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Guest Editors: *Dr. S.C. Dike* LLM, Ph.D, *Dr. N.K. Akani* LLM, Ph.D

COVID-19, FORCE MAJEURE AND BREACH OF CONTRACTS

By

*Bamidele Olasehinde ADEBAYO**

Abstract

The outbreak and spread of the COVID-19 pandemic have had a global impact on every facet of life. Contracting parties are now focusing on how to mitigate its impact on their contractual agreements. Many of such contracts could no longer be executed due to the lockdown of economic activities. Governments are developing measures to curb the further spread of the unprecedented global pandemic, which has made contracts total unenforceable or difficult to comply. Though there are many ways of alleviating potential liabilities that may arise from a breach of contract; it is trite that any departure from agreed terms of a contract will lead to a claim in damages. If and when this type of outbreak occurs subsequently, what can the contracting parties do to avoid a breach? Is COVID-19 a force majeure event? Legally, can *force majeure* clauses be drafted in such a way that both present and similar pandemics in future are captured? This paper is written to answer these and related questions, and provide a guide to parties in contractual relationships affected by the pandemic regarding what to do now and in case of future epidemics of this magnitude.

KEYWORDS: COVID-19; Force Majeure; Pandemic; Breach; Contractual Agreement.

Introduction

Coronavirus, officially known as COVID-19, which originated in Wuhan, China, in December 2019, is spreading rapidly around the world to the extent that the World Health Organization (WHO) has declared the outbreak a pandemic¹. Following this development, there have been an imposition of travel restrictions by many countries, including Nigeria. Flights, hotel bookings, Conferences and AGMs, Business meetings, sports events and much more have been cancelled. All citadel of learning, from primary to tertiary, have been shut while some state governments have banned all religious activities.² The Nigerian Stock Exchange has issued new guidelines regarding the conduct of Company

* Bamidele Olasehinde ADEBAYO, B. Sc (Pol.Sc); LL.B; LL.M, B.L, FCIS, PhD (in view), University of Ilorin, lectures in the Faculty of Law, Redeemer's University, Ede, Osun State, Nigeria. Phone: 08109256441; 08023845649. E-mail: bamisehinde@gmail.com; adebayoba@run.edu.ng

¹ The Director-General of the World Health Organization (WHO), Dr. Tedros Adhanom Ghebreyesus, on behalf of the global health institution, has declared the novel corona virus (COVID-19) outbreak a global pandemic. This declaration was made on March 11, 2020.

² In Lagos State of Nigeria, for instance, religious gatherings were initially pegged at maximum of 50. Subsequently, the number was reduced to 25, and later 20, before an outright ban was imposed due to the sporadic spread of the virus. Subsequently, there have been partial lifting on religious activities with some restrictions on mode of worship. Presently, the rule on social distancing has been made nationwide to curtail further spread of the virus.

meetings as a result of the lockdown.³ We are witnessing a severe crash of Stock markets all over the world while central banks are lowering interest rates and taking measures similar to that of the 2008 global financial meltdown.⁴ The pandemic has affected businesses and their ability to perform their contractual agreements and obligations. Many individuals, companies, and businesses are eager to know whether or not they will be held liable for non-performance of their contractual agreements caused by the pandemic. COVID-19 has threatened and is still threatening the global economy. It has forced individuals, companies, and multinationals to grapple with the challenge of how they can and should conduct business during a worldwide public health crisis of this nature. Moreover, many legal implications are arising from the epidemic, such as employment relationships, insurance coverage of epidemic-related damages, and so on. Even businesses and organisations that are not required by the government to close are grappling with severe challenges due to the outbreak of the COVID-19 pandemic. The focus now for many is to work out how they could continue to operate after the introduction of strict social distancing requirements. Attention is now turning to whether businesses, customers and commercial partners can continue to perform their contractual obligations despite the unexpected situation they find themselves in and, if not, the consequences that flow therefrom. These events have brought to the fore; legal concepts that perhaps provoked little thought in normal times and are now very critical to business survival. Many inquiries from clients focus on whether COVID-19 is a “*force majeure*” event and on whether a contract has been “frustrated.” This paper discusses how the effects of COVID-19 have led to breach of contractual obligations between parties, what to do where and when such breach has occurred and how to guard against the impacts of a similar pandemic in future contractual agreements.

The Law, Contract and COVID-19

The principles of the Nigerian law of contract, like its English origin, are absolute. Failure to perform contractual obligations leaves the concerned party potentially liable to a breach of contract claim. Two major exceptions to this rule are the common law doctrine of frustration and *force majeure* clauses in a contract. Some likely questions will arise if a business or party is unable to perform a contract. Such questions include: whether there is a *force majeure* clause in the contract and if there is, whether it specifically lists ‘epidemic’ or ‘pandemic’ as a *force majeure* event. If ‘pandemic’ is not listed, the next question is whether the pandemic is captured in the general wordings of the *force majeure* clause (if any) in the contract. Another likely question is whether the pandemic actually prevented contractual compliance or whether it just made compliance more expensive.⁵ There is also the need to consider if all reasonable steps have been taken to mitigate or avoid the effects

³ The Nigerian Exchange is granting listed companies a sixty (60) day grace period for the submission of their Audited Financial Statements for the year ended 31 December 2019 (AFS), which are due to The Exchange on Monday, 30 March 2020.

⁴ See generally, Babajimi Ayorinde; Nigeria: COVID-19, Force Majeure and the doctrine of Frustration, posted on 28 March, 2020.

⁵ The Courts are reluctant to allow non-performance simply because it has become uneconomic.

of the pandemic.⁶ Another question to consider is what the contract says will happen in the event of a *force majeure* event, that is, whether it terminates the contract or whether it just suspends performance. Last but not the least is whether the contract specifies that a notice has to be served within a particular timescale to enable the contracting parties to rely on a *force majeure* clause.

If the contract does not provide for a *force majeure* clause, parties will have to rely upon the common law doctrine of frustration. This doctrine is to the effect that a party will be discharged from its contractual obligations if a change in circumstances, like the outbreak of COVID-19, makes it commercially and physically impossible to perform the contract, or would render performance significantly different from what the parties intend. The analysis of the facts in each case will determine whether contracting parties can successfully rely upon a *force majeure* clause or the doctrine of frustration. The same event can allow one business to avoid a breach of contract claim and disallow the other. Because of this uncertainty and the strict notification time limits imposed by insurers, all businesses are advised to review their insurance policy by notifying their insurance company of any actual or potential claim they may have.

Force Majeure Clause in A Contract

The term *Force majeure* is a French term meaning “a superior force.” It is an event or effect that can be neither anticipated nor controlled. *Force majeure* includes both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes, and wars).⁷ From the legal point of view, a *force majeure* is an act of nature or an act of man which is unforeseen and beyond the reasonable control of either or both parties to the contract, and which makes it practically impossible for one or both parties to perform their respective obligations under the contract. Some common examples of *force majeure* include events such as hurricane, earthquake, volcanic eruption, war, strike, riot, crime, plague, flood, and other similar events.

According to Black Law Dictionary, *force majeure* clause is a contractual provision that allocates risk if performance becomes impossible, primarily due to an event or effect that the parties could not have anticipated or controlled.⁸ Well-drafted *force majeure* clauses usually stipulate the required formalities to adopt before the provisions of the *force majeure* clauses can be applied. It will also state the time limits during which a party unable to perform pursuant to *force majeure* can be excused from performance. It will equally state that after the impossibility has continued for a specific period of time, the remaining contracting parties would, despite the ongoing presence of *force majeure*, be entitled to cancel the contract. This shows, in essence, that a *force majeure* clause is not automatically triggered but dependent on the wordings of the contract.

English common law does not automatically apply *force majeure* principles to contracts. Parties to contracts who wish to have *force majeure* relief must spell out what constitutes

⁶ Businesses will need to produce evidence of this.

⁷ Brian A. Garner, *Black's Law Dictionary*, 8th edition, pp 673-674.

⁸ Brian A. Garner, *Black's Law Dictionary*, *ibid*, p. 674.

force majeure in the contract itself.⁹ The implication of failure to spell out *force majeure* events is that performance of the contract cannot qualify as a *force majeure* event for the purpose of providing relief from performance. This is because such has not been named as a qualifying event in the contract. Common law recognises the doctrine of *frustration* of purpose. This is a narrower concept which applies when the actual performance of the contract is substantially different from what the parties intended.¹⁰ Where the contract fails to provide for *force majeure* clause, or the event falls outside what is covered by the *force majeure* clause, and a supervening event prevents performance, all of these will amount to a breach of contract. The law of frustration will be the only course available to the party in default to end the contract. If the failure for performance deprives the innocent party of nearly the whole benefit of the contract, this results in a repudiatory breach, which entitles the innocent party to terminate the contract and claim damages for the repudiatory breach.¹¹

The essence of such a clause is to protect the contracting parties from a breach of contract claim if they are incapacitated from performing their obligations due to an event that is outside their control. Contracting parties are at liberty to agree on what will constitute *force majeure* in their contract, and in the likely consequences of such an event happening. The court has held that contractual provisions between parties relating to *force majeure* events and the agreed consequences, as stipulated in the contract will take precedence over the provisions of the common law.¹² A contract can specify a list of events that will not, for the purposes of the contract, constitute *force majeure* events. Conversely, it can also contain a closed list of events, which are the only events recognised as *force majeure* events under the contract. Therefore, the purpose of a *force majeure* clause is to relieve a party of liability for the inability to discharge his or its contractual obligations due to circumstances beyond that party's control, or beyond his or its reasonable control. The need for such clauses arises because contractual obligations are generally treated by the courts, as absolute. When and where there is no *force majeure* clause, to be relieved of liability where it is incapacitated to perform its contractual obligations as a result of circumstances beyond its control, a party must bring itself within the common law doctrine of frustration.¹³

Time-bound and other sensitive contracts may be drafted to limit the protection offered by this clause where a party omits to take reasonable steps or appropriate precautions to prevent or mitigate the *effects* of the foreign interference, either when they become likely or when they actually occur. A *force majeure* may excuse all or part of the obligations of

⁹ Hongkong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha Ltd. [1962] 2 QB 26 at 69-70.

¹⁰ "Protecting your Business with Force Majeure Clauses". Hall Ellis Lawyers. Retrieved 4 April, 2020.

¹¹ "Terms & Conditions". Lufthansa. Visited 24 May 2020.

¹² Airports Company of SA Limited v BP Southern Africa (Pty) Limited and others [2015] JOL 34127 (GJ).

¹³ Frustration is an English contract law doctrine that acts as a device to set aside contracts where an unforeseen event either renders contractual obligations impossible, or radically changes the party's principal purpose for entering into the contract. However, the operation of this doctrine is limited, in that to establish that a contract has been frustrated, it is necessary to show that the occurrence of an event, beyond a party's control, has sporadically changed the situation in which the contract is to be performed that the contract should be regarded as having come to an end.

either or both parties. For example, a strike might prevent the timely delivery of goods, but not timely payment for the portion delivered. The essence of the *force majeure* clause in a contract, therefore, is to relieve a party from an obligation or suspend that obligation, depending on the circumstances. Generally, an attempt by one party to include something that should, fundamentally, be at his risk should be resisted at the formation stage.

It is normal for contracts to include specific definitions of *force majeure*, particularly at the international level, because of the different interpretations of *force majeure* across legal systems. Some systems restrict *force majeure* to an *Act of God*, such as floods, earthquakes, hurricanes, etc.)¹⁴ and exclude human or technical failures, such as acts of war, terrorist activities, labour conflicts, interruption, electricity failure or communications systems. It is, therefore, advisable to make a distinction between the *act of God* and the *act of man* while drafting contracts generally. In areas prone to natural disaster, *force majeure* requires a definition of the magnitude of the event for which it could be considered as such in a contract. For example, in a mining site, the possibility of earth tremor is high. If, therefore, a contract in this regard considers earth tremor as a *force majeure* event, the other party may refuse such inclusion because it can be reasonably expected that such events might occur in such sites. For small and moderate events, it is safer to specify the requirements for the contract processes. However, for significant events, it is not always feasible or economical to do so. A *force majeure* clause is a contractual mechanism, rather than an underlying common law doctrine. Its effectiveness in protecting a party will depend upon how it is drafted. Generally, clauses like these are similarly drafted. In the first place, *force majeure* should be defined.¹⁵ Secondly, the party whose interest is affected by a *force majeure* event is relieved from liability to the extent that it is unable or impossible to perform its contractual obligations as a result of the occurrence of that *force majeure* event. Thirdly, the party whose interest is affected by a *force majeure* event is required to use reasonable endeavour or diligence to overcome the effects of that event.¹⁶ The affected party is required to notify the other party by providing him details regarding the *force majeure* event.¹⁷ The courts have decided many cases on *force majeure* clauses.¹⁸ However, there has not been an established body of law as to the manner in which such clauses operate and

¹⁴ COVID-19 will expectedly fall under the 'act of God' aspect of *force majeure*.

¹⁵ For example, it can be defined as : (a) an event beyond a party's control (or reasonable control) which by the exercise of reasonable care the party is not able to prevent or overcome; or (b) an event beyond a party's control (or reasonable control), which by the exercise of reasonable care, but excluding measures which are not economically or commercially feasible, the party is not able to prevent or overcome. Specific examples of *force majeure* events are then usually listed. Common examples include acts of God, industrial action, breakdown of machinery, inability to obtain approvals, failure of suppliers, and other acts of men.

¹⁶ A clause will often provide that an affected party is not relieved from liability from the time by which, by the exercise of reasonable care, it could have overcome the effects of the *force majeure* event.

¹⁷ These details may include the nature and cause of the *force majeure* event; its likely duration; the means proposed to be adopted to overcome or mitigate the effects of the *force majeure* event; and evidence that the affected party has employed these means. Most clauses expressly provide that a party is not relieved by a *force majeure* event of an obligation to pay a stated sum of money.

¹⁸ *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2018] EWHC 1640 (Comm) (03 July 2018) ("*Seadrill Ghana*"); *Intertralex v Lesieur* [1978] 2 Lloyd's Reports 509; *Classic Maritime Inc. v Limbungan Makmur Sdn Bhd & Anor* [2018] EWHC 2389 (Comm) (13 September 2018) ("*Classic Maritime*"); *Rhodia International Holdings Limited & Another v Huntsman International LLC* [2007] EWHC 292 (Comm).

should be construed. Instead, the construction of a particular clause depends upon the specific words used in that clause and the parties' intention, as reflected in those words and the remaining clauses of the relevant contract.

Is COVID-19 Pandemic a *Force Majeure* Event?

First, let us consider what *force majeure* clauses are all about. *Force majeure* clauses will generally specify the event or events that will depend on its impact, and relieve a party from contractual liability. Included in these events are war, terrorism, earthquakes, hurricanes, acts of government, plagues or epidemics. COVID-19 appears to fit in well into the epidemic's aspect of the definition. An action of government will occur where there has been an imposition of travel restrictions, quarantines, embargoes of all sorts, or has closed buildings or borders, as it is presently happening in virtually all nations of the world. However, the position is not too clear where the government makes recommendations rather than orders. Where no relevant event is specifically mentioned in the contract, it will be a question of interpretation of the clause and whether the parties intended such an event to be captured. This will involve considering whether the list of events included was meant to be exhaustive or not. Except specific words are used to suggest that a list is non-exhaustive, it might be challenging to posit that parties who set out a list of specific events but did not include a particular event, such as an epidemic, still intended that event to be covered. COVID 19 by all ramifications, is a pandemic. Our position is that even if the word 'COVID 19' is not specifically used in the contract because it is new terminology, the mere fact that the word 'epidemic' or 'pandemic' is used in a typical contract will cover events whose performance are hindered as a result of the outbreak of the virus.

Now to answer the big question of whether COVID-19 is a *force majeure* event. The answer is neither here nor there because it depends on the situation and circumstances. The definition of *force majeure* in the contractual agreement is one of such situations. It also depends on the drafting of the *force majeure* clause and the specific circumstances in which the clause is being applied to.¹⁹ Furthermore, the Nigerian government's stance on COVID 19 and any relevant policies, guidance, or directives it may make as the crisis develops is another factor.²⁰

Under English law, which forms a substantial part of Nigerian law, contract creates *force majeure* events, not statute. This means *force majeure* must be defined in the contract according to the mutual agreements of the parties. This contrasts with the position under civil law jurisdictions where the concept of *force majeure* is included within their civil codes. Although the requirements of *force majeure* depend on the terms of the contract, the party must usually also prove that: (1) the *force majeure* event caused that party's failure to perform its contractual obligations; and (2), they have taken sufficient steps to minimise the issue caused by the *force majeure* event.²¹ Proving a *force majeure* event can be quite

¹⁹ See generally, <http://www.farrer.co.uk/news-and-insights/coronavirus-contracts-cancellations-chaos> visited 10 April 2020.

²⁰ Part of those directives is the lockdown order, social distancing and self isolation in appropriate circumstances.

²¹ They are often expressly required to take "reasonable steps" or use "reasonable endeavours".

challenging, and the contracting parties may encounter some difficulties in relying on *force majeure* to excuse liability for failing to perform a contractual obligation. Two recent English High Court decisions demonstrated some of the problems contracting parties might face in relying on *force majeure* to excuse liability for failing to perform a contractual obligation.²²

The kind of unforeseen disruption to lives and businesses that we are now seeing through the outbreak and spread of COVID-19 is what a *force majeure* clause is expected to respond to. It now appears that the restrictions that the government has taken to curb will form part of the contractual definition of *force majeure*. However, both the contractual wordings and the impact of the relevant circumstances on the parties, together with the effect of government policies or directives, will be carefully scrutinised to determine whether the clause is applicable. It must be determined in individual cases whether COVID-19 meets the appropriate definition of a relevant *force majeure*-event. We must be cautious as to which law and legal understanding shall apply in connection with the respective agreement. Some governments have even outrightly declared COVID-19 as a *force majeure* event. For instance, the Iraqi government has announced that the ongoing COVID-19 crisis constitutes an event of *force majeure* for 'all projects and contracts.'²³

Under common law jurisdictions, *force majeure* events are continually being reviewed by the courts. However, it is widely accepted that events such as international pandemics, plagues, as well as acts of state are examples of *force majeure*. Therefore, the COVID-19 outbreak and the subsequent national and international lockdown can, in our view, reasonably fall within the definition of a *force majeure* event if it hinders or prevents a contracting party from performing his contractual obligations. The applicable law in an agreement can be of material influence on the interpretation of the respective clause, which is capable of leading to contrary results. It is also useful to consider the conflict of laws-related requirements in connection with a related legal assessment. There is a need to review specific clauses in a contract to determine whether it is a *force majeure* event if the term is not specifically defined in the contract. If there is no *force majeure* clause included in the contractual agreement, then statutory provisions covering the respective default constellation such as frustration²⁴ of the contract will apply.

If the *force majeure* clause omits the issue of costs already incurred or payments made under the contract, as it is in many cases, then the "costs fall where they lie." This implies that any payments made under the contract or any costs incurred by either of the parties in performing the contract becomes not recoverable. This may lead to a situation where one party is highly favoured against the other. There are two major methods of mitigating this

²² *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2018] EWHC 1640 (Comm) (03 July 2018) ("Seadrill Ghana"); and *Classic Maritime Inc. v Limbungan Makmur Sdn Bhd & Anor* [2018] EWHC 2389 (Comm) (13 September 2018) ("Classic Maritime"). See also <https://www.whitecase.com/sites/whitecase/files/files/download/publications/proving-force-majeure-claims-a-difficult-enterprise.pdf> visited 5th April, 2020.

²³ In a statement, the Iraqi Government's Crisis Cell said that the period of *force majeure* would be effective from 20 February. The total value of all major active projects currently under execution in Iraq stands at \$291bn, according to regional projects tracker MEED Projects.

²⁴ Even though there are a lot of similarities between them, *force majeure* and frustration are not exactly the same.

risk. The first method is the assessment of insurance, if any, that covers business interruption or cancellation cover to reimburse you for any losses. The other method is to consider the law of frustration. This is an unforeseeable event by the parties, and which does not arise as a result of a breach of contract by the parties, but which makes the performance of the contract impossible. An example will be a situation where the object of performance is no longer existing or has been destroyed by natural occurrences. For example, a change in the law which makes it illegal for a party to perform his obligations, or something that renders the whole purpose of the contract obsolete, will all qualify as frustrating events.

Force Majeure in the Context of COVID-19

Force majeure clauses are contractual clauses that change the obligations or liabilities of the parties under a contract if an extraordinary event or circumstance beyond their control prevents one or more of the parties from fulfilling those obligations.²⁵ For the COVID-19 pandemic to qualify as a force majeure event, contracting parties must have been unable to avoid its consequences, even with due care and diligence. However, this will not always be the case. For instance, in some situations, the effect of the COVID-19 pandemic on a party's ability to fulfill its contractual agreement can easily be avoided. For example, a person who decides to travel to France after the government had already strongly advised against, or even prohibited it, would not likely be able to invoke force majeure for subsequently being placed in quarantine. Also, the COVID-19 pandemic will constitute *force majeure* if it makes the fulfillment of a contract absolutely impossible. That the fulfillment of the contract has become much more difficult or expensive is not enough. If performance remains possible, albeit much more difficult for the party to complete the contract, that party will not be able to escape liability on the grounds of *force majeure*. Indeed, the occurrence of an unforeseen change in circumstances making the performance of a contract more onerous, but not impossible, would not result in a *force majeure*.

We have said that in English law, *force majeure* is a creature of contract and not of common law. It is different from some other legal systems where *force majeure* is a codified law.²⁶ Thus, whether a specific clause relieves a party of contractual liability will, under English law, depend on how risk is allocated between the parties and the precise wording used in the clause as provided for by the contract, the circumstances in which the parties entered into the contract, and the situation that has arisen. The party relying on a *force majeure* clause to excuse its non-performance or late performance should satisfy the court that this is the effect of the clause. If the contract contains a detailed *force majeure* clause, the terms of that clause will generally prevail. A well-drafted *force majeure* clause, for instance, will usually include a detailed description of what events constitute a *force majeure* event. In order to incorporate the impact of COVID-19, for instance, words such as "pandemic" or "outbreak" should be included. The consequences of the occurrence of a *force majeure* event

²⁵ Depending on their drafting, such clauses may have a variety of consequences, including excusing the affected party from performing the contract either in whole or in part; excusing that party from delay in performance, entitling them to suspend or claim an extension of time for performance; or giving that party a right to terminate.

²⁶ Like the Canadian civil code on frustration.

are many. For example, will it delay the object of the contractual agreement, or terminate it, and who will be liable for any costs incurred in the circumstance? It will also include the procedures to take upon the occurrence of a *force majeure* event. Notwithstanding that a contract contains such a clause, *force majeure* can still be applied because of law. In the light of COVID-19, a company's non-performance may still be excused. A party can successfully argue that COVID-19 is a *force majeure* event and can even prove that there is a direct link between the pandemic and its non-performance.²⁷

It can be argued that a pandemic is an unexpected event that could neither have been anticipated nor avoided. It can also be regarded as an impediment to business operations worldwide. Nonetheless, it may be challenging to use COVID-19 to claim *force majeure* in the absence of government policies such as travel restrictions or lockdowns,²⁸ which have hindered business operations. This is because it would be difficult to determine at what point precisely COVID-19 could be categorised as a *force majeure* event if there are no such restrictions. For example, if the government ordered a lockdown which, in turn, hinders business operations, and during the lockdown, a business or party failed to perform its contractual obligations, then COVID-19 could be categorised as a *force majeure* event during such period as is the case presently in Nigeria and most parts of the world. Thus, the party claiming *force majeure* must show that non-performance was beyond its control because it could not have otherwise prevented or mitigated the damage from such failure. In other words, the breach is a result of the lockdown order caused by the outbreak of COVID-19. Presently, many musicians, sportsmen and other entertainers have breached their contractual obligations due to COVID-19, which prevented them from performing as contracted after, in some cases, they have received advanced appearance or performance fee. What should they do? return the fee collected? What of the affected party that has paid these fees? The answer is: it depends on the wordings used in the contract.

Let us consider a hypothetical case to throw more light on this subject. Dr. A, a renowned Canadian Kidney disease expert, has agreed to deliver the keynote speech at a conference being organized by the Nigerian Medical Association (NMA). The conference is to take place in Abuja in the middle of March 2020. According to the contract executed by both parties, Dr. A has been paid, in advance, \$60,000 as his fee for the job. It was also agreed that Dr. A would make his travel arrangements and bear all associated costs. Thereafter, he bought a return flight ticket from Los Angeles, his base, to Atlanta, where the nearest Nigerian consulate is located, to enable him obtain a Nigerian visa. He spent the night in Atlanta and, therefore, had to pay for a hotel room. He has also spent \$10,000 on a non-refundable flight ticket from Los Angeles to Abuja via London. Just a few days before he was to depart Los Angeles, the Nigerian government imposed a thirty-day travel ban on travellers from certain countries severely affected by the COVID-19 outbreak, including

²⁷ Dewi Savitri Reni, a partner and Syarifah Reihana Fakhry is an associate at the Indonesian corporate law firm, SSEK Legal Consultants.

²⁸ In Nigeria, the federal government has completely locked down the Federal Capital Territory, Abuja; Ogun and Lagos states since Monday 30th March 2020 up to the time of writing this paper, a measure aimed at curbing further spread of the disease. To this end, the obstruction, delay and frustrations caused by the lockdown will make COVID 19, in our view; qualify as a *force majeure* event.

Canada. The travel ban will not be lifted until well after the conference has taken place. Indeed, no one can accurately predict when the travel ban will be lifted. As a result of this, Dr. A has had to cancel his trip to Abuja. The NMA is unhappy about this development and has demanded a refund of the entire \$60,000 paid to Dr. A. The NMA has also threatened to sue him for breach of contract if he doesn't pay up within two weeks. In this hypothetical situation, what are the likely defences open to Dr. A?

The answer will depend on the provisions of their contract, particularly whether or not it contains *force majeure* provisions. This will relieve a party from the obligation to perform the contract if the non-performance is caused by the occurrence of an event that is beyond the control of the parties. The typical *force majeure* provision would exclude liability for non-performance caused by specified events like fire, floods, strikes, riots, famine, explosions, earthquakes, armed conflict, or events generally referred to as acts of God.

Dr. A should note the following, concerning *force majeure* provisions, on this contractual engagement. First, he should note that *force majeure* provisions are not implied. They must be expressly contained in a contract. Where a contract fails to provide for *force majeure*, then *force majeure* cannot be invoked. Also, because there is no generally accepted definition of *force majeure*, the words used in *force majeure* provisions are crucial, as Dr. A will only be relieved from performing the obligations specifically mentioned in the *force majeure* provision. In the case of COVID-19, Dr. A is more likely to successfully invoke a *force majeure* provision if it expressly covers the "outbreak of diseases," "epidemics," or "pandemics." The inability to perform the contractual obligation must be directly traceable to the *force majeure* event. In other words, a default that would have occurred even if the *force majeure* event never happened will not benefit from a *force majeure* provision. If the contract contains a procedure that must be followed in order to enjoy the relief provided by the *force majeure* provision, then Dr. A must follow that procedure scrupulously. Some contracts, for example, require the party seeking to rely on a *force majeure* provision to give written notice to the other party. Non-compliance with these requirements could become an obstacle to a successful claim for relief under the *force majeure* provisions. *Force majeure* provisions will usually place an obligation on the party affected by the *force majeure* event to take immediate steps to mitigate its losses. Mitigation, in this context, involves taking reasonable steps to reduce the loss occasioned by the *force majeure* event. If Dr. A fails to mitigate his losses, he may be prevented from relying on the *force majeure* provisions.

In this hypothetical case, however, all hope is not lost for Dr. A if the contract is devoid of *force majeure* provisions. He may be able to rely on the doctrine of frustration of contract. Frustration will apply where an unforeseen event either renders a contract impossible to perform or makes the outcome of the performance substantially different from the parties' intention at the time of formation of the contract.

Where the doctrine of frustration is successfully deployed, it would result in the termination of the contract. In such circumstances, Section 6(2) of the Law Reform (Contracts) Law of the Federal Capital Territory (FCT), Abuja²⁹ provides that all sums paid

²⁹ FCT law will apply to our hypothetical case as the contract was to be performed in Abuja.

to a party under the contract are recoverable by the person who made the payment. However, Section 6(3) of the same law states that if the party to whom the payment was made had incurred expenses for the performance of the contract before the frustrating event occurred (just as Dr. A did), the court may, in appropriate circumstances, allow the retention of the portion paid to him or her which have been so expended.³⁰

In addition to the protection that *force majeure* provisions and the doctrine of frustration may provide, some statutes protect parties who may find themselves on the wrong end of a consumer contract because of unforeseen events like an outbreak of COVID-19. An example is Section 120(1) of the Federal Competition and Consumer Protection Act, 2018, which grants a consumer the right of cancellation of *advance booking and reservations*.³¹ A charge will be considered to be unreasonable if it "exceeds a fair amount" having regard to the nature of the goods and services ordered, booked, or reserved, and the length of the notice of cancellation, amongst others. Businesses and consumers must be aware of their rights under the contracts they have entered into, under the common law and statute to enable them to prepare when incapacitated to perform their contractual obligations as a result of COVID-19.

Interpretation and Impact of Force Majeure Clause

Determining whether circumstances beyond the parties' reasonable control cover issues emanating from COVID-19 depends on the interpretation ascribed to *force majeure* and also, on the facts in each situation. In an unprecedented case like the present, the courts are likely to be generous in their interpretation when faced with parties who have encountered unavoidable difficulties in performing their contractual obligations. However, such parties will still have to show that their non-performance, or late performance, was indeed beyond their control and could not have been avoided, prevented, or reduced.³²

Clauses may give a list of specific criteria, such as fire, flood, war, volcanic eruption, and similar events, alongside generic phrases or words, such as "or any other causes beyond our control." It all depends on the interpretation ascribed to the particular words used, but the general wording in this type of clause will mostly be broadly interpreted, as opposed to being restricted to events that are akin to those specifically mentioned. Following this, such a clause may still be triggered even if a health event or other relevant event is not expressly listed.

Considering the unprecedented nature of the COVID-19 pandemic and the actions of governments globally in response, it is most likely that COVID-19 would qualify or

³⁰ The doctrine of frustration, though similar in effect to the doctrine of *force majeure*, is quite more restrictive. Courts will generally not allow a party to use the doctrine of frustration as a tool to escape a bad bargain.³⁰ The doctrine of frustration will also not relieve a party from performing a contractual obligation simply because the event complained of has made the performance more difficult or expensive. Economic hardship is not a ground for invoking the doctrine of frustration.

³¹ The section specifically states that 'A consumer shall have the right to cancel any advance booking, reservation or order for any goods or services, subject to a reasonable charge for cancellation of the order or reservation by the supplier or service provider.'

³² <https://www.pinsentmasons.com/out-law/guides/covid-19-force-majeure-clause> visited 19th April, 2020.

constitute a *force majeure* event under many *force majeure* clauses. However, the occurrence of a *force majeure* event does not translate to protection from liability by the party for failing to perform or delay in performance. The particular nature of the contract and other prevailing circumstances shall be taken into account while interpreting *force majeure* clauses.

Generally speaking, the interpretation of *force majeure* clause in a contract depends on the way it is drafted and what the contracting parties intend *force majeure* to mean. The clause should indicate the effect the *force majeure* event should have on the affected party or parties, in order to set the process for what happens next. It is usual for *force majeure* clauses to specify the impact that the event or circumstances in question must have before the clause can be invoked. We can consider circumstances that can either prevent, hinder or delay performance. These are varied degrees of impacts on performance before a party will be relieved from liability in a *force majeure* situation.

The contract is expected to state what will trigger the *force majeure* event. It should state what can **prevent** the affected party from rendering his obligations under the contract. For instance, will the outbreak of COVID-19 make it totally impossible for the affected party to fulfill his or her obligations as the case may be? The contract should also envisage and state what can **hinder** the affected party from performing his duties. The *force majeure* event should put the affected party should find himself in a situation that could cause harm to their business as a whole. However, a mere increase in cost is insufficient to trigger the clause. For instance, if as a result of the outbreak of COVID-19, the only consequence it caused is an increase in the cost of performance, then in that circumstance, COVID 19 will not qualify as a *force majeure* event and can, therefore, not be relied on by the affected party. Also, to consider is whether the event **delays** performance by the affected party. For instance, adverse weather can lead to shipment delays or late take-off of flights. The effects of these can cause a delay in the contractual performance by the affected party. If COVID-19 can, in any way, cause a delay in the performance of a party's obligation under the contract, such party can invoke *force majeure* clause; otherwise, COVID-19 would not avail him if he relies on it as a *force majeure* event in such circumstance.³³ For a party to rely on *force majeure* clause, it must show that all the following requirements under the clause have been met: there has been a *force majeure event*; due to the *force majeure* event, the affected party has been prevented, hindered or delayed, depending on the circumstance, in performing its obligations; and the affected party has complied with any procedural requirements set out in the clause, such as giving adequate notice to the other party or parties and taking steps to reduce the impact.

Therefore, for a party to take advantage of the *force majeure* clause, such a party must ensure that all procedural requirements are fulfilled. Otherwise, the ability to rely on the clause becomes eroded. This may mean that the affected party is itself in breach of contract by not doing those things. It is equally necessary that steps must have been taken to minimise or reduce the impact of the *force majeure* event and show this to the other party.

³³ See generally, <https://www.farrer.co.uk/news-and-insights/coronavirus-contracts-cancellations-chaos-visited> 10 April, 2020.

An open line of communication between the parties must be maintained, and each party must be kept updated with any progress made, or further changes in circumstances.³⁴

Requirement to Give Notice

Most contracts require the party seeking to rely on the *force majeure* clause to give prompt and adequate notice to the other party of the *force majeure* event and the effects it is going to have on them. It is quite unreasonable to expect that the other party ought to have taken 'judicial notice' of the event. For instance, while it is true that COVID-19 is a common knowledge globally if it will hinder or prevent the contractual obligation of a party, responsibility is placed on him to adequately and promptly notify the other party or parties as the case may be. It is not enough to rely on the fact that the other party ought to know even without any notice.

It is possible that parties are in discussions to try to agree on a way forward without invoking the *force majeure* clause. However, the ability to rely on *force majeure* can be lost if the procedural requirements in the contract are not timeously followed, like that of giving the required notice promptly. Whether such notice shall be verbal or in writing or both depends on the wordings of the contract. Some clauses may also require the provision of updates, together with an express obligation to mitigate. For instance, considering the present situation of the outbreak of COVID-19, the party whose obligations under a contract have been made impossible to perform must by now notify the other party of his intention to rely on the clause given the prevailing circumstances. The common remedy if a *force majeure* clause is invoked is for one or more of the parties to be discharged from its obligations or liability under the contract without paying damages. Sometimes, *force majeure* clauses provide for the extension of time, suspension of time, or termination in the event of continued delay or non-performance. A right of termination could be commercially significant, as it may provide the platform to renegotiate the terms of the contract. Some clauses also clearly provide that extra costs incurred as a result of the inability to perform or perform timeously will be borne by a particular party; otherwise, the costs will be borne by the party that has incurred them, since there is no contractual provision to override this.³⁵

Effect of a Force Majeure Clause

Essentially, a *force majeure* clause will suspend the performance of the affected party's obligations while the impact of the *force majeure* event continues. The aim is that, where possible, the contract can be revived when the event is over. Both parties can, thereafter, perform their obligations as originally intended. However, some contracts place a time limit on the suspension and may give the non-affected party, and sometimes also the affected party, the right to source goods or services from elsewhere or to terminate the contract if the affected party is still incapable of performing its obligations within a

³⁴ See generally, <http://www.farrer.co.uk/news-and-insights/coronavirus-contracts-cancellations-chaos> visited 10 April 2020.

³⁵ This is known as liquidated damages clause as opposed to penalty clause in a contractual agreement.

specified period of time.³⁶ A party whose performance is not made impossible, such as those whose only obligation under the contract is to make a payment, will often not be relieved of the obligation to perform, even if the other party's obligations are suspended. A *force majeure* clause is just a means of allocating risk, and in some cases, that risk will fall on the party not directly affected by the *force majeure* event. In Nigeria, for instance, the lockdown does not affect people dealing with pharmaceutical drugs, edible food items, and those engaged in essential services. Therefore, COVID-19 and subsequent government directives on lockdown cannot constitute a *force majeure* for a party contracted to supply pharmaceutical products as the lockdown order does not affect such supplies.

Effect of Contract without *Force Majeure* Clause

If the contract in question omits a *force majeure* clause, or if such clause excludes an unforeseen event that a party wishes to rely on, this does not mean that the party is without a legal remedy. In such circumstances, the common law principle of 'supervening impossibility of performance' will be relied on so as to suspend the performance of its obligations. *Force majeure* is a creature of contract as opposed to a rule imposed by the general law. To this end, if there is no *force majeure* clause, an affected party will have to look into other provisions of the contract for remedies. If no remedy is provided by the contract, it may, in certain situations, be possible to rely on the doctrine of frustration of contract. However, it is very cumbersome to show that a contract has been frustrated. This is because frustration requires that an unforeseen subsequent event outside the control of the parties has either made the contract impossible to perform or has transformed the performance of the obligations under the contract into something so substantially different from the parties' intention that it would be unfair to hold the parties to their obligations. As with the test for "prevention" of performance under *force majeure* clauses, the fact that performance has been made more difficult or costly is inadequate. It is also doubtful if an epidemic or pandemic would be considered to be unforeseeable in the light of previous epidemics and warnings that further epidemics or pandemics are likely to occur. However, it is evident that the extent of the global government-enforced lockdowns was unforeseeable.³⁷ Frustration may also be commercially undesirable in some circumstances, since its effect, regardless of the parties' intention, is to terminate the contract immediately.

Relief for Contracting Parties in a Contract with *Force Majeure* Clause

We have been able to establish, to a considerable extent, that COVID-19 is a *force majeure* event. However, whether a contracting party can be relieved under an agreement due to COVID-19 depends on the specific circumstances. It is essential, therefore, to assess specific circumstance in each case. Generally speaking, the threshold for categorising an event as *force majeure* is very high. Since *force majeure* events are extraordinary, it follows that if the extraordinary event simply constitutes a temporary obstacle or impossibility, it

³⁶ See <https://www.farrer.co.uk/news-and-insights/contracts-in-the-time-of-covid-19-force-majeure-and-frustration/> visited 25 April, 2020.

³⁷ See <https://www.linkedin.com/pulse/force-majeure-deepak-dayal?articleId=6657534178151759872> visited 25 April, 2020.

will typically only allow a suspension of contractual obligations. If the extraordinary event is permanent, prolonged, or of indefinite duration, the entire contractual obligations may be terminated. Therefore, regarding COVID-19, because of the drastic measures being taken by governments all over the world, the end of the pandemic disease can be said to be in sight. Therefore, COVID-19 cannot be meant to last indefinitely. The import of this is that whoever is relying on it as a *force majeure* event must consider the nature of the contract and the duration. If it is a contract of long duration, then it might be suspended pending when the COVID-19 would be curtailed, by which time, obligations under the contract will resume where applicable. If it is a contract of short duration, however, and the duration falls within the period of the lockdown as a result of COVID-19, then obligations under the contract have been frustrated, and such contracts stand discharged.

It is our view that COVID-19 can, depending on the specific circumstances, constitute a *force majeure* event under Nigerian law. Whether this is the case in the particular situation will ultimately depend on, *inter alia*, upon the wording of the particular contract, the time of entering into the contract, and so on. If a *force majeure* clause is contained in the contract, the clause may make what constitutes a *force majeure* event more stringent or may ease the assessment. The contract may also include a hardship clause. Hardship clause covers situations where the performance of contractual obligations is still possible but unreasonably burdensome due to events beyond the control of the parties. Hardship clauses are usually easier to invoke than *force majeure* clauses. When considering whether COVID-19 relieves a party of its obligations under an agreement, with the effect of exemption from liability for non-performance, it is essential to review the specific contract carefully. On remedy, the general effect of *force majeure* is that for so long as it persists, it extinguishes the obligations owed between parties. In a particular case,³⁸ it was held thus: "if a person is prevented from performing his contract by *vis major* or *casus fortuitous*...he is discharged from liability."

The innocent party is not entitled to any damages for a breach of contract where the other party is unable to perform due to *force majeure*. However, the innocent party may have a claim for unjustified enrichment if such a party continued to perform in the case of reciprocal obligations.³⁹

As noted earlier, the time of entering into the specific contract is also essential. For instance, was the contract entered into before or after the outbreak of COVID-19? On 30 January 2020, WHO announced that COVID-19 is a Public Health Emergency of International Concern, and therefore, it appears unlikely that COVID-19 can constitute a *force majeure* event for a contract entered into after this date. This is because the outbreak is already existing, and contracting parties are reasonably expected to take this into consideration at the formation stage. Still, after the outbreak of COVID-19, a closer examination of the specific circumstances is required to assess if COVID-19 constitutes a

³⁸ *Peters, Flamman & Co v Kokstad Municipality* 1919 AD 427.

³⁹ See <https://www.polity.org.za/print-version/covid-19-national-shutdown-2020-force-majeure-and-the-legal-effect-on-commercial-contracts-2020-03-30> visited 25 April, 2020.

force majeure event in a particular situation.⁴⁰ The summary of it all is that COVID-19 may, depending on the specific circumstances, constitute a *force majeure* event. It will depend on *inter alia*, the wording of the particular contract, the time of entering into the contract, and so on.

Conclusion

The COVID-19 pandemic has caused unprecedented economic disruptions. Contracting parties have been subjected to situations where they cannot help but breach their contractual obligations due to the COVID-19 pandemic. Governments across the world have implemented policies that have disrupted business operations in a bid to curtail further spread of the virus. Contracting parties being affected by COVID-19 can still benefit from a precise assessment of the underlying contractual framework. Possible *force majeure*-clauses should be reviewed with particular care. A clarification of the wording of the respective *force majeure* clause regarding a contractual agreement should be considered to see whether the current crisis meets the contractual definition of a *force majeure* event. If it does, what will be the legal consequences deriving from this fact? In case no *force majeure* clause was provided for, the general statutory regulations under the respectively governing law would apply. Also, it shall be carefully considered which options are available to achieve a reasonable economic result. Parties to a contract should evaluate and comply with the legal framework for their conduct and ensure that such conduct complies with the agreement. A pro-active approach to the socio-economic consequences of the COVID-19 epidemic should be pursued. All contracting parties, individuals, groups, or corporations should carefully consider whether they will be able to continue to perform their contractual obligations as part of their planning for managing the impact of the COVID-19 crisis. If performance may be adversely affected, it is essential to review the terms of the contracts. With long-standing contracting partners, many businesses should try to agree on a mutually acceptable position, including varying contractual obligations and sharing the exposure equitably or proportionally as the case may be.

Recommendations

The ongoing COVID-19 pandemic is having an unprecedented impact on human lives, trade, and commerce. Contracting parties, in order to avoid the consequences of a breach, may want to rely on *force majeure* clauses for relief from the performance of certain obligations due to the adverse impact of the COVID-19 outbreak. Before taking such a step, a legal practitioner should be consulted to review any commercial contracts on the existence and applicability of *force majeure* clauses contained in the contract. Such a legal mind will also consider how to validly trigger such a clause or oppose an unjustified reliance on such a clause. If the absence of a *force majeure* clause in the contract, the legal practitioner can advise on whether or not there are any common law remedies available.

⁴⁰. See generally, Christina Vesterholm, and Anne-Sophie Sachse Petersen, Associate Partners in EY LAW. EY refers to the global organization, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients.

Also, the definition of *force majeure* should be so elastic or enlarged to include what are, hitherto known as *force majeure* events such as flood, earthquake, war and the likes, to include the outbreak of any pandemic disease like COVID-19 presently ravaging the world and any likely future outbreak of diseases, though not yet discovered, that may have the likely effects of disruptions to contractual agreements the way COVID-19. Secondly, as long as the *force majeure* event is not caused by any of the parties either due to negligence, omission or commission, then liabilities arising out of the occurrence should be equally borne by parties under the contract and by extension, by those who are likely to benefit from the outcomes of the contract even if they are not directly privy to the agreement.

Obviously, the COVID-19 pandemic has presented unprecedented challenges and impediments to businesses in conducting their normal operations. Enterprises must enact policies and measures to protect themselves in times like this. We suggest several measures contracting parties can take in this situation. There should be an extensive review of all business contracts, and there should be an identification of what events constitute *force majeure*, the available remedies provided, as well as the requirements to invoke *force majeure* if operations are disrupted by the effects of COVID-19.

There is also the need to include wordings or provisions on infectious disease or pandemic in new contracts and amend existing contracts where possible. This is one of the takeaways from the COVID19 pandemic. Identification and assessment of the consequences of the non-performance of all valid contracts are essential. It is also essential to ensure that all reasonable steps are taken to avoid non-performance or to reduce the damages due to non-performance.

Furthermore, it is critical to assemble and retain all documentation about the impact of COVID-19 on operations and the measures taken in response to it. It will not be out of place to continually engage and communicate with workers regarding updates on the pandemic. Contracting parties, especially corporations, should create a policy for the foreseeable future. For instance, there should be a work from home policy in the event of a lockdown. There should be adequate training for workers to prevent business operations from being severely impeded. Lastly, it is highly essential to check insurance policy, in order to ascertain if the contractual object is covered in the event of non-performance as a result of a pandemic like COVID-19.

Parties seeking to invoke *force majeure* for non-performance should take reasonable steps to mitigate the foreseeable damages brought about by the non-performance. To this end, companies should ensure that all the impact of COVID-19, as well as actions taken in response to such impact, are recorded. Also, parties seeking to rely on the outbreak of COVID-19 as a *force majeure* clause should take some practical steps to achieve their aim. First, the party must consider in detail the precise wordings of the *force majeure* clause, the contract as a whole, and the prevailing circumstances. Secondly, it is essential to explore alternative means of performing, reducing delay, or minimising any loss to the other party.

Thirdly, and as we have noted earlier, the party must promptly serve the required notice under the contract in accordance with the notice provisions. It is also necessary to consider carefully what event or circumstance constitutes the *force majeure*, taking into consideration, the wording of the clause and the timescales required for service of the notice, the outbreak of COVID-19, and subsequent government restrictions put in place. The party should not attempt to rely on increased costs to excuse non-performance or delay, as this will not usually be sufficient. It is also necessary to keep a documentary record, especially of why performance was impossible, hindered, or delayed. The actions taken to find alternatives and mitigate loss, and the service of any notices must also be documented. There is also the need to be aware of the difference between force majeure and frustration. While *force majeure* will relieve the party, relying on it the liability of non-performance under the contract, frustration has the effect of totally discharging the contract. The nature of the contract will determine whether COVID-19 is a force majeure in the circumstance or a frustrating event.