DETRIMENTAL NEGLECT OF *FORCE MAJEURE* IN COMMERCIAL CONTRACTS: FACTS, ISSUES AND A GLIMPSE AT COVID-19 EXAMPLE

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Abstract

Man is a commercial being; he cannot do without exchanging what he has for what he does not have. In doing this, he enters into contractual relationships. However, he does not know what the future holds because he is not in control of nature. Unforeseen events may occur to prevent his performance of contractual obligations. In such situations, he has no choice but to seek refuge in the concept of force majeure to mitigate the effects of contractual failures. Force majeure, therefore, highlights the need to make provision for unforeseen events in our business contracts. This is to enable the allocation of risks whenever supervening events occur in a contractual relationship. Unfortunately, as important as the concept is, it is often neglected and not brought in the picture when contractual bargains are made and crystallized into terms of a binding contract. Consequently, in times of war, pandemic, riot, fire outbreak, flood, hurricane, earthquakes, strikes and those events beyond the reasonable contemplation or control of the parties, it becomes problematic to excuse contracting parties of their contractual obligation to each other. This work looks into the facts, issues and roles of force majeure in commercial contracts using the COVID-19 pandemic as an example. A doctrinal research method was adopted in dealing with the topic. The article concluded that though force majeure, as a concept, is mostly neglected, yet it is a necessary weapon in the modern commercial world full of uncertainties. It was recommended that contractual parties should always incorporate force majeure in their contractual terms for ease of application.

Keywords: Force Majeure; Detrimental Neglect; Commercial Contracts; Covid-19 Example

1. Introduction

Commercial contracts are binding agreements that regulate business activities between two parties or individuals in the performance of their business obligations.[1] It is the binding nature of these agreements that gives producers, suppliers, transporters, wholesalers, retailers and consumers the barge of enforceability in times of breach in their relationship with one another.[2] However, there are situations when failure to keep to these binding agreements are

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1 I. E. Sagay, *Nigerian Law of Contract*., (3rd edn, Ibadan: Spectrum Law Publishing, 2018) pp 1 and 7.

2 G.H., Tretel, *The Law of Contract*, (10th edn, London, Sweet & Maxwell Ltd, 1999) 8; *Currie v Misa* (1875) LR 10 Ex. 153

caused by acts beyond human control. It is in such circumstances that the concept of force majeure assumes much relevance in our commercial world today.

For example, many of us are very much aware of the devastating effects of Hurricane Katrina in South Eastern United States in August 2005.[3] What of the recent Hurricane Helene in North-West Florida in September 2024[4] and Hurricane Milton in the West Coast of Florida in October, 2024? In these cases, many lives were lost, commercial activities disrupted and destroyed as communication infrastructures were shredded. Should we also recount the commercial losses during the outbreak of Ebola virus in 2014?[5] Just a few years ago, the entire world was thrown into pandemonium. Covid-19 virus released very deadly blow on human race. Its effects on human commercial activities were huge.[6] Many contractual relationships were shattered by death and impossibilities in the performance of contractual agreements occasioned by lockdown, closing of borders and restriction of movement that ensued throughout the time it held sway.

In these, many questions run through the legal minds. Would a landlord have excused a tenant for not being able to pay his rent because he could not do any work throughout the lockdown of Covid-19? Would manufacturers/suppliers remained bound to produce and deliver goods to its contractual retailers during the recently occurred Hurricane Helene? Given the disruption of transportation industry during pandemics, who bears the cost of storage fees and demurrage? What about during war, riot, fire, flood, strikes and other events generally categorized as "acts of God", would a party hold on to his legal rights against the defaulting party without minding that these events not only make performance of contract impossible but are also beyond the reasonable control of the contracting parties?

This article explores what constitutes force majeure, it's difference with frustration, common mistake, or exclusion clause; it shows to what extent the inclusion of force majeure in contractual agreements can excuse performance. It is interesting to see how the courts apply the doctrine of force majeure in resolving the impracticability associated with some commercial contracts. Special attention is directed towards the COVID-19 pandemic. Please note that court abhors vacuum, so where force majeure is not provided for in a contract, it appears that court will apply the doctrine of frustration to resolve contractual failure caused by supervening event.

2. Understanding the Concept of Force Majeure

Many jurisdictions are conversant with force majeure concept and have variably defined it.[7] The truth is that the concept originated from French Civil Law and is accepted defense tool in most jurisdictions that are traceable to the Napoleonic Code.[8] Force majeure is derived from a French phrase that means "superior force". It is an event or effect that can be neither

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3 R.D. Knabb, J.R. Rhome and D.P. Brown, "Tropical Cyclone Report, Hurricane Katrina 23-30 August 2005, <https://www.nhc.noaa.gov/data/tcr/AL122005_Katrina.pdf>, accessed January 23, 2025

4 J. Masters and B. Henson, "Helene is Now the Deadliest Mainland U.S. Hurricane Since Katrina" New Haven, Connecticut: Yale Climate Connections, https://yaleclimateconnections.org/2024/10/helene-is-now-the-deadliest-mainland-u-s-hurricane-since-katrina/Assessed November 2, 2024.

5 Center for Disease Control and Prevention, "Morbidity and Mortality Weekly Report (MMWR)" www.cdc.gov/mmwr, September 30, 2014. accessed December 13, 2024

6 O. Ezigbo and M. Ifijeh, "Coronavirus Spread:WHO Lists Nigeria Among High Risk Countries" in ***ThisDay*** Newspaper, March 10, 2020, https://www.thisdaylive.com/index.php/2020/02/01/coronavirus-spread-who-lists-nigeria-among-high-risk-countries/ Accessed March 3, 2025

7 *P.J.M. DeClercq,* 'Modern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability', *Journal of Law & Commerce* [1995], (15), 213, 255 note 18 (1995); *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC [2010] EWHC 40*

8 M. Hargrave. " Force Majeure", <www.investopedia.com>, accessed October 1, 2021

anticipated nor controlled, an unexpected event that prevents a contracting party from doing that which he has officially agreed to do.[9]

The French law applies three tests for whether a force majeure defense is applicable or not. They are as follows:

1. The force majeure event must be unforeseeable
2. It must be external to the parties in the contract, and
3. It must be irresistible.[10]

In common law systems such as those of the United States and the United Kingdom, force majeure clauses are borrowed from France though those events that will trigger its application must be more explicitly provided. To this effect, the modern business practice usually incorporate force majeure in their contractual provisions to excuse non-performance of a contract that is traceable to events beyond the control of the contracting parties. Such events are generally classified as ''acts of God''.

Even in International Chamber of Commerce, there have been attempts to clarify the meaning of force majeure by applying the ''impracticability'' standard. In other words, the performance of contractual obligation if not impossible, would be unreasonably burdensome to be fulfilled.[11]

In line with the English common law, force majeure can be defined in two ways:

1. It is a superior or irresistible force
2. It is an event or effect that cannot reasonably be anticipated or controlled.[12]

Here, question about what is and what is not foreseeable in a legal sense is a strong tool in measuring what is force majeure.

It is apposite that Force majeure in civil jurisdiction is different from that of common law jurisdiction. For instance in People's Republic of China's General Rules of Civil Law, Article 280, Force majeure is provided as ''unforeseeable, unavoidable and insurmountable objective conditions''. In Quebec, Canada[13] force majeure is described as a ''superior force in an unforeseeable and irresistible event including external causes with the same characteristics'' In Louisanian Civil Code[14] it were provided that an obligor is not liable for his failure to perform when it is caused by a fortuitous event that makes performance impossible'' and defining ''fortuitous event'' as an event that, at the time of the contract was made, could not have been reasonably foreseen''.

These civil law jurisdictions also usually codify the standard that must be satisfied before a party should invoke the doctrine, as well as certain defenses. For instance, the civil code of Quebec under Article 1470 says ''a person may free himself from his liability for injury caused to another by providing that the injury results from superior force, unless he has undertaken to make reparation for it. However, this does not mean that judicial decisions do not play a role in interpreting the application of the doctrine. In fact, judicial decisions are used in

9 Black Law Dictionary, 10th Edn, 2014.

10 A. Villedieu and A. Fevre, "''Law and Regulations of Force Majeure in France''. CMS, https://cms.law /en/imt/expertguides/cms-expert-guide-to-force-majeure/france, Accessed August 6, 2021

11 International Chamber of Commerce, ''ICC Force Majeure and Hardship Clauses 2020, http://iccwbo.org /content/uploads/sites3/2020/07/icc-force majeure-introductory-note.pdf, page 1, Accessed August 6,2021.

12 Webster, 3rd New International Dictionary

13 See Canada's Civil Code of Quebec, Article 1470

14 Article 1873 and 1875

determining if a specific event meets the applicable codified definition of force majeure event and the applicability of statutory defenses.

From the foregoing, the significant difference between common law and civil law jurisdictions lie in the fact that contracting parties in common law jurisdictions can prescribe the manner in which the doctrine of force majeure may be invoked by defining the terms that will apply to their relationship. On the other hand, parties in civil law jurisdictions are often limited by the parameters defined or provided in the statute.

Despite the difference between the two jurisdictions, the doctrine serves a similar purpose, which is anchored on providing an excuse for non-performance when a particular type of event happens.

3. Force Majeure and Similar Concepts

3.1 Force Majeure, Frustration and Common Mistake

The doctrine of Force Majeure is often exchanged with the doctrine of frustration of contract and common mistake. These terms for me wear human faces in contractual relations. They understand that sometimes, inability to perform contractual obligations may be genuine and needs the understanding of the party not in default. The terms, however, may look similar but they have significant differences.

Parties occasionally enter into a contract based on a common assumption that they later discover was false. Where the common assumption is present at the date of entry into the contract, the contract may be set aside on the ground of common mistake.

Alternatively, events occur after the formation of the contract that were not within the contemplation of the parties when they entered into the contract. Where events have occurred after making of the contract which render performance impossible, illegal, or something radically different from that which was in the contemplation of the parties at the time at which they entered into the contract, then the contract may be discharged on the ground of frustration.

Common mistake is separated from frustration on the ground that the latter deals with the discharge of contract, while mistake concerns the formation of contract.[15] Frustration is typically more closely related to force majeure and is used interchangeably. A contract is said to have been frustrated if the performance of the contract becomes impossible, just as we have in force majeure. However, the word impossibility is said not to be restricted to physical or literal one when the issue of force majeure is involved. The performance of an act may not be literally impossible but it may be impracticable from the point of the object or purpose the parties had in mind.

Frustration doctrine therefore is more rigid. It operates too drastically as it brings a contract to an end irrespective of the desires and wishes of the parties. Whereas with force majeure, parties can make provisions for the consequences in case there is occurrence of force majeure event. In some cases, the force majeure clause can make provision for the suspension of the contractual obligations to give more time for the performance or to allow the parties to wait for the supervening events like bad weather, strike, riot, etc to give way.[16] After that, the parties can now resort to termination of the contract if there is no way out.

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15 E. Mckendrick, *Contract Law*, (9th Edition, UK: Palgrave Macmillan, 2011), 245-346.

16 G. Treiel, ***Fustration and Force Majeure***, 3rd Edition, UK:Sweet & Maxwell, 2014.

It can be seen here that the remedial rigidity that goes with the doctrine of frustration is at variance with the flexibility that drafting an appropriate force majeure clause gives. The major difference, therefore, between force majeure and frustration lies in the remedy of unseen or supervening events. Whereas force majeure makes provision for the unforeseeable events, frustration does not and tends to discharge a contract. Determination of frustration is left entirely to the discretion of the court, whereas force majeure is expressly provided by the contracting parties themselves. An example of force majeure clause can be seen in *Channel Island Ferries Ltd v Sealink UK*[17] where the contracting parties agreed that:

> "A party shall not be liable in the event of non-fulfillment of any obligation arising under this contract by reason of Act of God, disease, strikes, lock-out, fire and any accident or incident of any nature beyond the control of the relevant party."

Force majeure is seen here as the provision made by the contracting parties to guard against certain impossibilities in their contract. This is so because the future is very uncertain with a lot of unexpected events like inflation, accident, pandemic, strike etc interfering with contracts.

On the other hand, an example of frustration can be found in the case of *Krell v Henry*[18] where a coronation procession has been announced to take place along Pall Mall on 26th and 27th June, 1902 in United Kingdom. By contract which was evidenced in writing, the defendant agreed to hire from the plaintiff a flat in Pall Mall for the purpose of watching the coronation procession for two days. The defendant paid the deposit upon signing the contract. The procession however, did not take place on the announced dates because the king became ill. Consequently, the defendant declined to pay the balance of the agreed rent. The issue was whether the defendant was obliged to pay the rent despite the procession being cancelled? The court decided in favour of the defendant because both parties recognized that a contract was reached based on the coronation procession taking place on the days originally fixed. They did not foresee that the procession would be cancelled; otherwise, there would not be a contract. Since the holding of the coronation was the foundation of the contract, the plaintiff was not entitled to recover the balance of the rent fixed by the contract because the contract had been frustrated and discharged. It is not as a result of the fault of any of the parties involved. In *A. G. Cross River State v. A. G. Federation*[19], the Supreme Court of Nigeria held that frustration of contracts 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 frustration cases, therefore, no provision is made for eventualities; automatically, the contract is discharged because the purpose of the contract has been defeated.

17 1988 1 Lloyd;s Rep 323
18 1903 2KB 740
19 [2012] 16 NWLR (Pt. 1327) 425, 480; paras. E-F

3.2 Exclusion of Liability Clause and *Force Majeure*

Though both terms have the same effects, which is targeted towards relieving a contracting party of an obligation or liability that flows from the contract. Under Nigerian law, an exclusion clause may be struck out for being unfairly prejudicial, ambiguous or even obnoxious. However, Force Majeure clauses, even where prejudicial or unpleasant, may be upheld by the courts.[20]

3.3 *Force Majeure* and *Pacta Sunt Servanda*

Force majeure aligns with the concept of *pacta sunt servanda* which implies that agreements must be kept. *Pacta sunt servanda* is a key concept in civil and international law with analogy in common law. It recognizes the sanctity of contractual obligations, that is to say that it preaches that executed contracts must be faithfully complied with, notwithstanding the occurrence of unforeseeable events that could alter the compliance of obligations.[21] That is to say that if force majeure is not provided in the contract, there will be no basis for its application. The only doctrine that permits derogation from pacta sunt servanda when a supervening event not provided in a contract is the doctrine of frustration and not force majeure.[22] It is however important to draw the line that a party cannot be excused from a contract merely because he had a bad bargain or that the contract has become too expensive or difficult to fulfill. Adverse economic conditions that make the performance of a contract more expensive do not necessarily qualify as Force Majeure. Similarly, a contract is not frustrated merely because its execution becomes more difficult or more expensive than either party originally anticipated at the time of its negotiation.[23] In *Tsakiroglou & Co. Ltd v Noblee Thorl GMBH*,[24] irrespective of the fact that Suez canal was closed and was the only customary route for shipping goods, the House of Lords held that the contract of sale of groundnuts was not frustrated. The argument that an alternative route of shipping the goods was much more expensive as the ship would now have to go around the Cape of Good Hope, which is three times the distance from Hamburg to Port Sudan was considered immaterial. In essence, where performance is possible, a mere rise in freight price would not be a ground for one of the parties to say that the contract was discharged by the impossibility of performance.

4. Scope, Characteristics, and Consequences of Force Majeure

The object of force *majeure* is to specify those events that will terminate a contract and free the parties from performance, thereby overcoming the general reluctance of law to find impossibility or frustration.[25] For anything to qualify as force majeure, it must have the following characteristics:[26]

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20 A. Adewale, "Business Unusual Covid-19: Frequently Asked Questions About Managing Commercial Transactions In Nigeria", <https://www.templars-law.com/app/uploads/2020/04/Templars-Thought-Leadership-COVID-19-FAQs-ON-MANAGING-COMMERCIAL-CONTRACTS-IN-NIGERIA-1.pdf>, accessed December 13, 2024

21 M. Angoitia and C. Fuentes , "Legal Implications of Covid-19: Fulfillment of Contractual Obligations in Mexico", 2020, <https://www.taxand.com/wp-content/uploads/2020/03/mexico-27.03.20-covid-19-update.pdf> , accessed December 13, 2024

22 Y. H. Tessema, "Force Majeure and the Doctrine of Frustration Under the UNICOROIT Principle, CISG, PECL and the Ethiopian Law of Sale: Comparative Analysis" in *Journal of Law, Policy and Globalization*, [2017], Vol.5

23 Supra (n.20).

24 [1962] AC 93[1961] 2 All ER 179; [1961] 2 WLR 633; [1961] 1 Lloyd's Rep 329; 105 Sol Jo 346

25 J. Chuah, *Law of International Trade: Cross Border Commercial Transactions*, (5th Edn London: Sweet & Maxwell, 2013)

26 Supra (no.10)

1. It must be a general event, that is, one that affects in general terms any legal entity or individual
2. The event must be an external one, meaning that it must occur beyond the responsibility of the obligor. It must not be as a result of underperformance or bad bargain.
3. The force majeure event must be unforeseeable; in other worlds, the event could not have been avoided or anticipated by common diligence. A warning for an expected force majeure event shall not trigger it.
4. It must be an irresistible event. This implies that, there is an absolute physical or legal impossibility for the parties to fulfill their obligations. There must be no alternative mode of performance of the contract.
5. For an event to qualify as force majeure, it must totally upset the very foundation upon which the parties rested their obligations.
6. Force majeure is contractual; it is not a common law concept. It is therefore, not implied into a contract but must be expressly provided for in the contract. This means that if you do not have it in your contract, there is generally no ''common law'' force majeure right'' outside the bounds of a contract to rely on, although in civil jurisdictions, the doctrine is provided in the statute.
7. Force *majeure* provision may not result in termination of contract where some contracts allow for a termination of the contract upon trigger of a force majeure provision.
8. The intention of force *majeure* is to save the performing party from the consequences of some event beyond its control, affecting the performance of a contract.

Dissecting the characteristics further, Rhodes Vivour JCA, as he was then, in the Court of Appeal case of *Diamond Bank Ltd v Ugochukwu*[27] stated that for *force majeure* to take place, there must be event(s) that substantially alter the nature of the contractual rights of the parties to make it unjust for the parties to perform those rights, such as:

- where the subject matter of the contract has been destroyed or is no longer available
- death or incapacity of a party to a contract
- the contract has become illegal to perform as a result of new legislation
- there is an outbreak of war, and
- where the commercial purpose of the contract has failed [28]

Party seeking to rely on force majeure provision must therefore prove that:

1. they are unable to perform their contractual obligations, not because it has become more expensive
2. there is a force majeure event that is beyond his control
3. Force majeure clause is provided in the contract
4. there is a causal link between the supervening event and the loss or eventual inability to perform the required obligation under the contract. The causal link also known as the ''but for'' test will enable the court to determine whether the non-performance is a direct consequence of a supervening event by asking the question, 'but for' such supervening event the contract would have otherwise been performed.

27 [2008] 1 NWLR (pt 1067)

28 *Globe Spinning Mills Nigeria PLC v Reliance Textile Industries Ltd* (2017) LPELR-41433 (CA), *AG. Cross River State v A.G. Federation & Anor* (2012) LPLR-9335 (SC).

5. The party has taken all reasonable steps to avoid or mitigate its consequences.[29]

Consequences of Force Majeure[30]include termination of contract**, r**efraining from performing the contract**,** suspension of performance of the contract**,** Claim for an extension of time for performance or any other action as may be agreed by the parties to the contract

6. Explaining Force Majeure Through the COVID-19 Pandemic

(A) The Nigerian Experience:

In the year 2020, the World Health Organization (WHO) declared COVID-19 a pandemic.[31] The pandemic and the various measures that were taken by governments around the world have caused unprecedented disruptions to commercial, economic and social activities globally and Nigeria is not exempted. The President of the Federal Republic of Nigeria, in pursuant of the powers conferred on him by the Quarantine Act[32]issued the Covid-19 Regulations 2020 and imposed a lockdown restricting movement of people firstly in some parts of Nigeria namely- Lagos, Federal Capital Territory Abuja and Ogun State for an initial period of 14 days with effect from 30th March, 2020.[33] The then Governor of Rivers State, Nyesom Wike towing the line of the Federal government of Nigeria on March 26, 2020 ordered the closure of land, air and sea borders of the state. This means no vehicles, ships or air flights are entering and leaving the State as a preventive measure against the novel corona virus.[34] On April 18, 2020, Governor Hope Uzodimma of Imo State in an Executive Order No. 001, 2020 imposed a dusk-to-dawn curfew in the State to checkmate the ravaging corona virus. The same approach was replicated in almost all the states of the Nigerian federation.

In the light of the above, COVID-19 is a pandemic that disrupted almost every known business, supply and value chains in Nigeria. As such, the pandemic cannot but have legal consequences.[35] One of the legal consequences of COVID-19 pandemic is the loss of employment and unintentional breach of commercial contracts. To this extent, can the COVID-19 pandemic be considered a force majeure?

The Department of Petroleum Resources (DPR) in a circular dated March 20th, 30th and April 2nd, 2020 declared COVID-19 pandemic a force majeure. This is because the pandemic has all the characteristics of force majeure. Unfortunately, DPR is the major regulator of the Nigerian oil and gas industry and as such, its directive may not apply to other sectors of the economy. Moreover, Force Majeure is contract-specific.[36] In other words, it cannot be imposed on contracting parties, especially when it is not part of the express terms of their agreement. It therefore appears very doubtful that a regulator like DPR or any third party can successfully use regulatory fiat or other means to declare Force Majeure with regards to contracts to which

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29 D Adu and B. Adepoju, "Nigeria: Covid-19, Force Majeure and Implication on Contractual Obligations" famsville solicitors, 2020, www.mondaq.com.accessed October 4, 2021.

30 S. Harwood, COVID-19: Legal and Contractual Implications, March 23, 2020. htp://www.shlegal.com /insights/covid-19-leal-and-contractual-implications. accessed, February 12, 2025.

31 World Health Organisation, "Corona Virus Disease (COVIDD-19) pandemic" Http://www.euro.who.int/ en/health-topics/health-emergencies/coronavirus-covid-19/news/2020.3/who-announces-covid-19-outbreak-a-pandemic, accessed March 7, 2024.

32 Chapter Q2, Laws of the Federation of Nigeria, 2004

33 U. Udoma and B. Osagie, "The Impact of the Corona virus (Covid-19) Pandemic on Contractual Obligations under Nigerian Law", www.uubo.org, accessed 12 October, 2023. see also "Total Lockdown: Wike shuts all Rivers Air, Land, Sea Borders indefinitely Against Covid-19, www.Vanguardngr.com

34 C. Ukpong, ***Premium Times***, March 26, 2020, www.premiumtimesng.com, accessed October 23, 2024

35 K. A. Oyinwola, "Legal Analysis of The Challenges Of Covid-19 Pandemic In Nigeria" lecture delivered at an online event organized by Tawakkul Multi-purpose Cooperative Society Limited, Ilorin in April 2020**.**

36 Op.cit

they are not parties. Such a move will certainly be at variance with the principles of privity of contract and freedom of contract applicable in Nigeria.[37]

The point is that COVID-19 pandemic has all the characteristics of a supervening event. For example, Ogunji[38] in their empirical research submits that lockdown and social distancing implemented by the government brought about shutdown of market places and that South East known for its diverse economic activities like agriculture, aquaculture, e-commerce, artisan, craftsmanship etc experienced a crumbled economy as people could not transact freely and this affected mostly small and medium enterprises. However, for these supervening events associated with Covid-19 pandemic in the South East to be considered a Force majeure will depend on whether the party relying on it incorporated it in their contract since force majeure has no general or automatic application. Where the force majeure clause is stated in the contract and covers events like outbreak of diseases, pandemics, epidemics or governmental actions, the party that have been prevented from performing his contractual obligation because of the difficulty imposed by the measures associated with covid-19 such as movement or travel restrictions, border closures and so on may be able to successfully plead or rely on force majeure. Alternatively, the contractual provision that permits act of God to be a basis to excuse performance of contract can also be interpreted as force majeure.

In reality, the party relying on covid-19 pandemic as force majeure must prove that:

1. Covid-19 pandemic was the cause of his/her inability to perform or delayed performance, that is, but for the pandemic, he/she would have fulfilled his obligations.
2. His or her non-performance was because the circumstances was beyond his control
3. He/she has taken all reasonable steps to avoid or mitigate nonperformance without success.
4. The force majeure event which is covid-19 here, is provided for in the contract.

Where the contract does not expressly incorporate a force majeure clause, it is a question of interpretation whether the parties intended such an event to be covered. This involves considering whether the list of events included was intended to be exhaustive or non-exhaustive. Unless specific words are used to suggest that a list is non-exhaustive, it will be difficult to argue that force majeure was intended. For instance, a contractual term that refers to events "beyond the parties" reasonable control is non-exhaustive and can be interpreted a force majeure clause. However, the party relying on such clause must also show that their non-performance or late performance was truly outside their control and could not have been prevented or mitigated.

The court may not consider covid-19 pandemic a force *majeure* where the lockdown or restriction that a party is relying on for non-performance is temporary and the court discovers that the contract can be performed once normalcy is restored. However, if there is no implied force majeure clause, an affected party should look to other provisions of the contract for potential routes out of its difficulties. If no route is provided, it may be possible to rely on the doctrine of frustration of contract.

(B) International Cases Where Covid-19 Pandemic Was Considered a Force Majeure

Hengyun International Investment Commerce Inc.[39] Here a commercial tenant argued that the Government of Quebec's March 24, 2020 Order suspending certain non-essential business

[37] Op.cit, p.3

[38] J. Ogunji, S. Iheanacho and C.V. Ogunji, "Counting the Cost: The Effect of COVID-19 Lockdown on Households in South East Nigeria" <https://doi.org/10.3390/su132212417>, accessed March 13, 2025

[39] QC. 9368-7614 Quebec Inc. 2020 QCCS 2251

activities prevented it from generating revenue and so, as a result, the statutory doctrine of superior force relieved its rent obligations. The Superior court of Quebec agreed and found that the government order prevented the landlord from fulfilling its obligation to provide peaceful enjoyment of the property and also excused the tenants duty to pay rent, notwithstanding that the lease expressly contemplated that rent was due even if peaceful enjoyment could not be delivered.

The case of *Durham Sports Barn Inc. Bankruptcy proposal*,[40] a commercial tenant invoked *Hengyun* principle to make the same argument in connection with the Government of Ontario's shutdown order. Like the lease in *Hengyun,* the Durham Sports lease expressly carved out rent obligations. Based on the plain language of the lease, the Ontario Superior Court rejected the tenant's argument and distinguished *Hengyun* based on the different approaches in Ontario and Quebec and non-incorporation of force majeure in their lease agreement.

In the *Northern District of Illinois Case of Re Hitz Restaurant Group*[41] a restaurant group tenant invokes 'governmental action' phrase of force majeure clause, arguing that rent obligation was excused by the Illinois Governor's coronavirus order shutting down on-premises dinning, theorizing that the order prevented it from operating is business, court agrees in part, holding tenant's rent obligation would be reduced on a pro rata basis in accordance with the decrease in revenues from its inability to offer on premises dinning.

In *Eastern District of New York Case of Gomel Capital Partners*[42] ,[43] the plaintiff seeks to terminate real property purchase contract and to recoup $275,000 deposit, alleging that the outbreak of the COVID-19 global pandemic is a force majeure event, a quintessential "act of God" and invoking contractual provision that permits termination when a force majeure event prevents performance of the contract for "more than 30 days beyond the closing date. The parties later settled out of court, though.

In Southern District of Texas, there was a case of *Khan v Cinemex USA Real Estate Holdings* ***Inc.***[44]*where* the plaintiff sought *inter alia*, specific performance ordering defendant to close on cinema chain purchase transaction 'arguing that defendant's reasons for refusing to close that relate to Covid-19 are invalid because the contract was negotiated after the pandemic was declared and the material adverse effect clause expressly excludes pandemics, case automatically stayed because defendant filed for chapter II bankruptcy.

From these cases, it is obvious that Covid-19 is considered a force majeure where certain criteria are met. In other words, there is no straight answer to the question of whether Covid-19 should be considered a force majeure. It depends on the terms of the contract and the prevailing circumstances.

7. Conclusion

Force Majeure is indeed one of the legal concepts that are neglected in commercial contracts, yet it is a necessary weapon in today's commercial world full of uncertainties and eventualities. When giving its usual place, it is capable of mitigating the legal consequences of a breach of contractual obligation due to supervening events. The major requirement for its

40 2020 ONSC 5938
41 No. 1:20-b-05012 (Bank. N.D. 111, 2020)
42 *LLCV601 ne 29 Drive, LLC etal*
43 N0. 1:20-CV-01922-FB-JO (E.D.N.Y. 2020)
44 No.4:20-CV-01178 (S.D. Tax. 2020)

application is that it must be embedded in the terms of the contract. This is so because the principle of privity of contract and freedom to contract will prevent its general application even when it comes through regulatory *fiat* or through a third-party interference. Many events considered as force majeure are usually hidden under the term "acts of God." They include natural disasters, epidemics, wars, pandemics and the like. They are acts beyond the reasonable control of the contracting parties as was the case with the COVID-19 pandemic. It is therefore, recommended that contractual parties should always make provision for force majeure in their contract or lose the protection it gives when supervening events occur.