a claim of *force majeure* due to the pandemic?

Force majeure, a French term for 'superior force' is an obscure legal term that allows the debtor to avoid liability for damages caused by non-performance of a contract. It is typically associated with dramatic events like natural and manmade disasters i.e. earthquake, lightning, flood, and war. However, an event like the coronavirus and/or its subsequent events (e.g. travel restrictions, closer of factories, and quarantine of people) does not automatically qualify as *force majeure* under the Civil Code. The debtor must show that the event is reasonably unforeseeable and has prevented him absolutely from performing his obligations.

³ Art. 1764 of the Civil Code

⁴ Art. 1764(2) of the Civil Code

⁵ Art. 1770 of the Civil Code

⁶ George Krzeczunowicz, Formation and Effect of Contracts in Ethiopian Law, Addis Ababa University, 1983, 129

The first condition is objectively easy to prove for contracts made before COVID-19 became a global pandemic, around February and March of 2020, or since 1 of January where the existence of the virus in China was revealed. However, contracts made after the impact of the pandemic was made public knowledge, specifically after the Ethiopian government has issued a public health emergency, may find it more difficult to show the event is unforeseeable. As per the second criteria, economic hardship alone does not qualify as *force majeure* as the law insists on ‘absolute prevention’ as opposed to making the performance of the contract more onerous. For example, unexpected increase or reduction in the price of raw materials necessary for the performance of a contract is not a *force majeure*.

Thus, the answer to the big question of whether the current coronavirus crisis qualifies as a *force majeure* is not clear and requires a case-by-case analysis. An interesting example from the international football world shows the difficulty linking *force majeure* with global pandemics. In 2015, the Government of Morocco unsuccessfully claimed the Ebola outbreak at the time constitute *force majeure* and attempted to postpone hosting the African Nations Cup. However, the Confederation of African Football (CAF) disagreed on the ground that it is still possible to hold the tournament, although it is more difficult. Subsequently, Morocco was banned from the next two Nations Cups and fined money.⁷ Similarly, although the current coronavirus pandemic is theoretically the best candidate for a *force majeure* event, there is no guaranty the courts will accept it as a justification in specific cases.

It is also important to note that a *force majeure* event may release a party from liability for damages and not the contractual obligation. A person or business that is unable to perform i.e. pay rent in time, supply good or go to work, cannot use this as an excuse to end the contract. The rules for cancellation and termination of contracts has no correlation with *force majeure*. There is **no** provision under our law for the debtor to unilaterally terminate the contract by citing a change in the nature of the performance, like COVID-19 or any act of God. Comparatively, many countries like France, the United Kingdom, the United States and Germany have a rule on frustration/hardship which allows a debtor to legally require renegotiation of contracts or judicial termination of the contract if an event like COVID-19 makes the performance of a contract more expensive or impossible.⁸

In Ethiopia, this doctrine ‘unforeseen circumstances’ is available for an administrative contract under article 3183- 3189. Accordingly, were circumstances which could not be foreseen on the making of the contract upset the balance of the contract, the party contracting with the administrative body can require the authority to share in the loss arising from such circumstances.⁹ Thus, anyone that has a contract with the government should seriously consider using these rules to reduce the burden caused by COVID-19.

The law does allow the creditor to cancel the contract even before the obligation of the debtor is due where the performance of the debtors has become impossible or is hindered so that the essence of the contract is affected.¹⁰ The creditor must reasonably show that he would not

⁷ Natasha Frost, Businesses all over the world are learning that “force majeure” is no get-out-of-jail-free card, April 9, 2020, <https://qz.com/>

⁸ Article 1195 of the French Civil Code, Article 313, German Civil Code and the doctrine of frustration in Common law countries.

⁹ Art 3183 of the Civil Code Ethiopia

¹⁰ Art 1788 of the Civil Code Ethiopia

have entered into the contract without the term which the other party has failed to execute being included.¹¹

Finally, for future contracts, the parties may avoid any *force majeure* issue relating to the coronavirus by drafting a clear and unequivocal term that prohibits the use of the pandemic as pretext for non-performance and liability. The Civil Code under article 1886 (Extension of liability) and 1887 (Limitation of liability) allow the parties extensive freedom to control the rules on liability for non-performance even in the event of *force majeure*.

Conclusion

Any business or person that has a private contract that is made impossible or more onerous to perform due to the coronavirus pandemic must carefully consider all available legal and contractual options. In general, the best recommendation is to start renegotiation of contracts as it saves the parties the hassle of dealing with expensive and long litigation. Although, lawyers typically prefer to go to court in their self-interest, contracting parties should insist on exhaustion of all other dispute resolution methods i.e. negotiation, mediation and arbitration.

Secondly, our Civil Code has no rule to force the creditor to renegotiate a contract. Thus, the debtor must successfully convince the creditor of the value of renegotiation in developing a win-win solution and the cost of litigation.

Thirdly, our Civil Code requires a high threshold to escape liability through *force majeure*. Thus, debtors must be careful if they plan to use this obscure legal doctrine.

Finally, the doctrine of ‘unforeseen circumstances’ under administrative contracts law is a golden opportunity for parties contracting with administrative bodies to request sharing of loss caused by COVID-19.

¹¹ Art 1785 of the Civil Code Ethiopia