COVID-19 Contractual Disputes

Oyetola Muyiwa Atoyebi, SAN.

Introduction

The disease caused by the novel coronavirus first identified in Wuhan, China, and named Coronavirus disease 2019 (COVID-19). 'CO' stands for corona, 'VI' for virus, and 'D' for disease. Formerly, this disease was referred to as '2019 novel corona virus' or '2019-nCoV'. COVID-19 is a new virus linked to the same family of viruses as Severe Acute Respiratory Syndrome (SARS) and some types of common cold. Due to the disease geographical spread, the virus has been declared a pandemic and as constituting a public health emergency of international concern.

Following the WHO declaration of the disease as a global pandemic, the impact of the outbreak has been felt worldwide as countries have issued various restrictive measures; travel bans, quarantine citizens, established lockdown, isolate the infected in a bid to stop the spread of the decease. These measures continue to affect contractual obligation of parties in an attempt to halt the spread of the pandemic.

Due to the forceful effect of this hydra headed pandemic, parties to existing contractual obligations are entering uncharted waters with the raging spread of the Covid-19. As the pandemic continues to navigate borders, performance of obligations under agreement will unavoidably become elongated if not totally difficult or impossible to perform and this may consequently lead to inevitable disputes between contracting parties. Raising, *inter alia,* questions like; what to do when it becomes impossible for a party to meet its contractual obligation due to the pandemic? or what are the available protection for debtors who fail to meet their financial obligation as a result of the pandemic? would arise.

Given the unexpected nature of the outbreak, parties to a contract will readily place reliance on the principles of Force Majeure and Common Law defence of the Doctrine of Frustration, as a possible shield to excuse delay or escape liability for non-performance of contractual obligations.

This paper attempts to proffer answers to some of the above burning issues hinting on the Covid-19 pandemic, with its main focus on the applicability and implication of the Legal Concepts of Force Majeure and Frustration vis-a-vis Covid-19, as available defence in contractual disputes.

COVID-19: A Force Majeure or Frustrating Event?

It is beyond doubt that as a result of the occurrence of Covid-19 pandemic, contracting parties will invoke force majeure clauses in an agreement and/or presumably place reliance on the defence of frustration in a bid to escape or delay obligations under such contracts. These two concepts will be used either as a shield in any dispute arising after the breakout of the pandemic for the purpose of mitigating liability or absolving any liability that may fall due.

Can such reliance be successfully pleaded as a defence?

The Concept of Force Majeure

The term "force majeure" means a superior or irresistible force. The concept is similar to the common law concept of 'act of God", which has been defined as a providential occurrence or extraordinary manifestation of the forces of nature which could not have been foreseen and the effect thereof avoided by the exercise of reasonable prudence, diligence and care, or by the use of those means which the situation renders reasonable to employ – this was the definition offered in the case of *Southern Air Transportation v Gulf Airways*, 215 La. 366,375,40 So. (1949).

Broadly speaking, Force majeure events are unexpected circumstances outside a contracting party's reasonable control which prevents the party from performing its obligations under the contract. It is an event that can neither be anticipated nor controlled. It includes both natural and human acts. The human acts may be political in nature; riots, strikes or war.

The concept can be said to be a corollary of the principle of sanctity of contract which finds expression in the latin maxim, *Pacta Sunt Servanda* meaning "agreement must be kept"

A force majeure clause lays out the circumstances in which a party (to a contract) can be excused from performing its contractual obligations where such performance is precluded or made impossible by state of affairs outside that party's control. It can be a complete or partial excuse of obligations or liabilities often by specific events which are outlined in the contract (sometimes by way of a definition). Customarily, a party seeking to plea force majeure as a defence will have to show that:

- An event which is beyond its control has occurred; and
- it has prevented, hindered or delayed its performance of the contract; and
- it has taken all reasonable steps to avoid or mitigate the event or its Consequences.

Thus, a party seeking to rely on the corona virus outbreak or the resulting governmental restrictions as a force majeure event to escape liability or delay obligation under a contractual or commercial agreement must establish that the Covid-19 pandemic falls within the protection offered by the wordings of the force majeure clause in the contract. For instance, if "disease" or "epidemic" is not expressly included, it can be classified under the term "act of God" (once described as "an irresistible act of nature"), or some other catch-all provision, will suffice - but that will require careful consideration. Noteworthy is the fact that the doctrine of force majeure relieves a party of a contractual obligation only when a fortuitous event makes performance impossible as decided in the American case of *Esplanade Oil & Gas Inc. v Templeton Energy Income Corporation* 889 F.2d 621 (1989).

It is also important to check and comply with the requirements of contractual notice in order to protect against a technical challenge from adversary party. Ultimately, whether or not the outbreak of corona virus will constitute an exculpating force majeure event, will depend upon the actual language used in the specific contract or commercial agreement and its peculiar facts. The force majeure clause and the surrounding circumstances will need to be evaluated on a case by case basis. The

contractual clauses will therefore require analysis and the occurrence of a force majeure event will depend on the circumstances of the case.

Doctrine of Frustration

The common law defence of frustration is available to a party where an occurring event is not the fault of neither of the contracting parties, but which makes it impossible for a party under the agreement to fulfil a fundamental obligation or transforms the obligation into a completely different obligation.

The import or meaning of frustration of contract has been stated and restated many times by the Apex Court to be the prevention or hindering of the attainment of a goal and when a contract becomes incapable of being performed by unforeseen circumstances. In the case of *Mazin Eng. Ltd v Tower Aluminium* [1993] 5 NWLR (Pt. 295) 526 Wali JSC, adopted Viscount Simon's definition of frustration as rendered in *Cricklewood Property & Investment Trust Ltd v Leighton's Investment Trust Ltd* (1945) 1 All ER, 252 at 255, which contained the following proposition:

> "Frustration of contract is the premature determination of an agreement between parties lawfully entered into and in course of operation at the time of its premature determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by law both as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement."

The events which have been recognized by the courts as constituting frustration include:

- subsequent legal changes or statutory impossibility;
- outbreak of war;
- destruction of the subject matter of the contract or literal impossibility;
- Government requisition of the subject matter of the contract;
- cancellation by an unexpected event.

The Supreme Court of Nigeria in the often cited decision in *AG Cross River State v. AG Federation & Anor.* (2012) LPELR-9335(SC) P. 50, Paras. A-B, gave a blanket interpretation to the application of the doctrine of frustration when it held that the doctrine applies to all categories of contractual undertakings, thereby making it a principle of general application to all contracts.

While it is the duty of the court to state whether the prevailing occurrences of Covid-19 pandemic constitute frustrating event, the party who intends to fall back on the virus and the circumstances surrounding it as a defence or frustrating event to escape liability under contractual undertaking has the bounding duty to carefully and properly plead facts and establish same by convincing evidence, how the effects of the pandemic prevented or will make performance of the obligation under the contract impossible.

Conclusion

Although the defence of force majeure and frustration are available to a party to the contract that has become impossible to perform, what constitutes a force majeure event is determined by objective test which depends on the specific wording of the provisions in a contract. The courts will also have recourse to what is reasonable in the circumstance to determine whether an event amounts to frustration. The party seeking to rely on any of the defences has the duty of acting in accordance with the spirit of the letters of the agreements and present facts supported by concrete evidence before the court, so as to take their benefits of the defences.

Additionally, it may be safely said that it is not necessary that the Corona virus or general health emergency be expressly specified as a force majeure event before parties can rely on the pandemic (Covid–19)as a defence. If the pandemic is considered to an unforeseen circumstance which is not due to the fault of either party to a contract by the court, a contracting party will successfully rely on it as a defence.

Paper by **Oyetola Muyiwa Atoyebi, SAN.**

Mr. Oyetola Muyiwa Atoyebi, SAN is one of the most notable professional Nigerian youth, who has distinguished himself in his professional sphere within the country and internationally. He is the youngest in the history of Nigeria to be elevated to the rank of a Senior Advocate of Nigeria. At age 34, he was conferred with the prestigious rank in September, 2019. Mr. O.M. Atoyebi, SAN can be characterized as a diligent, persistent, resourceful, reliable and humble individual who presents a charismatic and structured approach to solving problems and also an unwavering commitment to achieving client's goals. His hard work and dedication to his client's objectives sets him apart from his peers. As the Managing Partner of O.M. Atoyebi, SAN and Partners, also known as OMAPLEX Law Firm, he is the team leader of the Emerging Areas of Practice of the Firm and one of the leading Senior Advocates of Nigeria in Information Technology, Cyber Security, Fintech and Artificial Intelligence (AI). He has a track record of being diligent and he ensures that the same drive and zeal is put into all matters handled by the firm. He is also an avid golfer.

Email: Atoyebi@omaplex.com.ng
LinkedIn: https://www.linkedin.com/in/atoyebi-oyetola-muyiwa-san-804226122/