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Frustration of Contracts in an Evolving Legal Landscape: Covid-19 as an Anthropogenic *force majeure*?

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1. Introduction

The globe, and more so in the 21st century, is a pretty much dynamic place, nothing is static. With this dynamism, there has been an inevitable corresponding strain on the earth's natural resources. Furthermore, harmful human activity has reached its crescendo and has significantly altered the planet's climate, ecosystem, biological diversity, and atmospheric chemistry[1] – welcome to the new geological epoch, the Anthropocene Era.

This new era, characterised by uncertainty, unpredictability, the severe strain on earth's resources, population explosion, and variability in climatic conditions, has incubated and birthed previously unprecedented phenomena. Towards the end of the last decade, more particularly in November 2019, a novel virus (Corona Virus Disease of 2019) emerged in Wuhan, Hubei Province in China. Its ugly underbelly soon thereafter protruded and devastated planet Earth with speeds only reminiscent of the Spanish Flu of 1918. Its reverberating effect has laid waste to economies, and livelihoods, and decimated human life. As a result, on 12th March 2020, the World Health Organisation (WHO) declared it a global pandemic, the COVID-19 Pandemic. For the first time, irrespective of global differences, humanity faced a common enemy.

Be that as it may, in the ensuing years, in testament to its tenacity, humanity recovered from the shock of the pandemic aided by breakthroughs in science, prevention measures, and mass vaccinations. For commerce, the extent of the Pandemic's effect on various economies and contractual obligations soon emerged. With the post-covid recovery phase, the business world is still reeling under the pain of failed contractual obligations owing to the unforeseeable pandemic and the resultant enforcement action i.e., lockdowns and restriction of movement. Enter the concept of *force majeure*, parties who defaulted in their obligations have cited the pandemic as an intervening factor beyond their control that prevented them from fulfilling their obligations.

'Force Majeure' is ordinarily defined to include both acts of nature and extraordinary circumstances due to human intervention.[2] This is in contrast with an 'Act of God' which includes acts of nature only such as earthquakes and other

[1] Carl Sagan, Pale Blue Dot: A Vision of Human Future in Space (Ballantine Books Edition, 1997) P. 174.

[2] See, Bryan A. Garner (ed.), Black's Law Dictionary (8th Edition, 2004) p. 1914.

natural disasters. However, this understanding is changing, with the evolving scientific and environmental knowledge, most erstwhile natural phenomena (acts of God) are increasingly being attributed to human activity on the biosphere and terrestrial life,[3] and thus the classical distinction between *force majeure* and acts of God is increasingly being blurred. The occurrence of natural phenomena such as drought and floods are increasingly knowable, predictable, and probable thus challenging the previous understanding that they were unknowable and thus Acts of God. However, climate change has in the recent past made such knowable phenomena unknowable or unpredictable in terms of intensity, frequency, or timing as previously known from climatic patterns thus further blurring the distinction.[4]

This bulletin therefore proceeds on the aegis of this development i.e., what is the implication of the awareness that some natural phenomena such as epidemics, floods, and drought are increasingly being empirically linked to human activity on the biosphere rather than purely natural phenomena[5] on contractual obligations and the concept of *force majeure*. This linkage is due to the known manifestations of climate change because of global warming, pollution, ocean acidification,[6] deforestation, and global biodiversity loss (sixth mass extinction)[7] among others that have accelerated the Anthropocene – a period of severe strain on the earth's resources.

COVID–19 Pandemic as force majeure/an act of God – The Evolving Jurisprudence

As earlier indicated, an act of God is a phenomenon, majorly because of a natural event that is unforeseeable at the time parties enter into a contract. Its occurrence often renders the performance of a contract or a contractual obligation impossible. In essence, a contract is frustrated. The concept of frustration was coined to mitigate the harsh effects of common law i.e., the strict application of the doctrine of 'pacta sunt servanda' which translates to 'agreements must be kept' without exception. The doctrine which has its rules in the Law Reform (Frustrated Contracts) Act, 1943 (United Kingdom) is applicable in Kenya by virtue of Section 2 of the Law of Contract Act, Cap. 23 Laws of Kenya.

From classical cases, the concept of *force majeure* and its application in declaring contracts as frustrated has been straightforward. An example is the case of Taylor v Caldwell (1863) where the parties had entered a contract in which Caldwell hired Surrey Gardens and Music Hall for a week-long concert. However, prior to the first concert, the building was destroyed in a fire. Taylor sued for breach of contract and for damages regarding expenses incurred in adverting. The Court decided that there was no breach of contract since the subject matter in which the contract was based, the hall had been destroyed, and the performance of the obligations rendered impossible. The contract was therefore found to have been frustrated by no fault of either party.

Fast forward to the 21st Century, recently, the Court of Appeal sitting at Nakuru delivered a judgement in favour of Jomo Kenyatta University of Agriculture and

[3] See generally, Dana Desonie, Climate: Causes and Effects of Climate Change (Chelsea House Publishers, New York, 2008).

[4] See, Simion Swakey Ole Kaapei & 89 others v Commissioner of Lands & 7 others [2014] eKLR.

[5] See, generally, Russel D. Thompson & Allen Perry (Eds.), Applied Climatology: Principles and Practice (Routledge Publishing, 1997).

[6] See generally, Alanna Mitchel, Seasick: Ocean Change and the Extinction of Life on Earth (University of Chicago Press, Chicago 2009).

[7] See, generally, Elizabeth Kolbert, The Sixth Extinction: An Unnatural History (Henry Holt and Co., New York, 1st Edition 2014).

Technology (JKUAT) against Kwanza Estates Limited. In its judgement, the Court recognised the Covid-19 pandemic and the ensuing mitigation action i.e., lockdowns as *force majeure* that could not have been possibly foreseen by the parties and had the effect of frustrating the contract.[8]

The brief facts of the case were that JKUAT had entered a lease with Kwanza Estate Limited for the lease of the premises for its Nakuru Campus. JKUAT utilised the premises and performed its contractual obligation i.e., payment of rent. However, with the onset of the pandemic and the ensuing mitigation measures, the Court took notice that there was a closure of institutions of learning and that JKUAT was unable to utilise the premises and thus not generating any income from the property.

The upshot of the factual disposition of the above informed the Court's pronouncement that the pandemic was a *force majeure* event that caused JKUAT undue difficulty in continuing with the lease agreement in accordance with its purpose and making the payments thereupon agreed. The Court further states that: -

> ***"[t]he pandemic was no secret, and the respondents [Kwanza Estate Limited] were aware of the government directive to close schools and universities. Therefore, to require performance in the face of such unforeseen and unavoidable circumstances, not caused by any acts and/or omission on the part of the appellant is absurd, unfair, and unjust."***

This decision has laid a precedent for a deserving party to claim the frustration of a contract by the occurrence of the Covid-19 pandemic as an Act of God. However, a party seeking to rely on this must prove that the performance of the contract was frustrated and that the alleged Act of God did not make the performance of the obligation merely laborious or difficult. Further, as enumerated in the introductory chapter, the definition or conceptualization of a deserving party is increasingly contentious since there can be scientific forecasts, weather forecasts, and alerts available at the time of entering a contract. Can the occurrence of a predicted or forecast even be termed as foreseeable and a party to a contract deemed to have been aware of its possibility?

Effect of Acts of God on Contractual Obligations – Doctrine of Frustration

The sum effect of the doctrine of frustration or the invocation of the *force majeure* clause has the effect of discharging a party from the performance of the obligation. A contract that is found to have been frustrated is automatically terminated.

[8] See, Jomo Kenyatta University of Agriculture and Technology v Kwanza Estate Limited (Civil Appeal 64 of 2022) [2023] KECA 700 (KLR) (16 June 2023) (Judgment).

Threshold of Proof – Impossibility versus Difficulty

As earlier alluded above, there is a standard that must be met for the occurrence of a circumstance to be termed as *force majeure* thus discharging a party from the performance of its obligation under a frustrated contract. This threshold is often high. A party has the duty of demonstrating the performance of the contract has been rendered impossible and that the circumstance must not merely occasion difficulty. Traditionally, *force majeure* has been within the confines of natural phenomena such as death, earthquakes, war, acts of terror, changes in governmental policies, etc.

Over time, the threshold curved out by the Courts has been two-pronged i.e., that for an occurrence to be termed as a *force majeure* frustrating a contract, first, there must be a fundamental change in circumstances beyond the control and original contemplation of the parties. As such, the mere fact that a contract has been rendered more onerous does not of itself give rise to frustration. Secondly, where the circumstances in which the performance of a contract is called for would render it a thing radically different from that which was undertaken by the contract, a party can claim frustration.

[9] Kenya Union of Commercial, Food and Allied Workers v Tusker Mattresses Limited [2020] eKLR.

Conclusion

The Covid-19 pandemic has offered a reflective mirror to the legal and commercial landscape. With the recent developments, the traditional understanding of acts of God has been challenged, the Anthropocene era provides new and novel challenges that call for an expansion in the scope of due diligence and research in consummating commercial agreements.

Even with the recognition of the fact that Covid-19 was unforeseeable, a litigant is still faced with the uphill task of demonstrating how the pandemic frustrated the performance of its contractual obligation as mere difficulty cannot be said to constitute frustration.[9]

This is an ongoing debate in a dynamic legal sphere that challenges the previous standard boilerplate clauses in contracts. It calls for considered *ad hoc* drafting on what constitutes *force majeure* and unique to the contract i.e., in renewable energy contracts. Can inadequate wind, water for hydropower, etc be considered *force majeure* in the wake of climate change and increasing empirical evidence of climatic conditions? The era of standard boilerplate clauses is gone and there is a need for a bespoke, empirical-based era of drafting *force majeure* clauses.

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