

COVID-19 AND FORCE MAJEURE CLAIMS IN PERFORMANCE OF A CONTRACT

-Suyash Shrivastava & Neelakshi Joshi¹

ABSTRACT

The radical domino effect of enduring COVID-19 pandemic is felt by every sector around the world. Every other country in the world has imposed ban on traveling, every work is limited to people's houses. Restrictions are imposed on human moments. Covid-19, linked with the notorious Coronavirus, has become a word that has created havoc in the world and has been declared to be a pandemic by WHO. As the virus affects life, it affects whatever comes out of life, be it democracy, rule of law, society, economy, polity, culture, foreign policy, globalization, social order, interdependence, religious tolerance, trust, empathy and what not. It is a tough choice between lives and livelihood. Governments all over the world have restricted foreign travel and have potted their international margins. As a result economic and contractual related activities have taken a hit, everyone is suffering from loss either it be producer or consumer. This disrupts the effective working of contracts, also, led to supply chain disordering. There is a delay in the performance of contractual obligation whether it is unintentional or motive based. Every other company is in huge financial burden due to non-performance of existing contracts.

Given the exceedingly miscellaneous nature of resources and services required to fulfill contractual obligations, there is a big danger that many contracting parties may be unwilling or unable to continue the contractual obligations that might lead to breach of contract and most importantly financial loss for both the parties. With the foreign investors packing their bags and domestic market already at halt, the misery of people cannot be reduced to mere economic figures. This affected every type of contract whether it is manufacturing contracts or selling ones.

But India is a country of laws; the question that arises here is what can be done to save the parties from liabilities? This paper will be dealing with what are the effect of covid-19 on contracts, will pounder upon the concept of force majeure and articulate about what are force majeure events. Further examines how force majeure clause can be interpreted in this pandemic.

¹ 2nd Sem, Student, Indore Institute of Law

The paper also focuses on statutory laws that are related to force majeure and India's position with respect to force majeure, and measures taken by Indian authorities with some practical steps or remedies that can be followed.

Keywords: *Pandemic, Contractual obligation, Liabilities, Laws, Remedies.*

INTRODUCTION

On 11th of March 2020 the World Health Organization declared that the infectious disease goes by the coronavirus disease or COVID- 19, can be characterized as ‘pandemic’. The coronavirus has given this planet a dual blow as it has already smothered every economic sector, many developing and even developed economies are on the brink of collapsing and on the other side on an average daily more than a lakh are getting affected worldwide. In just a span of few days after the announcement of this pandemic, every country in the world has imposed ban on traveling, human contact and every work got limited to people's houses.

Covid-19, linked with the notorious coronavirus, has become a word that has created havoc in the world and has been declared to be the biggest ever pandemic by WHO after the Spanish flu, which lasted for almost two years from January 1918- December 1919. Such highly contagious viruses affect life, and whatever comes out of life, be it democracy, aristocracy, economy, polity, culture, foreign policy, globalization, social order, interdependence, religious tolerance, trust, empathy and what not. It is a tough choice between lives and livelihood.

The global figure rapidly of the affected is near to the 8 million mark and the restless world is now watching steep share market crash seems to me like a Hollywood movie scene. Choosing life and lockdown amounts to an unbearable loss of 5.2 % of the global GDP and with respect to Indian economy which was already ailing from poor consumer demand will be one of the worst affected economies. The accommodative policy stance by RBI and the Centre also doesn't offer a comprehensive gateway out of it.

With the foreign investors packing their bags and domestic market already at halt the misery of people cannot be reduced to mere economic figures. This disrupts the effective working of contracts, also, led to disordering of supply chain, and there is a delay in the performance of contractual obligation whether it is unintentional or motive based. Whether it is manufacturing contracts or selling ones, every such kind of contract is affected due to this deadly virus. Further, the companies may not be able to perform their obligations under their

customer agreements because of their suppliers' non-performance, and may in turn seek to delay and/or avoid performance (or liability for non-performance) of their contractual obligations and/or terminate contracts. Parties may also cite Covid-19 as a basis for renegotiation of price or other key contractual provisions. (E.g. - volume of materials exported from or imported into affected areas due to shifts in supply and demand).²

At this hapless state of occurrence, parties and whoever is connected to commercial contracts whether it is some from within the nation or outside, is continuously evaluating their contractual provisions for searching suitable rights and commitment ,mainly on possible areas for performing commercial contracts, particularly Force Majeure.

FORCE MAJEURE

Although the term force majeure is not given under any Indian statute. The law regarding force majeure means “superior force” and its essence can be traced under section 32 and 56 of Indian Contract Act, 1872.³ The term ‘force majeure’ according to Black’s law dictionary “*an event or effect that can be neither anticipated nor controlled*. The term includes both acts of nature (e.g. floods and hurricanes) and acts of people (e.g. riots, strikes and wars).⁴ It is a contractual obligation in which the performance by the parties will be delayed or excused temporarily.

Happening of Force Majeure event protects a party from non- performance or failure in performance of a party. Mostly Force Majeure events include Act of god, or natural calamity, wars, pandemics, strikes etc., which cannot be controlled.

Force Majeure is a concept brought to save the parties the consequences of non- performance of control due to some situation on which they have no control over. As a result of invocation of Force Majeure, the contract is not solely stooped but the effected party is expected to carry out their duties to the extent not averted by happening of force majeure event. The party who is claiming the force majeure needs to prove that despite of all the reasonable care taken by them, they could not avoid or mitigate the event of Force Majeure. In current scenario it is coronavirus. Whether the contractual duties of parties could be avoided or not is based on specific terms of the contract. The courts would examine that in

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1. ²Cyril Amarchand Mangaldas, “CORONAVIRUS, FORCE MAJEURE AND IMPACT ON COMMERCIAL CONTRACTS”, (23 March 2020) <https://www.bloombergquint.com/coronavirus-outbreak/covid-19-coronavirus-force-majeure-and-impact-on-commercial-contracts>
 2. ³ Energy Watchdog v Central Electricity Regulatory Commission, [2017] 14 SCC 80, Para 32.
 3. ⁴ Black's Law Dictionary, Abridged, 9th -West 2010.

that whether Covid-19 prevented the parties from performing their contractual obligations or not.

Force Majeure or impossibility of performance was first time taken into consideration in the year 1863, when the Queen's bench held that “*if some unforeseen event occurs during the performance of a contract which makes it impossible of performance, in the sense that the fundamental basis of the contract goes, it need not be further performed, as insisting upon such performance would be unjust*”.⁵

DIFFERENCE BETWEEN FORCE MAJEURE AND VIS MAJOR

Often the two terms ‘force majeure’ and ‘vis major’ are interchangeably used, but the two are quite distant, besides that force majeure is a French term and vis major is a Latin term. The apex court in the case recognized the distinction between them, where it held that force majeure is a much wider term, as “*breakdown of machinery, which, though normally not included in "vis major" are included in "force majeure"*”.⁶

Their definitions also vary to a great extent, the definition of force majeure has already been mentioned in the preceding section⁷, and for the vis major states that “*an overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado*”.⁸

INDIAN JURISPRUDENCE ON FORCE MAJEURE

The concept of force majeure is often confused with the Doctrine of Frustration, but they are both different topics to deal with. The legislation has dealt with this concept which can be observed under section 32 of Indian Contract Act, 1872, which covers contingent contract. Section 32 of Indian Contract Act says: “*Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void.*”⁹

From contractual perspective upon the happening of force majeure event, parties can get temporary relief from performing contractual obligation by invoking force majeure clause.

Section 56 of Indian Contract Act, 1872, says:

⁵ Taylor v. Caldwell, (1863) EWHC J1 [QB].

⁶ Dhanrajmal Gobindram v. Shamji Kalidas & Co, (1961) AIR 1285 SC, Para 19.

⁷ *Supra* note 3.

⁸ *Ibid.*

⁹ the Indian Contract Act, 1872, Section 32.

The section simply states that “*an agreement to do an act impossible in itself is void*”. But, the latter part of the section holds much relevancy with our case, which states that “*A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful*”¹⁰.

The essentials which can be drawn out are-

1. There must be valid contract.
2. The performance is not done yet or ongoing;
3. The performance of contract become impossible because by way of facts of law.

Section 56 was briefly discussed in the case of *Satyabrata Ghose v. Mugneeram Bangur & Co.*¹¹, in which the Apex court held that it would not be correct to say that section 56 only applies to cases of ‘physical impossibility’ or literal impossibility. Also, the performance of the contract will become impossible if an untoward or unfavorable event, which the parties must not have contemplated or it is beyond the control of the parties happens and it upsets the very foundation upon which the parties rested their bargain.

INVOCATION OF FRUSTRATION

The frustration of a contract is not easy to invoke, over the years the courts from India and overseas have held that the frustration should be invoked in very ‘narrow limits’. The apex court in the year 1967 held that, “*The Courts have no general power to absolve a party from the performance of his part of the contract merely because its performance has becomes onerous on account of an unforeseen turn of events*”.¹²

Also, in an instructive English judgment the court while hearing a case in which because of the closure of the Suez Canal (a major trading route) the party had to incur heavy expenses for supplying goods through a different route and was claiming frustration of contract. The House of Lords held that “*even though the contract had become more onerous to perform, it was not fundamentally altered. Where performance is otherwise possible, it is clear that a*

¹⁰ the Indian Contract Act, 1872, Section 56.

¹¹ *Satyabrata Ghose v. Mugneeram Bangur & Co.*, (1954) AIR 44.

¹² *The Naihati Jute Mills Ltd. v. Khyaliram Jagannath*, (1968) 1 SCR 821, Para 17.

mere rise in freight price would not allow one of the parties to say that the contract was discharged by impossibility of performance".¹³

The apex court in a case referred to a theory which states that, “*Since the subject matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as "the contemplation of the parties", the application of the doctrine can often be a difficult one. In such circumstances, the test of "radically different" is important: it tells us that the doctrine is not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances".¹⁴*

All the above mentioned judgments removes any ambiguity regarding invocation of frustration and makes it clear that for claiming it there has to be an extraordinary event.

PANDEMIC AND FORCE MAJEURE

The Force Majeure clause is way wider than just “Act of God”. Whether the pandemic such as Covid-19 can come under “Act of God”? Whether the effects on contracts due to Covid-19 trigger the force Majeure clause in contracts? Let’s answer them. The scope and range of a Force Majeure clause in pandemic events such as Covid-19 has to be evaluated on the basis of definition of force majeure clause under the jurisprudence pertaining to the title ‘extraordinary events’ and ‘state of affairs beyond the reasonable power and control of the parties’. However the thing that we need to know is that the force majeure clause does not specify the term ‘epidemics’ and ‘pandemics’. All this things will depend upon the legal interpretation of the clause.

There are two possible occurrences, which may help us to interpret that force majeure clause covers a pandemic like Covid-19.

- 1) As the force majeure clause consist of the term ‘extraordinary events’ or the ‘circumstances beyond the control of the parties’ and in present scenario if we see all the non-performances would invoked, if it is proven the all the circumstances caused the pandemic are beyond the control of any normal person.

¹³ Tsakiroglou & Co. Ltd. v. Noblee Thorl GmbH 1961 (2) All ER 179.

¹⁴ Supra note 2, at Para 39.

2) If the clause defining force majeure plainly include a pandemic incorporation of pandemic in the list containing force majeure events will provide more clarity as to whether the Covid-19 pandemic should be included in force majeure event or not.

But mainly whether the party can be excused to perform the contractual obligations or not on the account of covid-19 being declared as a pandemic that will depend upon the terms and conditions mentioned in the contract and the nature of party's obligation.

The government of India has taken some major steps to safeguard the parties in commercial contract during this outbreak of covid-19. The Ministry of Finances, Government of India considered an office memorandum recently proclaims that event of any disturbances in the supply chain due the outbreak of covid-19 in any country, such situation shall be covered under force majeure , wherever considered appropriate.

Similar one of the major initiative was taken by the Ministry of New and Renewable with respect to ‘solar project developers’. The ministry issued a memorandum **bearing no. 283/18/2020-GRID SOLAR dated March 20, 2020**¹⁵, talked about Covid-19 as force majeure event and decided to allowance of in the scheduled time extension in scheduled commissioning date of RE projects. **The Ministry of New & Renewable Energy vides Office Memorandum bearing no. F. No. 283/18/2020-GRID SOLAR dated April 17, 2020**¹⁶, all over again talked about occurrence of Covid-19 as force majeure event.

Added that if any party misses the deadline of contractual obligation due to the spread of coronavirus can invoke the clause including force majeure events to avoid any financial penalties, but with the developers have to produce evidences in support their respective claim in non-performance of contract and delay in supply chain due to spread of coronavirus in china or in other country.

Such relief given by government is big help in this rough time for the parties indulge in commercial contracts.

CAN PANDEMIC BE DECLARED AS AN ACT OF GOD

Till now the Indian courts have not pronounced any concrete statement on the basis of which it can be said that a ‘pandemic’ is also an act of god. However, the apex in a judgment stated that “*An act of God provides no excuse unless it is so unexpected that no reasonable*

¹⁵ <https://mnre.gov.in/public-information/current-notice>, (19 June 2020).

¹⁶ *Ibid.*

human foresight could be presumed to anticipate the occurrence”¹⁷, also, relied on a definition quoted by a British jurist which states that “*an occurrence which no human foresight can provide against and of which human prudence is not bound to recognize the possibility*”¹⁸.

The thing is in question for the reason that some are referring to the judgments of courts overseas, where they included ‘epidemic’ as an act of god. The Supreme Court of Maine (US) in the case of *Lakeman v. Pollard*, 1857¹⁹, excused some labors for performance of a contract by stating that, since cholera outbreak is an ‘act of god’ the workers cannot be sued for breach.²⁰ The similar judgments were given in the case of *Sandry v. Brooklyn School District*²¹, where court discharged the school from paying the bus drivers during an epidemic.²²

Moreover, recently England and Wales court (Comm.) held that "any other cause beyond the Seller's reasonable control" of force majeure clause includes "*delivery of the aircraft (which is the obligation of the seller and a matter principally under the seller's control) would be caught by that clause, such as the seller being unable to deliver the aircraft on time due to a pandemic causing a dearth of delivery pilots*".²³ Soon there will be plethora of cases regarding the force majeure clause in the contracts, and there is a possibility that courts will treat this pandemic as an act of god.

WHAT IF FORCE MAJEURE CLAUSE IS NOT MENTIONED

This situation may arise that the provision of force majeure may not be there or may be the clause of force majeure has not been mentioned by the parties while signing the contracts. In such situations and the aggrieved party or the one who was not able to fulfill contractual obligation can argue relief under doctrine of frustration.

¹⁷ The Divisional Controller, KSRTC v. Mahadeva Shetty & Ors., (2003)7SCC 197, Para 9.

¹⁸ *Ibid.*

¹⁹ 43 Me 463 (1857).

²⁰ **ADARSH SAXENA, ADITYA SIKKA & DRISHTI DAS**, “FORCE MAJEURE IN THE TIMES OF COVID -19”, (20 JUNE 2020) [HTTPS://CORPORATE.CYRILAMARCHANDBLOGS.COM/2020/04/FORCE-MAJEURE-IN-THE-TIMES-OF-COVID-19/#_ftnref10](https://corporate.cyrilamarchandblogs.com/2020/04/force-majeure-in-the-times-of-covid-19/#_ftnref10)

²¹ 182 NW 689.

²² *Supra* note 19.

²³ Tandrin Aviation Holdings Ltd. v. Aero Toy Store LLC and Ors., [2010]EWHC 40 (Comm), Para 46.

REMEDIES

- The remedies available to parties will be determined to the basis of language of force majeure clause. We can find the force majeure clause in details of the contract; we can find the force majeure clause which is provided to the parties for the immediate termination of contract in presence of any event given in force majeure clause.
- Some contracts it might mention in the contract that can help by putting hold on the contract, until the force majeure event is put to an end and everything resume to normal.
- Some contracts can provide restriction in time after that time period; either party may terminate the agreement provided with the written notice. i.e., if non- performance of the event is happened due to an event that appears to be permanent.
- Some might require the contract to remain in force until the force majeure event is put to an end. More of a temporary suspension.

SAFEGUARDS UNDER COMMERCIAL CONTRACTS

In this time of global pandemic here are some safeguard given under commercial contracts.

Re-evaluate and review the contract consisting of force majeure clause and examine the relevant factors and incidents mentioned to start off the ‘*rule of excuse*’.

- Making sure ‘all’ and ‘any’ notification procedure as directed in the given condition of any of the contract.
- Collectively (along with if there is any other parties) evaluate the impact of outbreak of global pandemic that is covid-19 on the performance of the contract.
- Commence the chance to fulfill the condition of the contract in alternate possible way. Any failure will safely rule out any upcoming ‘defense’ with respect to any other method of fulfilling obligations.
- Keep the record of evidence to accord non-performance of the contract to the lone force majeure event, in this outbreak of covid-19.
- Keep stern record of all the notices and orders by the government and administrative bodies.
- All records must be maintained with the unavoidable expenditure.

MEASURES TO BE TAKEN IN EXTREME SITUATIONS

In this hard time each party has role to play for the effective and smooth working of contracts. Here are some measures that should be taken in extreme situation:

1. If the parties are invoking the clause of force majeure then it is essential for them to maintain all possible records of their activities to mitigate the event earlier and how the party tried its best to discharge its full potential to avoid this situation.
2. One of the major steps that can be taken by the parties is to keep check of all the government notification and important orders issued during the time of pandemic. This can play vital role in after role of arbitration and litigation.
3. The party should always find alternative and innovative ways to fulfill their obligations. If this also results in failure then party will be able to counteract future arguments from other party.
4. There should be plentiful amount of evidence that it was impossible to perform contract due to this Covid-19 situation.
5. Always preserve the record of all the expenses incurred additionally during this force majeure event.
6. Lastly there should be open discussion among the parties for any chance of future continuation of contract and if termination that too.

CONCLUSION

We can see that there are many problems faced by both the parties of a contract. They are not able to fulfill their respective contractual obligation due to this ongoing pandemic. There are some remedies available, since it all depends on what has been written in a contract under the force majeure clause; it becomes an important issue at this point of global pandemic to evaluate the key contract and clauses within. Moving further, it would be best to invoke the clauses consisting of, price escalation, liquidated damages so as to lower burden of the amount that is being suffered. Most importantly our consumers and suppliers should be aware of their rights given by law before entering into a contract, so things would not get uglier in the hard times like Covid-19. They should also be aware of other remedies available if there is no clause of force majeure is available. There are plenty of thing the parties should take care of and measures like they should be aware of government notification or evidences that they tried their best in fulfillment of the contract but due to this invisible problem their hands were cuffed.