



COVID-19: MANAGING DISRUPTION IN THE NIGERIAN AVIATION INDUSTRY



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Introduction

The novel coronavirus pandemic (“**Pandemic**” or “**COVID-19**”) has impacted businesses and communities around the globe. Countries have announced varying levels of restrictions on the movement of people and trade and borders have been closed to all but essential travel.

In a bid to contain the spread of COVID-19 in Nigeria, the Federal Government recently issued regulations restricting movement and closed Nigerian airspace to commercial flights save for authorised flights. Arguably, the Aviation Industry (the “**Industry**”), an integral part of globalisation, appears to be one of the worst-hit. The International Air Transport Association (“**IATA**”) has projected that Nigeria’s aviation industry will have 3.5 million fewer passengers, resulting in a \$0.76 billion revenue loss, risking 91,380 jobs and \$0.65 billion in contribution to Nigeria’s economy.

The Industry (including airline operators, service providers and investors), has taken several precautionary measures to manage the impact of the Pandemic including grounding of aircraft, reducing flights and cancellation of flights and supply contracts.

We have set out below general guidance to clarify legal and regulatory impacts of the Pandemic for clients in the Industry.

General Overview of the Impact of COVID-19 on the Industry in Nigeria

Some of the circulars and regulations issued by the federal and state governments to curtail the Pandemic and which impact the aviation industry include the following:

The Nigeria Civil Aviation Authority (“NCAA”) Circulars: On March 21, 2020, the NCAA issued a circular restricting international flights into Nigeria, save for emergency and essential flights subject to special permission issued by the Federal Government. The NCAA has suspended the issuance and processing of Air Operating Certificate and other certificates till 30 June 2020 but pending applications can be completed and reviewed online.

COVID-19 Regulations 2020: On March 30, 2020, the Federal Government issued the COVID-19 Regulations 2020, restricting business operations and movement in Lagos, Ogun and the Federal Capital Territory (“**FCT**”), Abuja, for an initial period of fourteen (14) days. This has now been extended for a further fourteen (14) day period from April 13, 2020. All commercial flights have been suspended, save for authorised essential flights and special cases.

Lagos State Infectious Diseases (Emergency Preventions) Regulations: The Governor of Lagos State, in March 2020, issued the Lagos State Infectious Diseases (Emergency Prevention) Regulations 2020 (the “**Regulations**”) and shut down non-essential movement in Lagos a week before the Federal Government. The Regulations give the Governor powers to, *inter alia*, restrict movement within, into or out of the state to contain the spread of COVID-19.

The Central Bank of Nigeria (“CBN”) Circular: The CBN has issued a circular granting one-year moratorium on all payments of CBN intervention loan facilities and a reduction of interest rates from 9% to 5% per annum on all applicable CBN intervention facilities.

The Economic Stimulus Bill (the “Bill”): On March 24, 2020, the House of Representatives introduced and passed the Emergency Economic Stimulus Bill. Under the Bill, employers who maintain their current employee size as at the 1st day of March 2020 until the 31st day of December 2020, will be entitled to a 50% income tax rebate on PAYE. The Bill, if passed, will

be of comfort to the Industry as aviation businesses face COVID-19 induced financial constraints which will inevitably lead to staffing reductions.

What should you be doing?

Aircraft leasing and financing arrangements

In order to navigate these unprecedented times, the following clauses in the relevant agreements need to be reviewed:

Material Adverse Change/Material Adverse Effect (MAC/MAE) Clauses: These clauses would typically allow a party to terminate or adjust its obligations in the event that there is a substantial adverse change in its business that has resulted in its inability to perform obligations in an agreement. In determining whether the Pandemic qualifies to trigger a MAC/MAE clause, one must consider:

- The specific MAC/MAE event language in the agreement. Such provisions may come under an Event of Default clause which will be triggered where any event or series of event occurs which have a material adverse effect on the ability of a party to comply with its obligations; it is very likely that failure to open for business or procure goods and services to operate due to a government shutdown may suffice to trigger a MAC/MAE clause.
- The extent of the negative impact of the Pandemic must be lasting to affect the ability to perform any future payments.
- The effect of invoking a MAC/MAE clause. Depending on the language of the agreement, invoking of a MAC clause may expedite payment obligations. This may be favourable for the payee, but payors may be challenged on payment obligations at this time. A mutual agreement to restructure due or future payments is advised.

Force Majeure Clauses: Force majeure clauses are intended to protect parties from unforeseeable circumstances or events that prevent a party from fulfilling the terms of a contract. These circumstances or events are situations outside the control of the parties, which make performance of contractual obligations impossible. In order to trigger a force majeure clause, you must consider the following:

- **Does the Pandemic constitute a force majeure event?** – most standard force majeure clauses make provisions for events like “war”, “strikes”, “pandemics” or “acts of State”. With the COVID-19 declared as a pandemic by the World Health Organisation (“WHO”), a party may trigger a force majeure clause.

Where the force majeure clause does not include “pandemic”, but includes “acts of State” or an inclusive clause such as “*any other unforeseen event beyond the reasonable effort of either party*”, a party may rely on the various regulations of the NCAA and the Federal Government, as acts of state to trigger a force majeure clause and in the absence of a specific reference to “pandemic”, the COVID-19 may qualify as an unforeseen event beyond the control of both parties.

- **Does triggering the force majeure event excuse performance?** – the extent of effect of force majeure will be stated in the Force Majeure clause. Therefore, a force majeure event may not result in the complete discharge of obligations to perform. There is usually a duty to mitigate and, in many cases, parties have the opportunity to re-negotiate the terms of the agreement or extend the time frame for meeting contractual obligations.

- **Can parties meet the notice requirements?** - to rely on a force majeure clause, all the conditions must be met. In many cases, the agreement stipulate notice of force majeure to counterparty(ies) within a certain timeframe. Parties will have to check their agreements to be sure of these provisions and timelines, if any.

Doctrine of Frustration: In the absence of a force majeure clause, parties may be able to invoke the doctrine of frustration to justify non-performance under contract if performance is rendered impossible by the event(s) relied upon.

- The fact that the Pandemic has made it harder or more expensive to perform obligations will not operate as a frustrating event. A counterparty is likely to challenge reliance on frustration where it is able to show that there are other means of satisfying contractual obligations.
- There is a higher threshold on the party claiming frustration to prove that the event has frustrated the contract and made performance of obligations impossible.
- Whether or not a contract has been frustrated will ultimately be determined by the courts on a case by case basis.

Note: If a force majeure clause is unavailable, consider other contractual provisions that could be relevant e.g. MAC clauses, price adjustment, limitation of liability and exclusion clauses, variations or change in law, events of default, and extension of time clauses should be considered.

In the alternative, a more commercial friendly solution would be for the party unable to perform contracts due to the impact of COVID-19, to engage the other party to re-negotiate agreements in order to reach mutually agreed variations. Also, collaboration and good faith obligation clauses can also serve as a basis for seeking a commercial solution.

Supply Chain Agreements

In the Nigerian Aviation Industry, several outsourced services ranging from airline catering companies, cargo handling, cleaning services, private security arrangements, information technology services etc., provide support services to airlines. In view of the restriction of movement and flights in Nigeria, it is almost impossible for service providers to perform their contractual obligations under the numerous service level agreements ("SLA").

The same options discussed above should be considered subject to specific contract terms. We advise early engagements to re-negotiate the SLA terms to agree mutually acceptable terms in order to mitigate the effects of the Pandemic.

Note:

Depending on the nature of the services and the specific terms of the SLA, a party may be entitled to claim a refund of money paid in advance for the provision of services where the services cannot be provided due to the impact of the Pandemic. The obligations and liabilities of the parties to the SLA will depend on the specific terms of the SLA.

Employment/ Labour Matters

Operators in the aviation industry have significantly reduced and in some cases suspended all operations due to the restriction on movement in Nigeria and closure of global borders to commercial flights. Invariably, some operators may need to reduce their work force, in order to reduce overhead costs to manage the significant decline in revenue.

Some of the ways an airline operator may review employment arrangements to manage the impact of COVID-19 include are:

Redundancy – Employers in the Industry may declare redundancies on the basis that operations have become skeletal and they are unable to provide work for employees. Employees must be informed of proposed redundancies, the reasons for the same and the impacted positions. Employment contracts must be terminated in accordance with their respective terms.

For employees who are members of the National Union of Air Transport Employees (“**NUATE**”), the trade union must be pre-notified of the redundancies and the same must be implemented in line with applicable Collective Bargaining Agreements (“**CBA**”) must be paid.

Furlough/Lay-Off – the usual term used in Nigeria is Lay-off. An employer may use the option of lay-off to temporarily suspend employment contracts due to the impact of COVID-19 on its business. The employees must be engaged and the terms of a lay-off must be explained to and agreed to by the employees i.e. the duration of the lay-off and whether it is unpaid or partly paid. Where a suspension leads to terminations, the termination process must comply with the terms of the employment contracts. Any alteration of employment contracts necessary to implement lay-off must be agreed by the employees.

Reduced Pay/ Work Hours – This is also another option to manage the impact of COVID-19. Employees must be notified of the proposed reduced pay/ work hours prior to implementation especially as such actions may result in an amendment of employee contracts. For employees covered by the Labour Act (lower cadre employees who perform manual labour or clerical work), employees are entitled to wages only on the first day of the lockdown period where the employer is unable to provide work as a result of an emergency beyond the employer’s control (which does not exceed one week or such longer period as an authorized labour officer may allow). The Labour Act does not envisage such a global pandemic which has now exceeded a week. Also, there has been no guidance issued by the Minister of Labour or other authorised labour officer as to how to treat employment contracts of Labour Act employees impacted by the COVID-19 pandemic. Our advice would be for each employer to keep employees informed as to the challenges of the business at this time and the impacts on their contracts

Note: It is important for employers to engage with employees both unionised or non-union; if there are union members, the union should be notified prior to implementing any work force reorganisations aimed at mitigating the impact of COVID-19.

Passenger Ticketing

The contractual relationship between airlines and passengers usually arise from ticket purchase. Passenger tickets usually have a validity period of one (1) year. Where there is a default, the prices and schedule may change depending on the party that defaults. Where the airlines are unable to honour their contractual obligations to customers, the law permits them to refund according to each airline’s regulations. All the global airlines have issued ticketing procedures as a result of the Pandemic.

According to the IATA General Conditions of Carriage (Passenger and Baggage), where there is a failure by the carrier to provide carriage in accordance with the contract of carriage or where a passenger requests a voluntary change of his or her arrangement, refund shall be made in accordance with the IATA and the carrier’s regulations. The IATA General Conditions of Carriage (Passenger and Baggage) also stipulates the circumstances for cancellation of a ticket and the value of the ticketing fee refundable. The IATA General Conditions of Carriage

(Passenger and Baggage), do not regulate the period for refund. Airlines may implement their procedures for refunds in line with the IATA General Conditions of Carriage (Passenger and Baggage), within a reasonable period, or conversion of tickets to vouchers or mileages, after duly notifying the passengers.

Article 19 of the Montreal Convention 1999 also provides that an airline would be liable for any damage occasioned by a delay in the carriage of passengers, baggage or cargo by air except *there is proof to show that the carrier and its servants or agents took all measures that were reasonably required to avoid the damage or that it was impossible for them to take any such measures*. The impact of COVID-19 on carriage by air resulting in delays and/or cancellation of already scheduled flights is beyond the control of airlines however, carriers are expected to implement damage control processes to mitigate potential losses suffered by passengers such as:

- Prompt notification of the reasons (s) for the flight cancellation/delay;
- Prompt notification of the available next steps such as: requesting for a ticket refund via the airline's ticketing platform, obtaining vouchers for the exact ticket purchase price where tickets are purchased via third party agents;
- Periodic updates to passengers on the status of all ticket related claims; and
- Ticket rescheduling and/or cancellation as may be required.

Conclusion

As the effect and impact of COVID-19 on businesses and communities continues to unfold across the globe and in Nigeria, we will continue to monitor the evolving situation, especially government and regulatory directives in Nigeria, and keep you abreast of any developments that may impact businesses in general and the aviation sector specifically.

If you require any clarification, our lawyers are available to provide the needed support during these challenging times.



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