

# FORCE MAJEURE AND THE DOCTRINE OF FRUSTRATION; THE COVID 19 EFFECT

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G.O. SODIPO AND CO.

NEWSLETTER

March, 2020 Edition

On the 12<sup>th</sup> Day of March 2020, the World Health Organization declared the Corona Virus Disease (Covid-19) a global pandemic.<sup>1</sup> As a result of the wide spread and rapid rate of infection, as well as an increasing number of deaths, various emergency measures have been put in place by local, national and even international organizations and authorities to curtail/contain the outbreak. These measures have led to the lockdown and slowdown of many sectors across the country and around the world. Covid-19 has no doubt triggered severe social and economic consequences for individuals, corporate and governments across the world.

Most domestic and international contractual obligations have been frustrated and become difficult and impossible to continue. This implies that contractual obligations of parties may be delayed or may not be performed. Parties may seek to rely on force majeure clauses and/or the doctrine of frustration so as to avoid liability for a breach of contract.

## **Force Majeure**

Force Majeure is a common clause in contracts that essentially frees both parties from liability or obligation when an extraordinary event or circumstance beyond the control of the parties, such as a war, strike, riot, crime, epidemic or an event described by the legal term act of God (hurricane, flood, earthquake, volcanic eruption, etc.), prevents one or both parties from fulfilling their obligations under the contract. In practice, most force majeure clauses do not excuse a party's non-performance entirely, but only suspend it for the duration of the force majeure.<sup>2</sup>

A party seeking to rely on force majeure, must prove that they have taken reasonable steps or found alternative ways to perform, but the extraordinary event made it impossible for the performance of the contract. It is important to note that, the performance becoming more expensive or more difficult does not suffice.

A force majeure clause may require the non-performing party to notify the other party on the happening of a force majeure event. Depending on the drafting, this may be a pre-condition to

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<sup>1</sup><http://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/news/news/2020/3/who-announces-covid-19-outbreak-a-pandemic>

<sup>2</sup>[https://en.wikipedia.org/wiki/Force\\_majeure](https://en.wikipedia.org/wiki/Force_majeure)

the right to rely on the provision. In that situation, a failure to notify in the prescribed manner will result in a party being unable to rely on the provision.<sup>3</sup> This should also be done within particular timescales, including any formalities required for the service of notices. In other cases, a failure to notify will not prevent a party from relying on the provision, the only consequence will be a potential damage claim (if the other party has suffered a loss).

In effect, force majeure is unforeseen, beyond the control of the parties and objectively impossible for one or both of the parties to perform their obligations under the contract. It suspends performance of parties' obligations, pending when the event is over then parties can resume their obligations as they originally intended.

### **Is Covid-19 a force Majeure event?**

This will depend on the words used in the contract. Some contracts define what could amount to force majeure to include, earthquakes, war, tsunamis, plagues, acts of government, epidemic, serious pandemic, etc. However, Covid19 is not likely to be contained in the list of force majeure events. But where the term epidemic or serious pandemic is included, it should cover for Covid19.

Where no relevant event is specifically mentioned, it is a question of interpretation of the clause whether the parties intended such an event to be covered. This involves considering whether the list of events included was intended to be exhaustive or non-exhaustive. Unless specific words are used to suggest that a list is non-exhaustive, it can be difficult to argue that parties who set out a list of specific events but did not include a particular event, such as an epidemic, nonetheless intended that event to be covered.<sup>4</sup>

Where there is no definition as to what could amount to a force majeure in the contract, it gives room for uncertainty. However, it could also give room to cover a wide range of matters that can be force majeure. This will largely depend on interpretation.

Parties seeking to invoke this clause to exonerate themselves from liability must check the wording of their contract to determine if this applies to them.

### **Doctrine of frustration**

In the absence of a force majeure clause, a non performing party or parties may seek to rely on the common law doctrine of Frustration. Frustration occurs wherever the law recognizes that without default of either party, a contractual obligation has become incapable of being

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<sup>3</sup><https://www.macfarlanes.com/what-we-think/in-depth/2020/force-majeure-and-frustration-in-the-context-of-covid-19/>

<sup>4</sup><https://www.pinsentmasons.com/out-law/guides/covid-19-force-majeure-clause>

performed, because the circumstances in which performance is called for would render it radically different from what was undertaken by the contract<sup>5</sup>.

The doctrine of frustration applies where an event that was not foreseen by the parties, and which does not arise as a result of a breach of contract by either of them, makes performance of the contract impossible<sup>6</sup>. A contract cannot be said to be frustrated merely because its execution becomes more difficult or more expensive than either party originally anticipated, and has to be carried out in a manner not envisaged at the time of its negotiation<sup>7</sup>. The doctrine of frustration is similar to force majeure on the face of it, however, it does not allow for the suspension of the contract, the parties are released from their contractual obligations and the contract comes to an end.

All sums paid by a contracting party before the frustrating event will be repayable and if money was due to be paid at the time of the event, that sum is no longer due. The parties may be able to recover costs they have incurred in performing their contractual obligations prior to the frustrating event.

Frustration for many parties will be commercially undesirable, since its effect, regardless of the wishes of the parties, is to bring all parties' obligations under the contract to an end.

## **Conclusion**

In Conclusion, in light of the global pandemic COVID-19, businesses and parties to contract should carefully consider if they or their counterparties will be able to continue performance of their contractual obligations, bearing in mind the tests that allow force majeure or the doctrine of frustration as a defense to nonperformance. Parties are advised to seek proper legal counsel before deciding on the way forward, as there may be need to review the terms of contract so as to plan accordingly and avoid post Covid19 conflicts.

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<sup>5</sup>Davies Contractors Ltd. v. Fareham DC (1956) AC 696, Tsakineglon & Co. v. NobleThorh G.M.B.H (1962) A. C 93, G.N. Nwaolisah v. Paschal Nwabufoh (2011) LPELR-SC.211/2003

<sup>6</sup><https://www.farrer.co.uk/news-and-insights/contracts-in-the-time-of-covid-19-force-majeure-and-frustration/>

<sup>7</sup>Davies Contractors Ltd (Supra note 5)