



LEGAL TAKE

**FORCE MAJEURE
THE PARADE OF HORRIBLES**



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Often force majeure clauses are considered a “parade of horrors” as they are an exhaustive list of catastrophic events that may excuse a party from carrying out their obligations under a contract.

The concept of force majeure developed from French law, which allows the affected party to be discharged from performance of their obligations where an event has occurred which is unforeseeable, unavoidable and beyond the control of the affected party, the effects of which could not be avoided by appropriate acts.

For one to rely on a force majeure, it must be expressly outlined in the agreement between the parties. It is important when negotiating an agreement that the parties agree on:

- a) which events qualify as a force majeure;
- b) whether the rights apply to one or both of the parties;
- c) the requirements of the affected party to notify the other party;
- d) the obligations to mitigate; and
- e) rights of the other party in the event of continued delay.

This article seeks to explore the use of force majeure clauses from a real estate Developers perspective. We shall examine how force majeure events are defined and qualified, how parties draw the causal link between their obligations and the force majeure event and the procedural requirements.

Qualifying a Force Majeure

The typical fashion of drafting a force majeure clause is to list specific events that may hinder the performance of a party's obligations if they were to happen.

Common examples would include acts of God, acts of terror, civil unrest, labor strikes etc. However, it is worth noting that this is not a one-size fits all definition and may change depending on the nature of the transaction. While most people agree that acts of God such as floods and earthquakes are a conventional parts of the force majeure clause there have been discussions on whether issues such as labor strikes and adverse business conditions qualify as force majeure events. For instance, would it be appropriate for a developer to rely on a force majeure when their staff on site go on strike? Similar to this example, would it be appropriate if the same developer relied on adverse business conditions due to the prevailing Covid-19 Pandemic to be excused from their obligations under a contract?

To determine if either of the examples above would allow a developer to rely on the force majeure, we must examine the effect of the claimed force majeure vis-à-vis the obligations of the developer. If the force majeure events renders the obligations of the developer impossible to carry out then they would qualify. However, if the force majeure event makes the obligations of the developer impractical or expensive to carry out then such event may not qualify as a force majeure as there is room for the developer to mitigate and seek alternative solutions.

Applying the above rationale to our two examples, we note that in the first example it may be argued that a strike on site is within the developer's control and a developer in a strong financial position could possibly mitigate such an event by hiring or sourcing new staff - this action may prove to be more expensive it does not necessarily render the developers obligations impossible to carry out. In the second example, the onset of the pandemic saw lock downs and restrictions on movements and gatherings which would have render the developer's

obligations impossible to carry out given that construction was not practically possible especially at the onset of the pandemic.

From the foregoing, it is clear that the drafting of a force majeure clause is not standard and is subject to change depending on the nature of the transaction. When listing a non-exclusive list of events that would excuse the obligations of a party in a contract, it is important to consider the following factors:

- a) Can the transaction be affected by the force majeure event;
- b) Does the event render the obligations of the party impossible or impractical;
- c) Is the event beyond the affected party's control;
- d) Is the event precipitated by the actions of the affected party's or their negligence; or
- e) Could the event have been avoided by the affected party through exercise of diligence.

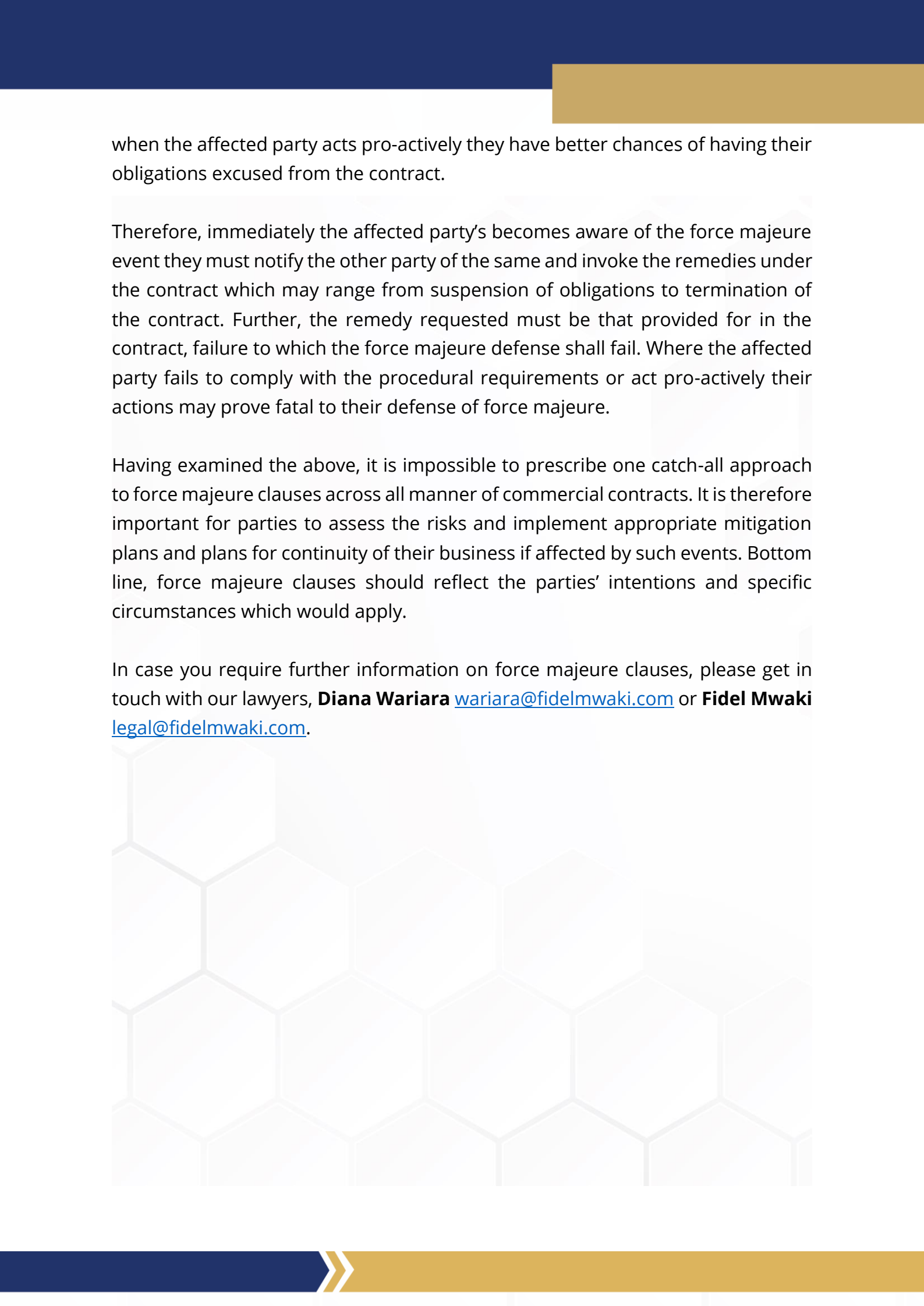
Drawing the Causal link

A force majeure defence requires the affected party to demonstrate that the event directly occasioned their non-compliance to the extent outlined in the contract. For instance, if the excise duty on imported finishing's increases significantly after entering the contract then a developer may not rely on the action by Kenya Revenue Authority (KRA) to excuse their obligations under the agreement. This is because KRA's actions of increasing excise duty did not directly prevent the developer's non-compliance. Rather, action by KRA merely made compliance of the contract less profitable for the developer.

Using the above example, the affected party must always draw the causal link between the force majeure event and their non-compliance under their agreement. Further, it must always arise directly from the force majeure event and should not be because of a ripple effect of another event.

Procedural requirements

When drafting the force majeure clause it is critically important to outline the procedures to be followed by a party that wishes to invoke the clause. Where the procedure is unclear or has not been outlined, common practice has shown that



when the affected party acts pro-actively they have better chances of having their obligations excused from the contract.

Therefore, immediately the affected party's becomes aware of the force majeure event they must notify the other party of the same and invoke the remedies under the contract which may range from suspension of obligations to termination of the contract. Further, the remedy requested must be that provided for in the contract, failure to which the force majeure defense shall fail. Where the affected party fails to comply with the procedural requirements or act pro-actively their actions may prove fatal to their defense of force majeure.

Having examined the above, it is impossible to prescribe one catch-all approach to force majeure clauses across all manner of commercial contracts. It is therefore important for parties to assess the risks and implement appropriate mitigation plans and plans for continuity of their business if affected by such events. Bottom line, force majeure clauses should reflect the parties' intentions and specific circumstances which would apply.

In case you require further information on force majeure clauses, please get in touch with our lawyers, **Diana Wariara** wariara@fidelmwaki.com or **Fidel Mwaki** legal@fidelmwaki.com.

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