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THE EFFECTS OF COVID-19 ON CONTRACTUAL OBLIGATIONS

Contractual obligations are the legal responsibilities engaged by each party involved in a contractual agreement. These obligations are usually spelt out by parties to the agreement. This article would be analyzing the impact of **COVID-19** on contractual agreements and will also attempt to decide whether it is a ground for claiming relief under a *force majeure* provision and the alternative reliefs in law where the clause does not cover a pandemic.

DEFINITION OF FORCE- MAJEURE

Force majeure is a French word which means *'superior force'* a common clause in contracts that can limit a party's liability when an extraordinary event or circumstance outside the party's control prevents or hinders that party from fulfilling its obligation under the contract.

It refers to circumstances outside a party's reasonable control which prevents the party from fulfilling its contractual obligations, despites its best intentions and without any fault attributable to that party. *Force Majeure* is a common clause in contracts which provides that one or both parties can cancel a contract or be excused from either part or complete performance of the contract on the occurrence of a certain specified event or events beyond the parties' control.

Force majeure is regarded as a creature of contractual innovation with case law acting as a guide to its application and effect. Traditionally, *force majeure* clauses were intended to deal with acts of God such as hurricanes, floods and volcanic eruptions. However, more recently, *force majeure* clauses/events have been broadened to cover a wide range of events such as cyber-attacks, cobalt shortages or a collapse in stock markets, epidemics etc.

Furthermore, it is now common for *force majeure* clauses to not only include events that make performance impossible but also events that make performance impractical or commercially unviable.

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THE SCOPE OF FORCE MAJEURE UNDER NIGERIAN LAW

In **Globe Spinning Mills NIG Plc v Reliance Textile Industries Ltd**[1] *force majeure* was described as something which is unexpected and unforeseen making nonsense of the real situation envisaged by the parties.

In **Diamond Bank Ltd v Ugochukwu**[2], the court held that for *force majeure* to occur, there must be an event which significantly changes the nature of the contractual rights of the parties that it would be unjust to expect the parties to perform those rights such as:

1) Where the subject matter of the contract has been destroyed or is no longer available

2) Death or incapacity of a party to a contract

3) The contract has become illegal to perform as a result of a new legislation

4) The contract has been frustrated on the outbreak of a war

5) Where the commercial purpose of the contract has failed.

Force majeure is generally intended to include occurrences beyond the reasonable control of a party and therefore, it would not cover:

- Any result of the negligence or malfeasance of a party, which has a materially adverse effect on the ability of such party to perform its obligations.

- Any result of the usual and natural consequences of external forces. To illuminate this distinction, take the example of an outdoor public event abruptly called off. If the cause for cancellation is ordinary predictable rain, this would most probably not qualify as an occasion of a *force majeure*.

[1] (2017) Per Ndukwe Ayanwu JCA

[2] (2008) 1 (NWLR) Part 1007

- If the cause is a flash flood that damages the venue or makes the event hazardous to attend, then this almost certainly *would* qualify as a *force majeure* event. Some causes might be arguable borderline cases; these must be assessed in light of the circumstances.

  Circumstances that are specifically contemplated (included) in the contract – for insurrections, riots, epidemics, landslides, lightening, earthquakes, fires, explosions, storms, floods, civil disturbances and restraints of all governments which makes the operation of (say a textile or spinning industry), impossible.

  On the occurrence of any of the events as listed above the parties shall be relieved from liability under their agreement, except in relation to an obligation to make outstanding payments on the due dates and in delivering to the Buyer the quantity of yarn already manufactured and any available excess which has not been committed to a third party before the occurrence of the *force majeure* event.

APPLICABILITY OF FORCE MAJEURE CLAUSES IN A CONTRACT

In deciding on the applicability of a *force majeure* clause in a contract, the courts will look at the exact wordings of the clause and the reliefs that are provided under it such as the notice period and reliefs provided by the contract .

It is important to note that establishing that a *force majeure* event has occurred may give a party the option to either:

- Terminate the contract,
- Refrain from performing the contract,
- Suspend performance of the contract, or
- Claim an extension of time for performance

A party wishing to invoke a force majeure justification for his failure/inability to perform under a contract must;

- Ascertain and retain evidence demonstrating that they are unable to meet their contractual obligations,

- Demonstrate that the circumstances are considered a *force majeure* event at law or under the contract

- Establish a causal link between the alleged *force majeure* event and his inability to perform under the contract (in this case how the **COVID-19** pandemic caused the inability to perform/loss it is claiming)

NEGOTIATING CONTRACTS UNDER THE COVID -19 ERA

Parties should ensure that express words which cover **COVID- 19** and other pandemic events are incorporated into force majeure clauses, going forward.

It is important to note that even if the clause covers **COVID-19** it is still subject to other conditions in the contract being satisfied including issuing notices to parties and considering if parties could not have reasonably avoided the effect of **COVID19** on the contractual performance.

RELATIONSHIP BETWEEN FORCE MAJEURE AND THE DOCTRINE OF FRUSTRATION

Case Study

A musical company had organized a show for one thousand (1000) people at the cost of One Hundred Thousand for standard tickets and One Million Naira for VIP tickets. All seats had been fully booked and tickets had been tagged non- refundable. As a result of the **COVID 19** pandemic the Federal Government had ordered a lock down and banned social gatherings in excess of 10/20 people in Lagos, Ogun and Abuja. Evidently, it has now become impossible to perform not only the main contract but also other ancillary/underlying contracts entered into as a concomitant/consequence of the main contract. These will include but may not be limited to payments to vendors for food and refreshments, booking of the hall and engagement of artists who will perform, and people from all walks of life are billed to attend and had booked their flights tickets and hotels.

The question would be whether the **COVID-19** event is an occasion of a *force majeure* or frustration of the contract?

Frustration would occur where it is established to the satisfaction of the court that due to a subsequent change in circumstances which was clearly not in the contemplation of the parties, the contract has become impossible to perform[3].

The doctrine of frustration has been restricted to:

a) Situations where the supervening event destroys a fundamental assumption

b) Where Force Majeure clauses are drafted into a contract[4].

A contract is frustrated when an event occurs that makes the contract impossible to perform or obligations become fundamentally or radically different to those originally undertaken.

To determine whether frustration applies to a contract, it is important to identify the party's contractual obligations at the date of the contract and how the particular event in question alters them.

It is important to note that delayed performance as opposed to events that materially alter contractual obligations generally do not amount to frustration of a contract. If the delay is particularly long or has serious effects on contractual obligations, the impact on the obligation might be sufficient to amount to frustration.

In any event, frustration cannot be invoked where it is due to the parties' negligence or fault rather it has to be a supervening event or unforeseen event which renders the contract impossible to perform.

It would seem and we submit that the doctrine of *force majeure* has its limitations as it is not every supervening event not contemplated by the parties to the contract that would qualify as a *force majeure* event, especially if it has not been specifically provided for under the principle of **expressio unius est excusio alterius** (that is the expression of one thing is the exclusion of others) while the doctrine of frustration *simpliciter* will seem to offer a wider net and may offer a remedy in such situations.

[3] Diamond Bank Ltd v Ugochukwu (2007) LPELR- 8093 (CA)

[4] Ibid

We venture to think that a great majority of contracts that have now been caught up in this pandemic may not have contemplated anything of the nature of the **COVID19** and so it may be difficult to look to force majeure for relief.

In the absence of an applicable *force majeure* clause, a non performing party may seek to rely on the common law concept of frustration and argue that the spread of **COVID-19** is a 'supervening event' which has brought the contract to an end and released both parties from further performance of it.

The focus in terms of the **COVID-19** circumstance will be on the parties specific contractual obligations and whether they have 'radically changed' as a result of the spread of the epidemic to the extent that requiring a party to comply with its strict contractual obligations would mean requiring it to do something radically different from that which it originally promised to do.

It will be important to identify the consequences of the pandemic on the party's ability to perform the specific contract. The defense will collapse on the mere basis that circumstances in the society generally has become more onerous, expensive or uneconomic.

In conclusion, in the wake of the current **COVID-19** pandemic, it is reasonable to surmise that a lot of commercial transactions will fail and/or suffer substantial delay in performance and give rise to significant commercial disputes which will come up for resolution either in arbitration or in the regular courts.

It is suggested that parties take advantage of the many dispute resolution options available to them and that they do not necessarily have to end up in the adversarial system of the four walls of a court room. Since this is a novel event which despite the best efforts of any party to a contract cannot be helped, parties to contracts facing challenges as a result of **COVID-19** at this time are encouraged to have an open mind and bend over backwards to achieve a resolution of any disputes that may arise.

Whatever the case, what is beyond dispute is that the deleterious effects of the **COVID-19** pandemic will be felt all over the world from Wall Street to Beijing to Lagos, many years from now.

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It is hoped that lawyers both In-House and external, have taken the appropriate lessons from the very many difficult legal questions which the pandemic has thrown up and are better prepared to protect the interests of their employers/clients in the years to come when they are negotiating and drafting contracts on behalf of their principals.

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