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FORCE MAJURE CLAUSES – CAN CURRENCY DEVALUATION ACT AS A TRIGGER?

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INTRODUCTION

Contracts are executed with the expectation that certain conditions will continue to exist to facilitate the smooth performance of the contracts. In most cases, the anticipated conditions subsist till the conclusion of the contract. However, there are instances where the expectation of the parties is dislodged by the occurrence of uncontemplated events—usually beyond the parties' control—which alter the conditions (the continuous existence of which the entire contract depends) and render the performance of the contract difficult or impossible.

FORCE MAJEURE CLAUSES

As a precaution against this risk, parties customarily include a "force majeure" clause in their contracts to provide that on the occurrence of these unforeseen events, the affected party may be legally excused from certain obligations or their obligations under the contract may be altered without penalty. [1] Although, the importance and benefit of force majeure in a contract cannot be argued, the issue sometimes arises in the determination of the circumstances that constitute a force majeure event.

Force Majeure clauses are interpreted strictly by the courts and for a party to benefit from the provisions of a force majeure clause, they must satisfy all the test/triggers provided by the contractual clause. Only events or circumstances provided in the clause will be found as a force majeure event.

Giving the currency fluctuation experienced by many countries and recently in the United State (US) where the Dollars (USD) is trading at record lows against the Euro and the Canadian dollar, and at an eight-year low against the Yen, some contractors now claim inability to perform their obligations under the contract due to the unexpected devaluation of the USD. [2]

This raises the question on whether unexpected and extreme currency devaluation may constitute force majeure?

CURRENCY DEVALUATION AS A FORCE MAJEURE EVENT?

The legal concept of force majeure was originally defined as an Act of God or natural occurrence, such as a flood, fire, earthquake, and other natural disaster [3]

[1] Globe Spinning Mills (Nig) Plc v. Reliance Textile Industries Ltd (2017) LPELR-41433(CA)
[2] Masuda Funai Eifert & Mitchell, "Is the sinking US dollar a "force majeure" that excuses a foreign seller's performance" accessible at https://www.lexology.com/library/detail.aspx?g=ef0ec546-5fe4-4978-9b8b-9549af9c695f
[3] Ibid

However, parties to contracts have over the decades expanded the list of possible “force majeure" events to include uncontrollable, man-caused actions that may make a party’s performance impossible or impracticable or delay the performance beyond the agreed timeline [4] These events include, for example, wars, natural calamities, acts of terrorism, uprisings, labour strikes, and embargoes. [5]

The currency fluctuation and devaluation experienced by many countries, appears to be generating controversy, as contract parties are calling for re-categorisation or re-definition of events that may trigger force majeure clause in their contracts. [6] The question arises whether such currency devaluation could have any effect on contracts which were negotiated for a fixed-price denominated in foreign currency—for instance, the US Dollar—by absolving a defaulting party from the liability of non-performance, where such was not specified in the contract?

Some contractors, particularly in sales contracts, are arguing that currency devaluation is a force majeure event that makes it impossible for them to sell their product at the fixed-contract price. They contend that the increasing costs of obtaining raw materials for their products is a force majeure event that excuses performance [7]

At this juncture it is pertinent to note that the essence of a force majeure clause in a contract is to address situations where the performance of a contract becomes impossible or impracticable due to the occurrence of supervening events that were not contemplated by the parties at the time of making the contract [8] This then leads to a further question on whether currency devaluation renders the performance of a contract impossible?

Although, there appears to be no case law on this point, it is the opinion of this writer that, in the absence of express provision in the contract, currency devaluation may only render the contract economically unprofitable for one of the parties and not impossible to perform; thus, currency devaluation cannot automatically trigger a force majeure clause in the contract This is because a mere change in the market price of raw material—occasioned by currency devaluation—from what it was at the time of executing the contract only points to possibility of a reduction in the producer’s profit margin and not an impossibility or impracticability to produce or supply.

[4] C.G.G. (Nig) Ltd v. Augustine & Ors (2010) LPELR-8592(CA)
[5] C.G.G. (Nig) Ltd v. Augustine & Ors (Supra)
[6] Masuda Funai Eifert & Mitchell, “Is the sinking US dollar a “force majeure" that excuses a foreign seller's performance” accessible at https://www.lexology.com/library/detail.aspx?g=ef0ec546-5fe4-4978-9b8b-9549af9c695f
[7] Ibid
[8] Federal Ministry of Health v. Urashi Pharmaceuticals Ltd (2018) LPELR-46189(CA)

The propriety of this view would be evident where the circumstance is examined on the flipside. A producer would not be heard arguing that an increase in the value of the agreed contract-currency —which could result in increase in the producer's profit margin, usually to the detriment of the buyer —should constitute a force majeure event. This argument would also not avail the buyer where the contract did not mention currency devaluation as a force majeure event.

THE POSSIBLE WAY OUT

Whether or not currency devaluation will trigger the force majeure clause in a contract would depend on the circumstance of the case, nature of the contract and, most importantly, the intention of the parties as expressed in the contract. Therefore, where parties intend for currency devaluation to trigger the force majeure clause of the contract, they may need do one of the following:

Express Mentioning of Currency Devaluation as a Force Majeure Event

It is trite that when parties enter into a contract, they make their own law to which they are subject. [9]

Thus, parties to a contract define the terms that govern their relationship under the contract and, the limit to their rights and obligations and exceptions, where necessary.

Therefore, in defining what would trigger the force majeure clause in a particular contract, there is nothing preventing the parties from specifically including "extreme and unexpected currency devaluation". Thus, parties who intend for currency devaluation to trigger the force majeure clause of their contract may specifically state so in the contract.

The question that may then arise is what would constitute "extreme and unexpected currency devaluation"?

This may, be addressed by pegging the devaluation at a certain percentage. For instance, the contract may define force majeure to include "substantial and downward change in the value of the contract-currency up to 30% from its value as at the date of the contract".

[9] SPDC (NIG) LTD & ORS v. Nwawka (2003) LPELR-3206(SC)

Hardship Clause

Contract parties who intend for extreme currency devaluation to excuse delay in performance or non-performance of their contractual obligation as a result of a supervening event may include what is known as hardship clause in the contract. This may be in addition to a force majeure clause.

A hardship clause allows the parties to review the terms of the contract where a change in circumstances occurs that fundamentally modify the initial expectations of the parties with respect to their obligations, so that performance, though not impossible, becomes unusually onerous for one party. [10]

Although, a hardship clause does not operate to absolve parties from their obligations or terminate the contract outrightly, it allows the parties to renegotiate the contract in the event where fundamental change in the circumstance of the contract occurs.

The clause defines hardship for the purpose of the contract in which it appears and provides a procedure for adapting the contract if hardship as defined occurs.

Where hardship, as defined in the hardship clause include extreme currency devaluation, the parties to the contract may rely on this clause to initiate renegotiation of the contract to address the change in circumstance. The clause should also provide for situation where parties are unable to agree upon renegotiation.

CONCLUSION

Giving the fact that the purpose of force majeure in a contract is to address situations where the performance of a contract becomes impracticable or delayed due to no fault of the parties, it would be difficult for currency devaluation to trigger the force majeure clause in a contract where it is not specifically defined as such. This is because events that may trigger the force majeure clause of a contract are expressly provided by the parties in the contract at the time of execution. Moreover, currency devaluation may only give rise to unprofitability of the contract and not impossibility to perform the obligation; thus, when not so specified by the parties, currency devaluation cannot be relied upon to trigger the force majeure clause in the contract.

[10] Joseph Gold, “Hardship, Impracticability, Unconscionability, Unforeseeability”, IMF eLibrary, accessible on https://www.elibrary.imf.org/view/books/071/04248-9781475506921-en/C11.xml. Accessed on 01/06/2021

However, to arrest situations where currency devaluation would render the performance of contractual obligations difficult, impracticable or impossible, parties may include “extreme currency devaluation” in the definition of events that may activate the force majeure clause of the contract.

They may also include a hardship clause to give room for renegotiation of the affected terms of the contract with adequate provision to cater for instance where the parties may not reach *ad idem* on the renegotiated term.

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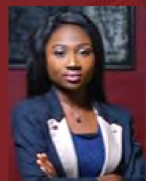

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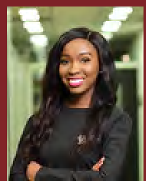

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