
The impact of the Covid-19 pandemic is greatly felt in the business sphere, especially with the performance of contracts entered prior to the pandemic. Many parties to commercial agreements find themselves in precarious positions where the performances of their obligations are now either impractical or impossible to fulfil. The law generally respects the sanctity of contracts, with limited exceptions. One of such exceptions is the occurrence of a force majeure and frustration of contract, which shall be analysed in light of the Covid-19 pandemic.

**DEFINITION OF FORCE MAJEURE**

A force majeure event is an occurrence outside the reasonable control of a party to a contract preventing that party from performing its obligations under the contract. Typically, they include war, strike, riot, insurgency, epidemic or an event described as an Acts of God. Acts of God usually encompass hurricane, flood, earthquake, volcanic eruption and other natural disasters.
Generally, parties insert *force majeure* clauses in a contract as a protection clause to mitigate or remove liability for non-performance of obligations due to unavoidable catastrophes. In the absence of a force majeure clause in a contract, parties can rely on the common law principle of frustration of contract but this defence must be sufficiently pleaded by the party seeking to rely on it as a defence.

**THE TEST FOR FORCE MAJEURE**

Although *force majeure* as a legal doctrine is unknown to common law (and by implication, to jurisdiction operating the Common Law system, like England, Nigeria, USA, Canada), Civil Law jurisdictions recognise the doctrine of *force majeure* and it may be pleaded in such jurisdictions, whether or not the contract contains a *force majeure* clause. To take benefit of liability exclusion by relying on the doctrine of *force majeure*, defaulting party must prove that the event which has occurred satisfies the following criteria:

(i) Its occurrence was beyond the control of the parties;
(ii) It could not have been reasonably foreseen by the parties;
(iii) The parties could not have prevented its consequences.

On the other hand, although Common Law jurisdictions do not recognise force majeure as a doctrine, when the contracting parties expressly include a force majeure clause in their contract, stating the events that will exculpate a party from liability or limit the parties’ liability, the courts will enforce the clause as it would any other clause in the contract. In that situation, the events which will amount to force majeure would be expressly stated in the contract, as well as consequences and remedies upon occurrence of the event.

**PROCEDURAL REQUIREMENTS FOR A FORCE MAJEURE CLAIM**

Generally, the force majeure clause in contracts stipulates the procedure for an affected party to seek protection under force majeure. Most clauses require the affected party to give prompt notice to the other party of the relevant event and the effect(s) on the affected party's performance. The affected party may also be required to take steps to minimise or mitigate the impact of the event on its ability to perform. Where the contract stipulates the
timeline or procedure for communicating a force majeure event, the onus is on the affected party to communicate same as provided under the contract to avoid losing its right to be covered by the provision.

For Civil Law jurisdictions where the force majeure doctrine is imputed into contracts by default, the statute providing for it often states the steps for such claims.

**IMPLICATIONS OF FORCE MAJEURE**
The implication of a *force majeure clause* depends on what the parties stated under their contract; and the implication of a *force majeure* doctrine depends on the statute (although the parties can by contract, expand the doctrine)

Generally, successful pleading of *force majeure* often serves to suspend performance of the contract, thus extinguishing liability for the affected party due to non-performance during the time of the *force majeure* event. However, the suspension of obligation to perform only lasts as long as the force majeure event persists (except performance would have become unreasonable by then. For instance, when the subject of the contract is needed for a particular purpose which has now passed)

Parties are generally advised to consider remedies to mitigate the effect of a force majeure event. Some contractual remedies for force majeure include an extension of time to perform those obligations (where feasible), suspension of performance for the duration of the force majeure event and resumption after the passage of the force majeure event. In some cases, if the force majeure event persists for an extended period, parties may terminate the contract.

**THE DOCTRINE OF FRUSTRATION**
The doctrine of frustration is a Common Law doctrine that applies when an unforeseeable event not caused by the action of either parties occurs, rendering the performance of the contract impossible. Where frustration occurs, the contract is automatically discharged and any future performance under the contract is cancelled.

**THE TEST FOR FRUSTRATION**
Frustration of contract is a factual inquiry and sometimes overlaps with other common law defences to non-performance. Frustrating events could include a change in the law that makes it unlawful for one of the parties to perform their obligations, destruction of the subject matter of the contract or an extenuating circumstance that makes the whole purpose of the contract obsolete.

In general, frustration applies where:
- The underlying event is not the fault of any party to the contract;
- The event or circumstance occurs after the formation of the contract and was not foreseeable by the parties at the time of formation; and
- As a result, it has become physically or commercially impossible to fulfil the contract, or the obligation(s) to be performed has radically transformed from what was initially undertaken or envisaged.
REMEDIES AVAILABLE UNDER THE DOCTRINE OF FRUSTRATION

Except parties expressly provide for alternate remedies in their agreement, the effect of frustration under common law is to render the contract terminated and the parties discharged of further liabilities. Monies already paid become unrecoverable, except there has been total failure of consideration on the part of the party who received the money (i.e. that party has not given any benefit whatsoever in return).

But in addition to Common Law, some jurisdictions, like England, have the additional statutes on frustration, like the English Law Reform (Frustrated Contracts) Act of 1943 which allows parties to recover monies paid under a contract which has been frustrated without having to prove total failure of consideration (i.e. a party may be able to recover a part of money paid for which the other party has not performed, and allow the other party to keep such part of the money that is for the obligation he already performed).

The parties are allowed to include clauses in their contract to expand or limit the application of this doctrine. Hence, parties may provide for other remedies like suspension of the contract instead of termination, an injunctive order against a party restraining the affected party from rescinding the contract during the period of suspension, and a mandatory order permitting the non-affected party to seek an order of specific performance if the other party fails to discharge his contractual obligation after the suspension period, parties executing an addendum to the contract agreeing to extend the contract, or parties agreeing to substitute the contract with new terms.

HELL OR HIGH WATER CLAUSES

It is noteworthy that certain contracts insert a hell or high water clause to prevent the operation of force majeure clauses and the doctrine of frustration. A hell or high water clause is a clause inserted into a contract, mandating that payments for the subject matter must continue regardless of difficulties affecting performance, use or enjoyment of the subject matter. Typically, this clause is inserted in agreements for property leasing and operation of a leased asset. The purpose of this clause is to mitigate any loss of profit due to the non-breaching party because of the breaching party relying on the doctrines of force majeure and frustration of contracts.

Courts are divided on whether to enforce hell or high water clauses, and often look to the unique circumstances of the case before enforcing such clauses. In instances where the Courts have enforced the clause, the main ground for upholding the principle is that parties are free to contract, except for instances of fraud and misrepresentation. Courts have also found that hell or high water clauses are of commercial necessity to certain industries and transactions, such as equipment leasing and rental agreements, as the give parties confidence to enter into certain agreements freely and ensure that parties’ interests are protected.

COVID-19 FORCE MAJEURE AND FRUSTRATION OF CONTRACT

Covid-19 pandemic has brought about restriction of movement, the prohibition of mass gatherings and inter-territorial restrictions which can frustrate the performance of obligations under a contract. On the face of it, it would appear that where a contractual obligation requires movement of persons and things or mass gatherings, Covid-19 poses a frustrating circumstance.

Nevertheless, the law is settled that a contract is not frustrated merely because its execution becomes more difficult or more expensive than either party originally anticipated at the time of its
negotiation. Furthermore, the law has made it clear that it is the nature of the contractual obligation to be performed by a party that determines whether or not a party's non-performance can be excused by force majeure.

The Covid-19 outbreak and the concomitant restriction of movement can constitute a force majeure event or an event of frustration, depending on the nature of the obligations to be performed. The unforeseen disruption to lives and businesses that we are experiencing is exactly what a force majeure clause is designed to address. However, the contractual wording and the impact of the unique circumstances on the parties will need to be scrutinised to determine whether the clause should be triggered. In situations where an existing contract does not contain a force majeure clause or the force majeure clause does not cover pandemics, an affected party may be able to rely on the doctrine of frustration if the contract has become impossible to perform. Thus, the contract will become terminated and the parties will be relieved from further obligations, except they have provided in their contract that the effect of frustration will be suspension of the contract rather than termination.

CONCLUSION
The Covid-19 pandemic is not only a threat to mankind; it is also a threat to businesses across the world and it is having an unprecedented impact on trade and commerce. Some businesses may seek to rely on force majeure clauses, doctrine of frustration, or other contractual reliefs to excuse the performance of their obligations while the pandemic persists. However, it requires a factual inquiry and scrutiny into the contractual obligation[s] to determine whether such a contract can be suspended or discharged, and the applicable remedies.

As part of Covid-19 pandemic risk planning, businesses should consider whether they will be able to continue to perform their contractual obligations. This consideration will enable businesses position in any ongoing negotiations and prepare to deal with any situations where performance is impossible.

Going forward, a continuity plan is crucial to address times of uncertainties. It is imperative that legal advice be sought in contract negotiation and drafting to ensure that unforeseen circumstances will be adequately provided for under your contract.

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