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COVID-19, FORCE MAJEURE AND FRUSTRATION IN COMMERCIAL TRANSACTIONS: A RE-ASSESSMENT

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Abstract

The recent outbreak of the corona virus (Covid-19) pandemic including the various public health measures imposed by governments worldwide, undoubtedly, caused unprecedented disruptions on commercial activities and impacted on the ability of individuals to perform their contractual obligations. The lockdown on activities meant that time-bound commercial obligations could not be met. The doctrine of 'force majeure' as well as 'frustration' has recently assumed new relevance in commercial lexicon in the context of post-pandemic world. Essentially, whether a force majeure or frustration applies to a pandemic depends on the wording of the clause and the jurisdiction whose law governs the commercial contract. This paper seeks to re-assess the impacts of the Covid-19 pandemic on commercial dealings and how the doctrines of force majeure and frustrations can provide succour or otherwise to a party prevented or adversely affected from performing its obligations under a commercial contract in this post-pandemic era.

Keywords: Covid 19, Force Majeure, Frustration, Effect, Commercial Transaction, Post-pandemic era, Nigeria.

1. Introduction

A generally accepted principle of international commercial contract dealing is *pacta sunt servanda*.[1] The principle emphasises that each party to an agreement is liable for its non-execution even if the cause of the failure is beyond its power and was not or could not have been foreseen at the time of signing the agreement.[2] Owing to this, it has to be stated that excusing a party from its contractual obligations for a force majeure or frustrated event is an exception rather than the rule given that contract obligation is a strict liability.[3] The obligor is therefore liable in damages for breach of contract even if he or she is without fault. The same applies even if circumstances have made the contract more burdensome or less desirable than he or she had anticipated.[4] On one hand, the principle reflects natural justice in commercial transactions given that it binds a person to his promise and protects the interests of the other party.[5]

On the other hand, practice has shown that on many instances strict application of this rule may lead to the opposite of its purpose.[6] In other words, the situation existing at the conclusion of the contract may subsequently have changed so completely that the parties,

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[1] To keep a promise and fulfil obligation is the bedrock of every civilised legal systems. These demands are expressed in the principle ø*Pacta sunt servanda*ù (promises must be kept) which represents an irreplaceable element of contract law and the functioning of modern business and commerce as a whole. I. Lackshuk, øThe Principle of *Pacta Sunt Servanda* Under the International Lawù (2017) 83 *American Journal of International Law* 2; J. Yackee, øPacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Realityù (2008) 32(5) *Fordham International Law Journal* 23.

[2] K. Berger and D. BehnForce, øForce Majeure and Hardship in the Age of Corona: A Historical and Comparative Studyù(2020) 6(4) *McGill Journal of Dispute Resolution* 79-130.

[3] Ibid

[4] H. Wehberg, øPacta Sunt Servandaù (1959) 53*American Journal of International Law* 779

[5] *See* D. Maskow, øHardship and Force Majeureù (1992)*Am. J. Comp. L* 657, 658.

[6] R. Hyland, øPacta Sunt Servanda: A Meditation,ù(1994) 34(2) *Virginia Journal of International Law* 5-433.

acting as reasonable persons, would not have made the contract, or would have made it differently, had they known what was going to happen.[7]This situation may hardly arise with short-term contracts, which often exhibit a simple structure where non-performances are exchanged for money. The same may not be the case with long-term businesses which may be more or less complicated in nature.[8] The complex nature of these long term contracts is further amplified owing to the fact that such businesses usually imply a greater element of uncertainty given that it is more or less affected by governmental measures.[9]

The emergence of the Covid-19 pandemic along with the various public health measure imposed by the government which disrupted commercial activities, no doubt, created contractual problems. It had already delayed or adversely affected contractual discussions, particularly in light of the global market's response to the spread of the virus.[10] Indeed, apart from the devastating impact that Covid-

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[7] The doctrine of *rebus sic stantibus* was developed to initiate the possibility of releasing the obligations that become onerous by changed circumstances. The principle allows the parties to modify or terminate an agreement because of serious disruptions and is considered part of the *lex mercatoria*. In combination with the good faith requirement, it means that parties should be willing to renegotiate. If an event happens that would not have been in the contemplation of the parties (like Covid-19) then the fundamental changes to their obligations would not have been intended by the parties and this vitiates their consent. Therefore, there is a strong case for saying that despite the key principle of contractual certainty, extreme economic hardship caused by Covid-19 is a cause for renegotiation. See I. Schwenzer, øForce Majeure and Hardship in International Sales Contractsù (2008) *Victoria University of Wellington Law Review* 39; C.M. Schmitthoff, *Schmitthoff's, Export Trade: The Law and Practice of International Trade* (England: Sweet and Maxwell, 1986) 146.

[8] B. Winarno, øImplications of Pacta Sunt Servanda Principle in the Long Term Contract between the Indonesian Government and Pt Freeport Indonesiaù (2016) 47 *Journal of Law, Policy and Globalization* 1-11.

[9] Ibid

[10] The spread of COVID-19 threw the global market into a state of flux. Countries are in varying stages of coping with the pandemic and its fallout. Some industries are clearly coming out ahead in the current situation but that success can come with significant challenges. See Wordbank, øImpact of Covid-19 on global market.ù at <www.wordbank.com/us/blog/international-marketing/covid-19-global-market-impact> Accessed 12 June 2023.

19 continues to unleash on human beings and countries worldwide, its outreach also reached commerce and business.[11] In some instances, the lockdown imposed by the governments in many countries as containment measures meant that a number of time-bound obligations could not be met. In others, the restrictions on movement would simply be raised as an excuse to avoid or delay obligations.[12] Indeed, if the statistics about the commercial slowdown and possible global economic recession occasioned by the impacts of this Covid-19 are anything to go by, the commercial effects of the pandemic are likely to be catastrophic in the nearest future.[13]

In other words, commercial entities will need to start reviewing their contractual obligations to come up with strategies to deal with existing and future obligations. The doctrines of force majeure and frustration have assumed new relevance in commercial lexicon today and how these concepts will be construed by contractual parties in the context of post-covid-19 world. In some commercial transactions, a force majeure clause may relieve a party from performing its contractual obligations entirely.[14] While in other instances,

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[11] See France 24, øCovid-19: Air France-KLM reports ÿ815 million first-quarter operating lossù at <www.france24.com/en/20200507-covid-19-air-france-klm-reports-ÿ815-million-first-quarter-operating-loss> Accessed 30 April 2023.

[12] See øThe World Health Organization (WHO) Report on Covid-19 Pandemicù at <www.who.int/emergencies/diseases/novel-coronavirus-2019> Accessed 30 April 2023.

[13] COVID-19 was declared as a pandemic by the Director-General of the WHO, Dr. Tedros Adhanom Ghebreyesus, on 11th March 2020 due to the rapid increase in the number of cases outside China since the end of February 2020 that affected a growing number of countries). WHO, øWHO announces covid-19-outbreak-a-pandemic.ùat <www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/news/news/2020/3/who-announces-covid-19-outbreak-a-pandemic> Accessed 30 April 2023.

[14] B. Majumder and D. Giri, øCoronavirus & Force Majeure: A Critical Study - Liability of a Party Affected by the Coronavirus Outbreak in a Commercial Transactionù (2020) 51 *Journal of Maritime Law & Commerce* 52.

performance may be suspended until the force majeure event ends.[15] Whether a force majeure clause applies to a pandemic depends on the wording of the clauses and the jurisdictions whose law governs the contract. In the same vein, the concept of frustration is a defence available to a commercial party who would otherwise be liable for breach of contract for non-performance of contractual obligations but for the occurrence of a fundamental event that makes it impracticable or impossible to perform the contract.[16]

The paper seeks to re-examine the impact of the covid-19 pandemic and to analyse how the doctrines of force majeure and frustration can provide succour or otherwise to a party prevented or adversely affected from performing its obligations under a commercial contract dealings in this post-pandemic period. Beyond the introduction, part two is the conceptual clarifications between the doctrine of force majeure and the concept of frustration. Part three discusses the legal implications of invoking these doctrines on commercial transactions. Part four examines when the doctrine of force majeure clauses may be triggered in the context of covid-19 pandemic and beyond. It also discusses the key issues to be considered on force majeure clauses in post covid-19 world. Part five is the conclusion which summaries the discussions.

2. Force Majeure: Conceptual Clarifications

The expression '**force majeure**' is a French term that literally means superior force.[17] The concept of force majeure is primarily directed at

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[15] Ibid.

[16] H. Fazilatfar, øThe Impact of Supervening Illegality on International Contracts in a Comparative Context,ù (2012) 45 *Comparative and International Law Journal* 4; U. Draetta, øForce Majeure Clauses in International Trade Practiceù (1996) 547 *Int'l Bus. L. J.*5.

[17] Although, the origin of the concept is Roman, however, it was adopted by the French Civil Code (The Napoleonic Code) dating back to 1804. In terms of the exemption of non-performance, it should be noted that force majeure is not a principle applied or

settling the problems resulting from non-performance of contract obligations either by suspension or by outright termination.[18] It can further be defined as 'an event or effect that is neither anticipated nor controlled in contractual relationship.[19]It is a contractual provision allocating the risk of loss if performance becomes impossible or impracticable especially as a result of an event that the parties could not have anticipated or controlled.[20] In other words, it provides for the discharge of one or both parties when a contract has become impossible to be performed. Force majeure occurs when the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it impossible.[21]

A similar effect is contained in the UNIDROIT Principles of International Commercial Contracts.[22] For instance, Art 7.1.7 provides that a party's non-performance is excused if that party proves that the non-performance was due to an impediment beyond

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acknowledged by all legal systems. The exemption doctrine is referred to in different concepts under civil and common law systems that do not recognise force majeure. In England, frustration is employed, and under US law, impossibility is the doctrine applied to changed circumstances. Force majeure, which originates from Roman law, gives rise to the exemption from the liability for non-performance in the case of an unforeseen or unexpected event beyond the control of the parties. P. Mazzacano, øForce Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance: The Historical Origins and Development of an Autonomous Commercial Norm in the CISG,ù (2011) 2 *NJCL* 2; F. Azfar øThe Force Majeure 'Excuse' (2012) 26 (2) *Arab Law Quarterly* 249-253.

[18] It is a common clause in agreement that frees parties from certain liabilities, where an extraordinary event or circumstance which is beyond their control occurs in a manner and way that limits their ability to perform or fulfil parties contractual obligations.

[19] B. Garner, *Black's Law Dictionary* (St. Paul, MN, USA: Thomas Reuters, 2014) 48.

[20] See A.H. Puelinckx, øFrustration, Hardship, Force majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstancesù(1986) 47*J. Int'l Arb* 20.

[21] See M. Katsivela ,øContracts: øForce Majeure Concept or Force Majeure Clauses?ù(2007) 12(1) *Uniform Law Review* 1016119.

[22] Article 7.1.7 of the UNIDROIT Principles of International Commercial Contracts.

its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome the impediment or its consequences.[23] In the same vein, the United Nations Convention on Contracts for the International Sale of Goods (CISG) provides that a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control.[24] It further provides that the party could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.[25]

A force majeure clause in a commercial contract would typically include an exhaustive list of events.[26] Alternatively, it could include non-exhaustive lists wherein the parties simply narrate what generally constitute force majeure events and thereafter add such other catch-all phrase such as 'and such other acts or events that are beyond the control of parties'.[27] Obviously, a force majeure event or

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[23] Ibid

[24] See Article 79 of United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, [hereinafter "CISG" or "the Convention"].

[25] Art. 7.1.7 of the UNIDROIT Principles; Art. 79 of CISG, Art. 8:108 of Principles of Europeans Contracts Laws (PECL) and Art. 1792 of the Civil Code reveal that different legal documents may use various terminologies to describe situations of force majeure. While the UNIDROIT Principles along with the Civil Code uses simply the term force majeure to deal with situations that give rise to impossibility of performance, the CISG employed the term öExemptionsö. PECL in its part set forth the term öExcuse Due to an Impediment÷ to describe situations of force majeure. See Y. Tessema, øForce Majeure and the Doctrine of Frustration Under the UNIDOROIT Principle, CISG, PECL and the Ethiopian Law of Sales: Comparative Analysisù (2017) 58 *Journal of Law, Policy and Globalization* 1-18; see K. Ajibo, øFacing the truth: Appraising the potential contributions, paradoxes and challenges of implementing the United Nations Conventions on Contracts for the International Sale of Goods (CISG) in Nigeriaù (2013) 2(1) *Journal of Sustainable Development Law and Policy* 175-189

[26] Such as acts of God, war, terrorism, earthquakes, hurricanes, government policies, explosions, fire, plagues or epidemics or pandemic

[27] It would also include conditions which would have to be fulfilled for such force majeure clause to apply to the contract and the consequences of occurrence of such force

circumstance can be the source of much controversy in the negotiation of a contract in many jurisdictions.[28] Given the different interpretations of force majeure across legal systems, it is common for contracts to include specific definitions of force majeure, particularly at the international contracts.[29] At the same time, some legal systems limit the concept of force majeure to an Act of God.[30] The advisory point is that in drafting of force majeure clauses in contract proper distinction is to be expressly provided between the 'act of God' and other shades of force majeure even if it is not followed by catch-all phrases given the narrow interpretation by the court.

Common law systems do not recognise force majeure. However, there are similar concepts for the exemption of liability due to changed circumstances.[31] For instance, if English law is the applicable law, then the doctrine of frustration is applicable. The threshold for frustration is high given that the contract needs to be either impossible to perform or illegal or that the main purpose of the contract must have been thwarted.[32]This could cover difficulties caused by a pandemic but would not cover all contracts that are

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majeure event. Consequences would include the suspension or termination of obligations of the parties upon occurrence of a force majeure event.

[28] Parties should generally resist any attempt by the other party to include something that should, fundamentally, be at the risk of the other party.

[29]R. Hillman, *Principles of Contract Law* (3rd ed, USA: West Academic Publishing, 2014) 354.

[30] Some other systems may exclude human or technical failures such as acts of war, terrorist activities, labour disputes, or interruption or failure of electricity or communications systems. Force majeure clauses are drafted using the catch-all phrase to cover an imagined range of supposedly impossible events such as 'acts of God, floods, earthquakes amongst others, and are relied on to insulate business relationships or contracts from the shock of unexpected, unimaginable or unforeseen happenings.

[31]M. Katsivela, øContracts: Force Majeure Concept or Force Majeure Clauses?.ù (2007) 12 *Unif. L. Rev* 101 -108. A. Puelinckx, øFrustration, Hardship, Force Majeure, impre'vision, Wegfall der Geschaftsgrundlage, Unmo¨glichkeit, Changed Circumstances: A Comparative Study in English, French and Japanese Lawù (1986)*J. Int'l Arb* 47.

[32] See *Taylor v Caldwell* [1863] EWHC QB J1.

disrupted because of the pandemic. For instance, it would not cover the situation where the contract can still be performed, although performance might now be significantly more onerous for one of the parties. Therefore, if the contract does not contain an adequate force majeure clause it could very well be that the contract cannot be terminated without one of the parties being in breach and thus liable to pay damages.[33] In terms of the consequences of force majeure, there is a distinction drawn between temporary and permanent impediments. If there is a temporary impediment, suspension of obligations is followed, whereas, in the case of a permanent impediment, the exclusion of the liabilities appears.[34]

2.1 Doctrine of Frustration

Frustration of contract is a defence available to a defendant who would otherwise be liable for breach of contract for non-performance of contractual obligations but for the occurrence of a fundamental event that makes it impracticable or impossible to perform the contract.[35] Simply put, once an event occurs capable of rendering performance of a contract impossible and different from what the parties contemplated and strikes at the substratum of the contract, the doctrine of frustration applies.[36] Hence, frustration is the happening of an act outside the contract and such act makes the completion of performance of a contract impossible.[37]

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[33] There is *Unmöglichkeit der Leistung* in Germany, although each of these operates somewhat differently and will have a different threshold as to when a contract can be terminated without incurring liability.

[34] B. Nicholas, øForce Majeure in French Lawù in Ewan McKendrick,*Force Majeure and Frustration of Contract* (2nd Ed, Informa Law, 1995) 24.

[35] H. Smit øFrustration of Contract: A Comparative Attempt at Consolidationù(1958) 58(3) *Columbia Law Rev* 287-315

[36] P. Mazzacano, øForce Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance; The Historical Origins and Development of an Autonomous Commercial Norm in the CISGù (2011)2 *NJCL* 1.

[37] M. Eisenberg, øImpossibility, Impracticability and Frustration,ù (2009) 1 *Journal of Legal Analysis* 1

It has been held judicially that 'frustration' occurs wherever 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 radically different from what was undertaken by the contract.[38] For instance, in *A. G. Cross River State v. A. G. Federation,*[39] the Nigerian Supreme Court held that frustration of contract 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.'

In other words, frustration brings a contract to an end immediately and automatically.[40] Generally, the law takes legally binding contracts seriously given the difficulty of escaping liability for non-performance of contractual obligations even when something happens that makes it harder, more expensive or onerous to perform.[41] Frustration of contract provides an exit route for parties to be relieved of their legal obligations. Historically, there had been no way of setting aside an impossible contract after formation. However, it was not until 1863 following the English case of *Taylor v Caldwell* [42] that the emergence of the doctrine of frustration was properly recognised.[43] In that case, two parties contracted on the hire

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[38] See *A. G. Cross River State v. A. G. Federation* [2005] JELR 45203 (SC)
[39] (2005) JELR 45203 (SC)
[40] See *Maritime National Fish Ltd. v. Ocean Trawlers Ltd* ([1935] 104 LJPC 88).
[41] See *Davis Contractors Limited v. Fareham Urban District Council* [1956] UKHL
[42] EWHC QB J1[1863] 3 B & S 826; see *Fibrosa Spolka Akcyjna* v *Fairbairn Lawson Combe Barbour Ltd* [1942] UKHL 46.
[43] See *Krell v Henry* [1903] 2 KB 740

of a music hall, for the performance of concerts. Subsequent to contracting, but prior to the dates of hire, the music hall was burned down. It was held that the contract was impossible to perform entailing the frustration of contract. However, it is instructive to note that hardship, even if severe, does not constitute frustration. This was put in perspective in *Davis Contractors Limited v. Fareham Urban District Council.*[44]

2:2:1 Interplay Between Force Majeure and Frustration

The Court of Appeal in *Globe Spinning Mills Nig Plc v. Reliance Textile Industries Ltd,*[45] agreed that force majeure is a clause inserted in a contract which allows parties to rescind a contract upon the occurrence of certain specified events beyond the control of parties making performance unrealistic and impossible.[46]From a contractual perspective, a force majeure clause provides temporary reprieve to a party from performing its obligations under a contract upon occurrence of a force majeure event.[47] A force majeure clause typically spells out specific circumstances or situations, which would qualify as force majeure events. It specifies the conditions which would have to be fulfilled for such force majeure clause to apply to

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[44] See *Davis Contractors Limited v. Fareham Urban District Council Council* [1956] UKHL. In this case, Davis Contractors agreed with Fareham UDC to build 78 houses over eight months for £92,425. Given that Davies was short of labour and materials, it ended up taking 22 months with extra cost of £115,223 before the completion. Davis argued that the contract was frustrated, void, and therefore they were entitled to *quantum meruit* for the value of work done. The House of Lords held that although the performance of the contract had become more onerous but not frustrated.

[45] [2017] LPELR ô 41433 (CA)

[46] Ibid

[47] J. Hoekstra, øRegulating International Contracts in a Pandemic: Application of the Lex Mercatoria and Transnational Commercial Law,ù in *Covid-19, Law and Human Rights* (Essex: University of Essex, 2020) 117ô25; K. Berger, *The Creeping Codification of the Lex Mercatoria* (Kluwer Law Internationa, 1999); G. Cuniberti, øThe Three Theories of Lex Mercatoriaù (2013) 52 *Columbia Journal of Transnational Commercial Law* 5

the contract and the consequences of occurrence of such force majeure event.[48]

Meanwhile, the doctrine of frustration may however be a ground for avoiding contractual obligations in a situation where force majeure clause was not provided for. At common law, a contract may be discharged on the ground of frustration when an unforeseen event outside the control of the parties occurs which renders it physically or commercially impossible to fulfil the contract or transforms it into a radically different obligation from the one undertaken at the time the contract was executed.

As previously stated, frustration was not always the case under the common law before the decision in *Taylor v Caldwell* given that the law in England was extremely rigid and courts rarely reach the decision that a contract has been frustrated. A contract had to be carried out, notwithstanding that it had become impossible to perform because of some unforeseen event which happened after it was made. It was also irrelevant that the unforeseen event was not the fault of the parties to the contract.[49] This rigidity of the common law to uphold the absolute sanctity of contract was largely relaxed by the decision in the case of *Taylor v. Caldwell* where a party to the contract was not able to provide a hall for the purpose of a show as a result of a fire outbreak which engulfed the building. Blackburn J succinctly captured it thus:

'Where from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continue to exist, so that when entering into the contract they must have contemplated such continue existence as the foundation of what was to be

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[48] J. M. Perillo, øForce Majeure and Hardship under the UNIDROIT Principles of International Commercial Contractù (1997) 5 *Tul. J. Int'l & Comp. L.*5-17.
[49] Ibid.

done, then, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract but as subject to an implied condition that the parties shall be excuse in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor'

Frustration of a contract will not occur where the intervening circumstance is one which the law would not regard as so fundamental as to destroy the basis of the agreement; or that the terms of the agreement show that the parties contemplated the possibility of such an intervening circumstance arising; or one of the parties had deliberately brought the supervening event by his own choice.[50] As previously highlighted, a contract is not frustrated where the execution by one party becomes merely difficult or expensive than originally anticipated and has to be carried out in a manner not envisaged by parties.[51]

3. Effect of invoking the doctrine of frustration

First, under the doctrine of frustration, impossibility of a party to perform its obligations under a contract is linked to occurrence of an event or circumstance subsequent to the execution of a contract and which was not contemplated at the time of execution of the contract.[52] Second, frustration of a contract to be invoked and applied requires that the entire subject matter or underlying rationale for the contract is destroyed. In essence, the doctrine of frustration renders the contract void and consequently all contractual obligations of the

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[50] See *Jacob v Afaha* [2012] JELR 34940 (CA).In this case, the court held that self-induced frustration is no frustration but a breach of contract. The parties to this case had entered into a hire purchase agreement, the subject of which was a motorcycle. Six days into the agreement, the motorcycle was stolen. The court held that the frustration of the contract resulting from the theft of the motorcycle was self-induced and amounted to a breach of contract.

[51] See *Federal Ministry of Health v. Urashi Pharmaceuticals Limited* [2018] LPELR-46189 (CA).

[52] *Maritime National Fish Ltd. v. Ocean Trawlers Ltd* ([1935] 104 LJPC 88).

parties cease to exist irrespective of the wishes of the parties.[53] This was the decision of the Nigerian Supreme Court in *A.G Cross Rivers State v. A.G of the Federation* and *Anor*.[54] The decision was based on the judgement of the International Court of Justice on the cessation of Bakassi and the Cross River estuary to Cameroon, which consequently made Cross River State a non-littoral state and thus no longer entitled to be paid derivation revenue. The Court observed that:

> *'...this, unfortunately, is now the fate of the agreements between the parties which have been automatically terminated by the implementation of the judgement of the ICJ. The Court cannot close its eyes to this existing situation and declare that the plaintiff should continue to enjoy the benefits and privileges of a littoral state when it is no longer one by subsequent legal changes.'*[55]

Frustration of a contract is the end result of events arising in parties obligations. The question of breach of contract will not arise as none of the parties can be held responsible for the occurrence of the frustrating event or circumstances. However, where breach of contract occurs before the frustrating event, the frustrating event cannot be relied on.[56] In *Nospecto Oil & Gas Limited v Kenney & Ors*,[57] the appellant had argued that the action of the inter-governmental agency leading to the seizure of its licence, the freezing of its account were frustrating events that made it incapable of meeting its obligations to its investors. The court after an examination of the

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[53] Ibid

[54] [2005] JELR 45203 (SC).

[55] Ibid

[56] See *Chandler v Webster* [1904] 1 KB 493.

[57] [2014] JELR 36439 (CA).See generally, *Nwaolisah v. Nwabufoh* [2011]14 NWLR (Pt. 1268) 600; *Malik v. Kadura Furniture & Carpets Company Limited* [2016] LPELR-41308 (CA); *George I.U Obayuwana v. Governor, Bendel State & Anor* [1982] LPELR-2160 (SC); *Sunday Odum v. Nwoye Chibueze* [2015] LPELR-40895 (CA); *Onuigbo v.Azubuike* [2013] LPELR-22796(CA).

pleadings and depositions of parties held that in so far as the contract obligation has fallen due before the frustrating event, each party must fulfil its obligation under the contract.

Nevertheless, where money has been paid and received by a party for the performance of an obligation which has failed or has been rendered impossible the money is to be returned given that the law frowns at unjust enrichment.[58] In other words, a complete failure of consideration occurs where one of the contracting parties fails to receive the benefit of valuable consideration which goes to the root of the contract.[59]

3:1 Effect of invoking force majeure

Under force majeure provision, parties typically identify, prior to the execution of a contract, an exhaustive lists of events, which would attract the applicability of the force majeure clause. Force majeure contractual provision contemplates an event which can result in deferment of performance of contractual obligations and therefore rights of parties there under until such event is abated and typically does not completely excuse parties from performing their obligations.[60]

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[58] *Augustine Asibe &Ors. v. Owerri Municipal Local Government* [2012] LPELR-9820 (CA).

[59] Nigerian laws have made some improvement on provisions for the adjustment of the rights of the parties where a contract is frustrated to avoid unjust enrichment. For instance, Section 8(2) of the Law Reform (Contracts) Law of Lagos State provides that where a contract has become frustrated, and the parties have for that reason been discharged from further performance of the contract, all sums paid or payable to a party in accordance with the provisions of the contract before the contract became frustrated will in the case of sums so paid, be recoverable by the person who paid the sums, and sums payable shall no longer be paid. Under Section 8 (3) of the Law, the court may not order the recovery or refund of any portion of the contract sum that had been expended for the purpose of performance of the contract before the contract became frustrated. Similar provisions can be found in s.382, *Contract Law*, Cap 26, *Revised Laws* of *Enugu* State 2004.

[60] S. Kiraz and Y Ustun, øCOVID-19 and force majeure clauses: an examination of arbitral tribunalùs awardsù(2020) 10*Uniform Law Review* 1

Typically, where a force majeure event is not specifically covered under a contract, frustration of a contract may be claimed by the affected party, however, if the case is opposite and a particular event is covered as a force majeure event under a contract, frustration of such contract cannot be automatically claimed.[61] Similarly, force majeure clauses in a contract suspend performance in the occurrence of supervening events which is not the fault of either party but maintain the existence of the contract.[62] This is unlike frustration of contract which puts an end to the contract because it has become impossible to be performed.[63]

Furthermore, activating the effect of the force majeure clause will depend on the letters of the contract. Obviously, parties agree to suspend performance, or excuse liability for non-performance, instead of triggering an automatic discharge of the contract.[64] Sometimes, there would be wording for a long stop date and at other times there is no longstop date.[65] The general result is that a party is excused from its obligation without damages being payable to the other party.[66]

The force majeure clause has the same effect as frustration of contract, save for the opportunity it provides to parties to contractually control the effect of the occurrence of the force majeure event.[67] The force majeure clause would thus usually provide for the

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[61] Ibid
[62] Ibid
[63] J. Smith and A. Berhman, øThe importance of a strong*force majeure* clause in an unstable geopolitical environmentù (2015) 8(2) *The Journal of World Energy Law & Business* 116ô129.
[64] .H. Marek, øContinuity for Transatlantic Commercial Contracts After the Introduction of the Euroù(1986) 66*Fordham L. Rev* 6
[65] Ibid
[66] *UBA Plc v. BTL Industries Ltd.* [2006] NGSC 54
[67] P. Declercq, øModern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticabilityù (1995) 15 *Journal of Law and Commerce* 213.

occurrence of certain frustrating events, the duration of the force majeure event, notice for triggering force majeure, and the effect on the contract, such as suspension on performance of obligations and/or the option to terminate the contract.[68] Upon the occurrence of a force majeure event, contracting parties must comply with the conditions provided in the force majeure clause before invoking force majeure such as the requisite notice period and compliance with the duration of the force majeure event.[69]

3:2 Impossibility versus impracticability in Commercial Transactions

Impossibility of performance is often raised as a defence for breach of contract. For example, the party that is accused of breach may be excused from the breach if it can prove that it would have been impossible to perform the contract. Conversely, impracticability is similar in some respects to the doctrine of impossibility because it is triggered by the occurrence of a condition which prevents one party from fulfilling the contract.[70] The major difference between the two concepts is that while impossibility excuses performance where the contractual duty cannot physically be performed, the doctrine of impracticability comes into play where performance is still physically possible, but would be extremely burdensome for the party whose performance is due.[71] Thus, impossibility is an objective condition, whereas impracticability is a subjective condition for a court to determine.[72]

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[68] Ibid.

[69] S. Halpern, øApplication of the Doctrine of Commercial Impracticability: Searching for øThe wisdom of Solomonù (1987) 135*U.PA.L. Rev* 1123

[70] Ibid

[71] M. Augenblick & A. B. Rousseau, øForce Majeure in Tumultuous Times: Impracticability as the New Impossibility Itùs Not as Easy to Prove as You Might Believeù (2012) 59 *The Journal of World Investment & Trade* 13.

[72] In regards to frustration of contract, a contract does not become frustrated merely because it has öbecome difficult to perform÷ as against öbecome impossible to perform.

For instance, in *Tsakiroglou & Co. Ltd. v. Noblee Thorl Gmbh,*[73] the defendant agreed to ship some Sudanese peanuts during 1956 to Hamburg for a certain price. On 2nd of November, the Suez Canal was closed to shipping. The defendant could still have transported the peanuts within the contractually agreed time but this would mean going via the Cape of Good Hope which would have taken four times as long and increased the cost of transport considerably. The defendant did not carry the goods and argued that the contract had been frustrated. The House of Lords held that the contract was not frustrated. It was still possible to perform the contract without any damage to the peanuts.[74]The fact that it was more difficult or costly to perform is not sufficient to amount to frustration. The mere rise in freight price would not allow one of the parties to say that the contract was discharged by the impossibility of performance.[75]

4. Force Majeure, Frustration in a Post-pandemic World: A Re-assessment

As has been previously canvassed, force majeure clause does not give a blanket protection against any non-fulfilment of contractual terms unlike the doctrine of frustration. 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. It is important to

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When a supervening event, like a fire, makes performance impossible, contract law may excuse performance under the doctrine of øimpossibility of performance.ù; See E. Posner, *Contract Law And Theory* (Aspen Publishing ,2011) 160.

[73] **[1962] AC 93. Similarly,** in the fall of 1956, Egypt nationalised the Suez Canal, touching off an international crisis that led to the canalùs closure. This spawned a number of Suez Canal cases because ships that normally would have travelled through the canal were forced to extend their voyages by thousands of miles around the Cape of Good Hope. See further *Transatlantic Financing Corp. v. United States,Transatlantic* [1965]363 F.2d. 312 (D.C. Cir.)

[74] S. R. Brener, øOutgrowing Impossibility: Examining the Impossibility Doctrine in the Wake of Hurricane Katrinaù (2006) 56 *Emory L.J* 461-471.

[75] U. Benoliel, øThe Impossibility Doctrine in Commercial Contracts: An Empirical Analysisù (2020) 85 *Brook. L. Rev* 85

note that force majeure clauses do not generally provide for termination of an agreement, rather, the provisions generally suspend a party's obligation to perform under the agreement for the duration of the force majeure event.[76]

There is no doubt that the outbreak of the corona virus (Covid-19) pandemic together with the various public health measures imposed by governments worldwide had caused unprecedented disruptions to commercial activities and impacted the ability of businesses and individuals to perform their contractual obligations.[77] Covid-19 resulted in lockdowns and restrictions of movement in countries.

In some instances, the lockdown on activities would mean that time-bound obligations could not be met. In others, the restrictions on movement would simply be raised as an excuse to avoid or delay contractual obligations.[78] It could also be used as an opportunity for a party to extricate oneself from an unfavourable contract deals. However, whether performance is excused depends on the event that makes performance impossible or unfeasible.

On one hand, the court will determine whether the pandemic was contemplated under the contract. For instance, if the event of Covid-19 was so unusual and unexpected that the parties could not reasonably have foreseen it and it unfairly places the risk of its happening on either party, then a court may excuse further performance of the contract on both sides. On the other hand, if the

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[76] See C. Twigg-Flesner, øA Comparative Perspective on Commercial Contracts and the Impact of COVID-19: Change of Circumstances, Force Majeure, or What?ù in Katharina Pistor (ed), *Law in the Time of COVID-19* (Columbia: Columbia Law School, 2020).

[77] F. Taghizadeh-Hesary, øEconomic impacts of the COVID-19 pandemic and oil price collapse.ù at <www.asiapathways-adbi.org/2020/05/economic-impacts-covid-19-pandemic-and-oil-price-collapse> Accessed 25 June 2023.

[78] United Nations Industrial Development Organization (UNIDO), øManaging COVID-19: How the pandemic disrupts global value chainsù at < www.weforum.org/agenda/2020/04/covid-19-pandemic-disrupts-global-value-chains> Accessed 12 June 2023.

risk that such an event could happen was one that the parties should reasonably have anticipated or if the contract had already assigned the risk to one of the parties, then a court normally would not excuse further performance. In fact, known risks assigned by contract will not excuse performance no matter how disastrous or onerous the consequence of that risk may appear.[79]

In business contracts, the language of the specific force majeure provision is the key factor in determining whether the force majeure clause will apply in this post-pandemic era drawing from the recent covid-19 experience.[80] Some force majeure provisions will expressly exclude pandemic or global health crises from the application of the force majeure clause, while others will expressly include such events and still others will be silent on the issue.[81]

Given that force majeure is a commercial contract term, whether or not and to what extent the Covid-19 pandemic would qualify as a force majeure event will largely depend on the drafting and construction of the force majeure clause in a contract. To be included, the wording of the force majeure clause must specifically mention such words and phrases as plagues, epidemic, pandemic, global health crisis, acts of government measures and other catch-all provision such as "acts beyond the parties' reasonable control." Such omnibus phrase will however be subject to interpretation by the courts. It is not sufficient to just prove that the Covid-19 pandemic qualifies as a force majeure.[82] Particularly, the party must prove that the pandemic or the resultant government lockdown and other containment measures prevented, hindered or delayed it from performing its obligations under the contract.[83]

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[79] H. Lewis, øAllocating Risk in Take-or-Pay Contracts: Are Force Majeure and Commercial Impracticability the same Defense,?ù(1989) 42 *SW.L.J* 1047.

[80] Ibid

[81] Ibid

[82] Paula Walter, øCommercial Impracticability in Contractsù (1987) 61(2) *St John Law Review* 2

[83] Ibid

For instance, inability to perform under a contract for services classified as "non-essential" under Covid-19 government restrictions may amount to force majeure where performance would require the non-performing party to breach government directives, while non-performance may not be excused for services classified as "essential" in similar circumstances, even though the essential services become more difficult or expensive to perform. The non-performing party must explore all reasonable avenues or alternatives to fulfil its obligations under the contract notwithstanding that the alternative is more difficult or more expensive. The Nigerian Court has held that:

'the reasons given by the non-performing party regarding the influx of illegally smuggled fabric into the country and lack of access to power to run its business operations as an excuse for failure to deliver a predetermine amount of fabric on monthly basis are the usual vicissitudes of the trade in Nigeria, and the result of the usual and natural consequences of external forces, which must be put into consideration by anyone doing business in Nigeria, and thus not force majeure.'[84]

Moreover, difficulty in performing including the higher cost of performance or that performance would make the contract less profitable are not enough to declare a force majeure.[85] However, the party claiming the Covid-19 pandemic as a force majeure event must show that it was physically or legally impossible to perform the contract.[86] In *Peter Dixon and Sons, Ltd. v. Henderson Craig and Co., Ltd,*[87] where the force majeure clause in the contract provided for acts "beyond the control" of the parties, the court held that the inability of sellers of wood-pulp to deliver goods from Canada to England due to

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[84] See *Globe Spinning Mills* Nig *Plc v. Reliance Textile Industries Ltd* [2017] LPELR-41433 (CA).

[85] J. Camero, øMission Impracticable: The Impossibility of Commercial Impracticabilityù (2015) *U.N.H. L. REV* 13

[86] Ibid

[87] (Ct. of App. 1918) 118 L. T. R. 328; see *Tennants (Lancashire), Ltd. v. C. S. Wilson & Co., Ltd.* [1997].

the ongoing First World War was squarely within the meaning of the force majeure clause in the contract. In deciding the case, the court established 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.

Where a contract does not contain a force majeure clause, a contracting party who is unable to perform his contractual obligations as a result of any of the measures put in place by the government and public health authorities to contain the covid-19 outbreak cannot rely on force majeure. However, such a party may be able to rely on the common law doctrine of frustration, if as a result of the covid-19 outbreak or any of the containment measures imposed by the government, the party has been prevented from performing its obligations under the contract or performance of the contract has been rendered impossible or radically different from what the parties had contemplated.

4:1 Force Majeure Clauses in Post-Covid-19 World

It is pertinent to note that with the lifting of lockdown worldwide and the whole pandemic situation being subsided except in few cases in China, the consequences of it would continue to stay with us. The global community will have to adapt to a new, post-covid-19 world.[88] One of the main lessons to learn from Covid-19 pandemic should be that businesses would have to refrain from incorporation of a force majeure clause that is too rigid in this post-pandemic world. Commercial contract dealings will need to embrace an all inclusive catch-all force majeure clause that specifies a certain force majeure

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[88] One of the changes we should expect is a Covid-19-inspired term in force majeure clauses-perhaps one that mentions pandemics, epidemics, or viral outbreaks or similar terms, just as terrorism became a standard term in force majeure provisions after the September 11 terrorist attacks, and earthquakes became a standard term after the 1989 Loma Prieta quake. See T. Murrey, *Force Majeure and Coronavirus (COVID-19): Seven Critical Lessons from the Case Law* (Lexis Practice Advisory Journal, 2020)

events, in addition to other unspecified events which leave a room for protection against unimagined situation in the future.

In other words, the lists may be exhaustive and non-exhaustive in nature but inclusive enough to accommodate unanticipated events.[89] Similarly, post-pandemic contract is likely to witness an incorporation of hardship or renegotiation clause to cushion the effect of hardship where excessive allocation of risks may likely impact on one of the parties. In this sense, hardship clause can provide for financial reliefs when continued performance may likely results to injustice to either party. There may be need for the affected party to show a causal link between Covid-19 and its failure to perform. The force majeure event or circumstance must be causative to the contractual breach and a party claiming force majeure is typically required to establish that it was the force majeure event (and not some other factor) that caused the party to be unable to fulfil its contractual obligations.[90] For instance, with the recent note by the UNIDROIT Secretariat, it is acknowledged that the measures implemented by governments do lead to force majeure and that the health conditions of employers and employees pose a significant risk to the performance of the contract regarding confinement

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[89] Whether Covid-19 pandemic or similar event is specifically listed as a force majeure event in the contract. Some more recent contracts may specifically include Covid-19. Even if Covid-19 or a similar event is listed, other requirements may still need to be satisfied to constitute force majeure such as causation. Second, whether the force majeure clause contains catch-all wording. If the force majeure clause does not specifically list Covid-19 or a similar event, the parties must consider if Covid-19 would fall under general force majeure wording, such as "other similar events" or "Acts of God." This depends on the rest of the force majeure clause, the contract, and the circumstances causing the non-performance. Parties should not assume that these catch-all clauses apply to Covid-19 pandemic automatically.

[90] The impacted party may need to show a causal link between Covid-19 and its failure to perform (there should not be too many steps between Covid-19 and the non-performance). It may also need to establish that Covid-19 prevented, hindered, or delayed performance, as required by the contract wording. For example, if the contract provides that the force majeure event must prevent performance, the impacted party generally must show performance is impossible and not just difficult or unprofitable.

procedures. Although these measures are deemed to be an impediment, whether these give rise to the application of force majeure depends on other factors such as delivery dates, the type of goods, the origin of the parties, and other related things. The restrictions and measures implemented due to the virus must affect the contractual obligations. In other words, where the covid-19 does not affect the import-export of goods or the delay in the delivery of goods under commercial obligations, it may not likely be relied on given that no causal link has been established.

Moreover, most contracts provide that for an event to qualify as force majeure, it must be unforeseeable or not reasonably foreseeable at the time of execution of the contract. Events that may have reasonably been provided against, avoided, or overcome may be excluded. If so, a force majeure clause that does not specifically list covid-19 (or similar event) is unlikely to apply to new contracts entered into in post-pandemic world - and therefore foreseeable.

The duty to mitigate may be a requirement to the impacted party in order to show that it took reasonable steps, in good faith and with due diligence, to mitigate or avoid the effects of the force majeure on its contractual performance as courts generally interpret force majeure clauses narrowly.[91] This will enable parties to know whether force majeure excuses the affected party from performing the contract in whole or in part or excuses a party from delay in performance or entitles the party to suspend or claim or an extension of time for performance; or whether it gives that party a right to terminate the contract.

Moreover, parties are likely to review their contractual obligations in this post-pandemic era in order to know whether the force majeure clause has any notice requirements to ensure the timeliness, complete content, and proper delivery method of any force majeure notice.

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[91] See Declercq (n 67).

This further includes the procedure required to trigger force majeure and what must be satisfied by the party invoking the concept including the consequences of lack of such notice Furthermore, the applicable state law governing the commercial contract is to be considered in post-pandemic world.[92]The choice of law and choice of forum (forum shopping) provisions in the contract may likely determine how a force majeure clause is to be interpreted going forward in this post pandemic era.

5. Conclusions and Recommendations

Whether a contractual obligation can be avoided on the grounds of force majeure or frustration of contract is a factual determination based on the specific terms of the contract. The courts would examine, whether in each case, impact of covid-19 pandemic prevented the party from performing its contractual obligation. Force majeure is a variant of frustration. The relationship between both doctrines is such that force majeure clauses are used in contracts to avoid frustration. To avoid a contract being found to have been frustrated, parties should apportion risks, as far as possible in a force majeure clauses embedded in the contract. Also impracticability of performance may not excuse a party from performance unlike impossibility of performance which will. A further lesson to learn from covid-19 pandemic is that commercial contracts dealings can have major consequences for businesses if these contracts are not analysed diligently. Contemporary business practices need to be incorporated so as to drive a mechanism that clearly incorporates checks and balances with regard to legal obligations of the parties to a contract. The world has already witnessed the shortcomings of sub-standard and open-ended contracts that led to huge financial losses to businesses around the globe due to the pandemic.[93] The post-

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[92] Industry or trade practice may also be relevant to the clause's interpretation.

[93] The owner of British Airways, International Airlines Group, reported a record ỹ7.4bn loss in 2021 due to covid-19 pandemic and called for the introduction of digital health

pandemic era must be welcomed with contemporary business strategies.

Whether a force majeure clause applies to a pandemic depends on the wording of the clause and the jurisdiction whose law governs the contract. On one hand, a pandemic may not be considered a force majeure event, particularly if such an event (or similar event) is not specifically referenced in the clause, which is often the case. On the other hand, where the contract contains a force majeure clause, it will be necessary to construe the clause in order to determine whether covid-19 and/or the various measures put in place by the government to contain its spread qualify as force majeure events. As such, for a force majeure clause to become applicable (should any force majeure event occur), the occurrence of such events should be beyond control of the parties and the parties will be required to demonstrate that they have made attempts to mitigate the impact of such force majeure event. If an event or circumstance comes within the ambit of a force majeure event and fulfils the conditions for applicability of the clause then the consequence would be that parties would be relieved from performing their respective obligations to be undertaken by them under the contract during the period that such force majeure events continue. Some contracts also contain a provision that if such force majeure event continues for a prolonged time of period, the parties may be permitted to terminate the contract.

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passes for passengers to enable the airline industry to get back on its feet. The airline group reported a total annual operating loss of ÿ7.4bn (È6.4bn), including expensive fuel and currency hedges, retiring its planes early and the costs of its 10,000 staff redundancies ô a ÿ10bn swing in a year from its ÿ2.6bn profit in 2019. The result is a tip in the iceberg of the serious financial impact that Covid-19 has had on businesses globally. See Guardian UK, øBritish Airways owners hit by record lossù<www.theguardian.com/business/2021/feb/26/british-airways-owner-iag-hit-by-record-loss-covid> Accessed 12 June 2023.