

COVID-19 and Its Impact on Contractual Relations: How to Mitigate Damages, Renegotiate Your Contracts and Avoid Disputes (Part II)

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Introduction

In [Part I](#) of our series on *COVID-19 and Its Impact on Contractual Relations*, we addressed how parties may rely on *force majeure* clauses as a defense to non-performance or delayed performance of their contractual obligations amidst the pandemic. What happens in circumstances where COVID-19 has made performance impossible, but your contract lacks a *force majeure* clause? In this article, we explore the application of the common law principles of frustration, impossibility and impracticability of performance.

Impracticability, Impossibility and Frustration of Contracts

Where a contract does not have a *force majeure* clause, a party may still be able to rely on the common law principles of frustration and potentially on the doctrine of impossibility or impracticability of performance. Having developed through common law, the principles do not need to be set out in the contract.

The doctrines of impossibility and frustration were created to achieve an equitable result in light of unforeseen circumstances and are therefore applied narrowly by the courts. The doctrine of impossibility focuses on the obligations specified in the contract, and the doctrine of frustration concerns the reason that a party entered into a particular contract. It is important to note that neither doctrine will allow a party to escape a bad bargain; rather, they will excuse further performance of obligations under a contract due to supervening events that render performance impossible and have the effect of terminating the contract – although in some narrow instances courts have relied on the doctrines to suspend the contract.

Effect and Operation of the Doctrines

The effect of frustration or impossibility is the automatic termination of a contract following an unforeseen event which renders a contractual obligation impossible to perform or transforms the obligation into a radically different obligation from that undertaken at the moment of entry into the contract. Frustration does not, however, affect the rights and obligations that had accrued prior to the date of the frustrating event.

A party seeking to rely on frustration or impossibility will have to prove that (i) the underlying event or circumstance is not the fault of either party to the contract, (ii) the underlying event or circumstance occurred after the formation of the contract and was not foreseen by the parties, and (iii) that it has become physically and commercially impossible to fulfil the contract, or that performance would render their obligation radically different from that which was anticipated to be undertaken under the contract. This position has been upheld in the Kenyan Courts as reflected in the two Court of Appeal decisions of *Lucy Njeri Njoroge v Kaiyahe Njoroge*¹ and *Kenya Airways Limited v Satwant Singh Flora*².

The test is highly contextual. A determination as to whether contractual obligations have radically changed as a result of the pandemic will require a thorough analysis of the contract in question, the nature of the contractual obligations and the factual circumstances which have affected the parties. There are a number of circumstances which could arise either as a result of social distancing, health, economic or governmental measures in light of the pandemic, and which may allow a party to claim frustration of contract. However, the effects must, from an objective perspective, have been unforeseeable and rendered the party's performance impossible. Instances in which parties could seek to argue impossibility or frustration could be in the case of critical delays caused by COVID-19 measures, the unavailability of products or individuals, the failure to obtain goods in the country due to cargo restrictions or factory shut downs at the source, changes in law rendering the good or service illegal, and so forth.

¹ Lucy Njeri Njoroge v Kaiyahe Njoroge [2015] eKLR

² Kenya Airways Limited v Satwant Singh Flora [2013] eKLR



As a note of caution, it is insufficient for a party to argue that the changed circumstances have made performance more onerous, expensive or uneconomic. Similarly, the non-performance should not be caused by a party's acts or decisions. For example, a party choosing not to supply a finished product to its customer at the agreed price because of a rise in the price of raw materials may not be protected by the doctrine of frustration as a court may find that the party could have performed under the contract and that any non-performance was self-induced. For example, in **Samuel Chege Gitau & another v Joseph Gicheru Muthiora**³ Justice J.L. Onguto stated that "*the essence of frustration is that it should not be due to the act or election of the party seeking to rely on it.*" A party would also be denied the ability to rely on frustration or impossibility to improve their position. In fact, the law of equity dictates that if reliance on the doctrines produces an inequitable result between the parties (for example due to a pre-payment by one party) then the loss would be recoverable in the form of a claim for restitutionary damages, on the premise that it would be unjust for a party to be excused from performance and retain the benefit of the contract.

Where the facts have led to the performance of a contract becoming unfeasibly difficult or unjustifiably expensive, a party may be able to rely on the doctrine of impracticability to excuse their performance. While the doctrines of impossibility and frustration are tested objectively, the doctrine of impracticability is a subjective test determined by the courts. As one of the few exceptions to the sanctity of contract, the doctrine of impracticability is not well developed in Kenya or by the English courts. However, jurisprudence from the United States indicates that a party would need to demonstrate that their performance is vitally different from what was envisaged at the time of the contract and therefore that, while performance is still possible, it would be extremely burdensome upon the party.

The remedies of frustration and impossibility are generally not available to parties who have a *force majeure* clause in their contracts. This is because a *force majeure* clause indicates that the parties had reached an agreed position on what would constitute an intervening event that would prevent their ability to perform their contractual relationships and hence elucidates the relevant terms between the parties. As a result, the courts will seek to uphold the parties' freedom of contract by upholding the explicit agreement by virtue of the *force majeure* clause.

Finally, the remedies would also be unavailable in cases where there is an express provision in the contract for the frustrating event (separate from a *force majeure* clause). If parties anticipated and provided for the event or circumstances in question, the common law doctrines of frustration and impossibility cannot be relied upon.

³ Samuel Chege Gitau & another v Joseph Gicheru Muthiora [2014] eKLR

Conclusion

Because of the highly contextual nature of the application of the doctrines of frustration, impossibility and impracticability, parties wishing to rely on them must conduct a thorough analysis of their contract and their obligations, and meticulously compile evidence supporting their position that performance has been rendered impossible or vitally different from that originally envisaged.

Notwithstanding the significant impact of the pandemic, contract law dictates that parties must do their utmost to fulfill their contractual obligations. However, parties also have the option of renegotiating contractual terms to adjust to changed circumstances. The process of renegotiation will have to take into account any provisions in the contract regarding variation or amendment of terms, as well as certain contract law principles and regulatory requirements to avoid future litigation or investigations by enforcement agencies. In our upcoming articles, we explore the options for claiming that a material adverse change may have occurred before analysing the principles of contract renegotiation, including how to avoid exerting undue influence, taking advantage of the other party's duress, and being deemed to have exerted an anti-competitive influence in your negotiations.



Key contacts

Should you have any questions on the impact of COVID-19 on your contractual agreements, please do not hesitate to contact [Dominic Rebelo](#), [Luisa Cetina](#), or your usual A&K contact:



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