



COVID-19 PANDEMIC AND THE DOCTRINE OF FORCE MAJEURE



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Introduction

The outbreak of Coronavirus (COVID-19) has disrupted the world's economy. As already known, the virus was first detected in Wuhan, China, in December 2019, it soon spread to other countries of the world, with many international travel hubs like London and New York being badly hit.

This necessitated various preventive measures like travel bans, border closures and quarantine measures. Many workers cannot move to their places of work or carry out their jobs, which has tremendous effects on incomes, particularly for informal and casually employed workers. Consumers in many economies are unable or reluctant to purchase goods and services. Given the current environment of uncertainty and fear, many enterprises, especially those deemed non-essential, are compelled to delay investments, purchasing of goods and the delivery of goods and services.

The pandemic, as well as emergency measures imposed by various governments to check its spread, has made it impossible or impracticable for many parties to perform their contractual obligations. A common question in the wake of the pandemic will thus be whether the pandemic should serve to release a party from their contractual obligations.

There are a few potential hotbeds for post-pandemic disputes. Insurers and policy holders should look to determine whether or not the pandemic falls within the risk contemplated in a given insurance policy. The situation also raises significant employment law issues, as a lot of workers have been furloughed or laid off by employers on account of the economic pressure exerted by the pandemic and the government actions taken to combat it.

In this article, we consider the legal risks that the pandemic may engender, as well as pre-emptive measures for managing the expectations/liabilities of parties.

COVID-19 Pandemic: Impact on Commerce

The COVID-19 pandemic has left the world comatose not only with the rapidly rising death toll but the rate at which some economy of the world are crashing. Some of the measures put in place by various governments are the types that have the effect of impeding, if not reversing, the growth of the economy and triggering a wave of defaults in commercial transactions.

With the lock down order issued by governments to curb the spread of the virus, contracts have been adversely affected. No doubt, the affected parties will be looking to rely on the pandemic as an absolving factor in their inability to deliver on their agreements. It is therefore important to consider whether the pandemic is a force majeure and as such capable of excusing a contracting party who is unable to fulfill their contractual obligations. It is equally important to consider the ramifications for parties who have not inserted a force majeure clause in their contract.

Force Majeure: Scope and Application

Broadly, a force majeure clause relieves a party from strict compliance with its contractual obligations where a force majeure event occurs, and any such non-performance will not constitute a breach of contract.¹ It is a common clause in contracts that frees both parties from liability or obligation when an event beyond the control of the parties prevents one or both parties from fulfilling their obligations under the contract. Force majeure clauses thus serve as a precaution against the risks posed by certain economic, political, and natural disaster events.²

Additionally, Force Majeure event is an unanticipated event that is beyond a party's control and which prevents a party from performing its obligations under the contract.³ Anerin (AJ) Van Schalkwyk explained force majeure in the following words:

¹ <https://www.arthurcox.com/COVID-19/corporate-and-ma/covid-19-practical-considerations-force-majeure-clauses-in-contracts/> assessed on Thursday, 9/4/2020.

² <https://www.whitecase.com/sites/whitecase/files/files/download/publications/article-paris-energy-series-9-force-majeure-clause.pdf> accessed on

³ ibid

“Force majeure is the term used to describe an event or occurrence that makes contractual performance impossible. The event that renders contractual performance impossible only arises after conclusion of the contract and is due to an occurrence, event or circumstances beyond the control of any one of the parties.

*The principle of force majeure differs from that of hardship caused to either party to a contract due to changed circumstances, in that while hardship impacts on a party’s ability to perform, it does not render performance impossible”.*⁴

The application of force majeure to a given contract depends on the law and jurisdiction under which the contract was executed. Under the common law, there are no general law concepts of force majeure. It is generally treated as a creature of consent and as such applies only when a force majeure clause is included in a contract.⁵ By contrast, the force majeure doctrine is generally recognized in the civil law jurisdiction and applies whether or not included in the contract between the parties in contemplation. Thus, the law of a particular jurisdiction plays a vital role in determining the scope and application of the doctrine.

In New York the force majeure clause is narrowly construed.⁶ The general rule is that a party’s performance will be excused only if the force majeure clause specifically contemplates the particular event which prevents performance.⁷ And even where a force majeure clause contains an expensive catch-all provision in addition to specifically listed events, the catch-all provision should not be given expansive meaning.⁸

In China, Article 117 of the PRC Contract Law provides that if the contract cannot be performed due to an event of force majeure, liability is partially or wholly exempted depending on the effect of the event of force majeure unless

⁴ Nature and effect of Force Majeure Clauses in the South African Law of Contract, <https://www.mobt3ath.com/uploade/book/book-56829.pdf>

⁵ Ibid, footnote 6

⁶ COVID 19 Impact on Commercial Transactions & Dispute; Patterson Belknap Webb & Tyler LLP, Litigation Alert, March 23, 2020.

⁷ Ibid

⁸ See *Kel Kim Corp. v Cent Markets* 70 NY2D 900, 902- 03 (1987)

the law provides otherwise.⁹ The forgoing shows that the Chinese law gives a wider scope to the doctrine. Thus, courts are very generous with construing a force majeure clause. And even where it is not contained in a contract, by virtue of Article 117, it is applied ipso facto.

In Nigeria, the principle of force majeure is only applicable where parties have agreed and included a force majeure clause in their contract. This is because Nigerian inherited her law from the English common law which does not automatically apply force majeure principles to contracts. The Nigerian law however, like the common law, recognizes the concept of frustration of purpose, a narrower concept that applies when the actual performance of the contract is radically different from what the parties intended. The case of *A.G Cross-River State V. A.G Federation & Anor*¹⁰ is instructive in this regard:

“The doctrine of frustration is applicable to all categories of contracts. It is defined as the premature determination of an agreement between parties, lawfully entered into and which is in the course of operation at the time of its premature determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by law both as striking at the root of the agreement and entirely beyond what was contemplated by the parties when they entered into the agreement”¹¹.

It is the prerogative of the court to decide whether and when frustration has occurred. Frustration occurs whenever the court recognizes that without default of either party a contractual obligation has become incapable of being performed.

The courts have recognized certain situations or events as listed below that constitute frustration:¹²

a. Subsequent legal changes;

⁹ Gide Loyrette Nouel, Newsletter, 17 Feb, 2020.

¹⁰ (2012) LPELR-9335(SC)

¹¹ *N.B.C.I v. Standard (Nig.) Eng. Co. Ltd* (2002) 8 NWLR (Ppt.768) Pg.104. *Mazin Engineering Limited v Tower Aluminium (Nigeria) Ltd.* (1993) 5 NWLR (Pt.295) Pg. 526.

¹² *Cricklewood Property & Investment Trust Ltd v. Leightons Investment Ltd.* (1945) 1 All ER 252; *Knell v. Henry* (1903) 2 KB 740; *Obayuwana v. The Governor of Bendel State* (1982) Pg. 167; *Araka v. Monier Construction Company Ltd.* (1978) 2 LME Pg.60.

- b. outbreak of war;
- c. destruction of the subject matter of contract;
- d. government requisition of the subject matter of the contract;
- e. cancellation of an expected event.

It is worthy of note that when force majeure has not been provided for in a contract (or the relevant event does not fall within the scope of force majeure clause), and a supervening event prevents performance, thus leading to a breach of contract,¹³ the option that may be available for such a party is to rely on the doctrine of frustration.

Furthermore, where a force majeure clause covers the relevant supervening event, the party unable to perform will not have the benefit of the clause where performance merely becomes more difficult, more expensive and or less profitable.¹⁴ For an event to be categorized as an act of God, it must be established that:

- a. the event was free of human involvement;
- b. it was not possible or realistic for a human to guard against the event;
- c. the event happened due to natural causes, directly and exclusively;
- d. the event could not have been prevented by any amount of foresight, planning or care¹⁵.

Whether Parties Can Rely on the Pandemic as a Defence for Breach Based on the Doctrine of Force Majeure

From the forging analysis, it is obvious that a party can only rely on the principle of force majeure as a defense for breach *viz a viz* the existing pandemic if such party can satisfy that:

- 1. there was a force majeure clause in the contract in issue;
- 2. among the events contemplated by the clause includes the outbreak of pandemic or an epidemic;
- 3. where the clause contemplates a pandemic that the pandemic rendered performance totally impossible and there was no way he could have executed the contract.

¹³ Ibid, footnote 14

¹⁴ <https://hallelis.co.uk/blog/force-majeure-business-contracts/> accessed on Friday, April 10, 2020.

¹⁵ Ibid

In the absence of the above conditions, a defense of force majeure may not avail a party who is in breach of a contract. However, such a party could rely on the doctrine of frustration, but must establish that the pandemic rendered his contractual obligations impossible, or radically changed the party's principal purpose for entering into the contract.

Each contract document must be reviewed to determine the applicability of the force majeure clause and how a contract might be affected by the COVID-19 crises. J-K Gadzama LLP has specialist contract lawyers experienced in such matters who can counsel on how to approach your counterparty, or respond to an approach on this issue.

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