

COVID-19 AND FORCE MAJEURE CLAIMS IN PERFORMANCE OF CONTRACTS

Rasveen Kaur Kapoor¹

ABSTRACT

With technological advancements, commercial arrangements have been meticulous across the globe, ensuring the world to be a global village. Subject to the commercial arrangements, to ensure due performance of the contracts and the interests of the parties involved, most commercial contracts duly involve, the "force majeure" clause. These clauses are usually incorporated to extinguish the liabilities of both parties concerning the performance of the contract, during circumstances beyond the control. With, the World Health Organization's (WHO) official declaration to the fact that the coronavirus disease 2019 (COVID-19) is a pandemic it is inevitable that the outbreak of Covid-19 would massively affect the business and commerce. Much like the international trade and commerce, the COVID-19 virus has effectuated loss of lives, social distancing, shutdown of businesses and also nationwide lockdowns across the globe. This has resulted in trade and commerce (barring essential services/requirements), both domestically and internationally, coming to a standstill.

This paper critically analyzes the involvement of "force majeure" clause in commercial agreements, its elements and implications, its necessity in the course of a pandemic. The author has presumed for the purpose of this paper that the contract does not include a force majeure clause that explicitly mentions Covid-19 as a force majeure event.

¹ 2nd Year, Student, Indore Institute of Law, Indore

INTRODUCTION

A. MEANING:

The primary element to which all commercial agreements revolves around reads as, “*Pacta sunt servanda*’ which means agreement must be kept. However, this principle is not absolute in nature, the primary reason to this being the subjugation of the performance of the contract to the circumstances that prevail or may prevail in the due performance of the contract.

The term “Force Majeure”, being a French phrase reads as, “superior force”, means, any event or circumstance or combination of events that wholly or partly prevents or causes unavoidable delays, independent to the will of the parties concerned in the performance of its obligations under any agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the affected party and could not have been avoided if the affected party had taken reasonable care or complied with prudent utility practices. The Black’s Law Dictionary defines the term Force Majeure as,

“An event or effect that can be neither anticipated nor controlled.”

Force majeure clauses excuse a party from performance if some unforeseen event beyond its control prevents performance of its contractual obligations.² The inclusion of a force majeure clause, the precise language of the clause thereto, in commercial agreements shields the contracting parties against the unforeseeable, and hence makes it an elemental provision in all contracts.

B. FORCE MAJEURE CLAUSE

The Indian Law doesn’t specifically mentions any provision per se the Force Majeure Clause, therefore, the parties to contract are bound by the terms stipulated under a force majeure clause. These clauses specifically mention the fact as to what may qualify to be a force majeure event and the obligations of the parties thereto on happening of such an event. The inclusion of a Force Majeure Clause under any commercial arrangement predominantly depends upon the drafting

² Article 79, The United Nations Convention on Contracts for the International Sale of Goods (“CISG”)

abilities of the contracting parties and hence rests a room for dynamism in this behalf. The inclusion of a Force Majeure Clause to any commercial contract is often overlooked but the recent outbreak of Coronavirus pandemic clearly defined the need and the utility of the Force Majeure Clause.

i.) GENERAL COMPONENTS TO A FORCE MAJEURE CLAUSE :

- a.) Defining the scope of Force Majeure; Acts of God, Acts of Government, Other Acts outside the control of a party. Whether the definition inclusive or exhaustive;
- b.) Describing the effect that the event needs to have to make the clause applicable being impossibility in performance, hinderance in performance, defeats the objectives, destruction of relevant asset, etc.;
- c.) Describing the actions that a party needs to take to avail the benefit of the Force Majeure clause. e.g. written notice;
- d.) Describe how the Force Majeure event will affect the contract, e.g. extension of time-periods, suspension of obligations, or termination of contract.

ii.) POINTS TO CONSIDER WHILE INVOKING “FORCE MAJEURE” :

- a.) A written notice must be issued to invoke Force Majeure clause. Force Majeure protection is likely to take effect from the date of issue of the notice and not the date of commencement of the event. Force majeure clauses consist of procedures which need to be followed by the parties, and such adherence is critical for successfully availing the benefits of the clause. The notice clauses usually are not complex, and the sole requirement is generally that the grantor of the force majeure should be timely informed about the event so that adequate steps can be taken by him to agree to the force majeure or termination, whichever the agreement holds.³
- b.) The affected obligor is required to prove; the existence of the Force Majeure event, that the Force Majeure event has affected its ability to perform its obligations under the

³Reed Smith LLP, Available at [https://files.reedsmith.com/files/Uploads/ Documents/alert06045.pdf](https://files.reedsmith.com/files/Uploads/Documents/alert06045.pdf), Accessed on 11th February, 2020.

contract and that he has taken and continues to take all possible actions to mitigate or avoid the effects of the Force Majeure event.

WHETHER COVID-19 WILL BE CONSIDERED AS A 'FORCE MAJEURE' EVENT

A. BACKGROUND:

COVID- 19 has been declared as a pandemic by the World Health Organization⁴. The novel strain of Coronavirus was detected in the Wuhan city of China, whereby the outbreak of Novel Coronavirus (Covid-19) has engulfed the globe with a medical emergency and has claimed numerous lives. It is howsoever graver than other types of Coronaviruses because it has never been identified in humans before. On 19th February, 2020, vide an office memorandum O.M. No. 18/4/2020-PPD⁵, the Government of India has clarified that the disruption of the supply chains due to spread of coronavirus in China or any other country should be considered as a case of natural calamity and “force majeure clause” may be invoked, wherever considered appropriate, following the due procedure. Similar initiative was taken by the Ministry of New & Renewable Energy with respect to ‘solar project developers. The Ministry vide an Office memorandum dated 20.03.2020⁶, recently declared that whoever miss contractual obligation deadlines on account of COVID -19, can invoke the force majeure clauses to avoid any financial penalties.

B. FORCE MAJEURE AND COVID 19:

The term 'Force Majeure' is a term of wider import and the widest meaning that can be given to 'Force Majeure' is that where reference is made to 'Force Majeure', the intention is to save the performing party from the consequences of anything over which he has no control.⁷ Generally, when a contract having a force majeure clause mentions specific events which constitute force

⁴ <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen>

⁵ <https://doe.gov.in/sites/default/files/Force%20Majeure%20Clause%20-FMC.pdf>

⁶ No. 283/18/2020-GRID SOLAR, Ministry of New & Renewable Energy (MNRE).

⁷ Uttar Haryana Bijli Vitran Nigam Limited and Ors. vs. Central Electricity Regulatory Commission and Ors. (07.04.2016 - APTEL) : MANU/ET/0077/2016

majeure events, and specifically excludes other events, then the events which are excluded specifically cannot be availed by the parties.⁸

Accordingly, it is imperative to note that, “Force majeure denotes all circumstances independent of the will of man, and which it is not in his power to control. In such cases, force majeure is sufficient to justify the non-execution of a contract”.⁹ It has been an unprecedented situation not only in India but all over the world. Government of India has, vide notification dated 19th February 2020, taken the stand that, the coronavirus "should be considered a case of natural calamity and FMC (i.e. force majeure clause) maybe invoked, wherever considered appropriate, following the due procedure." The term 'force majeure' has been defined in Black's Law Dictionary, as 'an event or effect that can be neither anticipated nor controlled' When such is the position, and it is officially so notified by the Government of India and the Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force can be anything but an "ordinary" period.¹⁰

Although force majeure clauses are not standardized and often depend on the parties' discretion and drafting ability, there are many standard formats which are available and are known to be widely used.¹¹ The Article 7.1.7 of the “Principles of International Commercial Contracts,” UNIDROIT¹²; has clearly mentioned in this lieu that in order to invoke the application of a force majeure clause four elements must be satisfied, being; firstly, the Impediment must be Beyond the Control of the Party; secondly, the Impediment must have a continuing effect on the Performance of the Party; thirdly, the Party Failing to Perform must Provide a Notice and lastly, invocation of

⁸ Energy Watchdog (2017) 14 SCC 80

⁹ Lebeaupin v. Richard Crispin & Co., [1920] 2 K. B. 714, 719

¹⁰ K. Srikanth vs. The Asst. Commissioner of Income Tax, Company Circle-II(4) (19.05.2020 - ITAT Chennai) : MANU/IX/0106/2020

¹¹ Refer to Germany: Bürgerliches Gesetzbuch (BGB) § 313 (Störung der Geschäftsgrundlage); Italy: Codice Civile (CC), Arts 1467-1469 (eccessiva onerosità sopravvenuta); France: Code Civil (CC), Art 1148 (force majeure). See also Konrad Zweigert and Hein Kötz, Einführung in die Rechtsvergleichung (3ed, JCB Mohr, Tübingen, 1996) 533

¹² Article 7.1.7 of the “Principles of International Commercial Contracts,” UNIDROIT Principles for International Commercial Contracts, 2010 <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010/404-chapter-7-non-performance-section-1-non-performance-in-general/1050-article-7-1-7-force-majeure>, Accessed on 9th February, 2020.

force majeure in no way restricts a party from exercising termination rights under the contract or withholding the performance.

It can be argued that an implied exclusion can be awarded to the granter if the agreement fails to state that Coronavirus is a force majeure event. However, it is general practice that in cases where the event is relatable to an express or implied clause, force majeure would arise.¹³ The Coronavirus outbreak has taken place globally and it has been declared as a “Global health emergency” by the World Health Organization.¹⁴ The outbreak of Coronavirus pandemic has disrupted the supply chains and with the shutdown of factories there has been a major impact as regards the manufacturing processes. If an untoward event or change of circumstance totally upsets the very foundation upon which the parties entered into their agreement, it can be said that the promisor finds it impossible to do the act which he promised to do.¹⁵

Arguendo, the outbreak of an epidemic is not covered by force majeure clauses in an agreement; however, the extent of the lockdowns, restrictions and isolation in various parts of the world certainly presents a strong hindrance to the performance of any contract. Because no reasonable steps could have been taken by the party foreseeing the response to the outbreak, this epidemic is distinct from other biological epidemics.¹⁶ Henceforth, in circumstances where the due application of the contractual processes have been terminated solely due to the lockdown measures in the wake of Coronavirus outbreak thereto the due the temporary impediment pertinent to the Coronavirus outbreak is justifiable. However, in cases, where the general nature of the contractual obligations are not directly related to the due performance of such contractual obligations, a force majeure clause cannot be invoked in that behalf. In order to prove that the event was beyond the control of the parties, it needs to be established that the parties could not have taken steps to prevent the effects of the event in question.¹⁷ For example; A house is on rent and the tenant refuses to pay

¹³ GV Projects & Investments (P) Ltd. v. National Highway Authority of India, (2019) 173 DRJ 717 at ¶23

¹⁴ South China Morning Post, Available at, <https://www.scmp.com/news/china/society/article/3048314/china-coronavirus-world-health-organisation-declares-outbreak>, Accessed on 4 February 2020

¹⁵ Satyabrata Ghose v. Mugneeram Bangur & Co. 1954 SCR 310

¹⁶ 2Jolie Giouw, “Corona Virus (2019-nCoV) and Force majeure Clauses”, Bird & Bird ATMD Legal Update, Available at <https://www.twobirds.com/~media/chinese/bbatmd-legal-update---coronavirus-and-force-majeure-clauses---feb-2020-v3.pdf?la=en&hash=D7F2802E382D297449227732ECDA32C767EFC475>, Accessed on 11th February, 2019

¹⁷ Channel Island Ferries Ltd. v. Sealink UK Ltd., [1987] 1 Lloyd’s Rep 559 at ¶570

rent to the landlord citing force majeure; in such a case the invocation of force majeure clause is not justifiable as the tenant still possess the house and the outbreak of Coronavirus pandemic is nowhere direct related to the performance of contractual obligations.

In the case of a force majeure event, the party who wishes to avoid liability for non-performance must prove to the court that the event of the force majeure directly affected the performance and also that it was beyond the party’s control to prevent or stop the event.¹⁸ Furthermore, in other case, where to, A hospitality group that faces a huge business downturn due to the Coronavirus outbreak, cancels all the payments to hotels/hostels citing Force Majeure clause is also not justifiable as the hospitality group continues to receive the benefit of the hotels/hostels, and since it is facing a business downturn would not entitle it to suspend its duty to pay the owner of the hotels/hostels

FRUSTATION AND IMPOSSIBILITY

In case of frustration of contracts, the contract is put to an end and does not continue. A contract can be said to be frustrated if its performance is impracticable and useless from the point of view of the object and purpose of the parties, though the performance of the contract itself is not necessary literally impossible.¹⁹ According to the provisions of Section 56, it shall be noted 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.²⁰ The Supreme Court of India has held that, “Where the contract provides for contingencies upon the happening of which the contract cannot be carried out, and also provide for consequences, such cases will be governed by Section 32 of the Contract Act and not by Section 56. If an act becomes impossible at a future date and that exigency, which is beyond the control of

¹⁸ Holcim (Singapore) Pte Ltd. v. Precise Development Pte Ltd., [2011] 2 SLR 106

¹⁹ Satyabrata Ghose v. Mugneeram Bangur & Co. 1954 SCR 310

²⁰ Section 56, The Indian Contract Act 1872

the promisor and could not have been prevented by him, is not provided for in the contract, then the contract becomes void as provided in Section 56 of the Contract Act.”²¹

The outbreak of Coronavirus disease may not render a contract ‘impossible’ to perform, since its effects and the lock-down is temporary. A contract is not frustrated merely because the circumstances in which it was made are altered. It is only when a consideration of the terms of the contract, in light of the circumstances existing when it was made, shows that the parties never agreed to be bound in a fundamentally different situation which unexpectedly emerged, that the contract ceases to bind.²²

However, if a contract is time-bound (e.g. delivery of goods or services) and a delay will defeat the purpose of the contract, then it could be said that frustration of contract would be applicable. Also, it is pertinent to note that the view mentioned hereto by the author, varies circumstantially, as in case of part performance of the contract it is advisable that temporary impediment as regards the contractual obligations that are impossible in nature as of now, midst the pandemic shall be sought, as application of the doctrine of frustration in this behalf can be prejudicial as regards the business interests of the parties in the long run.

UNJUST ENRICHMENT

The principle of Unjust Enrichment is set out in Section 70 of the Indian Contract Act, 1872. Under Section 70²³, the principle of Unjust Enrichment would require that, A person should do an act or deliver any goods/service to another person. It should be amply clear that such act or delivery is not intended to be gratuitous. The recipient should derive a benefit from the act or delivery. Section 70 of Contract Act provided that, where a person lawfully did anything for another person, or delivered anything to him, not intending to do so gratuitously, and such other person enjoyed benefit thereof, latter was bound to make compensation to former in respect of, or to restore, thing

²¹ *National Agricultural Cooperative Marketing Federation of India v. Alimenta S.A.* (Judgement dated 22nd April 2020 passed by the Supreme Court in C.A. No. 667 of 2012)

²² *Alopi Parshad & Sons Ltd. v. Union of India* 1960 (2) SCR 793

²³ Section 70, The Indian Contract Act, 1872

so done or delivered.²⁴ That doctrine of unjust enrichment is a just and salutary doctrine and no person is entitled to collect duty from the purchaser at one end and also seek refund of the same duty from the Revenue on the ground that such duty has been collected contrary to law.²⁵

The principle of Unjust Enrichment would apply both in cases of Force Majeure and Frustration of Contract. In case a contract is affected by Force Majeure, any person who has derived a benefit from the other party's performance of the contract is required to restore or provide fair compensation for such action or delivery. The basic purpose of force majeure clauses is in general to relieve a party from its contractual duties when its performance has been prevented by a force beyond its control or when the purpose of the contract has been frustrated.²⁶ It is a settled principle of law that damages for breach of contract are awarded to place the injured party in the same position in which it would have been had the contract was not broken.²⁷

One of the aims of every judicial system has to be to discourage unjust enrichment using Courts as a tool.²⁸ In case a contract is declared void due to frustration, any person who has derived a benefit from the other party's performance of the contract is required to restore or provide fair compensation for such action or delivery. If these requirements are fulfilled, the recipient is required to restore the act or delivery or make fair compensation for the action or delivery to the provider.

²⁴ Mahanagar Telephone Nigam Ltd. vs. Tata Communications Ltd. (27.02.2019 - SC) : MANU/SC/0288/2019. See also <https://singhania.in/contract-act-1872-sections-68-72-central-excise-and-customs-law-act/>

²⁵ Commissioner of Customs vs. Hindalco Industries Ltd. (24.09.2008 - GUJHC) : MANU/GJ/0738/2008

²⁶ Phillips P.R. Core, Inc. v. Tradax Petroleum Ltd., 782 F.2d 314, 319 (2d Cir. 1985)

²⁷ Slum Rehabilitation Authority vs. M.M. Project Consultants Private Limited (16.06.2020 - BOMHC) : MANU/MH/0653/2020

²⁸ K. Rajalingam and Ors. vs. R. Suganthalakshmi and Ors. (28.05.2020 - MADHC) : MANU/TN/3069/2020

CONCLUSION

The doctrine of Force Majeure is wide in nature which covers acts by ‘superior forces’ that are beyond the control of the contracting parties, the rules of legal interpretation and the language of the clause to the extensive nature of doctrine are far broad in nature per se, the doctrine of Act of God is concerned. There have been substantive lockdowns at different points of times in India that has disrupted the very nature of business practices in general parlance. The unforeseeability of the outbreak of novel strain of Coronavirus makes it imperative to note that it being a force majeure event in entirety. Also, followed by the causation effects of the Coronavirus disease it is imperative to note that no mitigating steps could have been taken by the contracting parties per se the outbreak of the virus being novel in nature and the consequential effects of the same are concerned. The unpredictable and novel strain of the Coronavirus disease has really placed a question as regards the performance of the contracts and the obligations of the contracting parties in this behalf and calls for the contracting parties to directly allocate the association of the significant risks; regards the outbreak of the Coronavirus Disease.