

## **FORCE MAJEURE AND FRUSTRATION OF CONTRACTUAL OBLIGATIONS ACROSS AFRICA**

### **1. Introduction**

- 1.1. The scope of presentation covers, at a high level, force majeure (“FM”) and doctrine of frustration (impossibility of performance) in common law and civil law jurisdictions across Africa. As such, it does not constitute legal advice.
- 1.2. FM is an often misunderstood concept by the layman. Many assume, sometimes genuinely, sometimes opportunistically, that FM circumstances can be used as an excuse to avoid contractual obligations, particularly payment, based on the significant adverse effects of C-19. This is not always the case, and if you are wrong you risk putting your company in breach of contract, repudiation, and damages. FM must therefore be invoked with caution and only after legal advice has been sought.
- 1.3. The scope of FM needs to be carefully considered – both direct and indirect impacts of certain events. For example –
  - 1.3.1. impact of temporary closure of, or restricted services by, public registries and regulators on reporting and compliance obligations, particularly in a highly regulated sector;
  - 1.3.2. ability to fulfil governance and related duties – AGM’s/EGM’s; and
  - 1.3.3. lease and supply chain issues.
- 1.4. Circumstances of force majeure, also referred to as vis maior or casus fortuitus, may have a variety of contractual implications, including in relation to –
  - 1.4.1. conditions precedent – parties may be obliged to use all reasonable/best efforts to procure the fulfilment of certain cps;
  - 1.4.2. material adverse change provisions – these are typically found in M&A transactions and permit a party to resile if a MAC event arises between signature and completion, and may be specific or general;
  - 1.4.3. force majeure provisions - these typically suspend the obligation of the affected party to perform for so long as the FM endures, and often permit the other party to terminate if the FM endures beyond a stipulated time period; and
  - 1.4.4. frustration or impossibility of performance – which may result in the automatic termination of the contract.
- 1.5. Contractual remedies may also be circumscribed by laws passed to deal with the circumstances of FM.

1.6. The manner in which common law and civil law jurisdictions in Africa treat these concepts must be distinguished. In the latter case, it is generally legislated, whilst in the former it is not.

## 2. Force Majeure

2.1. Civil law jurisdictions in Africa (e.g. Francophone Africa)

2.1.1. Article 1218 of the French Civil Code

When an event is beyond the control of the debtor, which could have been reasonably foreseen at the time of conclusion of the contract and whose effects cannot be avoided by appropriate measures, prevents performance of its obligations

2.1.2. The elements of FM in civil law jurisdictions therefore typically comprise –

2.1.2.1. the event preventing force majeure must be external – outside of the contracting parties’ control;

2.1.2.2. unforeseeable at the time of signature of the contract; and

2.1.2.3. unavoidable – where the effects could not have been prevented by appropriate measures;

2.1.3. The French Civil Code also recognizes the concept of “hardship” – a sort of FM light.

2.1.4. Article 1195 of the French Civil Code, which applies to contracts concluded after 1 Oct 2016, confers the right on contracting parties to renegotiate the contract in the event of a change in circumstances where

2.1.4.1. the change was unforeseeable at the time of conclusion of the contract; and

2.1.4.2. the change renders performance under the contract excessively onerous.

2.1.5. Relief for hardship can be contractually excluded, and the right to renegotiate must be understood in the context of the French law obligation to negotiate in good faith.

2.1.6. Depending on the circumstances, the consequences of C-19 may permit recourse to FM or hardship in civil law jurisdictions.

2.2. Common law jurisdictions in Africa (e.g. Anglophone Africa, including South Africa)

2.2.1. Fact, contract specific and governing law considerations – determined on a case by case basis, with reference to the wording and governing law of the contract.

Typically use general wording followed by “epidemic”, “quarantine”, “disease” and “governmental action”.

- 2.2.2. Courts tend to interpret force majeure clauses narrowly.
- 2.2.3. Issues which are typically subject to negotiation include –
  - 2.2.3.1. beyond [reasonable] control;
  - 2.2.3.2. requirement of foreseeability and provision against;
  - 2.2.3.3. obligation to mitigate effects; and
  - 2.2.3.4. consequences: notice, and suspension vs right of termination.
- 2.2.4. FIDIC (International Federation of Consulting Engineers) has issued an extensive guidance memorandum on COVID-19 implications for its standard contracts, dealing with, inter alia, environment, health & safety obligations, shortages and change in laws.

### 3. Frustration/Impossibility of performance

- 3.1. This doctrine, if applicable, results in the automatic termination of the contract.
- 3.2. Elements that require to be satisfied –
  - 3.2.1. force majeure event must have commenced after conclusion of the contract;
  - 3.2.2. such event must make it physically or commercially impossible to perform a material obligation or in a manner radically different to that envisaged at the time of conclusion to the contract.

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