

# COVID-19 in Africa: Risks and Guidance

## On-demand Briefing Call - Key Takeaways

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### Overview

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- Over the past few weeks, we've seen African governments take strong action to contain the spread of COVID-19. The nationwide lockdowns and other related restrictions are resulting in unprecedented commercial and economic disruptions across the globe, and that may result in a disproportionate impact in Africa.
- In this briefing call, we cover a core set of considerations that businesses should have top of mind during this difficult time.

### Force Majeure and Change in Law

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- The COVID-19 outbreak is causing significant interruptions and many companies will contemplate claiming relief under their contracts as a result of the impact of the Covid-19 outbreak during these unprecedented times.

#### **“Force majeure” and its application in the context of Covid-19**

- Force majeure clauses generally excuse a party (usually for a specified time) from performing all or part of its obligations, because performance is prevented by an unexpected or supervening event beyond that party's reasonable control. Subject to the language of the contract, the affected party may also be able to claim compensation as a result of losses arising from the event.
- Events, such as the Covid-19 outbreak cause delays, and could be a likely ground for force majeure claims. For example, in circumstances where governments issues regulations limiting gatherings to no more than 10 people, a contracting party may not be able to complete its project on time or perform scheduled maintenance. Travel bans and lock-downs imposed by governments may also impact the ability of skilled labor and professionals to complete work.
- Whether the Covid-19 outbreak affects existing contracts depends largely on the specific wording of the contract and the parameters of the definition of force majeure.

## **Elements required to prove force majeure under English and South African Law**

- Supervening act, event or circumstance in question falls within scope of the relevant force majeure clause.
- Conditions precedent (if applicable) - such as issuing of notices - have been satisfied.
- The supervening act, event or circumstance is the sole cause of the affected party's inability to perform their contractual obligations (i.e. had the supervening event not occurred, the affected party would have been ready, willing and able to perform their contractual duties).
- The affected party has taken all reasonable steps to mitigate or avoid the consequences of the supervening event.
- In the absence of a force majeure clause, or if the event is not covered by the force majeure clause in question, the common law doctrines may provide relief.
- Under South African law, the doctrine of supervening impossibility provides that if performance becomes objectively impossible after the contract was concluded without any fault of the parties and as a result of unforeseen and unavoidable events, the common law general rule is that the obligation to perform, as well as the corresponding right to performance (if any), is extinguished.
- Under English law, the doctrine of frustration may apply if an event occurs after the formation of the contract which renders performance physically or commercially impossible, or transforms the obligation to perform into something so drastically different from what was originally intended or agreed when the parties executed the contract, and is not due to the fault of either party.

## **“Change in Law” and its application in the context of Covid-19**

- Some contracts contain a “Change in Law” provision that describes particular circumstances where there has been a change in law that makes it impossible for a party to perform its contractual obligations.
- Given the continued global spread of the outbreak, various laws and/or regulations were passed by governments in order to contain the spread of the virus, but which also prevent parties from performing their contractual obligations (for example, nationwide lock-downs, curfews, travel restrictions, and self-isolation/quarantine measures).
- A party's entitlement to relief in respect of changes in law will depend entirely on the particular wording of the parties' contract. Generally speaking, a party will be entitled to both time and money in the event of a change in law.

## **Practical recommendations**

- Consider the specific wording of the contract and the parameters of the definition of force majeure in order to determine whether your contract covers an event such as the COVID-19 outbreak.
- If the contract does not contain a force majeure clause, there may be scope for a claim based on the doctrine of impossibility under South African law or the doctrine of frustration under English law.
- Consider condition precedents: what does the contract say about the issuing of notice (for example description of event, manner in which notice is issue, and timeframe within which notice must be delivered).

- Consider ways to mitigate losses. For example, taking measures to procure alternative supplies and materials to cover potential interruptions or delays in supply chains.
- Consider insurance arrangements and implications under the contract. Parties may be able to claim relief under insurance coverage policies for effects of the Covid-19 outbreak.
- Records, records, records! Keep records of documents identifying: (i) why performance was affected and the (ii) effects of the event that caused performance to be affected. Also keep records of the service of any notices. Also keep records evidencing the quantification of losses.

## **Financing – Events of Default – Response to COVID-19**

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COVID-19 is having a direct impact on the operations and financial condition of businesses across the world. One consequence of this is that lenders need to assess the credit and liquidity risk of these businesses and determine whether it is prudent for them to provide continued financial support with a view to achieving a better outcome for the lender (or, indeed, society as a whole) or whether they need to take immediate steps to manage this risk and mitigate their exposure. Similarly, corporate borrowers need to be alive to the myriad of contractual issues that might arise to the extent their businesses are affected by COVID-19.

We look at some of the key provisions and decisions borrowers and lenders need to consider when looking at Loan Market Association (LMA) loan type documentation in Africa.

### **Financial Pressure**

- As of April, 2 2020, businesses are under increasing financial pressure due to the economic and social impact of COVID-19. This is resulting in many businesses in Africa having to revisit their financing arrangements with creditors to avoid a breach of existing financing agreements or to agree additional working capital to tide them over the short to medium term.

### **Covenants Package and Events of Default**

- Many borrowers are experiencing event of default or potential event of default type breaches under their loan documentation.
- This includes typical Loan Market Association (LMA) loan agreement defaults such as:
  - non-payment default
  - breach of financial covenants (historic and forward looking)
  - misrepresentation
  - breach of information undertakings
  - cross default
  - breach of a negative pledge (e.g. incurring new indebtedness or granting new security to address liquidity issues in breach of other financing arrangements)
  - breach of material contracts
  - breach of material licences (e.g. failure to operate airline routes)

- breach of law / regulation (perhaps due to new law / regulation imposed by government)
  - litigation
  - insolvency / insolvency proceedings / creditors process
  - change of business
  - cessation of business (the inability to operate during a lockdown scenario for example)
  - audit qualification
  - expropriation (e.g. the ability of a borrower to conduct its business being limited by a restriction / intervention or expropriation of assets of or by a governmental authority)
  - convertibility / transferability event (foreign exchange law amended / enacted)
  - political and economic risk event (e.g. a deterioration occurs in the political or economic situation generally in the country of incorporation of the borrower)
  - material adverse effect occurs (e.g. in relation to the borrower's business, operations or current or prospective condition (financial or otherwise))
- These breaches may extend to the borrower, its subsidiaries and/or its affiliates depending on how the loan agreement was drafted and negotiated.
  - It may also extend to "major contracting parties" in the context of structured financings such as project finance and asset finance transactions.

#### **Lender – direct rights under a LMA loan agreement**

- If an event of default has occurred under a Loan Market Association (LMA) type loan agreement, the lender has a number of standard options which it may exercise at its discretion under the relevant loan agreement.
- These options are typically set out in the relevant event of default clause and include, at their most extreme, the right to accelerate the repayment of all outstanding loans (or part thereof) and the right to enforce any guarantee or security rights it may have been granted.
- The event of default clause may also permit the Lender to call a drawstop on future loans being advanced under the loan agreement and the right to cancel any commitment of the lender to make future advances.
- In addition, the lender may have the right to declare that any loan made available to the borrower on a committed "term loan" basis is now payable on demand (i.e. the relevant term loan may be re-characterised as an "on demand" loan similar to that made under an overdraft type facility).
- One important consideration in this context is whether the relevant loan is a syndicated loan, with multiple lenders, or a bi-lateral loan. In a syndicated loan, the exercise of these rights may be subject to majority lender consent or approval. This means that the relationship between the borrower and the majority lenders (calculated by reference to their commitment under the relevant loan agreement) is critical, with the relevant majority lenders dictating what actions may be taken.
- Another important consideration in this context is whether the relevant event of default is a "continuing" event of default at the time the relevant action is taken. If the relevant event of default is no longer continuing, then the lender may not be able to take these actions.
- The term "continuing" is important and advice should be taken on whether "continuing" refers to the relevant event of default not having been remedied or that event of default not having

been waived in writing by the relevant lender. This will depend on how the term was defined or the relevant construction clause was drafted and negotiated.

### Other important provisions under LMA loan agreements

- Other important provisions in a Loan Market Association (LMA) type loan agreement that are relevant to borrowers and lenders in this context will include:
  - any clause providing for the payment of default interest. This type of clause typically imposes an obligation on the borrower to pay additional default interest to the lender if a payment default has occurred. It is usually payable on the outstanding payment amount. Sometimes default interest is purported to apply to the whole principal amount of the loan outstanding (and not just the late payment amount outstanding). In these circumstances advice should be obtained to determine if such clause could potentially be characterized as a penalty and therefore unenforceable under the applicable governing law.
  - any clause providing for an interest rate ratchet. This type of clause typically amends the amount of interest payable on a loan if certain events occur which are not necessarily events of default. In cross-border transactions in Africa, this is most commonly seen in financings that require (i) an investment grade borrower to meet certain credit ratings criteria (e.g. a Standard & Poor's rating) or (ii) a borrower to meet certain financial covenant requirements. If the relevant ratings or financial covenants are not met, the rate of interest may change to reflect the additional risk that has been assumed by the lender.
  - any clause providing for the delivery of information to the lender. This type of clause is widely drafted and typically includes an obligation on the borrower to provide the lender with any information the lender may require regarding the borrower's financial condition, business and operations (or any other member of the borrower group) as the lender may reasonably request. This is a critical right of lenders and may be used actively by them to obtain information to determine the impact of COVID-19 on their respective borrowers (who will need to provide the relevant information requested promptly in accordance with the terms of the relevant loan agreement to avoid triggering an event of default).
  - any clause (i) requiring the borrower to notify the lender that a potential event of default has occurred (and the steps, if any, being taken to remedy it) promptly upon becoming aware of its occurrence or (ii) requiring the borrower to supply the lender with a certificate signed by its officers certifying that no potential event of default has occurred or is continuing (or if a potential event of default has occurred or is continuing, specifying the default and the steps, if any, being taken to remedy it). If this undertaking is not complied with, it may trigger an event of default, giving rise to the more drastic lender options outlined above.
  - any clause giving the lender access rights. This type of clause typically arises if the lender suspects a default or event of default is continuing or may occur. In these circumstances, the borrower may be obliged to permit the lender and its accountants or other professional advisers and contractors free access at all reasonable times and on reasonable notice at the risk and cost of the borrower to (a) the premises, assets, books, accounts and records of each member of the borrower group and (b) meet and discuss matters with management.
  - any clause giving monitoring rights. This type of clause is often seen in structured or mezzanine debt type financings and gives the lender the right to appoint an officer to attend meetings of the board of the borrower as an observer. This is an important tool in circumstances where a borrower is in financial difficulty. One important caveat in this context is that the relevant officer needs to remain an observer and not become involved

in board decisions or actions that risk the officer being deemed to be a shadow director under local law (with the risks associated with a financially distressed company).

- any clauses providing for indemnities/ recovery of costs and expenses. This type of clause typically allows the lender to be compensated for losses incurred by it under or in connection with the loan agreement and other finance documents. This may include, by way of example, loss it may suffer as a result of (i) a default occurring, (ii) carrying out an investigation of any suspected default, (iii) the protection of their rights, (iv) drafting and negotiation of waiver letters or amendments to the existing loan agreements or other finance documents, (v) the preservation of rights under the loan agreement and other finance documents and (vi) possible enforcement of the loan agreement and other finance documents.
- any clause providing for the preservation or protection of security under the so called “further assurance” provisions. This type of clause typically operates in circumstances where the lender needs to protect or perfect security over the assets of the borrower or other members of the group. This may include, by way of example, registration of security or up-stamping of security or other finance documentation to try to avoid ranking or priority issues with other creditors. It may also include the right of a lender to convert a floating charge over moveable assets into a fixed charge and thereby restricting the right of the borrower to dispose of floating charge assets which may be needed by the borrower to continue trading. These rights are in addition to the rights the lender may have under the relevant security documents and/or direct agreements to which it is a party.
- any clause permitting set-off and/or consolidation of accounts and/or control of accounts by the lender. This clause is of particular importance to borrowers in a liquidity scenario as they risk losing control of their bank accounts and treasury function as lenders try to manage their residual credit / debt exposure to the borrower across multiple accounts (which, in turn, may be secured in favour of the lender and subject to additional control).

### **Lenders – their initial response**

- Lenders appear to be acting responsibly to the current COVID-19 crisis and have so far elected not to accelerate loans or enforce security on any scale.
- Their initial response has instead been to communicate with their borrowers and, where necessary, seek to enter into conditional waiver letters (e.g. for payment defaults), amendment letters (e.g. to reschedule debt repayment obligations) and/or provide additional finance to tide them over for the short to medium term.
- In this context, the primary legal concern of lenders has been to ensure that the relevant waiver or amendment of the underlying documentation does not damage the integrity of the existing guarantees or security as a matter of local law. This may require the relevant guarantors or third party security providers to become a party to the relevant arrangements and consent to the relevant waiver or amendment to ensure these rights are continuing.
- Lenders may also be looking to obtain additional guarantees or new security from the borrower by way of additional credit support. This may include security over additional assets or guarantees from more credit worthy entities. In each case, lenders will be concerned to ensure the integrity of the new guarantees or security. In this context, there is a clear distinction to be drawn between new security for new facilities and new security for debt which is already outstanding. Lenders will need to be comfortable that issues such as “transfer at an undervalue”, “unfair preference” and “commercial benefit” do not arise under local law that could affect the legality, validity or enforceability of the new guarantees or security.

- A number of lenders are also conducting due diligence to determine the quality of their security package to better understand the nature of the assets that have been secured, the type of security over those assets, whether the relevant security has been properly perfected and whether there are preferential creditors or other issues that need to be considered. This will depend on the type of security package and the laws in the jurisdiction where the relevant assets are located. In this context, lenders are also seeking advice on possible business rescue, administration or receivership regimes and other possible insolvency related regimes in the country where the borrower and/or guarantors are incorporated (which is something that could rapidly evolve by law or regulation over time as COVID-19 impacts the economies of countries in Africa and government seeks to rescue or protect local businesses in the short term).
- Some lenders may benefit from bank guarantee or credit insurance type products that seek to insure or guarantee all or part of the loans made available. Advice is currently being provided by us to lender to help them determine if the pandemic (or response by government or other authorities to the pandemic) falls within the guaranteed or insured events.
- Some lenders are also looking closely at intercreditor issues and whether they have entered into any arrangements with other creditors that may affect the priority of payment or ranking of security among the various creditors of the borrower and borrower group. This may extend to shareholders that may or may not have loans outstanding that have been subordinated to the claims of the lender. These type of agreements may include information exchange obligations as well as possible standstill provisions (particularly important if the lender is providing subordinated or mezzanine type debt to the borrower). In these circumstances, the claims of the subordinated or mezzanine debt may be subject to senior lender claims and rights that need to be fully understood by the relevant lenders before they take any action against the borrower.
- In the context of intercreditor arrangements, if a lender is considering making new facilities available to the borrower or borrower group to provide urgent liquidity, it should consider whether intercreditor arrangements are appropriate which provide for the new facilities to be first ranking (in terms of repayment and security) ahead of other creditors of existing loans. This may be agreed as part of a workout or moratorium with other creditors.

### **Borrowers – their initial response**

- In South Africa, we are seeing a number of corporates facing enormous uncertainty as to how to navigate the various commercial agreements to which they are a party. In South Africa, a number of corporate tenants are summarily announcing to their landlords that they will not discharge their rental obligations under lease agreements for example.
- In the context of financing transactions, corporate borrowers need to understand how the impact of COVID-19 is affecting or will affect their obligations under their financing transactions. There are a myriad of contractual issues that might arise to the extent their businesses are affected by COVID-19. It is advisable to seek legal assistance in navigating these issues.
- Communication is key. Corporate borrowers who are in a position where COVID-19 is negatively affecting their business should engage with their financiers sooner rather than later and should be as transparent as possible with regards to the issues that they are encountering.

**Important:** this “take-away” note is not intended to be exhaustive and looks at a standard investment grade developing markets loan documentation rather than structured finance loan documentation which requires more bespoke consideration.

## Summary

- This article looks at rights that generally arise from the operative clauses in a Loan Market Association (LMA) type loan agreement.
- The lenders and borrowers will obviously need to look at other documentation within the suite of finance documents as well as connected transaction documents. This may include, by way of example, hedging arrangements, direct agreements, security documents, intercreditor agreements and other agreements that dovetail with the relevant loan agreement.
- Even in normal circumstances, lenders find themselves in a difficult position when a borrower becomes financially distressed. Lenders need to assess the short to medium term credit / liquidity risk of the borrower and its business and determine, in each situation, if it is better to keep the relevant borrower trading, with a view to achieving a better outcome for the lender.
- The impact of COVID-19 has made this process more complex and universal and involves elements of social responsibility combined with pressure on financial institutions from central banks and other governmental or inter-governmental bodies to help support the wider national or global community to deal with the economic fallout of this crisis.
- Lenders also need to consider the economic stimuli being proposed by governments around the world and the support being put together by development finance institutions (such as the World Bank, The African Development Bank, Afreximbank and many other) to help support financial institutions and the wider business community in these challenging times.

## Insurance Considerations Amid Covid-19

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- Policyholders should be aware of certain conditions that will require their attention when they consider the extent to which insurance coverage may protect their business against the effects of the Covid-19 outbreak.

### Likely claims

- Closure of business premises and other suspensions or reductions of business activities as a result of government directives or an actual local outbreak, causing (1) financial loss to a business's operations, and/or (2) cleanup costs and other extra expense, where the virus has been found;
- Cancellation of profit-making events as a result of the same causes, with the same consequences;
- Inability of the business to fulfill specific commercial obligations as a result of the virus's impact on the business itself or its suppliers;
- Inability of third parties to proceed with orders from the business, causing loss of revenue; and
- Liability claims from individual employees or third parties alleging that the business negligently exposed them to the virus.
- A further potential complicating factor is that many businesses may conclude that they need to close their premises or cancel events as a reasonable preventative measure before COVID-19 has directly affected any staff or premises, and before they have been required to do so under government compulsion.



## Potential Insurance Coverage

### *Closure of Business Premises and Other Suspensions/Reductions of Activities*

- Where an infectious disease has resulted in the closure of business premises, the most obvious port of call is a business interruption cover, which is often provided as part of a property policy. It indemnifies businesses for loss of profits as a result of an insured event that interrupts the business.
- The standard basic business interruption policy wording does not usually mention infectious diseases, but it often requires physical damage to property to trigger coverage; this requirement may call for careful attention to, and documentation of, the evidence of damage.
- A policyholder may, however, have purchased an extension of cover that will respond to the occurrence of infectious diseases without the need to show damage to property.
- Business interruption policies may also contain an extension of the standard cover that grants so-called nondamage denial of access cover.

### *Cancellation of Events*

- While a policyholder that cancels an event on account of the virus should be able to rely on business interruption cover as mentioned above, it may also have the benefit of cancellation cover.
- The scope of cancellation cover will depend on the policy wording: if the policy does not specifically mention infectious diseases, it may also have a catch-all other-perils cover for all causes not specifically excluded, in which case the exclusions will be key: for example, it may have a contamination exclusion, in which case the definition of contamination (if any) will be crucial.

### *Inability of the Business to Fulfill Specific Commercial Obligations*

- Liabilities to third parties flowing solely from breaches of contract tend to be excluded from most insurance policy forms. However, if the virus has directly affected the operations of the business and the relevant preconditions have been met, and assuming no force majeure clause protection is available under the relevant commercial contract, then the business interruption policy may cover these losses as part of the overall loss of profits claim.
- In addition, some business interruption policies are extended to provide contingent business interruption, covering a business for the effect of a business interruption of a third party (in a similar way to denial of access cover).

### *Inability of Third Parties to Proceed With Orders, Causing Loss to the Business*

- Particularly if its business interruption policy has a contingent business interruption extension, a business may have coverage protection for its losses caused by the inability of a contracting party to proceed with orders due to the virus. In addition, trade credit insurance may cover the third party's liability, subject to relevant exclusions.

### *Liability to Individuals Alleging Negligent Exposure to the Virus*

- Where the business is accused of negligently exposing or failing to protect its employees or third parties from the virus, it may have cover for defense costs and any resulting liability under the personal injury cover provided by an employer's liability policy (in the case of an

employee) or by a general liability policy (in the case of a third party, which would include an independent contractor).

- In both cases, the business should look out for exclusions that may bar coverage.

### General Advice

- Where a business believes that it is likely to have to take action connected with the COVID-19 pandemic, it should check the notice requirements under all potentially responsive policies.
- Businesses should consider with their brokers, in conjunction with a careful review of their coverage, whether in fact to provide precautionary notice to all their insurers at the earliest possible moment.
- Insurers will need to be notified and/or consulted in any event where a business proposes to take a decision that may give rise to a claim under a potentially responsive policy.
- Policyholders must also ensure that they create and retain sufficient documentary evidence to support any claim: for example, evidence of the company's grounds for any decision to close premises or cancel events; forensic evidence of where the virus has actually affected premises; all documents relating to the specific case and responsive actions; and all necessary financial documentation.
- If a policyholder is coming up to renewal during this difficult time, it should also be alert to insurers' efforts to add last-minute endorsements or other supplemental provisions imposing blanket exclusions for infectious diseases or otherwise restricting previously available coverage.
- Although some such changes may be inevitable in the present market conditions, they should at least be presented transparently and well in advance of the renewal date so as to permit adequate time for negotiation.

### Public Policy Considerations

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- In addition to issues discussed by my colleagues, we rely on our public policy capabilities to work with individual governments, policymakers and regional organizations to help address issues and/or opportunities where collaboration between the public and private stakeholders is critical to success.
- In the context of the COVID-19 pandemic, we are actively assisting the Smart Africa Alliance, an extension of the African Union tasked with accelerating development through affordable access to broadband and technology, identify private sector partners in response to an **Emergency Call for Proposals from technology companies** that can implement a digital solution that their 30 active member states (including over 750 million people) can use to communicate and coordinate a regional response to contain the spread of the virus.
- For more information about the **Emergency Call for Proposals for a Digital Solution for Governments to tackle the COVID-19 virus in Africa**, please visit [www.smartafrica.org](http://www.smartafrica.org). The deadline for proposal has been changed to Monday, April 6, 2020 at 17:00 pm Kigali time. Feel free to reach out to us as well, we have a strong relationship with the Smart Africa Secretariat, and we would be happy to assist where we can.

- We are also working with a number of clients who need to navigate the appropriate but stringent lockdown measures that governments in the region have imposed. The measures have understandably impacted the movement of people and goods between African nations and their international partners. This work has included efforts to reunite family members, facilitate the flow of badly needed medical supplies and the search for local legal services. If we can assist you in these or any other area, please let us know.

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Please reach out to our [COVID-19 task force](#) with any questions.

We invite you to visit our [COVID-19 Legal and Business Toolkit](#). The toolkit is a repository of our resources on these issues, where you can navigate through various event invitations/recordings, advisories, blog posts, and other content.

Please feel free to reach out to any of our speakers and we will work together to assist:

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