



COVID-19: AN ACT OF GOD (FORCE MAJEURE OR FRUSTRATION) IN LAW?

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INTRODUCTION

The emergence of the COVID-19 pandemic and the attendant lockdown which has disrupted commercial activities will, no doubt, create contractual problems. In some instances, the lockdown on activities could mean that time-bound obligations will not be met. In others, the lockdown will simply be raised as an excuse to avoid or delay obligations. Whatever their merits, there is likely to be a rash of breach of contract claims once normal business activities resume.

Two defences may lawfully be raised to these allegations; frustration and *force majeure*. Whilst many practitioners conflate these two concepts, there is a significant difference between them, and it will be the duty of courts (or arbitral tribunals) to assess the peculiar facts of each case, and apply the appropriate law in determining whether the relevant defence to an alleged breach of contract is meritorious in law.

THE DOCTRINE OF FRUSTRATION

A foremost principle of contract law is that promises must be kept. Parties are bound by the terms of a contract voluntarily made. This is reflected in the ancient Latin maxim "*pacta sunt servanda*." Where a party fails to keep his contractual obligation, the remedies of the counterparty lie in either:

- (a) an order of the court to compel the performance of that obligation (decree of specific performance), or
- (b) payment of damages to assuage any financial loss directly occasioned by the breach of contract.

One of the few exceptions for a party's failure to keep contractual promises is where an unforeseeable supervening event occurs, which makes it impossible to perform the contract.

The legal doctrine of frustration makes provision for the discharge of a contract where, subsequent to its formation, a change of circumstances occurs without default of either party as to make it legally, physically, or commercially impossible to fulfil the contract.

In the case of **A. G. Cross River State v. A. G. Federation**,¹ the Supreme Court of Nigeria held that frustration of contracts occurs "*where it is established to the satisfaction of the court that due to a subsequent change in circumstances, the contract has become impossible to perform. Frustration of contract arises where a supervening event destroys a fundamental assumption for the contract. In other words, frustration of contract occurs whenever the law recognises that without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from what was undertaken by the contract.*"

FORCE MAJEURE.

Force Majeure is a variant of frustration, but it only applies where parties have elected to include it in their executed contract. Although its effect is broadly similar to frustration in that it exculpates the parties from breach if performance is impossible because of certain specific events, it does not necessarily terminate the contract. The contract will continue to subsist until the obligation is eventually fulfilled, in so far as it remains capable of being fulfilled. Unlike frustration, *force Majeure* cannot be implied or invoked where a contract does not specifically provide for it.

In addition, because there is no generally accepted definition of *force majeure*, the words used in *force majeure* contract provisions are crucial, as a party will only be relieved from the performance of the obligations to the extent specifically described in the *force majeure* provision.²

SEPERATING THE WHEAT FROM THE CHAFF

The COVID-19 pandemic and the attendant lockdown consequences can be regarded as a supervening event that is out of the control of the parties and would, in appropriate cases, qualify as having had a disruptive impact on the performance of contractual obligations. The real problems that the courts (or arbitral tribunals) will have to grapple with lies in ascertaining

¹ [2012] 16 NWLR (Pt. 1327) 425, 480; paras. E-F.

² P.J.M. DeClercq, "Modern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability," 15 J.L. & Com. 213, 255 note 18 (1995); Tandrin Aviation Holdings Ltd v. Aero Toy Store LLC [2010] EWHC 40 (Comm).

the facts of each individual case in order to situate the allegations of breach of contract within the confines of either frustration or *force majeure*, particularly where there is a dispute as to whether the terms of a force majeure clause are applicable or whether the general doctrine of frustration should be invoked to override the specific terms of that clause

For instance, a contractual obligation may involve a service that must be physically performed by a vendor on a certain date, but could not be performed due to the COVID-19 induced restriction of movements or non-availability of materials. Any resulting loss from this non-performance may be excused on grounds of frustration. Where, however, it is shown that such services may be performed remotely, the defence may not avail.

Meanwhile, a party is more likely to successfully invoke a *force majeure* defence if the contract had expressly excused non-performance on grounds of occurrences such as "outbreak of diseases" or "infirmities" or even "restrictions due to a state of emergency".

CONCLUSION

If the statistics about the commercial slowdown and possible global economic recession occasioned by the COVID-19 pandemic are anything to go by, the economic effects of the pandemic are likely to be catastrophic. Commercial entities need to start reviewing their contractual obligations with their financial and legal advisors, and come up with strategies to deal with existing and future obligations. For instance, they may begin to initiate dialogues with contractual counterparties to agree to the suspension, or even termination of pending or prospective contracts; depending on the nature of the obligations and the occurrence of variable events or contingencies that make it impossible to fulfil these obligations.

One thing is sure: an outbreak of a health emergency such as the COVID-19 pandemic is an event which may radically affect parties' abilities to fulfil contractual obligations, due to no fault of theirs. Having said that; it must be clearly stated that COVID-19 is not a blanket event that will excuse non-performance of contractual obligations that fall due during this period. It can be raised to support a declaration of *force majeure* where such is contractually permitted, or to seek a complete discharge of the contract on grounds of frustration (or a combination of both, with frustration being an auxiliary defence), on a case-by-case basis. Where these issues arise, the facts that a party relies on will need to be critically examined to ascertain their appropriateness in justifying the non-performance of agreed obligations.

Please note that this article is a general discussion of law and does not constitute legal advice. For further information on this article and area of law, please contact **Kolawole Mayomi, FCI Arb**, mobile (+234.810.725.1110) or email kmayomi@spajibade.com

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