Legal Bulletin

Is your force majeure clause ready for modern disruption?

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Introduction

A Kenyan logistics company contracted to deliver imported medical equipment from Mombasa to nationwide major hospitals discovers that fuel prices have risen by nearly 50%, public transport operators are on a nationwide strike, and protesters have blockaded major roads into Nairobi. The Managing Director reaches for the contract and finds a single line: "Neither party shall be liable for delays caused by acts of God, war, or government shutdowns." The wording is familiar, and recognisably a force majeure clause, but is it sufficient for modern disruptions?

Force majeure is no longer theoretical. Regional conflicts, sanctions, pandemics, public demonstrations and cyber incidents all show how quickly commercial performance can be affected by events outside the parties' day-to-day control. Those events, however, do not automatically excuse performance. In most commercial contracts, force majeure is not an implied safety net. It is a negotiated risk-allocation clause, and its value depends almost entirely on the words chosen before the crisis begins.

The Kenyan legal framework

Under section 2 of the Law of Contract Act (Cap. 23 Laws of Kenya) (the "Act"), English common law principles of contract apply in Kenya, subject to Kenyan written law and the modifications recognised by the Act.

That matters because, in the common law tradition, force majeure is not a free-standing doctrine that automatically excuses performance whenever disruption occurs. Force majeure is instead a contractual mechanism, and it exists only where the contract expressly provides for it.

The Supreme Court of Kenya confirmed this in Kwanza Estates Limited v Jomo Kenyatta University of Agriculture and Technology Petition E001 of 2024, [2024] KESC 74 (the "Kwanza Estates Case"), describing force majeure as:

"A contractual provision allocating the risks of loss if performance becomes impossible or impracticable as a result of an event the parties could not have anticipated or controlled."

The Supreme Court stressed that force majeure must be written into the contract, specifying the kinds of events that apply.

What is force majeure and how is it different from frustration and hardship?

Not every disruption produces the same legal consequence. An airport closure, public protest, currency restriction or new regulation may affect a contract in very different ways.

Some events may justify temporary suspension of the contract or an extension of time. Others may be so fundamental that they bring the contract to an end. Others may leave performance possible, but commercially strained, making renegotiation the more appropriate response. That is why the distinction between force majeure, frustration and hardship matters: each one points to a different legal route and a different remedy.

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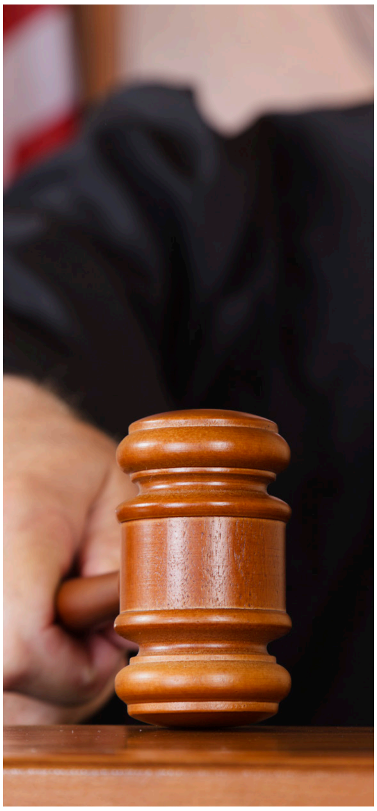

Force majeure is the contractual route. As emphasised by the Kwanza Estates Case, it applies only if the contract says so, and only to the extent the clause covers the event, the affected obligation and the relief claimed. Properly drafted, it can give practical relief such as suspension of the contract, extension of time, non-liability for delay, or termination after a prolonged disruption.

The practical point is simple: before signing, parties should decide what they want to happen if disruption strikes. If the answer is "pause performance", draft a force majeure suspension right. If the answer is "adjust the price", include a hardship or indexation clause. If the answer is "accept alternative performance", say so expressly. If the contract is silent, the party may be left with frustration - a much narrower and more disruptive remedy.

Frustration is a common law doctrine and is the default legal route where the contract has not adequately dealt with the event. It is narrow and drastic. In Five Forty Aviation Limited v Erwan Lanoe Civil Appeal No. 55 of 2016, [2019] eKLR, the Court of Appeal at Nairobi explained that frustration may apply where "a contract was built on a fundamental assumption that later fails through no fault of either party, making performance impossible or radically different from what was agreed". The consequence is not a neat extension of time or commercial rebalancing; frustration brings the contract to an end automatically.

Hardship deals with cases where performance is still possible, but the original bargain no longer works commercially. For example, a contractor may still be able to complete works, but a sudden spike in fuel, steel, transport or financing costs may make the agreed price unrealistic. Force majeure may not assist because the obligation is not impossible to perform; it is simply far more expensive. A hardship clause can fill that gap by providing for renegotiation, price adjustment, indexation (automatic price adjustment by reference to an agreed index), revised timelines or termination if the parties cannot agree.

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What makes a force majeure clause work?

A force majeure clause should be specific, not ornamental. A well-drafted clause must:

1. Name the risk (qualifying event): If the business is exposed to war, sanctions, civil unrest, strikes, port or road closures, fuel shortages epidemics or natural disasters, the clause should say so expressly, supported by a tailored catch-all for comparable events.

2. Say how badly performance must be affected (degree of impact): The clause should say whether relief is available only when performance is impossible, or also when it is delayed, disrupted or made substantially harder. This matters because a clause that applies only where performance is "prevented"

A properly drafted force majeure clause should not leave that answer to improvisation. It should identify the events covered, state how serious the impact must be, prescribe notice and evidence requirements, require mitigation, address payment obligations, permit or exclude alternative performance, allocate additional costs and provide a termination route if the disruption continues.

may require the affected party to show legal or physical impossibility. English authorities support this distinction in Tennants (Lancashire) Ltd v G.S. Wilson & Co Ltd [1917] AC 495 and Thames Valley Power Ltd v Total Gas & Power Ltd [2005] EWHC 2208.

3. Require a direct causal link (causation): The clause should require the affected party to show that the event caused the specific non-performance. English authority treats causation as central as in Seadrill Ghana Operations Ltd v Tullow Ghana Ltd [2018] EWHC 1640 (Comm).

4. Set out the procedure, mitigation obligation and consequences (mechanics): The clause should say how notice is given, what evidence and updates are required, and what relief follows. Any transaction-specific steps, such as alternative routes, substitute suppliers or payment channels, should also be stated expressly in the contract. In Channel Island Ferries Ltd v Sealink UK Ltd [1988] 1 Lloyd's Rep 323, the English Court of Appeal supported the general expectation that the party claiming relief due to force majeure is under a duty to show it has taken reasonable steps to avoid or reduce the event's effect. This is known as mitigation.

Alternative performance: RTI Ltd v MUR Shipping BV

When disruption happens, must the parties stick strictly to the contract, or must they accept reasonable alternatives to keep the deal alive?

Alternative performance means doing the deal in a different way from what the contract originally required, for example, paying in a different currency, using a different delivery route, sourcing from a substitute supplier or using a different payment channel.

A well-drafted force majeure clause should say whether a party must try alternative ways of performing before it can suspend performance or claim relief.

That issue arose in RTI Ltd v MUR Shipping BV [2024] UKSC 18. The contract required payment in US dollars. When sanctions delayed dollar payments, the paying party offered to pay in euros and cover conversion costs. The UK Supreme Court held that, without clear wording, a "reasonable endeavours" obligation did not require the receiving party to accept performance in a different way from what the contract required.

For Kenyan businesses, the drafting point is direct: if alternative performance, be it alternative currency, alternative payment channels, substitute suppliers or rerouting are meant to be part of the force majeure solution, the contract should say so expressly.

Conclusion: When disruption arrives, wording decides

Return to the Kenyan distributor in the opening example: transport routes are disrupted, costs are rising, and the contract speaks only of "acts of God". At that point, the question is whether the contract is capable of dealing with the disruptions.

A properly drafted force majeure clause should not leave that answer to improvisation. It should identify the events covered, state how serious the impact must be, prescribe notice and evidence requirements, require mitigation, address payment obligations, permit or exclude alternative performance, allocate additional costs and provide a termination route if the disruption continues.

Force majeure will not rescue a party whose contract is silent, vague or poorly adapted to foreseeable risks. In an era of cascading disruptions, Kenyan businesses should treat these clauses not as boilerplate to be copied unchanged from precedent banks, but as bespoke risk-allocation architecture demanding the same rigour as pricing and termination. The clause you draft today determines the conversation you have tomorrow.

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