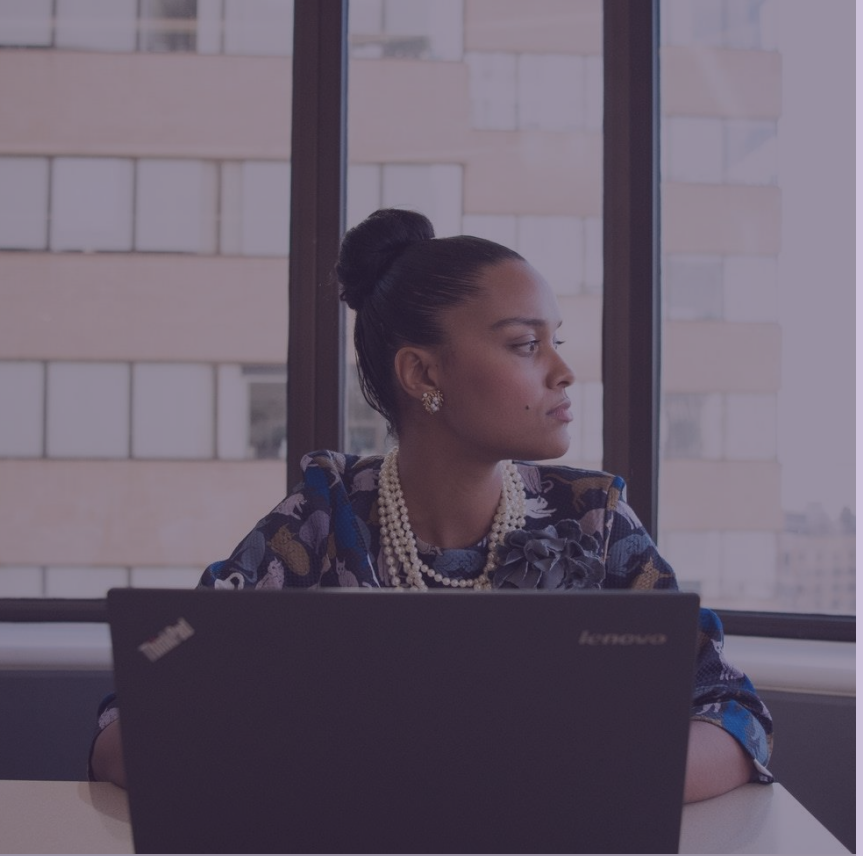

FORCE MAJURE

A SIMPLE CLAUSE WITH COMPLEX CONSEQUENCES

As Lord Radcliffe put it in ***Davis Contractors Ltd v. Fareham U.D.C.***[1]**,** *"frustration occurs whenever the law recognizes 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".*[2] The insight above underscores the value of a *Force Majeure* clause in any contract agreement.

A successful reliance on the claim of *Force Majeure* essentially frees both parties from liabilities arising from a breach of the contract due to an external frustration or a negative and unforeseeable change in the circumstances of a party or parties to the agreement. External events that give rise to frustration must be beyond the control of the party relying on *Force Majeure*.

THE OBJECTIVE TEST

The underlying test for effectuating most *Force Majeure* provisions is whether a particular event was within the contemplation of the parties when they made the contract. The event must also have been outside the control of the contracting party. Despite the current trend to expressly provide for specific *Force Majeure* events, case law grants an extensive meaning to the term *Force Majeure* when it occurs in commercial contracts.

Generally, there are three essential elements to *Force Majeure*:

[1] (1956) A.C 696
[2] Ibid at p. 729

1. It can occur with or without human intervention.
2. It could not have been reasonably foreseen by the parties.
3. It was completely beyond the parties' control and its consequences could not be prevented

The courts have weighed in on the true test of *Force Majeure*. In the English case of **Lebeaupin v Crispin**[3], *Force Majeure* was held to mean "*all circumstances beyond the will of man, and which it is not in his power to control. Therefore, war, floods, epidemics and strikes are all cases of Force Majeure".*

JUDICIAL INTERPRETATION

It must be established that the nature of the contract affects the viability of a *Force Majeure* claim. Hence, even the death of a party to the agreement may not be successfully explored as a reason to invoke a *Force Majeure* clause. In the Nigerian case of **Lewis v. UBA**[4], the Supreme Court opined per Peter-Odili JSC:

> *A refresher to the situation is that the Respondent had fully performed his obligation under the contract for the personal loan by making available the said sums and the next step is the obligation for repayment by the Appellant within the conditions of the loan agreement and this obligation does not cease because his employment has ended.* **This is because mere hardship, inconvenience or other unexpected turn of events which have created difficulties though not contemplated cannot constitute frustration to release Appellant from that obligation. A situation which not even the death of the Appellant, grave as that might be would not alter the course of events of the repayment as his estate would bear the liability.** *I anchor on the case* of **Davis Contractors Ltd v Fareham U.D.C.** *(1956) AC 696.*

FORCE MAJEURE AND THE COVID-19 PANDEMIC

There is an important caveat and that is, parties cannot invoke a *Force Majeure* clause if they are relying on their own acts or omissions. Additionally, the *Force Majeure* event must be a legal or physical restraint and not merely an economic one. In the Nigerian case of **A.G. Cross River State v. A.G. Federation & Anor**[5] the Supreme Court per Adekeye JSC held thus:

[3] [1920]2 KB 714 at 719
[4] (2006) 1 NWLR (Pt.962) 546
[5] NWLR 15 (pt. 947) pg. 71

> *The doctrine of frustration is applicable to all categories of contracts. It is defined as the premature determination of an agreement between parties, lawfully entered into and which is in the 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 at the root of the agreement and entirely beyond what was contemplated by the parties when they entered into the agreement.***

A pandemic like Covid-19, currently affecting the global economy, can be argued to be insufficient ground for invoking the *Force Majeure clause*. Yes, the virus may not have been envisaged by a party to an agreement, still the nature of such agreement will determine objectively if the pandemic can avail a breaching party freedom from liability. An objective test is more so important when the *Force Majeure* clause does not state in specific terms, a likely *Force Majeure* event.

On the other hand, a government shutdown or social/economic lockdown can *prima facie* avail a breaching party freedom from liability, the rationale can be attributed to the physical restraint placed on a party. In essence, a claim under the doctrine of frustration or *Force Majeure* must be legally acknowledged and must pass the objective test.

It is therefore understood that not all extreme cases or circumstances can open the door for a *Force Majeure* claim. The test for determining a *Force Majeure* must remain objective and each of the primary elements cannot be treated in isolation of another.

THE WAY FORWARD FOR CONTRACTING PARTIES

If a contracting party decides to include a *Force Majeure* provision in a legal agreement, it is advised that the application of the clause must commence by defining a closed list of events that can likely frustrate the execution of such contract. In other words, the wording should be structured thus: "any event beyond the reasonable control of the parties including…."

It must be understood that specifics limit the need for the Courts or Arbitral panel to apply the objective tests in the event of prevailing circumstances.

Contracting Parties must also consult their legal counsel before executing any contract agreement.

THE AUTHORS

Eseoghene O. Palmer
Associate
Dispute Resolution Group
eseoghene.palmer@jurislawng.com
01-6282550

Deborah Ayorinde
Associate
Corporate Commercial Group
deborah.ayorinde@jurislawng.com
01-6282550