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CORONAVIRUS PANDEMIC AND LIABILITY FOR BREACH OF CONTRACT

Dr Tom Kabau

Partner | tomkabau@lesinkonjoroge.com

Senior Lecturer, School of Law, JKUAT

'It may be that some investors, traders and service providers … who may be entitled to justifiably plead force majeure clauses or the principle of frustration to avoid legal liability due to unintended breaches may fail to obtain such benefits under the law due to their short sightedness, or even due to the lack of procedural compliance'

The odious coronavirus pandemic, referred to as COVID-19, has resulted in fundamentally unexpected disruptions of virtually all forms of commercial activities globally, with Africa and Kenya being no exceptions. Infections, travel restrictions by governmental lock downs, quarantines, health advisories and well-founded cautions have practi cally paralysed diverse business and economic activities. It is noteworthy that the World Health Organisation categorised COVID-19 pathogen as a universal pandemic on 11 March 2020.

It is expected that some parties to commercial contracts are in circumstances in which they are virtually unable to meet the obligations that they had previously bound themselves to fulfil under legally enforceable agreements. In the circumstances, the question is whether these parties will be liable, under the law, for breaching obligations they would otherwise have discharged were it not for the COVID-19 pandemic, or whether the legal system anticipates and mitigates the effect of such supervening circumstances.

FORCE MAJEURE

Under the law, the concept of force majeure operates to excuse a defaulting party that is confronted by the supervening circumstances from liability. Nonetheless, with Kenya being a common law jurisdiction premised on the English juridical tradition, like many other states, the concept of force majeure is a creature of contracts rather than the general law. This is in contrast to civil law countries, whereby force majeure concept can be forced into a commercial relationship even without a contractual foothold.

Force majeure circumstances imply conditions in which no human prudence could have anticipated and provided measures against, such as the COVID-19 epidemic. They are situations that are beyond the control of the parties to a contract, which inhibit or delay them from discharging their obligations, and may include natural disasters.

PREREQUISITES

Nonetheless, the mere existence of a force majeure condition does not automatically result in its legal applicability unless certain prerequisites are satisfied. The event being pleaded by the defaulting party must be within the legally permissible contractual definition and scope of force majeure, whether by virtue of specific or open ended clauses of the agreement. The party relying on the concept may have to demonstrate that the undesirable outcome was indeed caused by the pandemic. In that context, the party may have to demonstrate that it was reasonably impossible to mitigate the outcome, and its

reference to force majeure exemption is in good faith.

Thus, the fact that the coronavirus pandemic rendered the obligations unprofitable or onerous to perform may be insufficient to legally trigger the applicability of force majeure clause. In addition, it may be necessary that the party relying on the concept should have complied with procedural requirements under the contract, such as timely notification to the other party of the occurrence of the event. Given such qualifications, investors, service providers and traders with force majeure clauses in contractual obligations should scrutinise the agreements in order to align their activities and correspondence accordingly.

FRUSTRATION

As is case in many circumstances, a force majeure clause may be lacking in contractual relationships and other commercial settings, in which case the common law principle of frustration provides an alternative exemption to performance. Similarly, the principle is applicable where an external unforeseen supervening event, such as the occurrence of the coronavirus pandemic, renders the performance of contractual obligation impossible. Further, it is applicable where the epidemic, as a supervening occurrence, leads to outcomes that are radically dissimilar from what was anticipated by the contracting parties.

It seems that the principle of frustration has the potential to apply in diverse commercial settings unlike the case with the force majeure concept. However, as a matter of practice, its applicability requires a higher threshold of proof of the occurrence, impact, and incapacity to mitigate the event. Nonetheless, it is noteworthy that in respect of the COVID-19 pandemic, the general global notoriety of the outbreak and impact, and the accompanying governmental interventions that include restrictions and lock downs, lower the burden of proof for parties alleging the role of the epidemic in their incapacity to discharge their contractual obligations.
However, just like the case discussed with regard to force majeure, it is not enough for a party to allege that the pandemic frustrated the performance of their obligations by rendering it uneconomical, inconvenient or onerous to discharge. Further, which seems to be the case with the COVID-19 outbreak, the frustrating event should not be self-induced.

CONTEXTUAL APPLICABILITY

The question that remains is whether the notoriety and far reaching commercial and investment ramifications of the COVID-19 virus render force majeure clauses, or alternatively, the principle of frustration, applicable in all contractual circumstances. It may be that some investors, traders and service providers may attempt to rely on the force majeure clauses, or alternatively, the principle of frustration, in unjustifiable circumstances despite the coronavirus outbreak. On the other part, some who may be entitled to justifiably plead force majeure clauses or the principle of frustration to avoid legal liability due to unintended breaches may fail to obtain such benefits under the law due to their short sightedness, or even due to the lack of procedural compliance. In sum, it may be necessary that parties in commercial relationships scrutinise their contractual obligations in light of the COVID-19 outbreak, and if necessary, seek timely legal counsel.

At Lesinko, Njoroge and Gathogo (LNG) Advocates, we are committed to assisting our clients understand and contextualise the implications of the odious COVID-19 pandemic to their business and investment obligations, and undertake legally sound and informed activities and responses in the context of the concept of force majeure and the principle of frustration.