



# FIDIC'S FORCE MAJEURE CLAUSE IN THE FACE OF CLIMATE CHANGE: DE-RISKING CONTRACTS IN AFRICA

ENG LATOYA OUNA  
AR GROUP- ENGINEERING



27<sup>TH</sup> ANNUAL FIDIC AFRICA  
INFRASTRUCTURE CONFERENCE



- Civil & Structural Engineering
- Building Service Engineering

- Project Management
- Contract Management
- Document Management

**[kenya@argroup-engineering.com](mailto:kenya@argroup-engineering.com)**



# GLOBAL WARMING vs CLIMATE CHANGE

## A WORLDWIDE PERSPECTIVE

ENG LATOYA OUNA

ar

27TH FIDIC AFRICA CONFERENCE, 2021

**Global warming** is the long-term warming of the planet's overall temperature, significantly increased in the last hundred years due to the burning of fossil fuels. Burning Fossil fuels causes what is known as the "**greenhouse effect**" in Earth's atmosphere.

The greenhouse effect is when the Sun's rays penetrate the atmosphere, but when that heat is reflected off the surface it cannot escape back into space. The excess heat in the atmosphere has caused the average global temperature to rise overtime - global warming.

## Climate change

- Changes in weather patterns and growing seasons around the world.
- Sea level rise caused by the expansion of warmer seas and melting ice sheets and glaciers.
- Global warming causes climate change, which poses a serious threat to life on earth in the forms of widespread flooding and extreme weather.



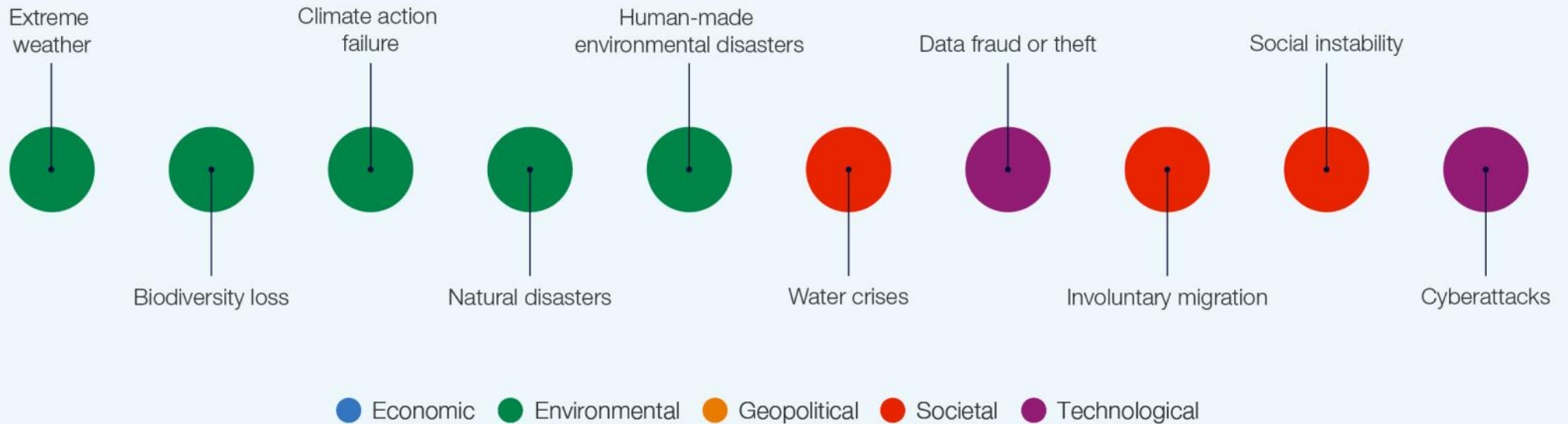
ar

TOP 10 RISKS OVER THE NEXT 10 YEARS

# Long-Term Risk Outlook: Likelihood



## Global Shapers



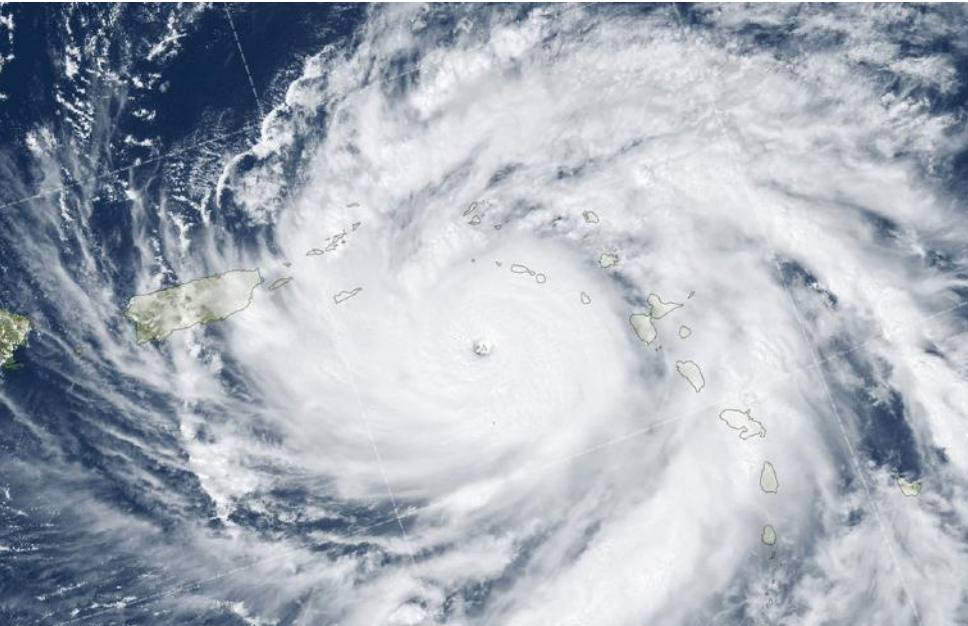


**Climate-related issues**  
**dominated all of the**  
**top-five long-term**  
**risks in terms**  
**of likelihood**

Global Risks Report 2020



27TH FIDIC AFRICA CONFERENCE

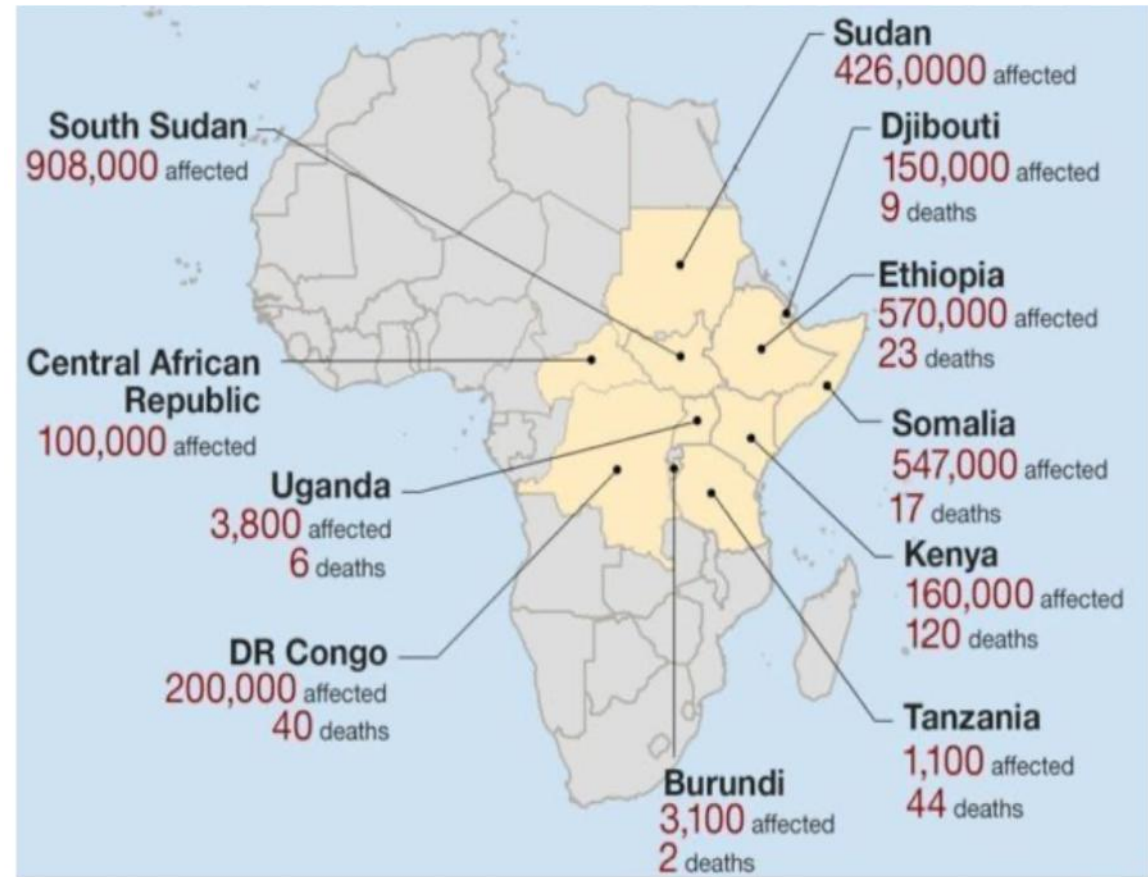


ENG LATOYA OUNA

There was an increasing number of heat-related events occurring around the world in 2019-2020.

The effects of the 2019 cyclones on East Africa estimated a damage value of > \$11.5 billion. The severe weather caused unsurmountable destruction in infrastructure and deaths around the region.

Globally, 45% of construction projects are affected by adverse weather resulting in billions of dollars in additional costs each year, mainly due to expensive schedule and cost overruns.



Source: OCHA

BBC



# FORCE MAJEURE

## APPLICATION IN CIVIL LAW, COMMON LAW AND FIDIC CONTRACTS

ENG LATOYA OUNA



27TH FIDIC AFRICA CONFERENCE, 2021



**Force majeure** literally means "superior force."

A force majeure clause operates to relieve a party of contractual obligations in certain circumstances, including environmental conditions ("acts of God") which render performance under the contract impossible.

As climate change increases exposure to extreme weather events, contracting parties may be more likely to invoke force majeure clauses to avoid liability where conditions outside their control have occurred.

This issue deserves attention because climate change is still a relative newcomer to the list of issues addressed at the planning stage of major projects and is given relatively little attention despite its increasing impact.

# FORCE MAJEURE IN CIVIL LAW

The concept of *force majeure* is derived from civil law . Given the inherent difficulty in predicting unforeseeable events, force majeure clauses are often incredibly broad. However, some national courts and arbitral tribunals strictly interpret foreseeability and require proof of impossibility of performance, or both.

For example the definition under the Quebec Civil Code (Article 1470) is as follows:

*“Force Majeure is an unforeseeable and irresistible event, including external causes with the same characteristics.”*

Under German Law the German Supreme Court has described Force Majeure (Höhere Gewalt) as:

*“an extraordinary event which affects the business from the outside, which is unforeseeable, which cannot be prevented even by applying the utmost care without endangering the economic success of the enterprise, and which also has not to be taken into account and to be put-up with by the Contractor due to its frequent occurrence.”*

In German Law, it is necessary that a force majeure clause is based on "unforeseeable, unavoidable and non-culpable events" to be effective.

# FORCE MAJEURE IN COMMON LAW

There is no common law right of force majeure; as such, a contract must contain a force majeure clause in order for a party to invoke force majeure.

The only similar common law concept - the doctrine of frustration - has limited application as explained in *Davis Contractors v Fareham UDC* 2 All ER 145,160 HL which says that frustration:

*“Occurs whenever the law recognises that without the 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.”*

# DEVELOPMENT OF FORCE MAJEURE IN FIDIC

## 4<sup>th</sup> Edition of FIDIC Conditions of contracts of 1987.

It does not have a force majeure clause and only references to **Special Risks** in **Clause 65**, cross-referenced to **Employer Risks** in **clause 20.4**.

It is also vague on natural causes/extreme weather and only mentions

*“any operation of the forces of nature against which an experienced contractor could not reasonably have taken precautions”.*

**Clause 66.1**, the contractor could be released from contractual obligations if “circumstances were out of their control” and thus render it impossible or unlawful for either or both parties to fulfil his or their contractual obligations.

Adds to the initial vagueness and does little in defining the “circumstances out of their control”.



# DEVELOPMENT OF FORCE MAJEURE IN FIDIC cont...

## FIDIC 1999 Conditions of Contract for Construction

Introduced the term "force majeure".

Clause 19.1 defines it as exceptional **events** or **circumstances** which:

- a) are beyond the party's control,
- b) the party could not foresee before entering the contract or have arisen,
- c) the party could not reasonably overcome
- d) is also not substantially attributed to the party.

Conditions a) to d) must be satisfied to qualify as force majeure.

This definition applies to, *inter alia*, natural catastrophes such as hurricanes, typhoons, volcanic activity and earthquakes.



# DEVELOPMENT OF FORCE MAJEURE IN FIDIC cont...

FIDIC places Cl 19.7 at a precarious position as a relief mechanism to the contract.

It entitles parties, under the law governing the contract to be released from further performance of the contract if the event or circumstance arises which makes it impossible for either or both parties to fulfill its contractual obligations.

There is a risk that Cl 19 contradicts/ overlaps the law governing the contract which makes it difficult to argue Force Majeure. Under civil law it lacks the concept of unforceability and additionally lacks proof of "frustration" required in common law.

# DEVELOPMENT OF FORCE MAJEURE IN FIDIC cont...

## • FIDIC Conditions of Contract for Construction 2017

FIDIC replaced the term “**force majeure**” with “**exceptional events**” to reduce similarities with similar reference in law. The definition, conditions and applications similar to 1999 Contract. In addition, the 2017 Contract:

- Provides for extension of time in Cl 8.5 for exceptionally adverse climatic conditions, which for the purpose of these Conditions shall mean adverse climatic conditions at the Site which are Unforeseeable.
- Directs responsibility to the contractor to familiarize themselves with the site and climatic conditions as provided in Cl 2.5, before tendering and thus prove that the prevailing conditions were unforeseen.
- Marks a change compared to the 1999 version in that (Sub-Clause 17.4(b)) allowed the Contractor to claim both an EoT and costs for rectifying the loss and damage whereas only an EOT is explicitly provided for in the 2017 version.



# DERISKING CONSTRUCTION CONTRACTS IN AFRICA

ENG LATOYA OUNA



27TH FIDIC AFRICA CONFERENCE, 2021



# 1. INNOVATION

Scientists can now measure the impacts of climate change and extreme weather events using:

- Climate forecasting equipment
- Weather stations
- Big data
- Machine Learning
- Precision satellites
- Internet of Things (IoT)

Knowledge of extreme weather events early enough reduces risk and increase foreseeability in construction contracts.



## **2. POLICY**

1. Bureaucracy hindering innovation
2. Taxes stifle innovation
3. Frequent review of building codes
4. Enforcement of construction laws and contracts

### 3. CAPACITY BUILDING

a) Encourage cross-disciplinary collaboration  
Introduce non-traditional professionals into construction contracts like GIS and remote sensing professionals, oceanographers, meteorologists and climatologists on board.

b) Knowledge transfer and training  
Training of construction professionals ought to be continuous and flexible, considering the dynamic nature of weather and climate. It should target from the top tier – the client, to the bottom tier – non-skilled labour.



## 4. CLIMATE RESILIENT CONTRACTS

Force Majeure is a creature of contracts. Parties ought to define a closed list of events that constitute force majeure or exceptional events under the contract.

Parties should expressly address in as much detail as possible how adverse weather events are to be dealt with under the contract to avoid surprises later. For example:

- Referring to available weather statistics and return periods.
- Compare the adverse climatic conditions that have been encountered with the frequency with which events of similar adversity have previously occurred at or near the Site.

Force majeure clauses should take steps that a party must take to mitigate the force majeure event or its impact on that party's ability to perform under the contract. If the clause is silent, then the invoking party must generally show that it made all "reasonable" efforts to mitigate, which will be a fact-specific inquiry.





# WAY FORWARD



Eng Latoya Ouna Kavisi



@namsiT

lo@argroup-engineering.com

ENG LATOYA OUNA

ar

27TH FIDIC AFRICA CONFERENCE, 2021

1. Parties need to change the way contracts define responsibility under *force majeure* or *exceptional events* as it directly relates to suspension, EoT, Claims and termination. Stakeholders should be flexible and open-minded to different possibilities to keep contracts running and reducing the likelihood of force majeure.
2. Engineers should be able to collect the correct and comprehensive information in a timely manner. Adaptive capacity should be at the forefront with efforts taken to acquire up to date technology and train stakeholders on the use and application of this technology.
3. Proving that a circumstance or event is “exceptional” can be difficult and could possibly result in a dispute. It is imperative that we, therefore, draft climate change resilient contracts, albeit to save time and money spent on dispute resolution.

# REFERENCES

1. National Geographic
2. Global Economic Report 2020 & 2021
3. BBC
4. <https://www.mondaq.com/canada/environment/735074/impacts-of-climate-change-foreseeable-or-unforeseeable-drafting-force-majeure-clauses-in-the-era-of-climate-uncertainty>
5. <http://corbett.co.uk/wp-content/uploads/Clause-19.pdf>
6. [\*\*Bird & Bird LLP\*\*](#)
7. [http://siteresources.worldbank.org/INTAFRICA/Resources/capacity\\_knowledge.pdf](http://siteresources.worldbank.org/INTAFRICA/Resources/capacity_knowledge.pdf)
8. <https://www.mccarthy.ca/en/insights/blogs/canadian-era-perspectives/impacts-climate-change-foreseeable-or-unforeseeable-drafting-force-majeure-clauses-era-climate-uncertainty>



**THANK YOU**

***ASANTENI SANA***

***MERCI BEAUCOUP***

***OBRIGADA***

اشكرک

ar