

When the Unthinkable Strikes: COVID-19 and its Impact on Ship-building Contract – A Force Majeure in the Offing?

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Abstract

Famine, tragedy, and war are some of the consequences of our existence and have a deleterious effect on our daily lives. On March 12, 2020, when the whole universe was enmeshed in an unprecedented large-scale outbreak of Covid-19, the World Health Organisation (WHO) declared that the outbreak is regarded as a pandemic virus affecting the entire universe. Infections continued to rise on a daily basis, which prompted various countries to respond quickly leading to the proclamation of various regulations to curtail the widespread transmission of the pathogen. The consequences of these strongest measures have had a momentous sway on contractual obligations, especially shipbuilding contracts. Some shipbuilding companies rushed to hide under the cover of force majeure/frustration to escape their contractual obligations. This has a knockdown effect on other contracts too and may eventually lead to a series of disputes as to whether the COVID -19 pandemic *per se*, is a ground to invoke frustration/force majeure, who is entitled to invoke it, and how the court can resolve these disputes. Adopting a doctrinal methodology, this article explores some of the murky legal scenarios playing out as a result of frustration or force majeure, and the ramifications and impact on shipbuilding contractual obligations under both English and Civil Law. It finds that from the perspective of English Law, it is difficult to successfully argue that contractual performance has been averted or deferred due to Covid-19 pandemic *simpliciter* unless it is clearly and tersely provided in the contract. This is in part because English law will adopt a *contra proferentem* rule. However, from the microscopic view of Civil Law, the general concept of force majeure is recognized as inherent in the underlying contract. The article therefore, recommends a prudent and careful drafting ploy to bring the COVID -19 pandemic under the canopy of a force majeure, capable of relieving parties from their contractual undertakings.

Key words: Covid-19 Pandemic, Shipbuilding Contract, Frustration, Force majeure, English Law, Civil Law.

1. Introduction

The rising surge in worldwide travel and trade has steered to a parallel advent of global risks such as disease and other health risks. The COVID-19 pandemic has altered the world's equation in terms of doing business, knocking down many people off guard and its ripple effect renders performance of contractual obligations otiose, especially in the shipping industry. Of recent, COVID-19 is assuming more potent and dangerous dimensions by metamorphosing

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into different variants such as Alpha, B.1.1.7,¹ Beta, B.1.351;² Delta, B.1.6172;³ Ganma, P.1;⁴ and Omicron, B.1.1.529.⁵ Discharging contractual obligations as envisaged by parties is seriously impaired and this raises a serious concern. Covid-19 was declared by the World Health Organisation (WHO) as a Public Health Emergency of International Concern (PHEIC).⁶

From the global perspective, the restriction on trade by various sovereign nations is extending and escalating with the spread of the pathogen. For instance, some ship owners and shipbuilders have issued ‘force majeure’ notices to buyers, extending the delivery period of newly built ships. For instance, the China Council for the Promotion of International Trade (CCPIT) stated that effective from 30th January 2020, ‘it would issue “force majeure” certificates to qualifying applicants, for the purpose of “shielding” the companies from legal damages resulting from COVID-19.’⁷ Interestingly, since the issuance of this notice, shipbuilding companies have issued more than 4,000 force majeure certificates.⁸

Apparently, the nagging question is whether the COVID-19 pandemic *per se*, is a *prima facie* ground for the shipbuilders to invoke force majeure? Put differently, based on the COVID-19 Pandemic, can parties to a contract safely vary, discharge, or suspend their underlying obligations under the contract for as long as the force majeure event continues? Intuitively, there is no one-size-fits-all approach. Each event depends on the

¹ First discovered in the United Kingdom, designated on 18th December, 2020. See Dena Bunis, ‘Alpha to Omicron: Why COVID-19 Variants Have Greek Names’ AARP (November 29, 2021) <<https://www.aarp.org/health/conditions-treatments/info-2021/covid-variant-names.html>> accessed 02 December, 2021.

² Discovered in South Africa and also designated on 18th December 2020. See Dena Bunis, ‘Alpha to Omicron: Why COVID-19 Variants Have Greek Names’ AARP (November 29, 2021) <<https://www.aarp.org/health/conditions-treatments/info-2021/covid-variant-names.html>> accessed 02 December, 2021.

³ It was found out in India and designated on 11th May 2021. See Dena Bunis, ‘Alpha to Omicron: Why COVID-19 Variants Have Greek Names’ AARP (November 29, 2021) <<https://www.aarp.org/health/conditions-treatments/info-2021/covid-variant-names.html>> accessed 02 December, 2021.

⁴ It was initially traced in Brazil and designed on 11th January 2021. See Dena Bunis, ‘Alpha to Omicron: Why COVID-19 Variants Have Greek Names’ AARP (November 29, 2021) <<https://www.aarp.org/health/conditions-treatments/info-2021/covid-variant-names.html>> accessed 02 December, 2021.

⁵ It was seen in multiple countries especially from the Southern African region, and designated on 26th November 2021. See Dena Bunis, ‘Alpha to Omicron: Why COVID-19 Variants Have Greek Names’ AARP (November 29, 2021) <<https://www.aarp.org/health/conditions-treatments/info-2021/covid-variant-names.html>> accessed 02 December, 2021.

⁶ The World Health Organisation made a declaration on 11th March 2020, declaring Covid-19 as a Pandemic. Public Health Emergencies of International Concern (PHEIC) have only been implemented five times in the last 15 years. More specifically, for swine flu (2009); polio (2014); zika virus (2016); ebola virus (2014 and 2019) and of recently, COVID-19 (Coronavirus). See World Health Organisation, ‘COVID-19 Pandemic: All Information’ <<https://www.who.int>> accessed 13 November, 2021.

⁷ Mr Zang Tiewei, who is the spokesperson of the Commission of Legislative Affairs of the National People’s Congress Standing Committee, stated that ‘for the parties who are unable to perform the contract, the epidemic is an unforeseeable, unavoidable and insurmountable force majeure.’ See FENECH ‘COVID 19 and Force Majeure in the Shipping Industry’ <<https://fenechlaw.com/covid-19-and-force-majeure-in-the-shipping-industry/>> accessed 02 November, 2021.

⁸ According to the Contract Law of the People’s Republic of China, except otherwise provided by law, parties could be exempted from performing contracts in part or in whole due to the event of force majeure. See Chapter VI thereof, adopted at the Second Session of the Ninth National People’s Congress on March 15, 1999 and promulgated by Order No 15 of the President of the People’s Republic of China on March 15, 1999.

surrounding circumstances and the construction of the force majeure clause (if any) in the contract, and whether there are other means of performance. Interestingly, most of the shipbuilding contracts are international in nature and are largely governed by English law, rather than Chinese or other civil law(s). However, under the former, there is no express provision or defined concept of force majeure, but rather, the doctrine of frustration applies. However, that does not preclude parties to a contract from freely inserting a force majeure clause in the contract, subject to the *contra proferentem* rule.⁹ Thus, most of the shipbuilding contracts contain a force majeure clause, which gives flexibility to the shipyard to vary or amend the due date of the ship's delivery otherwise referred to as 'permissible delay' under the shipbuilding contracts.¹⁰

Scholars have written extensively on this area, but most of the literature is restricted within the confines of either force majeure or frustration, without necessarily delving into the complexities and diversities of the concept as seen from both common law and civil law.¹¹ This article, sets out the salient features and complexities of 'frustration' as well as 'force majeure' from the perspectives of both common law and civil law jurisdictions.

In this article, the author provides a synoptic overview of a shipping contract and espouses the approaches of both common and civil law jurisdictions on the discharge of contractual obligations due to frustration. The article discusses the doctrine of frustration, its consequences, drawbacks, and limitations from the perspective of common law. Gleaning from the microscopic lens of civil law jurisdictions, this article traces the evolution of force majeure, its philosophical underpinning, drawbacks, interpretation, and unfolding events. Comparison between the two different jurisdictions is also provided vis-à-vis their distinguishing features especially concerning the impact of events on contractual obligations. Furthermore, it provides some useful hints on the drafting techniques to consider in drafting force majeure clauses.

2. Brief Overview of a Shipbuilding Contract

A shipbuilding contract is a recurring and cyclical trade. The boom in the trade made it difficult for shipbuilders to meet up with soaring demand for vessels. Numerous new shipyards sprung

⁹ Traditionally, it was observed that courts used to invoke a 'literal approach', subject only to the *contra proferentem* rule that any ambiguity would be interpreted against the person who put the clause forward. As put by one author, 'the assumption was that contracting parties had an obligation to use the correct language to achieve their objectives and that if they happened to have used words which bore a different meaning, the court would not look behind those words to discover their real intentions.' See Richard Stone, *The Modern Law of Contract*, (Routledge, 2008). However, adopting the modern approach, Lord Hoffman enunciated the point more tersely in *Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98, that 'almost all the old intellectual baggage of legal interpretation has been discarded in favour of an approach, which generally relies on the common-sense principles by which any serious utterance would be interpreted in ordinary life.' Thus, it is obvious that under Common Law, a court of law will narrowly interpret a force majeure clause.

¹⁰ See for example 'The Shipbuilders' Association of Japan (SAJ) 1974 Form – SJA 1974; The NEWBUILDCON Form published by BIMCO in 2007 – Newbuildcon 2007; the Norwegian Shipbuilding Contract (2000); the Standard Shipbuilding Contracts of the Association of European Shipbuilders and Shiprepairers in 1999 – AWES 1999; the Standard Shipbuilding Contract of China Shipbuilding Trading Co Ltd – CSTC Form; and the China Maritime Arbitration Commission (CMAC) 2012 Form – CMAC Form.

¹¹ Martina Farrugia, 'COVID-19 and Force Majeure in the Shipping Industry' <<https://iclg.com/briefing/12960-covid-19-and-force-majeure-in-the-shipping-industry>> accessed 12 November, 2021; Sumit Rai, '10 Considerations for Drafting a Robust Force Majeure Clause' <<https://agamalaw.in/2020/04/24/10-considerations-for-drafting-a-robust-force-majeure-clause/>> accessed 11 December, 2021.

up too, predominantly in China. However, the unfortunate nosedive of the shipyard industry in 2008 and its consequences led to sobering market modification as the freight market collapsed, forcing a low demand for new ships in the market. Thus, the repercussions of the dwindling of the shipping business put pressure on the shipyards and the resulting impact has been serious defaults, deferrals, and inordinate delays. Complicating the woes of the shipyards, Covid-19 further exacerbates the plight of shipbuilders, especially Chinese and European yards. China, Japan, and South Korea continue to maintain a stranglehold on global shipbuilding.

According to the 2020 statistics issued by the Shipbuilders' Association of Japan (SAJ), '...of the 1,084 worldwide recorded orders for new ships of more than 100 gross tonnage (GT) during the year, 659 (just under 61%) were placed with the big three Asian shipbuilding nations: Japan, South Korea and China. China accounted for 323 of those orders, almost a third of the world total.'¹² Notwithstanding the dominance of the Asian Superpowers in the shipbuilding contract, contractual parties continue to owe their allegiance to the English law as a governing law, and London as the seat of arbitration. As one author remarks, 'international buyers remain reluctant to experiment with Chinese law and arbitration for contracts involving Chinese shipyards'.¹³ Key interests in Asia and elsewhere remain happy to use English law and London arbitration. English law gives a large degree of certainty in respect of the meaning and effect of shipbuilding contract provisions, particularly those on the commonly used forms.'¹⁴ Most of the shipyards in Asia themselves appear to be at home with English law, adopting it as the applicable law to govern a shipbuilding contract. Perhaps, this demonstrates the dominance and global appeal of English law and especially London, as the legal market for maritime law.

2.1 Shipbuilding Contracts

There are numerous standard shipbuilding contracts, but the most commonly used is the Shipbuilders Association of Japan (SAJ) Form, commonly used across Asia, especially China, South Korea, and Japan. Most of the shipyards in China adopt the revised SAJ Form notwithstanding the issuance of 'the new Chinese Maritime Arbitration Commission Form in 2011.'¹⁵

¹² Campbell Johnston Clark, 'COVID-19's Implications on Shipping Contracts' <<https://www.cjclaw.com/site/news/covid19s-implications-on-shipping-contracts>> accessed 17 June, 2021. When the statistics are analysed in terms of gross tonnage (GT), the imbalance towards Asia remains striking. Of the world total of more than 33 million GT ordered in 2020, about 30 million GT was with shipyards in the big three Asian shipbuilding nations, with South Korea and China accounting for more than 11.8 million GT and 14.5 million GT, respectively; together, about two-thirds of the world total. For China in particular, new orders in terms of GT remained similar to 2017, 2018 and 2019 figures, despite order numbers having fallen, showing the demand for fewer but larger ships at Chinese yards.

¹³ Fenech and Fenech Advocates, 'COVID -19 and Force Majeure in the Shipping Industry' <<https://iclg.com/briefing/12960-covid-19-and-force-majeure-in-the-shipping-industry>> accessed 12 November 2021

¹⁴ Vanessa Tattersall and Simon Blows, 'Shipbuilding Contracts' in Andrew Chamberlain, Holy Colaco and Richard Neylon (eds) *The Shipping Law Review* (8th edn, Clare Bolton 2021) <https://www.hfw.com/downloads/SLR-8_7-Shipbuilding.pdf> accessed 31 March, 2021.

¹⁵ *ibid.* The Chinese Maritime Arbitration Commission Form is designed for use in international sales by Chinese shipyards.

Article VIII of the SAJ Form provides that ‘intervention of government authorities... labour shortages, plague, epidemics constitute grounds for postponement in the delivery date.’ In the same vein, the Baltic and International Maritime Council (BIMCO) has formulated its version of the shipbuilding contract, the NEWBUILDCON.¹⁶ The BIMCO NEWBUILDCON permits the extension of the delivery date pursuant to a force majeure incident which includes ‘any government ... control, intervention, requirement or interference epidemics ... any other cause of a similar nature to the above beyond the control of the Builder or its Sub-Contractors.’ While these clauses would seem to cater for delays caused by Covid-19, under BIMCO the shipbuilder bears the onus of establishing that those events ‘were not caused by the error, neglect, act or omission of the Builder, could not have been reasonably foreseen at the date of Contract and that the Builder would have taken all reasonable efforts to avoid and minimise the effects such events would have on the delivery of the vessel.’¹⁷

The emergence of the Covid-19 portends dooms for shipbuilding contracts. Although there was no reported judicial precedent concerning force majeure caused by a pandemic, disputes involving delays in ship construction are unavoidable and had occurred in the past. For instance, in *Adyard Abu Dhabi v SD Marine Services Limited*¹⁸ a dispute ensued between the shipbuilders (Adyard) and the buyers (SD Marine Services) concerning an extension of time under *force majeure*. The shipbuilders contended that the delay was occasioned by the buyer’s breaches of one of their contractual obligations. The shipbuilders failed to issue the required force majeure ‘notices’ claiming an extension of time under the contractual *force majeure* provisions, which ‘contained general words allowing extensions for any other delays of a nature which under this contract permits postponement of the delivery date’.¹⁹ They contended further that the ‘buyers’ failure to agree terms for the modifications was a breach of the contract that prevented completion of the ship.’ The court upheld the buyers’ contention and held *inter alia* that their rescission of the contract was in order. It went further to hold that the shipbuilder’s ‘failure to give *force majeure* notices disqualified it from claiming any extension to the delivery date.’²⁰ The court’s decision appears to reaffirm the well settled principle of law that parties are bound by their contractual undertakings and it is not within the precinct of court to pokenose in or re-write contractual terms for the parties.

3. Evaluation of Force Majeure under Common and Civil Law

3.1 Common Law Perspective

Gleaning from the Common Law, the force majeure *per se*, is alien, but in its place, the doctrine of ‘frustration’ is invoked as a force majeure. *A fortiori*, force majeure is not a stand-alone concept, in the sense that parties would be exempted from the contract as a result of the unforeseen event only if they fall within the relatively narrow doctrine of frustration. In other words, parties to the contract, should expressly agree on a force majeure clause in the underlying contract, otherwise, the doctrine of frustration will apply by default. Thus, parties

¹⁶ Chamberlain, Colaco and Neylon (n 14). The most recent version was issued in 2007. BIMCO is one of the biggest shipping industry trade associations and has the largest membership of shipowners.

¹⁷ *ibid.*

¹⁸ [2011] EWHC 848 (Comm)

¹⁹ *ibid.*

²⁰ *ibid.*

who intend to safeguard their contract to deal with unforeseeable circumstances that may likely arise during the term of the contract, should tersely and clearly insert a clause in the contract to that effect. Failure to do that will make them vulnerable and the law will, *stricto sensu*, hold them to their bargain. Nevertheless, the law, has, in some narrow instances, come to the rescue of parties who have failed to expressly provide for a force majeure clause in their contract, by introducing the doctrine of frustration. Under the bosom of the frustration doctrine, parties would be excused from discharging their contractual obligations if and only if the contract is ‘frustrated’ by some external supervening event beyond their control.

Under English Law, the guiding principle is ‘party autonomy’ or freedom of contract, which allows contracting parties to freely tailor their bargaining process. Typically, this entails coming up with various clauses that parties deem necessary to protect their commercial interests. By extension, this liberty also allows parties to excuse contractual obligation on the basis of circumstances beyond their control. Thus, parties have the flexibility and liberty to agree on the terms of their contract on the conviction that these terms are sacrosanct and would enjoy full protection of the law. This is one of the clear distinctions between common and civil law jurisdictions. However, such circumstances or event should not have been foreseeable at the time of contracting and must be difficult to circumvent. However, several contractual agreements have failed to provide for force majeure clauses, and, in those instances, a party affected by the Covid-19 pandemic would seek solace in the ‘doctrine of frustration’ to find legal justifications to escape from contractual obligations.

3.1.1. The Doctrine of Frustration:

The doctrine of frustration is an antiquated doctrine and has a chequered history under Roman Law. Based on a Latin aphorism, *les non cogit ad impossibilia* which means that the law does not compel a person to do anything vain or impossible. It connotes that frustration arises whenever the law accepts that devoid of fault from either of the contracting parties, contractual obligations are incapable of being accomplished. According to Lord Ratcliffe in *Davis Contractors Ltd v Fareham UDC*:

... frustration 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 that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do ... There must be ... such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.²¹

The general principle is that come what may, parties are strictly liable and bound by their contractual obligations, irrespective of unforeseeable consequences.²² The situation is as if the

²¹ [1956] AC 696; Richard Stone, *The Modern Law of Contract* (Routledge Cavendish, 2009). The Nigerian Court of Appeal in *Diamond Bank Ltd v Ugochukwu* [2008] 1 NWLR (Pt 1067) held that ‘frustration would occur where it is established to the satisfaction of the court that due to a subsequent change in circumstances which was clearly not in the contemplation of the parties the contract has become impossible to perform.’

²² This is a well-settled ancient principle of law, which was aptly captured in the latin maxim of ‘*pacta sunt servanda*,’ which simply means agreements are binding. Thus, parties to a contract are at liberty to freely tailor

contract is cast in stone. But it is obvious that parties are not infallible, because they are humans, and this makes it difficult and impossible to predict the future with precision. This goes with the popular adage of ‘who knows tomorrow’? It is apparent and of common occurrence, for parties to meet a brick wall, which would hinder the performance of the contractual obligations. In such an instance, what happens to the contract? Are parties relieved from their contractual obligations simply due to the emergence of the Covid-19 Pandemic? In other words, could the declaration of Covid-19 automatically relieve parties from discharging their contractual obligations?

3.1.2 The Absolute Contract

The common instances where the doctrine of frustration has been successfully applied are where the subject matter of the contract perishes. In some instances, the performance of the contract requires physical presence and personal performance such as in football or concerts. In those instances, the demise or ailment of the performing party, automatically brings the contract to an end. There have also been cases where events such as war or circumstances that make performance of contract illegal have been held to frustrate a contract. In all these cases, parties are ordinarily strictly liable to perform their contractual obligations notwithstanding the frustrating events. This led to the emergence of the principle established in *Paradine v Jane*.²³

3.1.2.1 The Rule in *Paradine v Jane*:

The ratio decidendi in this case, establishes the obligation to strictly perform contractual obligations notwithstanding the impracticability or impossibility of the performance of the contract. In *Paradine v Jane*,²⁴ the court submitted that the contractual obligations were not jettisoned by a ‘frustrating’ event, and failure by a party to discharge the contractual obligations due to the frustrating event, would be a breach of contract. This is premised on the freedom of contract and the party’s failure to insist on a clause providing for the event in question. In that case, the court laid down the rule as follows:

When the law casts a duty upon a man which, through no fault of his, he is unable to perform, he is excused for non-performance; but if he binds himself by contract absolutely to do a thing, he cannot escape liability for damages for proof that as events turned out performance is futile or even impossible.²⁵

This rule created extra ordinary hardship to the contracting parties, because irrespective of the frustrating event and even if the performance of the contractual obligation is practically impossible, a party is nevertheless bound. Apparently, there is no logic or any sense of fairness or justice in this rule.

their bargaining processes and it is not within the purview of court to make contract for parties. Once terms are agreed upon, parties are not generally allowed to derogate from them. See *Ashaka v Nwachukwu* [2013] LPELR – 20272; *Garba v Lawal* [2013] LPELR 20734 (CA); and *Agbareh v Emma* [2008] All FWLR (Pt. 409) 559.

²³ [1647] Aleyn 26; Simpson 91 LQR 247 at 269-273.

²⁴ *ibid.*

²⁵ *ibid.*

3.1.2.2 The Rule in *Taylor v Caldwell*²⁶

Subsequently, and fathoming the trouble caused by the rule in *Paradine's case*,²⁷ the court assuaged the hardship 'by providing that if the further fulfilment of the contract is brought to an abrupt stop by some irresistible and extraneous case for which neither party is responsible, the contract shall terminate forthwith and the parties be discharged.'²⁸ In *Taylor's case*, there was a contractual agreement in 1863, where the Surrey Gardens and Music Hall were leased for purposes of concerts and other events scheduled to take place in June and August, 1863. After the conclusion of the agreement but prior to the commencement of the first concert event, the entire hall, which was the subject matter of the lease, was gutted by fire. Neither of the parties was at a fault. This affected the concert, and prompted the plaintiffs to file a case for breach of contract. It was held that 'since performance was impossible, this event excused the parties from any further obligations under the contract.' Blackburn J, justified this approach on the basis that 'where the parties must have known from the beginning that the contract was dependent on the continued existence of a particular thing, the contract must be construed: ... as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without the fault of the contractor.'²⁹

This relaxation of the harshness in *Paradine's case* continues to apply in subsequent cases. In *Krell v Henty*,³⁰ where the defendant rented a flat from the plaintiff for the sole purpose of witnessing the coronation of King Edward VII even though the 'coronation ceremony' was not expressly stated in the contract. Unfortunately, the event was cancelled and this rendered the renting of the flat useless to the defendant because the main reason why the flat was rented was to watch the coronation of the King. The court held that 'the cancellation of the coronation event amounts to frustration, defeats the main purpose of the contract.'³¹ Borrowing a leaf from the decision of the Court in *Krell v Henry*,³² if the postponement of the event is caused by the State's response to COVID-19 in the form of Regulations restricting movement except essential services, then parties to the contract could successfully invoke the principle applied in this case, to discharge the contract. The Nigerian Supreme Court has lent credence to this proposition in *Nwaolisah v Nwabufoh*,³³ where it was held *inter alia* that 'if following the formation of a contract, an event occurs that renders further performance

²⁶ [1863] 3 B & S 826.

²⁷ [1647] Aleyn 26; Simpson 91 LQR 247 at 269-273

²⁸ *Ibid.*

²⁹ See further discussion on this: the dictum of Lord Wright in *Denny, Mott and Dickson Ltd v James Fraser & Co Ltd* [1944] AC 265, at 274-275, observing *inter alia* that the 'doctrine of frustration has been invented by the courts in order to supplement the defects of the actual contract.'; Lord Simmonds in *Tsakiroglou & Co Ltd v Noble and Thorl GmbH* [1962] AC 93 at 115 confirmed Lord Wright's dictum, commenting that 'the courts would refuse to apply the doctrine of frustration unless they consider that to hold the parties to further performance would, in the light of the changed circumstances, alter the fundamental nature of the contract.'

³⁰ [1903] 2 KB 740. The Court of Appeal took the view that the procession was the foundation of the contract and that the effect of its cancellation was to discharge the parties from further performance of their obligations. This reasoning was however criticized in *Larrinaga & Co. Ltd v Societe Franco-Americane des Phosphates de Medulla* [1922] 29 Com Cas 1 at 7, per Lord Finlay; *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524 at 529, per Lord Wright.

³¹ *Ibid.*

³² [1903] 2 KB 740

³³ [2011] 6 (Pt. 11) MJSC 80 at 84

impossible, illegal or radically different from that which was originally envisaged, the parties will be relieved from further obligations and may be able to recover money and goods transferred under the contract.’ Obviously, this decision restates the common law position on the effect of frustration on contractual obligations.

3.1.3 Frustrating Event

In a nutshell, what constitutes a ‘frustration’ is a question of fact, which must be assessed on its own merits, according to the surrounding circumstances.³⁴ It could generally be said that a frustrating event is one which:

- i. arises after the formation of the contract;
- ii. makes the performance of the contract as contemplated by the parties impossible, unlawful or fundamentally different from what was initially envisaged by the parties. For example, recent regulations issued by various governments on the restriction of movement;³⁵
- iii. is not deliberately occasioned by one of the parties to the contract purporting to rely on it; and
- iv. is not foreseeable or envisaged by the contract.

3.1.3.1 Consequences of Frustration

What then happens to the contractual obligations where frustration is successfully invoked? The common law takes a hard stance on the consequences of frustration. Obviously, without any prompting by either of the parties, the contract is discharged automatically, signifying cancellation of subsequent or future performance of the contractual obligations. Thus, in the event of frustration, the contract comes to an abrupt end. The implication of this automatic discharge of the contract, at common law, is prospective in dimension. What does that mean to the obligations of the contracting parties? It follows that parties are relieved from their future obligations but not prior obligations before the frustrating event. Undoubtedly, this would be too harsh and lead to the unjust enrichment of one of the parties.³⁶ In other words, a to use the classic phrase, ‘the loss lies where it falls’.

³⁴ There has been much discussion as to whether frustration presents a question of fact or law. One answer is suggested by Devlin J in *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401 at 435. While the application of the doctrine of frustration is a matter of law, the assessment of a period of delay sufficient to constitute frustration is a question of fact. It would appear that there are in fact three questions. First, what are the general rules about the doctrine of frustration? This is clearly a question of law. Secondly, what are the primary facts? This is equally clearly a question of fact. Thirdly, how is the first to be applied to the second? This is a question of degree or judgment which does not fall naturally as a matter of abstract logic into either category or the practical question is the extent to which the trier of fact’s views is open to challenge. See *Cheshire and Fifoot*, and *Furmson’s Law of Contract* (Oxford University Press, 2006).

³⁵ See COVID-19 Regulations issued by the Federal Government of Nigeria pursuant to the Quarantine Act. See also *Davis Contractors Ltd v Fareham UDC* [1956] AC 696; *Finlvet AG v Vinava Shipping Co. Ltd* [1983] 2 All ER 658; *United Cinema & Film Distribution Co Ltd v The Shell B.P. Petroleum Development Company of Nigeria Ltd* [1973] 3 UILR 439; *Ajuna Uncle Johnson v U.A.C. Nigeria Ltd* [1976] 3 ULLR 439. Note that the fact that performance of the contract becomes onerous, tedious or more expensive than originally contemplated by the parties to the contract, is irrelevant and will not necessarily qualify as ‘frustration’.

³⁶ *Appleby v Myers* [1867] LR 2 CP 651. In this case, the court came to a conclusion that ‘the contract was frustrated and both parties were discharged from the future performance. Accordingly, the plaintiffs were not entitled to be paid in respect of any of the work that had been completed because of the obligation to pay had not arisen at the time the contract was frustrated.’

3.1.3.2 The Rule in *Chandler v Webster*

The rule that legal rights already ‘accrued remain intact and irrecoverable’ was articulated in the case of *Chandler v Webster*.³⁷ In that case, ‘the plaintiff agreed to hire a room from the defendant in order to watch coronation procession and was required by the contract to pay 141 pounds immediately. He however paid 100 pounds initially. Before he paid the balance of 41 pounds, the procession was canceled. He sought to recover the 100 pounds already paid. It was held that any payment made before the cancellation is not affected.’

3.1.3.3 The Rule in *Fibrosa’s Case*

The House of Lords had an opportunity to remedy the hardship occasioned by the rule in *Chandler v Webster*.³⁸ In the celebrated case of *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*,³⁹ the House of Lords quashed the decision and provided some succour. In the *Fibrosa* case,⁴⁰ an English company agreed in 1939 to make machinery for a Polish buyer at a price of 4,800 pounds. The buyer paid an initial sum of 1,000 pounds. War broke out and Poland was occupied by Germany. The contract was therefore frustrated. In this action by the London agent of the Polish Company to recover the 1,000 pounds paid in advance since the contract had been frustrated by the outbreak of war, it was held that the London agent had no further liability. Additionally, the agent succeeded in recovering the 1,000 pounds paid since they had received absolutely nothing in return for the 1,000 pounds, that is, there was a total failure of consideration.⁴¹

The rationale behind this rule is that if a party paid money as provided in the underlying contract, but there is a total failure of consideration before the frustrating event, then the party is allowed to recover the payment. This was impossible under the rule in *Chandler v Webster*.⁴² This appears to ameliorate the palpable harshness and injustice occasioned in *Chandler’s case*. However, it creates hardship and unnecessary suffering on the other party who collected the money and failed to furnish the consideration. For example, where a machine supplier collects a deposit to manufacture a particular machine and goes ahead to procure all the necessary spare parts and commence the process of manufacturing before the contract is frustrated, the manufacturer would have incurred considerable financial cost. Based on *Fibrosa’s* rule, the deposit would be recoverable, but the repercussion would be devastating and put the manufacturer in a very precarious situation. So, while the House of Lords closed the door in *Chandler’s case*, they left it ajar in *Fibrosa’s case*. As observed by one author,⁴³ ‘in fact, it is obvious that the seller would bear most of the brunt having already altered his position and incurred manufacturing cost.’ This calls for an urgent and holistic reconsideration as the law is far from perfect.

³⁷ [1904] 1 KB 493.

³⁸ [1904] 1 K.B. 493.

³⁹ [1943] A.C. 32; [1942] 2 All ER 122

⁴⁰ [1942] 2 All ER 122.

⁴¹ *Ibid.*

⁴² [1904] 1 K.B. 493

⁴³ Jonathan Morgan, *Great Debates in Contract Law*, (1st edn, Palgrave Macmillan New York, USA 2012), 124.

3.2 Statutory Intervention

As observed, there is no end in sight from the common law's perspectives in addressing the consequences of frustration between the contracting parties. This called the Legislature to arms, by resorting to providing a statutory intervention to balance the inequality, injustice and hardship occasioned by both *Chandlers* and *Fibrosa's* cases respectively. To this extent, the Law Reform (Frustrated Contracts) Act,⁴⁴ was enacted in Britain. In Nigeria, the Law was replicated and applicable to the Federal Capital Territory of Lagos as the Law Reform (Contracts) Act 1961.⁴⁵ In the same vein, most of the states from the eastern part of the country have also enacted similar laws with certain modifications. Sadly, the Northern states have failed to take the hint from their counterparts and are still grappling with the principles under the common law.

3.2.1 Salient Statutory Provisions

One of the biggest takeaways of the statutory intervention is the discretion given to courts to equitably apportion loss and balance the difficulties and hardship posed by the common law. Interestingly, the decision reached in *Fibrosa's* case was reaffirmed by allowing the recovery of the money advanced in carrying out the contract. Likewise, money due prior to the frustrating event would not be paid. Thus, consideration furnished prior to the frustrating event could be recovered. A hypothetical example will make the point better. For instance, if Damujugu paid a deposit of ₦10,000,000.00 to Ladan for the supply of 1000 tons of rice. On his part, Ladan supplied 200 tons of rice to Damujugu, but unfortunately, the contract becomes frustrated. Here, the law confers a discretion on the court to take into consideration the surrounding circumstances of the case, to apportion the appropriate amount recoverable. Thus, Ladan, who had incurred some expenses in the process of supplying the rice prior to the frustrating event, is entitled to some compensation, based on the court's discretion.⁴⁶ *BP Exploration Co (Libya) Ltd v Hunt*,⁴⁷ is the leading authority here. In that case, the defendant, Mr Hunt, owned an oil concession in Libya. He entered into a concession with the Plaintiff (BP Exploration Co. Ltd) for the purpose of exploring, developing and operating oil in one of the marginal fields granted by Libya. He was also entitled to receive contributions in form of both oil and cash. On its part, the Plaintiff, was entitled to receive 50% share of the concession. In the event of an oil discovery, the plaintiff would be reimbursed for all its expenses out of the defendant's share of the oil. Subsequently, any expenditures incurred in the process of the oil production, would be shared equally between the parties. Luck smiled on the parties, as great deal of oil was found and the production came into full force in 1967. Four years later, there was a change of Government in Libya and the marginal field was expropriated by the Government, which led to the frustration of the contract. However, prior to the frustration, the Plaintiff had incurred the production cost of \$8.7 million and also paid another whopping

⁴⁴ 1942.

⁴⁵ Cap. 114 Laws of Lagos State 1994

⁴⁶ AM Adebayo, *Case Book on Law of Contract* (1st edn, Princeton & Associates Publishing Co Ltd 2015) 111. The author is of the view that: '[T]he law allows a party who had done something towards the execution of the contract, which constitutes a valuable benefit to the other (other than payment of money), to recover a sum of money not exceeding the value of the benefit so conferred by him on the other party.'

⁴⁷ [1979] 1 WLR 783.

amount of \$10 million to the defendant. They also got \$62 million worth of oil proceeds from the marginal field. Enraged by the unfolding events, the plaintiffs instituted a suit for the retrieval of all the moneys paid to the defendant under the concession agreement and also ‘other valuable benefits derived by the defendant under the concession agreement.’ Goff J held that ‘the contract was frustrated and awarded the plaintiff a just sum under section 1(3) of the Law Reform (Frustrated Contracts) 1943. He stated that the fundamental principle underlying the Act itself is prevention of the unjust enrichment of either party to the contract at the other’s expense.⁴⁸ He also discovered that ‘the valuable benefit obtained by the defendant, following frustration of the contract, consisted of the value of the oil he had actually obtained from the oil field, plus the compensation received from the Libyan government. This produced a valuable benefit of 84 million dollars. In assessing the just sum recoverable by the Plaintiff, Goff J took into account the expenses incurred by the plaintiff and the contributions received by the defendant and then deducted from this figure the value of the reimbursement oil received by the plaintiff. This produced a total of 36 million dollars, which being less than the defendant’s valuable benefit, was awarded in full.⁴⁹

3.2.2 Limitations

For every general rule, there is an exception and so is it in the case of the doctrine of frustration. The courts, before arriving at a decision as to whether a contract is frustrated, would take into cognizance the surrounding circumstances of the contract vis-à-vis the frustration event, intention of the parties and interest of justice. In so doing, the courts have consistently narrowed the effect of frustration and do not apply it where it is self-induced⁵⁰ and the event is foreseen or anticipated or provided for.⁵¹

3.3 A Force Majeure to the Rescue?

What then happens if parties are not well protected by the doctrine of frustration? As discussed, the doctrine of frustration is very narrow and limited in its scope, and comes to the rescue in some very limited circumstances. As an escaping route, parties who find they are incapable to accomplish their contractual undertakings due to the COVID-19 pandemic, could therefore invoke their contractual freedom to expressly insert a force majeure clause. This also offers better clarity, assurance, and eliminates all forms of ambiguity and uncertainty.

3.3.1 Civil Law Perspective

Literally, *force majeure* means ‘superior or greater force’ and it owes its origin to French Civil Law.⁵² From the perspective of Civil Law, the events constituting *force majeure* are clearly

⁴⁸ *ibid.*

⁴⁹ *ibid.*

⁵⁰ It is settled that where one of the parties to the contract is responsible for the frustrating event due to his recklessness or sheer negligence, the conduct will be considered as self-induced frustration, which does not amount to frustration. See generally *Mazin Eng. Ltd v Tower Aluminum* [1993] 5 NWLR (Pt 295) 526; *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524; *Ocean Tramp Tankers Corporation v VO Soyfracht (The Eugenia)* [1964] 2 QB 226. In *The Eugenia* Denning MR., observed thus: one thing that is obvious is that the charterers cannot rely on the fact that the *Eugenia* was trapped in the canal, for that was their own fault. They were in breach of the war clause in entering it. They cannot rely on self-induced frustration.

⁵¹ *Walton Harvey Ltd v Walker & Homfrays* [1931] 1 Ch 274.

⁵² See Code 1302 of the France Civil Obligations. Other Civil Law jurisdictions that operate similar systems like France includes Germany, Italy, Spain, Greece, Egypt, UAE etc,

and tersely defined and regulated and could be implied in the contract without express stipulation. Thus, a 'force majeure' event creates an unconditional excuse 'on the part of the debtor of all liability for non-performance of its obligations and without any compensation, to the extent that it even operates as a discharge from that obligation even without any express provision in the contract'.⁵³ There is no hard and fast rule or universally accepted definition of force majeure. Nevertheless, it can be regarded as 'an exceptional or supervening event or circumstance beyond the reasonable control of the parties that prevents (or delays, obstructs or hinders, which are lower standards) a party from performing its obligations and which could not reasonably have been provided against, avoided or overcome.'⁵⁴ Generally, parties to a contract usually complement the definition of force majeure by explicitly incorporating an array of certain events that constitute force majeure. Such list could include among other things such events as 'epidemics' or 'pandemics'. In some instances, even if words such as 'pandemic' or 'epidemic' are not expressly mentioned, it would not hinder or prevent a party from invoking force majeure under other instances such as adverse regulation, lockdown, emergency or complete shutdown, that are completely beyond the parties' control. The obvious question is: what then happens if the force majeure event occurs? Apparently, force majeure shields a defaulting party from discharging its contractual obligations. Nevertheless, invoking a force majeure *per se*, is insufficient, as the party would go an extra mile to establish a link between the force majeure event and the non-performance of the contractual obligation, as contemplated by the force majeure clause. Furthermore, apart from establishing a link, a party must take all reasonable steps to circumvent or assuage the event and its consequence, and show that having done that there are no other means of carrying out the contract. To determine a reasonable step, is a question of fact, and depends on the surrounding circumstances of each contract. It is interesting to note that the fact that a duty under a contract has become more onerous to perform does not to qualify as a force majeure event.⁵⁵ In a nutshell, to qualify as a force majeure, the clause should tersely and unambiguously specify the event.

Specifically, articles 1147 and 1148 of the French Napoleonic Civil Code extensively provide the legal basis of force majeure, which is captioned under 'damages for non-performance of the obligation'.⁵⁶

⁵³ Catherine Kessedjian, 'Competing Approaches to Force Majeure and Hardship' (2005) 25 *Internal Review Law & Economics* 27.

⁵⁴ As Stone aptly clarifies this position thus: 'Where there is a specific provision in a contract to deal with such issues, the contract will not generally be frustrated.' See Richard Stone, *The Modern Law of Contract* (1st edn, Routledge Cavendish 2009) 109. See also, *Jackson v Union Marine Insurance Co. Ltd* [1874] LR 10 CP 125. A further example is the issuance by the Government of Nigeria of the COVID-19 Regulation 2020, which was made under the inherent powers of the President pursuant to sections 2, 3, and 4 of the Quarantine Act.

⁵⁵ See *Tsakiroglou & Co Ltd v Noblee Thorl GMBH* [1962] A.C. 93.

⁵⁶ These articles are regarded as applying to *obligations de resultat* i.e. to cases of strict liability. They introduce, alongside force majeure, two other concepts, *cause étrangère* and *cas fortuit*. Article 1147 is treated as the more general statement, expressed in terms of causation and requiring the debtor to show that the non-performance has a cause which is extraneous to him and for which he is not responsible. Article 1148 appears to give two instances of such a *cause étrangère*, but it is now agreed that no useful distinction can be made between force majeure and *cas fortuit* and the former term is almost exclusively used. It does not, however, embrace all forms of *cause étrangère*. It is usual to identify in addition: (a) an act of a third party which makes performance impossible, and (b) an act or fault of the creditor.

It is not every ‘event’ that qualifies as a force majeure. Such event capable of constituting a force majeure must satisfy four basic criteria to wit: irresistible,⁵⁷ unforeseeable,⁵⁸ external,⁵⁹ and impossible (not just merely onerous or difficult). Towing the same line of reasoning, the UAE adopts the same approach with the French Civil Code in determining what constitutes a force majeure event. Specifically, article 273(1) provides that ‘in contracts binding on both parties, if force majeure supervenes which makes the performance of the contract impossible, the corresponding obligation shall cease, and the contract shall be automatically cancelled.’⁶⁰ Thus, an event of ‘force majeure’ inevitably discharges a contract provided that the event was unanticipated at the time of contracting, cannot be prevented, and therefore making the contract impossible to perform. To this extent, the Dubai Court of Cassation has ruled that ‘... if an event of force majeure has been established according to Article 273 (1), the obligation will be terminated in its entirety without any compensation for damage resulting from such non-performance, ...’.⁶¹ Interestingly, in some instances, performance of the contractual obligations would be difficult to execute because it is too onerous, cumbersome, but not impossible. In this instance, the principle of ‘exceptional circumstances’ comes into play.

3.3.1.1 The Maltese Position

The position under Maltese law is that force majeure is regarded as a defence for failure to discharge contractual obligations. Specifically, the Maltese law provides that ‘the debtor, even though there has been no bad faith on his part, shall be liable for damages, where competent, both for the non-performance of the obligation as well as for the delay in the performance thereof, unless he proves that the non-performance or delay was due to an extraneous cause not imputable to him.’⁶² In the same vein, Article 1134 of the Maltese Civil Code provides that ‘the debtor shall not be liable for damages if he was prevented from giving or doing the thing that he undertook to give or to do, or if he did the thing that he was forbidden to do, in consequence of an irresistible force or a fortuitous event.’⁶³ It is pertinent to determine what amounts to ‘an irresistible force’ or a ‘fortuitous event’ under Maltese Law? In shedding light on this point, the court in *Margaret Gauci v Pierre Caruana*,⁶⁴ referred to the Appeal Court decision in *Mizzi vs Paris*⁶⁵ where the Maltese Court of Appeal held that ‘...an irresistible force is one that could not be avoided by the exercise of due diligence. It cannot be claimed if a

⁵⁷ For an event to satisfy the requirement of ‘irresistibility’ it must be of such unpreventable nature, like earthquakes, and hurricanes, or other natural disasters, that are unavoidable.

⁵⁸ The event must be such that it could not have been foreseen. Otherwise, it must be prepared for, and therefore outside the remit of force majeure. This is a strict requirement and requires a high bar to comply with. For instance, in CE 9, April 1962, Chais d’Armagnac the Council of State adjudged that, since a flood had occurred 69 years before the one that caused the damage at issue, the latter flood was predictable. A similar decision was reached in the Administrative Court of Grenoble, 19 June 1974 Dame Bosvy where an avalanche was judged to be predictable since another had occurred around 50 years before.’

⁵⁹ In this aspect, the parties shouldn’t have been responsible for the emergence of the event.

⁶⁰ UAE Civil Code

⁶¹ (49/2014, Real Estate Cassation – Dubai Court).

⁶² Article 1134 of Maltese Civil Code.

⁶³ *ibid*

⁶⁴ [2009] 1668/1995/IAF

⁶⁵ [2017] 1773/2176/IAF

person has contributed to the damage by a positive or negative act.’ Thus, it is not sufficient for there to be an unusual disproportionate event, that is a product of the forces of nature, but it must be inevitable, in that it could not have been avoided through the exercise of due diligence of a *bonus pater familias*. Furthermore, in *Bartolo v Elesolar Company Limited*,⁶⁶ the court held that the onus of ascertaining the impossibility of performance lies with the person raising the defence.

In Malta, the Convention on the Contract for International Carriage of Goods by Road has been incorporated into its legal system.⁶⁷ Article 17(2) specifically makes a provision for a force majeure clause. In interpreting the clause, Hill and Massent stated among other things that ‘what the carrier must show is more akin to the plea of impossibility of performance of a contract which involves an event which renders the contract not merely more onerous but completely impossible of performance... the event must be one which literally could not be avoided by the carrier.’⁶⁸ On his own part, David Glass, submitted that ‘the carrier cannot hope, simply that ordinary care was taken, to escape liability. He must show that in respect of the particular loss or damage, no failing on his part could have contributed to it.’⁶⁹ Based on the foregoing, a party invoking force majeure must clearly establish a strong evidence to prove not only the actual cause but the linkage on how it arose devoid of any fault on his part.

3.3.2 Exceptional Circumstances

From the perspective of civil law, parties are allowed to modify, vary or suspend the performance of the contract under exceptional circumstances. However, there are certain conditions which must be fulfilled before parties could benefit from the ‘exceptional circumstances.’ Thus, the event must be: strictly of public nature, not foreseeable at the time of contracting, unavoidable, and the task has become impossible to accomplish or perform as a result. Article 249 (1) of the UAE Civil Code reads:

If exceptional circumstances of public nature, which could not have been foreseen, occur as a result of which the performance of the contractual obligation, even if not impossible, becomes oppressive for the debtor so as to threaten him with grave loss, it shall be permissible for the judge, under the circumstances and after weighing up the interests of each party, to reduce the oppressive obligation to a reasonable level if justice so requires, and any agreement to the contrary shall be void.⁷⁰

In this respect, the Dubai Court of Cassation has ruled that:

... as for the exceptional circumstances of public nature, although it doesn't make the performance impossible which would justify the automatic cancelation, it becomes burdensome for the debtor that would threaten of grave loss, and requires the

⁶⁶ First Hall Civil Court JRM 509/19991/1

⁶⁷ International Carriage of Goods by Road Act, Chapter 486, of the Laws of Malta (CMR).

⁶⁸ Andrew Massent and David Glass, *Contracts for the International Carriage of Goods by Road* (Lloyd's of London Press Ltd 1948).

⁶⁹ David Glass, ‘The Divided Heart of the CMR Convention’ (1999) *Economic Trade Law* 14.

⁷⁰ Article 249 (1) of the UAE Civil Code.

interference of the judge to reduce such onerous obligation to reasonable limits, without justifying the cancelation or termination of the contract.⁷¹

3.4 Nature of Force Majeure Clause

The Covid-19 pandemic has triggered significant concern to parties to the contract clamoring for a way out on how to discharge, vary, or suspend their contractual undertakings under the premise of force majeure clauses. It is squarely within the discretion of contracting parties to draft a force majeure clause to suit the contract contemplated. In drafting a force majeure clause in a contract, parties are at liberty to freely coin a force majeure clause to accommodate their exigencies. Paradoxically, force majeure clauses often provide key essential elements, which must be satisfied before successfully triggering the clause. They are as follows: the event, impact, and consequences of the event. These three postulations, which potentially determine the validity or otherwise of a force majeure clause, would be discussed extensively in the following posers.

3.4.1 The Event

There is no hard and fast rule for clearly articulating or defining a force majeure event, as each provision is considered on its own merit. However, some general guidelines have been formulated to shed some lights on whether an event qualifies as a force majeure. The leading question here is determining when the COVID-19 pandemic has led to the emergence of a force majeure event? Sometimes, despite the presence of a force majeure clause in a contract, parties may lock horns over complying or agreeing to the clause, and may resort to court for an interpretation. In so doing, over the time, courts have formulated guidelines on the interpretation or construction of force majeure clauses. The general rule is the *contra proferentum rule*.

3.4.2 Impact of the force majeure event

Once an event is qualified to constitute a force majeure, there is an obligation on the party seeking to invoke it to establish that: ‘it was prevented, hindered or delayed from performing its contractual obligations as result of the event; the event/inability to perform was beyond its control; and there were no reasonable steps the party could have taken to avoid the event or the consequences.’⁷² Additionally, there is additional obligation of reporting the incident of the force majeure.

3.4.3 What Constitutes Sufficient Notice?

Force majeure provisions generally require that the party asserting excuse of performance notify the counterparty of the relevant force majeure event(s) and provide required support. Some contracts contain detailed procedures and timelines for such notice. Some states require

⁷¹ Commercial Cassation – Dubai Court, 374/2011. In practice, the courts are reluctant to apply the principle of exceptional circumstances in events that generally can be predicted/foreseen at the time of contracting (e.g., changes in price, delay in obtaining permits and licenses, market fluctuation, etc).

⁷² The term ‘prevent’ has been interpreted to have quite a narrow meaning; the party claiming the force majeure must show that performance of its obligations was legally or physically impossible, not just more expensive than what was originally anticipated. See Campbell (n 12).

strict compliance with the notice provision in the contract when providing notice of force majeure. If the force majeure provision is silent concerning notice, the asserting party nevertheless may want to provide preliminary notice of the possibility of force majeure once it becomes evident that performance may be delayed or rendered impossible. The notice can always be amended or supplemented as additional details become available. Thus, a party seeking to rely on the force majeure clause must notify the other party of the fact that the force majeure event is impeding its performance within a specified time frame. The notice will usually be required to include detailed information about the force majeure event and its impact on the party's ability to perform its obligations. Most of the times, the reporting obligation is a condition precedent or *sine qua non* for a party to successfully invoke a force majeure clause.⁷³ There is no hard and fast rule as to the nature and content of notice. It suffices to state that generally, force majeure clauses do provide for meticulous processes and timelines for such notice. However, where the clause is silent on notice, the notifying party should take all the necessary steps to serve preliminary notice of the likelihood of *force majeure* once it appears apparent that performance of the contractual obligations may be hampered or impossible. Such notice should be flexible, swift, reasonable, possible to comply, and accommodate any other additional information.

Parties should always be cautious before asserting *force majeure* to avoid prematurely triggering a claim for breach of contract or anticipatory repudiation. The counterparty may seek to terminate the contract or avoid their own performance after receiving a notice of a *force majeure* event. If a legitimate *force majeure* defense is asserted, the party asserting *force majeure* will not be liable for breach of contract.

Interestingly, under English law, the position on requirement of notice is not without some ambiguities and controversy. In *Adyard Abu Dhabi v SD Marine Services*,⁷⁴ the shipbuilding contract in dispute categorically provided that 'in the event that the shipyard failed to notify the buyer of a force majeure event as agreed, the shipyard would not be entitled to rely on the force majeure event to extend the delivery date.' The English High Court held that 'such requirement was binding on the shipyard.' However, if there is no express notice requirement, there are two conflicting views. One view is that the shipyard still has the right to invoke the force majeure clause, but the shipyard should be liable for damages due to the delay in notification to the ship owner. The other view is that the shipyard will completely lose the right to invoke the force majeure clause.

3.4.4 Consequences

Generally, presence of a force majeure clause in a contract does not *ipso facto* mean that a party has a right to repudiate the contract upon proving the occurrence of a force majeure event. However, what it does is the creation of an opening or window for suspending the performance of obligations pending the cessation of the event, or in the alternative, an option to terminate the contract. Usually, a *force majeure* clause comes into effect once parties find it impossible to discharge their contractual obligations, but not when performance simply becomes

⁷³ In some countries, such as China, government authorities will sometimes issue companies with 'force majeure certificates' in cases where there is an event of broad impact such as the COVID-19 outbreak.

⁷⁴ [2011] EWHC 248.

burdensome. Furthermore, the clause would squarely address concerns on the aftermath of the force majeure event which precluded a party from discharging its obligation.⁷⁵ Normally, parties to the contract are excused from performing their contractual obligations until the force majeure event is abated or ceases to take place. For instance, when governments lift COVID-19 lockdown orders, then parties would resume performing their contractual obligations. Otherwise, everything is brought to a halt within the period of the lockdown. It is expedient to specifically provide in the force majeure clause a provision for constant updates by the party relying on the clause. Generally, force majeure clauses provide a way out: if the force majeure event is not abated within a certain period of time, then parties have an option to rescind the contract.

4. Mitigation Requirements and Causation

To soften the harshness of the force majeure event on the contracting parties, it is commonly expected that parties should endeavour to alleviate the impact of the force majeure clause.⁷⁶ Relatedly, there is the question whether the force majeure event must be the sole cause of the non-performance by the party relying on the force majeure event. This was raised and decided by the Court of Appeal in the 2019 case of *Classic Maritime Inc v Limbungan Makmur*.⁷⁷ In that case, Limbungan, having chartered a ship, sought force majeure relief on the basis that a dam had burst and stopped production at a mine from which Limbungan had been procuring iron ore, which it then shipped to Malaysia. However, there was evidence to show that Limbungan would not have wanted to ship the iron ore anyway, as demand for iron ore in Malaysia had declined. The Court held that Limbungan is not entitled to invoke the force majeure clause, on the ground that it required a party seeking relief to be ready, willing and able to perform the contract ‘but for’ the force majeure event. However, whether the ‘but for’ test will apply will depend on the wording used in the relevant force majeure clause.

5. Guide for Drafting a Force Majeure Clause

⁷⁵ In general, a force majeure provision excuses performance based upon the occurrence of specific qualifying events that constitute *force majeure* or that fall within the purview of a broader ‘catch-all’ category of events that may qualify as *force majeure* events. These may include acts of God, war, fire, national emergencies, labour strikes, diseases, pandemics, epidemics, natural disasters, governmental acts or regulations, and other acts beyond the control of the parties.

⁷⁶ Nevertheless, even if the clause does not expressly impose an obligation on a party to take mitigation measures, in practice the party may still need to show that it could not mitigate the effects, to demonstrate that the force majeure event actually caused the party to be unable to perform its obligations under the contract. Therefore, if alternative modes of performance are available but have not been pursued by a party to mitigate or prevent the impact of the force majeure event, it becomes less likely that a court will consider a party's non-performance attributable solely to the force majeure event. See Peter J Wiazowski, ‘Contract Performance in a Coronavirus World: Force Majeure Clauses and the Doctrine of Frustration’ <<https://www.nortonrosefulbright.com/en-ca/knowledge/publications/844d7cf4/contract-performance-in-a-coronavirus-world-force-majeure-clauses-and-the-doctrine-of-frustration>> accessed 31 March 2022.

⁷⁷ *Classic Maritime Inc v Limbungan Makmur SDN* [2019] EWCA Civ 1102 BHD. The ratio decidendi in that case was that there was an absolute obligation conferred on Limbungan to ship the cargoes as agreed. As observed by Males LJ that ‘imbungan’s obligation was not to be ready and willing to supply a cargo in each case, but actually to supply one.’ They took the risk of non-delivery for some reason whatsoever.

It is quite expedient, if parties are contracting under English law, to take into consideration the possibility of inserting appropriate clauses to address the impact of COVID-19 and any other epidemic. The following points would provide insight on the drafting ploy of an appropriate force majeure clause under a shipbuilding contract. Notwithstanding the standard form adopted in the shipbuilding contract, for a shipyard to successfully invoke force majeure and extend the delivery date, the shipyard must satisfy the following three requirements:

- a. There has been a force majeure event as clearly outlined in the force majeure clause contained in the shipbuilding contract;
- b. Failure to discharge the obligation to deliver the ship in time is caused by none other factors other than the force majeure event; and
- c. The notice requirements set out in the force majeure clause are satisfied.

Generally, to be effective, a force majeure clause consists of two main portions to wit: the definition of what constitutes a ‘force majeure event’ and the main or operative provisions which deal with what happens due to the occurrence of a force majeure event. For instance, a force majeure clause would provide that ‘performance of an obligation is excused when it is prevented or delayed by an irresistible, superhuman cause, unless the parties have expressly agreed to the contrary’.

In shipbuilding contracts, force majeure clauses are mutually agreed upon by the parties. The clauses are usually embedded within clauses concerning any delay in the delivery of the ship, and the possible categories of the events include ‘not foreseen or anticipated at the time of contract’, ‘beyond the control of the ship builder’, and ‘causing delay in delivery of the ship’.

5.1 Specimen of Force Majeure Clause in a Shipping Building Contract

In most standard shipbuilding contracts, the following force majeure specimen clause is widely used:

In the case of Force Majeure Delay, the Delivery Date shall be postponed by the number of days corresponding to the net delay in delivery as set out below. It shall be considered a Force Majeure Delay if the Delivery and Acceptance of the Vessel is prevented or delayed as a consequence of extraordinary circumstances or events beyond the Builder's control, such as:

- a. Acts of God; acts of princes and rulers; requirements of government authorities; war or warlike condition, civil commotion or riots, mobilisation; sabotage; strike or lockout (except local labour disturbances at the Builder's yard); quarantines; flood; typhoons, hurricanes; storms or other extraordinary weather conditions not included in normal planning; earthquakes; tidal waves, landslides; fires, explosions, collisions or stranding; import or export bans or restrictions; prolonged failure, shortage or restriction of electrical current, oil or gas; and/or any other extraordinary event beyond the control of the Builder;
- b. Late delivery of major parts or of important performance by Subcontractor(s) where the cause of delay would have been recognised as Force Majeure Delay under this provision if it had affected the Builder, provided that the Builder has shown due

diligence in its choice of Subcontractor and ensured a reasonable margin for delays so that at the time of ordering same it could reasonably be expected by the Builder to be delivered in time;

- c. Delays in the Builder's other commitments resulting from Force Majeure as herein described directly causing a delay of the Builder's performance hereunder;

Provided always:

That there shall be no Force Majeure Delay if such delay could reasonably have been foreseen or anticipated by the Builder on the Date of Contract, or that it could have been prevented or overcome by the exercise of due diligence by the Builder, its servants, employees or Subcontractors.

The provisions under sub-clause (a) above apply whether or not the Force Majeure occurs after the Contract Delivery Date. The Builder is obliged to do its utmost to avoid or minimise the Force Majeure Delay.

Gleaning from the above comprehensive force majeure standard clause, it is crystal clear that the clause is apt and covers all the essential requirements of a valid force majeure event. Although, the events listed do not expressly include the Covid-19 Pandemic, with the enactment of the catch-all phrase 'and/or any other extraordinary event beyond the control of the Builder', the COVID-19 Pandemic is fully covered.

6. Recommendations

Certainty and time are essential in a contractual relationship, especially complex and international transactions like shipbuilding contracts. It is of crucial importance for a solicitor to be vigilant, meticulous and apt in advising prospective clients before they agree clauses, especially force majeure clauses. It is always better to avoid incurring the default application of the common law doctrine of frustration, by taking a peep or hint into the civil law concept of force majeure. In so doing, the following steps should serve as guides when coming up with a force majeure clause:

- i. **Do Not Shoot Yourself in the Foot:** Provide an apt, and specific definition of force majeure which is sufficient enough to reflect and cover the risks. In essence, you should not be too narrow and restrictive. An example will suffice here. If, for instance, you state specific events to describe force majeure (e.g. storm, lockdown), do not follow the list with a phrase referring to 'other similar' causes/events. The implication here is that courts would narrowly interpret the contractual provisions, and end up limiting the application of the force majeure clause to only those specific events that are 'similar' to the express events specifically stated in the force majeure clause. To avoid that it is recommended to close the list with the phrase 'any other reason not within the reasonable control of a party'. The implication here is that the risk of narrow interpretation by a court is completely avoided, and apparently, courts would interpret the force majeure clause to accommodate an all-encompassing range of events.

- ii. **Knock-on Effect of the Event:** It is the usual practice that courts are inclined to adopt a narrow interpretation of the contractual provisions, including the force majeure clause. It is always better to not only state the specific events but the knock-on effect of the event.

Conclusion

Common-Law does not recognise force majeure as a matter of law, unlike some civil law jurisdictions. To claim force majeure under an English Law contract, the contract should expressly include a force majeure clause. If a contract does not include a force majeure clause, the common law doctrine of ‘frustration’ applies. From the Common Law perspective, frustration applies in extreme scenarios and then for a very narrow set of events. An event that deprives a contractual party of the expected benefits of actual performance, is alone, generally not sufficient to claim that the contract has been frustrated. However, parties find solace in force majeure clauses, although, they are usually interpreted strictly against the maker ensuring that they are not used unscrupulously by parties to dodge their contractual obligations. The existence of COVID-19 does not *ipso facto* create an automatic force majeure event. It must be the sole cause of hindrance to the performance of the contractual obligation in question in a manner beyond the parties’ control. The fact that contractual performance has become burdensome or more expensive, is not a justification to invoke force majeure. Thus, to benefit from a force majeure clause, a party has a duty to show that it has adopted the applicable standard of care required to perform the contract, made efforts to mitigate losses, and must further prove that it is neither negligent nor contributory to the failure or delay in discharging the contractual obligation(s). From the foregoing therefore, persons who entered into a contract after the outbreak of the COVID-19 virus and the imposition of various restrictions might have a hard time proving that the non-performance of their obligation(s) was unavoidable.