
**IMPACT OF COVID-19:
DISRUPTION OF
BUSINESS (FORCE
MAJEURE,
FRUSTRATION &
LIMITED ACCESS TO
JUSTICE)**

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OVERVIEW



- Introduction
 - What is Force Majeure?
 - Is COVID-19 a Force Majeure Event?
 - Consequences of Invoking Force Majeure
 - Doctrine of Frustration
 - How Can Businesses Prepare for Future Crises?
 - Consequences of Closure of Courts
 - Adoption of ADR Mechanisms
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WHAT IS FORCE MAJEURE?



ELEMENTS OF FORCE MAJEURE



1. Must be beyond the reasonable control of the affected party
2. The affected party's ability to perform its contractual obligations must have been prevented by the event
3. The affected party must have taken all reasonable steps to avoid and mitigate the effects of the event

INVOKING A FORCE MAJEURE CLAUSE

- The contract must have a Force Majeure clause
- *Ejusdem Generis* - "of the same kind"
- Courts will consider conditions parties entered into the Agreement & the circumstances that have arisen
- Could the event have been foreseen and could non-performance have been mitigated?
- Not enough that the contract has become more burdensome and less profitable
- Compliance with notice requirement



FORCE MAJEURE CLAUSE SAMPLE

"Neither of the Parties will be liable for any failure to comply with terms of this Agreement where such failure is caused directly or indirectly by unforeseen acts including but not limited to; an act of God, flooding, fire, government restrictions or other government acts, strikes, injunction or other labor problems, riots, terrorism or war, or any other causes beyond the control of either of the Parties, and which cannot have been reasonably foreseen and thus rendered the performance of this Agreement impossible. Upon the occurrence of any event of the type aforementioned, the affected Party will give prompt written notice to the other Party, with a description of the event and the duration which the affected Party expects its performance ability to be compromised. The affected Party shall devote its reasonable commercial efforts to remedy the condition giving rise to the failure to perform its obligations. If the event persists for more than twenty calendar days, either Party may terminate this Agreement."

IS COVID-19 A FORCE MAJEURE EVENT?



"An Act of God"?,
declared a 'pandemic' by
WHO, global health crisis



Quarantine, global
lockdown, self-isolation,
close of businesses, no
large gatherings



Restriction of movement
by all modes of
transportation, new
government directives



CONSEQUENCES OF A CLAIM FOR FORCE MAJEURE



EXTENSION OF TIME

Contractual remedies for force majeure may include extra time allowance for the affected party to perform their contractual obligations.

PART PERFORMANCE

The affected party may be excused from performing their obligations under the contract in whole or in part.



SUSPENSION OF PERFORMANCE

The affected party may be excused from a delay in performance, allowing them to suspend performance while the force majeure event persists.

RIGHT TO TERMINATE

Where the force majeure events continues over a long period, some provisions within the clause may entitle the parties to terminate the contract.



DOCTRINE OF FRUSTRATION



What is Frustration?

Without the default of either party, a contractual obligation has become incapable of being performed as the circumstances that have come about, will render performance radically different to what was undertaken by the contract.

(Nwaolisah v Nwabufoh 2011)

Elements Required to Establish Frustration

1. The Agreement does not include a force majeure clause
2. The underlying event is not the fault of either party
3. The circumstances surrounding the event occurs after the execution of the contract and
4. It is physically and commercially impossible to fulfil the contract or obligation becomes radically different

Consequences of Frustration

The effects of invoking frustration are more radical than force majeure. A successful claim for frustration results in an automatic termination of the contract by operation of law.

Frustration Under COVID-19

- Any rights that accrued before COVID-19 will remain enforceable when the contract has been terminated
 - Conversely, any rights which had not accrued as at the date of the COVID-19 outbreak, will not be enforceable.
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NIGERIAN CASE LAW ON FRUSTRATION/ FORCE MAJEURE



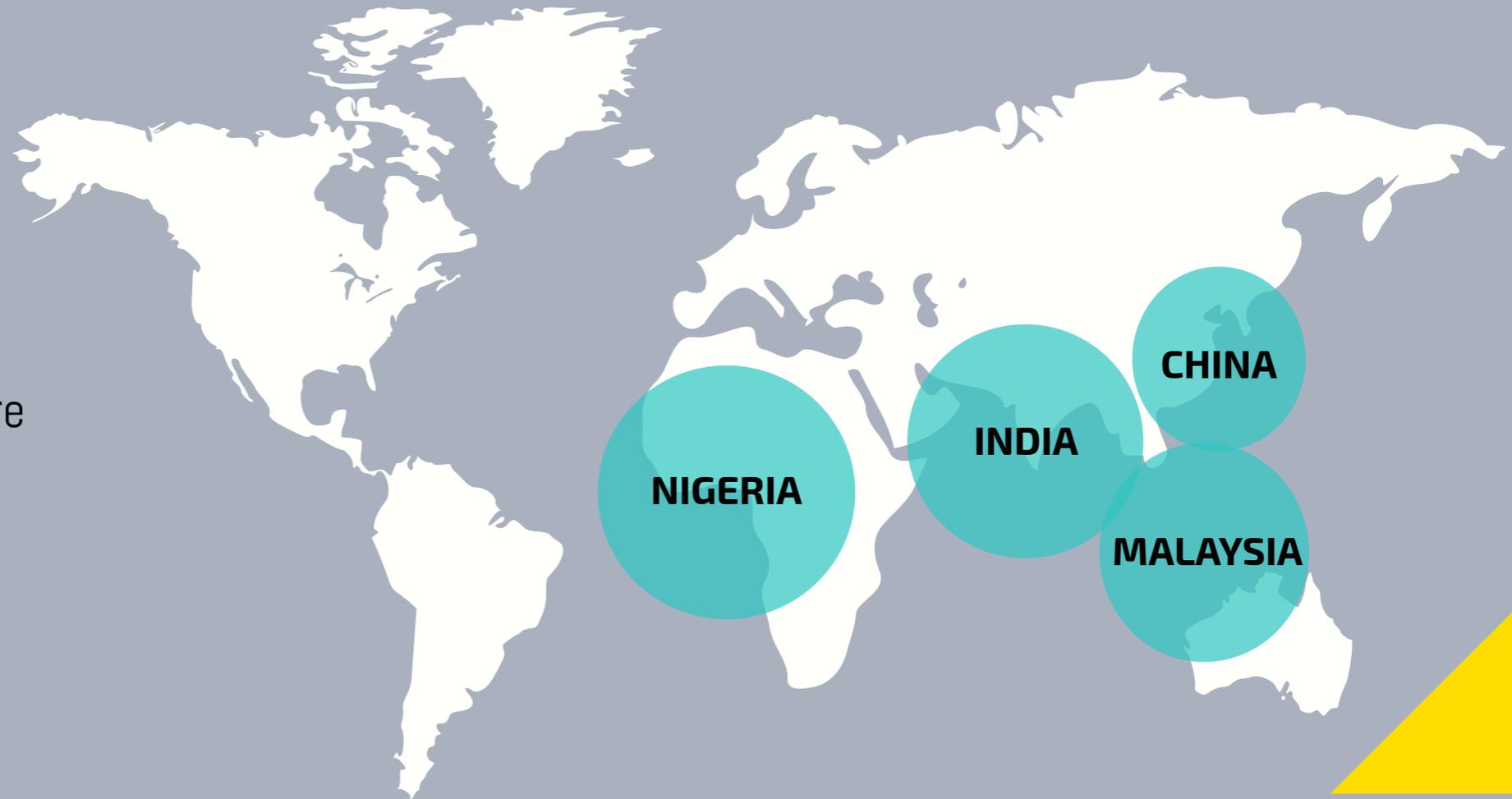
*Araka (Appellant) v
Monier Construction CO.
Nig Ltd (Respondent)
(1978)*



*Nospecto Oil & Gas Ltd
(Appellant) v Kennedy &
Ors (Respondent) (2014)*

FORCE MAJEURE ACROSS JURISDICTIONS IN WAKE OF COVID-19

Various companies across several jurisdictions have begun invoking force majeure provisions due to the unprecedented effects of COVID -19



WHAT CAN CLIENTS AND BUSINESS OWNERS DO NOW?

REVIEW YOUR CONTRACT TO DETERMINE WHETHER IT CONTAINS A FORCE MAJEURE CLAUSE

DETERMINE THE STEPS YOUR BUSINESS IS TAKING TO MITIGATE THE EFFECTS OF COVID-19

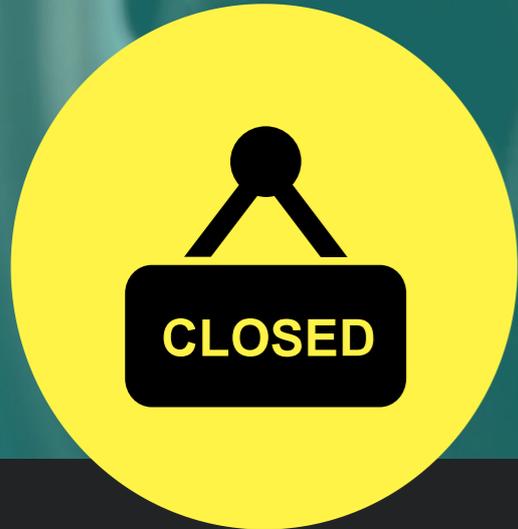
DETERMINE WHAT ASPECT OF THE CONTRACT YOU ARE UNABLE TO FULFIL DUE TO COVID-19

ENSURE THAT NOTICE PROVISIONS WITHIN THE FORCE MAJEURE CLAUSE ARE COMPLIED WITH

CONCLUSION

1. Parties should consider in detail the force majeure clause, the entire contract and the circumstances that have arisen
2. Parties affected by COVID-19 should take relevant steps to document the measures taken to mitigate effects of the pandemic
3. Parties should ensure force majeure claims are made carefully due to its serious consequences
4. Are events like COVID-19 covered under the parties' insurance policies? What conditions are required for a claim to succeed?
5. Consider the amendment of current contracts and update of agreement templates to account for future outbreaks

LIMITED ACCESS TO JUSTICE DUE TO COVID-19



CJN issued
directives calling
for courts closure
indefinitely



Access to courts
is limited - only
urgent matters
are being heard



Status of
pre-existing and
fresh disputes



Verdict: Uncertain

ADOPTION OF ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

NEGOTIATION

- Non-binding and compromise based ADR
- Greatest possibility of a "Win-Win"
- Procedural offerings: Instant Messaging, emails, teleconferencing

MEDIATION

(Same as Negotiation + neutral third party mediator)

ARBITRATION

- Adversarial and non-binding ADR
- "Win-Lose" resolution
- Procedural offerings: Documents Only procedure, virtual hearings

KEY CONSIDERATIONS



- Claim/Case Analysis
- Suitability Test & Choice of ADR
- Technological and Logistical Matters
- Legal & Procedural Matters
- Limitation Analysis



THANK YOU FOR LISTENING !



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