COVID-19 AS A SHIELD AGAINST BREACH OF CONTRACT: FORCE MAJEURE OR FRUSTRATION

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Preamble

In the wake of the outbreak of a deadly virus in Wuhan, People's Republic of China, the World Health Organization acting swiftly on March 11, 2020, declared the virus which is now infamously known as COVID-19 a pandemic. The virus constitutes a serious public health risk as its spread is global, infecting people and causing the death of many. Tackling it, therefore, requires a coordinated international response[1]. So, in a bid to contain the rapid spread of the virus globally, countries across the world quickly imposed various containment strategies that have unarguably affected local and global trade, with companies, employers of labour and employees at the receiving end. As expected, the ability of corporate institutions and individuals to fulfill contractual obligations entered into is now seriously in doubt as their economic fortunes continue to dwindle across the globe. From the closing down of schools, operation of restaurants and bars, and prohibiting gatherings of more than 20 persons to a total lockdown through the enforcement of social distancing and ban of free movement of persons locally or internationally, it is unlikely to find parties honouring contracts. This paper examines the potency of the COVID-19 pandemic as a complete shield, exculpating a contracting party from performing its contractual obligations under the concept of force majeure and under the common law doctrine of frustration.

[1]TedrosAdhanomGhebreyesus, Director-General, World Health Org., Opening Remarks at the Media Briefing on COVID-19 (Mar. 11, 2020), https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020

Introduction

A contract confers reciprocal rights and legal obligations on parties to do or not do a particular thing. The force of contract lies in it sanctity of commanding performance. The concept of "sanctity of contract" finds expression in the age-long Latin maxim, *"PactaSuntServanda*" which literally means that parties are bound by their contract. In other words, parties to commercial contracts are mutually bound by the terms and the Court has a duty to enforce performance, as any breach will attract damages. However, with COVID-19 as an unprecedented global health crisis, there are bound to be significant implications on organizations' legal and contractual obligations.[2]The human and economic toll of the outbreak has already eclipsed other major crises in recent memory and the situation is rapidly evolving.[3] Given the fact that the virus is one that constitutes a public health risk globally through the international spread of the disease and potentially requiring a coordinated international response[4], governments all over the world have put stiff measures in place to stem the spread of the pandemic across the world, resulting in the fact that both local and global trades have been halted, with several companies already shut down, employers laying off employees and local businesses remaining under lock and key, with the ability of contracting parties to fulfill contractual obligations freely entered into now threatened. Thankfully, contract law has long recognized and accommodated situations where performance is made impracticable[5]; what is more, the definition of the term breach of contract is one that accommodates lawful excuse as a defence to shield a non-performing party from liability. While stating what amount to a breach of contract, the Nigeria Court of Appeal stated in the case of ***KemtasNig Ltd v. Feb. AnichNig Ltd***[6]robustly as follows:

> "*A breach of contract is committed when a party to a contract, without lawful excuse fails, neglects or refuses to perform an obligation he undertook in the contract or either performs the obligation defectively or incapacitates*

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[2]Céline Legendre et al COVID-19 pandemic: A force majeure under Québec civil law accessed https://www.osler.com/en/resources/regulations/2020/covid-19-pandemic-a-force-majeure-under-quebec-civil-law

[3] Ibid

[4].see supra note 1

[5]David J. Ball et al, "*Contractual Performance In The Age Of Coronavirus: Force Majeure, Impossibility and Other Considerations*" accessed at https://www.natlawreview.com/article/contractual-performance-age-coronavirus-force-majeure-impossibility-and-other

[6](2007) All FWLR (Pt 384) 320, 342.

himself from performing the contract or by wrongfully repudiating the contract".

From the foregoing, it is undeniable that where there is a lawful excuse to avoid the performance of a contract, such failure, neglect or refusal to perform the contract will not be treated as a breach of contract from which the other party would be entitled to damages. Such lawful excuse would serve as a shield to protect the defaulting party from the wrath of the law in the event that there is a law suit at the instance of an aggrieved party. Two of such lawful excuses are the concept of *Force Majeure* and the doctrine of frustration. While the former is expected to be inscribed or encapsulated in a contract entered by the party who seeks to rely on it, the latter is a common law doctrine which will avail a non-performing party even where a force majeure clause is missing in a contract or where the force majeure is so narrow that COVID -19 cannot be safely imported into it without the court embarking on the forbidden act of rewriting contract for parties[7]. Notwithstanding the seeming blessings and relief for contracting parties, both the concept of *Force Majeure* and doctrine of Frustration are not absolute defences, as certain legal conditions must be met to ensure their applicability in appropriate cases.

COVID -19 as force majeure

A *force majeure* clause is included in a contract to enable one (or both) parties to be excused from performance of their contractual obligations, or to suspend or delay performance, upon the happening of a specified event or events beyond the party's control[8]. For the defence of force majeure to operate as an exculpating factor, it must be contained in the contract itself. In the landmark case of ***Gen. Elec. Co.* v. *Metals Res. Group. Ltd***[9] parties' integrated agreement contained no force majeure provision, the court made mincemeat of the defendant's argument by holding that there is no basis for a force majeure defense. It is worthy of note that the role of the Court in a case of contract is to give effect to the intention of parties as expressed in the contract agreement and nothing more. In the case of ***LingnesAercennesCongolaises v. Air Atlantic Nigeria Ltd*[10]*,*** the Court succinctly held thus:

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[7]It is not the function of a court of law to make agreements for parties or to change their agreement as made. See ***African Reinsurance Corporation v. Fantaye***(1986) 1 NWLR (Pt.14) 113

[8]Peter Godwin & Dominic RoughtonTrett Consulting March 2006

[9]293 A.D.2d 417 (1st Dep't 2002)

[10](2005) LPELR –5808

> *"There is no doubt that parties to a contract are allowed within the law to regulate their rights and liabilities themselves. The Courts do not make contracts for the parties. The duty of the Court is to give effect to the intention of the parties as it is expressed in and by their Contract"*

In the case of ***Facto* v. *Pantagis***[11],it was held that "a*force majeure* clause, such as contained in the defendant's contract, provides a means by which the parties may anticipate in advance a condition that will make performance impracticable". Thus, the party who wishes to rely on the Force Majeure clause must prove the facts bringing the case within the specific terms of the clause[12]. They must prove that one of the events referred to in the clause has occurred and that they have been prevented, hindered or delayed (depending on the specific wording used) from performing the contract by reason of that event[13]. It must not escape mention that a party cannot rely upon any event which it has itself caused and, where possible, it must take reasonable steps to avoid or mitigate the consequence of the event[14].

In considering the applicability of force majeure, courts look to see whether:
(1) The event qualifies as force majeure under the contract; in the case of ***Kel Kim Corp. v. Cent. Markets Inc.***[15], it was held that force majeure defence is narrow and excuses non-performance "only if the force majeure clause specifically includes the event that actually prevents a party's performance".
(2) The risk of non-performance was foreseeable and not able to be mitigated; and
(3) Performance is truly impossible[16].

The court's inquiry largely focuses on whether the event giving rise to non-performance is specifically listed as a qualifying force majeure in the clause at issue in the contract between the parties.

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[11]390 N.J. Super. 227, 231 (2007) cited in Paul, Weiss, Rifkind, Wharton & Garrison LLP, "*UPDATE: Force Majeure Under the Coronavirus (COVID-19) Pandemic*" accessed at www.paulweiss.com
[12]Paul, Weiss, Rifkind, Wharton & Garrison LLP, UPDATE: Force Majeure Under the Coronavirus (COVID-19) Pandemic www.paulweiss.com
[13]Ibid
[14]470 N.Y.2d 900, 902 (1987) cited in Paul, Weiss, Rifkind, Wharton & Garrison LLP, "*UPDATE: Force Majeure Under the Coronavirus (COVID-19) Pandemic*" accessed at www.paulweiss.com
[15]see supra note 12
[16]Ibid

Interestingly, even if a party can surmount this requirement, it cannot invoke force majeure if:
(1) it could have foreseen and mitigated the potential non-performance; and
(2) where performance is merely impracticable or economically difficult rather than truly impossible (unless the specific jurisdiction or contract at issue specifies a different standard).

In ***Re Cablevision Consumer Litigation***[17]***,*** the court noted that *force majeure* clauses are "construed narrowly and will generally only excuse a party's non-performance that has been rendered impossible by an unforeseen event". It must be underscored that inability to sell at a profit is not the contemplation of the law of a force majeure event excusing performance and a party is not entitled to declare a force majeure because the costs of contract compliance are higher than it would have liked or anticipated[18]. Also, non-performance dictated by economic hardship is not enough to fall within a *force majeure* provision[19].

Thus, to safely determine whether the impact of COVID-19 pandemic can constitute *force majeure*, the agreement freely entered by the parties must be thoroughly scrutinized for a *force majeure* clause which can accommodate occurrence of a pandemic and must be weighed against the backdrop of the above requirements. Where the above test is taken but failed, the court would be minded to refuse the excuse of force majeure as a defence, as it is not in the character of the court to rewrite contract for parties. This was the gist in the case of ***African Reinsurance Corporation v. Fantaye***[20] where it was held that it is not the function of a court of law to make agreements for parties or to change their agreement as made.

However, where the test is passed, Nigerian Courts can draw inspiration from the case of ***Lebrun c Voyages à rabais (9129-2367 Québec inc.)***[21]***,*** where the Court of

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[17] 864 F. Supp. 2d 258, 264 (E.D.N.Y. 2012) see supra note 12
[18]see supra note 12
[19]Ibid
[20](1986) 1 NWLR (Pt.14) 113
[21]*Lebrun c Voyages à rabais (9129-2367 Québec inc.) and Béland c Voyage CharteramaTroisRivièresltée,* cited in Céline Legendre et al "*COVID-19 Pandemic: A Force Majeure Under Québec Civil Law?*"accessed at https://www.osler.com/en/resources/regulations/2020/covid-19-pandemic-a-force-majeure-under-quebec-civil-law on March 28, 2020

Québec recognized that the Hini virus constituted a *force majeure* for an airline company.
It is also worthy of note that in contracts where the force majeure clause specifies "disease", "outbreak of illness", "epidemic" or some other similar term, it is opined that the current outbreak of COVID-19 would likely qualify by virtue of its scale and disruptive effects. It will equally suffice in contracts where no specific term relating to disease is used, if the omnibus term such as "act of God" is included.

In the English case of ***Peter Dixon and Sons, Ltd. V. Henderson Craig and Co., Ltd[22],*** the court held that the inability of sellers of wood-pulp to deliver goods from Canada to England due to the ongoing First World War was squarely within the meaning of the force majeure clause in the contract. The case further established the principle that the scope of a force majeure clause would be construed expressly and where necessary, by applying the *ejusdem generis*rule to clarify what the parties intended[23].

COVID-19 as frustration

Like the doctrine of *force majeure*, frustration is concerned with the liability of 'innocent parties, following an event which affects the performance of the contract. However, unlike force majeure, frustration is an established doctrine and does not require terms to be included in the contract for it to operate[24].Another major difference between the concept of force majeure and the common law doctrine of frustration is that, the doctrine of frustration will operate to discharge the contract completely while a force majeure clause will usually pause it for a period or mandate a renegotiation, although it can have any other effect the parties choose to specify[25].

Frustration as a principle of common law was developed to mitigate the harshness of the doctrine of absolute contract which implies that a party to a contract has the absolute obligation to fulfil the terms of the contract and will be liable for breach of

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[22] (1919) 2 KB 778
[23]AdemolaAdekunbi, Esq**, "***The Applicability Of The Doctrine Of Frustration/Force Majeure To Business Contracts In Light Of Covid-19***",** March, 27, 2020.
[24] HWF and 20 Essex Street, Force Majeure and Frustration, accessed at hfw.com
[25]AdemolaAdekunbi, Esq, "*The Applicability Of The Doctrine Of Frustration/Force Majeure To Business Contracts In Light Of Covid-19*" on March, 27, 2020 accessed at…..

contract regardless of any intervening factor that might have made the contract impossible to perform.

The doctrine of frustration was first established and expounded in the English case of ***Taylor v. Caldwell***[26] to alleviate the potential rigidity of the absolutism of contract. Due to the obvious hardship and injustice caused by the absolute contract rule, the House of Lords in what was simply referred to as the ***Fibrosa Case***[27] laid down the principle that where money is paid under a contract that has been frustrated, the paying party is entitled to recover the money that was paid[28]. This however left a lacuna as the party who has to refund money under a frustrated contract is left uncompensated.

Various statutory interventions sought vainly to remedy this lacuna until the matter was finally laid to rest by the case of ***B.P Exploration Co (Libya) Ltd v. Hunt***[29] where the court made it known that the underlying principle of frustration is to prevent the unjust enrichment of either party to the contract at the expense of the other. The facts of the case are quite illustrative. The Defendant, Mr. Hunt, was the owner of an oil concession in Libya who entered into an agreement with the Plaintiff, an oil company, under which both parties were to explore, develop and operate the oil concession as well as make contributions to the Defendant by way of cash and oil, and in return the Plaintiff would receive half a share of the concession, with the cost of production to be borne by the parties equally. It was further agreed that if oil was found, the Plaintiff would be entitled to the repayment of its expenses out of the Defendant's share of the oil. Large amounts of oil were discovered with the field coming on stream in 1967 but the 1971 revolution which overthrew the Libyan government eventually frustrated the contract. However before the frustration of the contract, the Plaintiff who had about 10m dollars to the Defendant and had spent

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[26] (1863) 3 B&S 826 All E.R 24

[27] (1942) 2 All E.R 122; (1943) AC 32

[28] See also the case of ***UBA Plc v. BTL Ind Ltd*** (2006) 19 NWLR (Pt. 1013) at 118, Paras D-E where the Supreme Court held that money paid under a frustrated contract is recoverable. In this case, the Respondent who was a customer of the Appellant imported goods on credit from its overseas suppliers and the goods were sent through the Appellant which the Respondent received after the Appellant had debited the Respondent's account for the purpose of paying the foreign suppliers. The Respondent also submitted all the necessary documents to enable the Appellant make quick remittance to the foreign suppliers. Meanwhile, the Appellant's application to the CBN for foreign exchange was unsuccessful but it failed to disclose this to the Respondent who upon finding out instituted an action for refund and profit. The SC in rejecting the Appellant's contention that the Respondent was seeking an unjust enrichment by asking for repayment affirmed the CA's decision that money paid in respect of a contract that has been frustrated is recoverable.

[29] (1979) 1 WLR 783

another 8.7m dollars on production related expenses had also recovered 62m dollars by way of oil obtained from the field. The Plaintiff thus brought this action to recover the money paid to the Defendant and for a sum in respect of other valuable benefits which the contract had conferred on the Defendant. The court held that the contract had been frustrated and awarded just sum in favour of the Plaintiff.

From the foregoing decision, it is exclusively the duty of the court, and not the parties, to determine the existence of frustration by stating whether and if frustration has occurred in a given situation. The court has the power to determine the existence of frustration even where the parties have shown otherwise[30]. In effect, frustration occurs whenever the court comes to the conclusion that without the fault of either party, a contractual obligation has become impossible of being performed.

Generally, frustration has come to be judicially accepted as the premature determination of an agreement between parties lawfully entered into and which is in course of operation at the time of its premature determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by law both as striking the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement[31].

The doctrine of frustration is a common law principle and need not be expressed by parties in their contract. In fact, a contract which is discharged on the basis of frustration is brought to an end automatically by operation of law, irrespective of the wishes and intentions of the parties.

However, for frustration of contract to occur, there must be in existence a lawful contract (oral or written) between the parties, and its premature determination, occurring due to an intervening event or change of circumstances, must be so fundamental as to have struck at the root of the contract beyond the contemplation of the parties at the time they entered into the contract[32].

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[30]See the case of ***AIICO Insurance Plc v. Addax Petroleum Development Company Limited*** (2015) 6 NWLR (Pt. 1456) 597 at 615, Para. D

[31]***Federal Ministry of Health Vs. Urashi Pharmaceuticals Ltd*** (2018) LPELR-46189(CA). See also ***MazinEngr Ltd Vs. Tower Aluminum (Nig) Ltd*** (1993) 5 NWLR PT. 295 526; and ***UBN Plc Vs. Omni Products Nig. Ltd*** (2006) 15 NWLR PT. 1003 660.

[32]See also ***NBCI v. Standard (Nig.) Eng. Co. Ltd*** (2002) 8 NWLR (Pt. 768) p.104

The Supreme Court case of ***AG Cross River State v. AG Federation & Anor***[33] is quite instructive as it clearly indicates that the doctrine of frustration of contract is applicable to all categories of contract.

There seems to be an exception with regard to labour contracts as ***CCB v. Onyekwelu***[34] tends to portray. In this case, the court held that where a company finds it difficult to continue in business and resorts to terminating the employment of its employees, it cannot successfully plead frustration as difficulty to continue in business could be as a result of the fault of the company.

The courts[35] have recognized certain situations or events as listed below that constitute frustration–

a. Subsequent legal changes
b. Outbreak of war.
c. Destruction of the subject matter of contract.
d. Government requisition of the subject matter of the contract.
e. Cancellation of an expected event.

In ***CCB v. Onyekwelu***(supra), it was held that it is not enough for a party to depose in his pleadings that a contract has been frustrated. Such a party must lead evidence as to the frustrating events, and where this is not done, the court is entitled to hold that the contract has not been frustrated. Thus, a mere allegation of any of the above recognized events without more, is fatal to the defence of frustration.

It must be pointed out that frustration of contract does not occur where:
a. The intervening circumstance is one which the law would not regard as so fundamental as to destroy the basis of the agreement;
b. The terms of the agreement show that the parties contemplated the possibility of such intervening circumstance arising;
c. One of the parties had deliberately brought about the supervening event by its own choice[36].

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[33](2012) LPELR-9335(SC)
[34](2012) LPELR-9335(SC)
[35]See the cases of ***Nwaolisah v. Nwabufoh*****(2011) LPELR-2115(SC) and *AG River State v. AG Federation & Anor* (supra)**

In the case of ***Nwaolisah v. Nwabufoh***[37]**,**the Supreme Court held as follows:

> *"A contract is not 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.*

The Supreme Court also restated that position in the case of ***Lewis v. UBA***[38]**.**Here, the appellant submitted that his continued retention in the employment of the respondent was a condition precedent to his repayment of the loans and his employment having been terminated, the enforcement of the personal loans had been frustrated. This court held that this stance was not sustainable because the contracts of employment and personal loans between the parties were two distinct contracts and their duration not co-existent. Thus, the appeal was dismissed.

Where a contract has been frustrated, the question of breach will not arise, as none of the parties can be held responsible for what happened. In effect, where a contract is frustrated, further performance is excused only if:

a. The frustration occurs before the breach of contract;
b. The frustration is without the fault of either party; and
c. The frustration is due to a fundamental change of the circumstance beyond the control and original contemplation of the parties[39].

In highlighting the test for frustration, the case of ***Folia v. Trelinski***[40]succinctly set out the criteria to be satisfied as follows:

1. The event in question must have occurred after the formation of the contract and should not be self-induced.

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36. see supra note 23
37 ibid
38 ***(2016) LPELR-40661(SC)***
39Ibid see also ***MazinEngr Ltd v. Tower Alumunium (Nig) Ltd*** (1993) 5 NWLR PT. 295 526. ***UBN Plc v. Omni Products Nig. Ltd*** (2006) 15 NWLR PT. 1003 660.
40 (1997) 14 RPR 655.

2. The contract must, as a result, be totally different from what the parties had intended.
3. The difference must take into account the distinction between complete fruitlessness and mere inconvenience.
4. The disruption must be permanent, not temporary or transient.
5. The change must be totally affect the nature, meaning, purpose, effect and consequences of the contract so far as concerns either or both parties.
6. Finally, the act or event that brought about such radical change must have been unforeseeable.

Invoking Force Majeure or Frustration: recommended steps for the defaulting party

Where a contract has been frustrated or rendered incapable of performance due to *force majeure*, the question of breach will not arise, as none of the parties can be held responsible for what happened.

However, it is only appropriate that necessary steps are taken to mitigate the hardship such unforeseen circumstances might cause. So, companies with contracts affected by the coronavirus pandemicare urged to take the following steps as a matter of urgent necessity:

• Review contracts to identify what force majeure and or frustration rights, remedies, and requirements may apply if a party's operations are disrupted by the effects of COVID-19.

• Identify the notice requirements and deadlines that have been or may be triggered as many contracts require the party invoking a *force majeure* clause to provide prompt written notice to its counterparty, often within a specific time period. Parties must be aware of these notice requirements, as the application of force majeure could be precluded absent compliance[41].

[41]David J. Ball et al, Contractual Performance In The Age Of Coronavirus: Force Majeure, Impossibility and Other Considerations accessed athttps://www.natlawreview.com/article/contractual-performance-age-coronavirus-force-majeure-impossibility-and-other

• Before deciding to invoke the contract's force majeure clause, parties should assess and document alternative means of performance or the availability of steps that may be taken to avoid or reduce disruption to operations[42].

• Counterparties should communicate as early in this process as possible. The sooner the parties notify one another of concerns about performance or inability to perform, the greater likelihood of resolution of disputes[43].

Conclusion

With the declaration of COVID-19 as a pandemic, and with its resultant effects, it is easy to predict disruption of contractual relationships in the coming days. Parties should be ready to invoke, and defend against, force majeure clauses and related doctrines that may operate to excuse performance[44]. If the shield of COVID-19 as an intervening agent is dexterously invoked by a non-performing party, the question of breach will not arise, as none of the parties can be held responsible. However as pointed out, a party who wants the court to excuse his non-performance as lawful must be ready to pass the various acid tests already laid down by the court.

[42]David J. Ball et al, Contractual Performance In The Age Of Coronavirus: Force Majeure, Impossibility And Other Considerations accessed at https://www.natlawreview.com/article/contractual-performance-age-coronavirus-force-majeure-impossibility-and-other
[43]Ibid
[44]Ibid