NEWS
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This NL is based on the legislative framework in force as at 2 April 2020. However, the competent bodies of the State are expected to approve and publish the regulations that put into effect the measures to contain the spread of the new Coronavirus that is responsible for the COVID-19 pandemic (see article 4 of Law 1/2020 which ratified the Declaration of the State of Emergency, appearing in Presidential Decree 11/2020 of 30 March). Therefore, TTA will update this NL as and when necessary.

MOZAMBIQUE
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13 APRIL 2020

# CORONAVIRUS: MANAGING THE RISK OF BREACH OF CONTRACT

*Businesses must assess the extent to which the impact of the Covid-19 could affect their ability to comply with the contractual obligations they have assumed, especially towards their customers. They must also evaluate the mechanisms available to them to react if the other party breaches a contract.*

**I. BACKGROUND:**

There is no doubt that surviving the Covid-19 pandemic has become the greatest common battle around the world in recent months. Despite this principle concern, it is important not to overlook the fact that, before this situation arose, people had entered into agreements, taken out loans, and signed commitments. Particular attention must be paid to these situations, because there is also no doubt that this pandemic will continue to influence personal and professional commitments already made. As a result, people need to know how to manage the risk of breach of contract, which, in itself, also bears a reputational risk.

First, businesses (particularly private ones) must assess the extent to which the impact of the Covid-19 could affect their ability to comply with the contractual obligations they have assumed, especially towards their customers. They must also evaluate the mechanisms available to them to react if the other party breaches a contract. This analysis should have a double focus: (i) on the contract the parties have made with each other, and (ii) on the legal rules that apply to it on a supplementary basis.

Second, it is important to remember that the impact of this pandemic is not the same in all corners of the world, nor in all sectors. For this reason, it is no surprise to hear that some countries have suffered more than others, and even within a country, some areas have been more affected than others. For this reason, especially in the case of parties based in different geographic areas, it has become difficult to manage situations of performance or breach of contract.

For contracts that include a force majeure clause, the situation tends to be less dramatic. The parties may have included this clause in two ways: (i) listing the events merely as examples, which is good, because such clauses will no doubt cover the Covid-19 pandemic as an event of force majeure and this will release the party under an obligation to perform or reduce their performance, as applicable, and (ii) exhaustively listing the events of force majeure in a detailed way, which makes the application of the clause problematic, because pandemics with the characteristics of the Covid-19 pandemic are very difficult to foresee, if not unforeseeable.

We believe there are no doubts this pandemic falls under the definition of a force majeure event, as it is a previously unknown virus that has spread throughout the world and was not expected. In addition, it is outside the of control of the parties.

**II. SUPPLEMENTARY LEGISLATION: THE MOZAMBICAN LEGAL SYSTEM.**

If the parties have not included a force majeure clause, they will need to look at the rules of the Civil Code, including articles 437, 438, and 790 to 793.

**i. Change in circumstances (articles 437 and 438 of the Civil Code):**

This refers to a change in the circumstances that originally led the parties to enter into the contract that leads to an increase in the burden of the obligation: the obligation becomes (justifiably) difficult to perform. If this happens, the party adversely affected by the change has the right to terminate the contract or ask for it to be modified based on equity, provided that it was not already in default on the date the circumstances arose.

*The party must also demonstrate that it could not have predicted the event and its consequences at the time the contract was made and that it was impossible to control it. Of course, it must also demonstrate that there is a causal link.*

**ii. Impossibility of performance (articles 790 to 793 of the Civil Code):**

In this case, instead of becoming more onerous, the contract becomes impossible to perform. In terms of duration and the extent to which performance is possible, in interpreting these four articles, we note that the law distinguishes between full and definitive impossibility (articles 790 and 791), temporary impossibility (article 792), and partial impossibility (article 793).

- In the case of **full and definitive** impossibility, there is no doubt the party under an obligation to perform will no longer be able to perform its obligations at all. In that case, it will be released from those obligations and will not have to pay any type of compensation to the other party, because that impossibility is not attributable to the party under an obligation to perform.
- In the case of a **temporary** impossibility to perform, the obligation is suspended for the duration of the impediment. During this period, the party under an obligation to perform is not liable (because it is facing a "force majeure event") for any loss or damage that the delay in performing the obligation causes to the other party. It should be noted, as set out in article 792(2), that the impossibility is only considered to be temporary, in light of the purpose of the obligation, if the other party still has an interest in maintaining the agreement.
- Finally, the Law established the situation of **partial impossibility**. In this situation, the party under an obligation to perform is released from the part of the obligation that is impossible and the other party's obligation is reduced in the same proportion, unless the latter has no justified interest in receiving only part of the obligation. In this case, it can terminate the contract.

**iii. Burden of proof:**

The burden of proving the existence of a situation of force majeure that justifies the non-performance is on the party that invokes Covid-19 as grounds for non-compliance.

*It is important to make it clear that the occurrence of the event itself is not enough to ensure that the party affected is released from its obligations. It will also be necessary to prove that the event was outside their control and that there is a causal link between the event and the failure to perform.*

Thus, that party must demonstrate a causal link between the force majeure event and its own inability to fulfil its obligations. In addition, the party must also demonstrate that it could not have predicted the event and its consequences at the time the contract was made and that it was impossible to control it. Of course, it must also demonstrate that there is a causal link.

**iv. Causal link:**

It is important to make it clear that the occurrence of the event itself (in this case, the Covid-19 pandemic) is not enough to ensure that the party affected is released from its obligations. It will also be necessary to prove that the event was outside their control and that there is a causal link between the event and the failure to perform. It must also prove that it could not have reasonably foreseen the event in question, nor its consequences, at the time the contract was made.

**v. Managing the other party's expectations:**

From the outset, it is important to highlight that, even in those cases where contracts are economically affected, good faith must prevail. The parties must think about alternative solutions (especially the party under an obligation to perform) to preserve the legal relationships established and to fulfil obligations, so that there is genuine social solidarity that ensures mutual cooperation and fairness between the parties. Therefore, faced with a situation that it believes to be one of force majeure, the party under an obligation to perform must:

- As a corollary to the principle of good faith, inform the other party of their actual or potential impossibility to ensure fulfilment of the obligations undertaken.
- The party under an obligation to perform must be aware that such a communication could amount to an advance declaration of non-compliance. Depending on the specific case, this could lead to the early maturity of the obligation to perform, to default, or even to definitive breach.
- Not performing the obligation on its due date may constitute unlawful conduct. In this case, however, the party under an obligation to perform may, depending on the circumstances of the case, prove that it is not at fault for the breach. If it succeeds, it will escape the duty to compensate.
- Impossibility is not to be confused with greater difficulty in performing. Nonetheless, in certain cases, one could also consider whether the excessive burden of performance should be equated with impossibility.

At present, the following measures can be adopted to mitigate the impact of the Covid-19 pandemic on contracts:

- Analyse the content of the contracts in force to ascertain whether they have clauses relating to events of force majeure, and review the scope and consequences of those clauses;
- Keep a detailed record of the impacts that the Covid-19 is having on the company and on the performance of its contractual obligations. Companies should also keep a record of all communications that are exchanged between the parties (which can be useful in any future dispute);
- Check whether the insurance policies they have taken out cover situations of pandemics and/or events of force majeure. If so, they should also check what actions they should take to ensure claims can be made successfully under those policies.

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