The DPR's declaration of the COVID-19 Pandemic as a *Force Majeure* event- Issues Arising by Racheal Obong[1]

Introduction

The COVID-19 pandemic ("the Pandemic") continues to negatively impact practically every sector in Nigeria and the oil and gas sector has not been spared. In a bid to respond to and address the challenges occasioned by the pandemic, the nation's foremost oil and gas regulator, the Department of Petroleum Resource (the "DPR"), recently issued certain directives in response to the pandemic. The DPR issued these directives to guide operations in the Industry for the duration of the period that the Pandemic subsists. While the intervention of the DPR to guide operations in the sector in these challenging times is a welcome development, there are some issues arising regarding the legal effectiveness and fairness of the directives.

DPR Directives

The key circular which forms the crux of this discussion was issued by the DPR on March 30, 2020 and is entitled "*Re: Management of Covid-19 Outbreak – Update 2*" (the "DPR Circular"). Its key clauses are as follows:

i. *All operators and their contractors are to ensure strict compliance with relevant Government directives and limit the number of personnel at project/construction sites accordingly;*
ii. ***The current situation is considered "force majeure" to ensure the safety and welfare of all personnel and to contain the spread of COVID-19****.*
iii. *All operators and their contractors are to comply with the directives of Government authorities on Social Distancing, Curfew, Lockdown, etc. as may be applicable.*
iv. *Consequently, we expect demobilization of personnel from these sites to the extent required to satisfy the above requirements".*

The DPR Circular was addressed to Industry operators, contractors and service providers ("the Parties") and prescribes measures that ought to be taken at locations of operations and construction sites in the Industry. As noted above, the DPR Circular declared the pandemic a "*force majeure*" event and thus directed the Parties to ensure the safety and welfare of its personnel and also manage the spread of the COVID-19 virus. It also mandated the Parties to limit the number of personnel at operations

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locations and construction sites and to comply with government directives on social distancing, curfews and lockdowns.

In addition, on April 2, 2020, the DPR issued another directive echoing its earlier position regarding the declaration of the Pandemic as a *force majeure* event. It further mandated the Parties to demobilize personnel from their sites as necessary in order to comply with the Government's directives on social distancing, curfews and lockdowns. Now from a public health perspective, the DPR Circular is worthy of praise in light of the huge risk that the Pandemic poses to public health and safety. From a legal standpoint however, the question of whether the Parties can rely on the DPR Circular declaring the Pandemic a "*force majeure*" is debatable.

Issues arising

The first issue that arises is whether the Parties can rely on the DPR declaration of the Pandemic as a *force majeure* event in the following situations:

i. Where the contract does not provide for *force majeure* at all;
ii. Where although the contract does provide for *force majeure*, situations such as the Pandemic are outside the scope of the *force majeure* clause under the contract.

In situations such as those outlined above, can the Parties rely on the blanket declaration of the Pandemic as a *force majeure* event? Going by the sacrosanct principles of privity of contract and the freedom of parties to contract, the government or regulatory authorities (DPR in this instance) would typically not intervene in private commercial matters and transactions. Also to be considered is the fact that provisions not expressly provided for in a contract are not to be implied into it. The exception to this is legislation, as legislation (including subsidiary legislation) can effectively rewrite contracts[2].

The next important issue to be considered is whether the DPR Circular can be considered as subsidiary legislation. It is certainly intended to be legally binding but its validity as subsidiary legislation can be questioned on the ground that it did not emanate from the Minister or pursuant to the powers of the Minister under the Petroleum Act 1969. It emanated from the DPR which is a body vested with the "*statutory responsibility of ensuring compliance to petroleum laws, regulations and guidelines in the Oil and Gas Industry*"[3]. This issue could have been resolved if the directive carried the legal backing of the Minister of Petroleum from the beginning. The Petroleum Act

[2] An example is the Deep Offshore and Inland Basin Production Sharing Contracts (Amendment) Act 2019 which now provides for "Royalty by Price" and "Royalty on a field basis". This means that parties will have to amend existing PSCs to bring them in line with these new provisions.
[3] https://www.dpr.gov.ng/functions-of-dpr/

mandates the Petroleum Minister as the sole entity authorised to make "orders and regulations" under the Act[4].

Another issue that may pose a challenge is when the Parties involved are not all regulated by the DPR. Can the Parties rely on the provisions of the DPR Circular to vary a contract between a Party regulated by the DPR and a third party who is not regulated by the DPR. If the DPR Circular is considered as subsidiary legislation, then a Party in the Industry can rely on it to vary a contract between itself and such third Party.

Furthermore, there are a few other issues that arise. There is the question of what can be considered as a *force majeure* event. Is the contemplated *force majeure* event the Pandemic itself or is it the lockdown orders arising from the Pandemic that actually make it impossible for performance to be carried out under the contract? Generally, Parties will be bound by the *force majeure* clause which would ordinarily provide for what events can trigger the declaration of force majeure. However, it must be emphasised that what is important is that the pandemic and/or lockdowns have made it temporarily impossible or at least close to impossible to carry out performance of the contract. If performance of the contract is still very possible, the mere fact that a Pandemic or lockdown exists may be immaterial as in such a case, it may not automatically constitute a force majeure event. This is because the affected party is generally required to use reasonable endeavours or diligence to overcome or mitigate the impact and effects of the *force majeure* event. There may however be a challenge in this regard, as the DPR circular seems to imply the opposite by stating thus: "*the current situation is considered "force majeure" to ensure the safety and welfare of all personnel and to contain the spread of COVID-19…You are to ensure immediate compliance with the above*".

Also to be considered is what happens where there are already contractual force majeure and frustration clauses; how will the terms of the DPR Circular work alongside such provisions? If there are no inconsistencies in the existing force majeure and frustration clauses, the terms of the DPR Circular regarding force majeure would not pose an issue, as they would complement these existing provisions. In the event that the reverse is the case however, the terms of the DPR Circular should prevail if it is considered as secondary legislation that is therefore binding on parties and can effectively rewrite contracts as noted earlier.

Separate from declaring force majeure in accordance with the DPR Circular, a party affected by the Pandemic can rely on the common law doctrine of frustration. Under the doctrine, there must be a supervening event ("frustrating event") that is not the fault of either party, which significantly changes the nature of the contractual rights and/or obligations and makes it unjust to hold the parties to the contract, as it may become substantially impossible to perform or make performance considerably

[4] Section 12 (1), Chapter P10, Petroleum Act, LFN 2004.

different from what was agreed by the parties at the time of entering into the contract. Whether or not the doctrine can be used as a defence will for the most part depend on the nature of the obligation to be performed under the contract. A party seeking to rely on the doctrine must prove that its performance has been rendered impossible by the Pandemic. It is not sufficient if the event makes it more expensive or onerous or impracticable to perform the contract, nor if an alternative method of performance is available.

Conclusion

As a result of the uncertainties surrounding the *force majeure* provision in the DPR circular, it is advisable that rather than simply invoke this provision, a Party engages its counterpart with a view to renegotiating their obligations and negotiating the effect of the Pandemic on their existing contracts. Parties may thus redefine the contracts and ensure that the new terms of the contracts are put in writing which may then be inserted as an addendum to existing contracts. It is important for Parties to put any amendments in writing and Parties may consider options that would mitigate any losses to be borne by one party due to the impossibility of performing its obligations under the contract, such as sharing the losses equally or in accordance with an agreed upon formula.

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