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EFFECT OF FORCE MAJEURE IN THE TIMES OF COVID-19
AGAINST THE CONTRACTS

INTRODUCTION

The catastrophic COVID-19 pandemic which has halted the whole world. It has proven to be not only a humanitarian but also an economic crisis. COVID-19 is defined as a global health crisis of this generation which through its spread has affected the lives on every country of each continent. The restrictions on the movement of the people and goods except for those who are involved in essential services resulted in the closing of industries and social life leading many businesses across the globe to suffer losses. Some of them even became bankrupt and some were at the verge of closing permanently. The economy is disrupted in the past as well by incidents comprising of, but not limited to the Indian Ocean Tsunami in 2004 and Gujarat earthquake in 2001 but nothing was as horrifying as the current pandemic. This ongoing scenario of lockdowns and travel bans have subsequently reduced the capacity of businesses to move goods and services within and across the national borders. The businesses are unable to perform their contractual obligations as the situation could neither be anticipated nor controlled by them. Ambiguity in the performance of contracts has directed the parties in envisaging breaches of contract and assessing their rights and remedies in relation to the same. The extent of uncertainty surrounding supply chains due to the COVID-19 pandemic has shifted the focus of the contracting parties on the historical expression called 'force majeure'. The Governments are struggling to keep the economical graph from crumbling and are introducing numerous

policies and benefits for the industry and business organizations. Countries like India have taken a major step of complete lockdown to reduce the spread of Coronavirus. A research by Barclays estimated the loss of India by economic activity to be as high as \$234 billion in the lockdown period, resulting in zero per cent GDP growth this fiscal year¹. As such, the parties may invoke 'force majeure' clauses in their contracts against each other to either avoid paying up or deliver services as per the contractual terms. Parties may cite this pandemic as a ground for discharging their commercial obligations or for opting renegotiating the price and terms of the contract. The contracting parties may include a force majeure clause in their contracts by deciding a list of events that can be said to be force majeure event or without it.

FORCE MAJEUR- A BREIF DISCRPTION

Force Majeure is a French word which literary means "a superior force". As per the contract law, 'force-majeure' is defined as "an event or effect that can be neither anticipated nor controlled; especially, an unprecedented event that prevents someone from doing or completing something that he or she had agreed or officially planned to do. The term includes both, acts of nature (e.g. floods and hurricanes) and acts of people (e.g. riots, strikes and wars)"² or in other words it is an unanticipated event which is outside the control of the contracting parties making the performance of the promise or contract impossible. Another term which is generally used for unprecedented events in contract law is 'Vis Major' a Latin word meaning 'Act of God'. The difference between the two terms is that the former includes both artificial and natural unforeseen events and the later only involves natural unforeseen events. The difference between the two terms is recognized by the supreme court in *Dhanrajamal Gobindram v. Shamji Kalidas & Co*³. In the case of *Phillips P.R. Core, Inc. v. Tradax Petroleum Ltd*⁴ the court held that in spite of the differences between the two terms the effect is to excuse non-performance of contractual obligation by a party and prevent it from being liable for the breach of contract. The parties may in Force Majeure clause into a contract by default. A company may insert a force majeure clause into a contract by default so that its liability could be absolved in the situation the contractual obligation cannot be fulfilled for reasons beyond its control.

The objective of Force Majeure is to exempt a party from performing contractual obligations which has become impossible, due to interference of a superior force. The present COVID19 situation has signified the importance of the concept of Force Majeure in contracts. The two

¹ Nirbhay Kumar, Lockdown 2.0: How it impacts ailing economy, India Today, April 16, 2020, at <https://www.indiatoday.in/mail-today/story/lockdown-2-0-how-it-impacts-ailing-economy-1667426-2020-04-16>

² Black's Law Dictionary, 11th Edition; Pg. 788

³ AIR 1961 SC 1285.

⁴ 782 F.2d 314, 319 (2d Cir. 1985)

completely different concepts that is Force Majeure and the doctrine of frustration of contract under section 56 of Indian Contract Act 1872 are often mixed at times. The term Force Majeure has neither been defined or explicitly mentioned under the Indian Contract Act or any other statutes in India. From perspective of the contracting parties, a Force Majeure clause provides temporary absolve a party from performing its obligations under a contract upon occurrence of a force majeure event.

CONTRACTS WITH FORCE MAJEURE CLAUSE

The COVID19 event is one of the rarest outbreaks that the world has witnessed so it is really difficult for any contract which was made before the event to have COVID19 event in the Force Majeure clause. As the COVID19 pandemic is becoming more and more destructive day by day so it has become important for the Indian courts for welfare of the contracting parties to consider COVID19 as a 'Force Majeure' event.

- 'Governmental orders', 'change in law' and / or 'act of Government' are involved in a typical force Majeure clause in a contract as one of the events to invoke the clause. All commercial and private establishments were ordered to be closed barring a few essential services by the government for a period of 21 days vide order ⁵. Due to this strict lockdown the fulfilment of the contract has become impossible and unlawful and against the order of the Government. Several penalties are taken by the government on the violation of the lockdown rules. The source of lockdown is the said order by the government and consequentially, there is also change in law wherein day-to-day business activities are suspended. Therefore, failure to perform contractual obligations due to this pandemic clearly fall within the constraints of Force Majeure.
- If a contract expressly mentions epidemic and/or pandemic disease as one of the events in the Force Majeure clause than it is understood and becomes crystal clear that COVID19 will initiation the Force Majeure clause agreed between the contracting parties.
- On 19th February 2020 the Department of Expenditure (Ministry of Finance, Government of India's) Office Memorandum expressed that COVID-19 pandemic is a natural calamity and thus, is covered in the Force Majeure clause provided in the Manual for Procurement of Goods, 2017. The said Memorandum further stated that

⁵ Ministry of Home Affairs, Order No. 40-3/2020-DM-1(A), March 24, 2020, at https://www.mha.gov.in/sites/default/files/MHAorder%20copy_0.pdf.

parties to the contract may terminate their liability under the said contract by invoking the Force Majeure clause.

- If an event is not specifically mentioned in the Force Majeure clause of a contract but phrases like “including, but not limited to” or “any cause/ event outside the reasonable control of the parties” are mentioned along with various events of Force Majeure. In such a situation the Ejusdem Generis rule may be applied. It is a rule of interpretation of contracts. The rule states that the general expression is limited to the shared characteristics of the specific words followed by it. For example, if in a contract Force Majeure clause includes ‘outbreak of disease such as Middle East Respiratory Syndrome (MERS) or any other similar contagious disease’. In such a case, ‘any other similar contagious disease’ is a general expression prefixed by specific diseases. Thus, it can be said that outbreak of COVID-19 falls within the scope of the general expression.
- A typical Force Majeure event is an unanticipated like Act of God than cannot be controlled by any of the parties to a contract leading to non-performance of contractual obligations. On 2nd March 2020 the media briefing by WHO expressed no doubt in admitting that COVID-19 was beyond any reasonable control of or anticipation by the contracting parties. It further added that a respiratory pathogen that is capable of community transmission, but which can also be contained with the right measures has never been seen before⁶.
- Various legislations of different nations around the world like United Kingdom and United states of America have considered natural calamity as a force Majeure event. The Supreme Court of North Dakota in *Sandry v. Brooklyn School District*⁷ discharged the school district from paying the wages to bus drivers, considered an appeal pertaining to claims by school bus drivers for paying their wages under their transportation contracts during the period that the schools were closed due to the influenza outbreak which is also a epidemic like COVID 19 which is spread even more than influenza outbreak and has become a pandemic.

In *Aviation Holdings Ltd. v. Aero Toy Store LLC*⁸ the court held that where a party is unable to deliver an aircraft on time due to a pandemic causing a dearth of pilots fell within the wordings of a force majeure clause. A delay in the discharge of cargo where

⁶ WHO, WHO Director-General's opening remarks at the media briefing on COVID-19 - 2 March 2020, (Apr. 19, 2020, 4:00 PM), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---2-march-2020>

⁷ 182 NW 689.

⁸ [2010] 2 Lloyd's Rep 668

the defendant could not obtain enough horses to unload a ship on time was excused by the District Court of Southern District of New York excused due to a then prevailing horse flu pandemic on the ground that the horse flu pandemic fell within the ambit of 'Act of God'.⁹

CONTRACTS WITHOUT FORCE MAJEURE CLAUSE

It is not necessary for the contracting parties to include a Force Majeure clause by default in a contract. In such a case where the contract does not contain the clause then the affected party will not be able to invoke the principle of Force Majeure. However, the affected party can claim relief under the doctrine of frustration under section 56 or section 32 of the Indian Contract Act, 1872.

Doctrine of frustration¹⁰. "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."

Section 32- If the performance of a contract contingent on the happening of a future uncertain event such type of contract cannot be enforced by law unless or until the event has happened.

For instance, if we take an example of a star channel production house which had entered into a contract with an event organizer to provide sound and lighting for a celebrity award show.

However, due to the COVID 19 pandemic a strict lockdown has been imposed in India due to which the award show can no longer take place. In this case, the contract between the production house and event organizer will be frustrated as it is now impossible to organize the award due to the strict lockdown in the country and neither of the parties could perform their contractual obligations and therefore the contract will, in light of in light of Section 56 of the Contract Act, become void and if the event organizer has received any advance under the said contract, the event organizer will be 'bound' to repay the advance to the other party .

- If the happening of the event becomes impossible, the contract becomes void. Impossibility arising after the formation of a contract is known as a supervening impossibility. It makes a contract void. It is to be noted that self-imposed impossibility of performance of a contract is no excuse for non-performance. However, parties are

⁹ Coombs v. Nolan 6 F Cas. 468

¹⁰ Section 56 Indian Contract Act, 1872

discharged from performance of their contractual obligations where the impossibility is caused by circumstances beyond the control of the parties¹¹.

- In the case of *Satyabrata Ghose v. Mugneeram Bangur & Co.*¹² the SC held that when there is a clause (express or implied) relating to Force Majeure event in a contract, it is governed by Section 32 of the Indian Contract Act whereas if a force majeure event arises dehors the contract then Section 56 of the Act applies. The supreme court in *Energy Watchdog v CERC*¹³ while hearing an appeal of rise in the prices of coal imported from Indonesia would result in frustration of the Power Purchasing Agreements held that the application of the doctrine of frustration must always be within narrow limits and the Doctrine of frustration will not apply so long as the fundamental basis of the contract remains the same.

SITUATIONS WHERE FORCE MAJEURE AND DOCTRINE OF FRUSTRATION WOULD NOT BE APPLICABLE

- The negligence of the parties or other malfeasance are not excused by the Force Majeure concept. It cannot be invoked where non-performance is caused by the natural and usual circumstances of external forces or situations which could be contemplated. Also Financial and commercial difficulties in the performance of a contract are not involved in the situations where Force Majeure could be invoked.

In order to get relief under a force majeure clause, the affected party has to demonstrate that the event of force majeure was beyond its control, and that all reasonable steps (which can be financial or commercial in nature, like hiring extra manpower, spending additional money, seeking another manufacturing lines or suppliers, etc.) to mitigate the consequences of the event were taken by them and that there are no alternative means to perform the contract.

- The doctrine of Frustration of contract under section 56 would not be applicable when:
 - (i) The frustration of contract is self-induced.
 - (ii) When the contracting parties decide to perform the contract in spite of the intervening event or circumstances.

CAUSATION AND DUTY TO MITIGATE

Mere proving the pandemic of COVID 19 as a Force Majeure event would not relieve a party from performing contractual obligation. The non-performance of the contract should be a result of direct impact of COVID 19 and the party seeking the reliance on

¹¹N.D. KAPOOR, ELEMENTS OF MERCANTILE LAW, 125 (2012)

¹² 1954 SCR 301

¹³ (2017) 14 SCC 80

the force majeure event is also under duty to mitigate and explore alternate means of performance. The guidance on the causal link between the force majeure event and the resulting situation is provided in the Orissa high court judgement of *Sri Ananda Chandra Behera v. Chairman, Orissa State Electricity Board*¹⁴. The Bombay high court held that the absence of a direct causal link between the non-performance and Covid-19 pandemic was one of the other grounds on which the Court refused to grant an injunction restraining the encashment of letters of credit. It was later sought inter alia on the ground that the original contract for sale of steel had become impossible to perform due to Covid-19 pandemic and the nation-wide lockdown. However, the Court said that supply of steel was an essential service and, since there were no restrictions on its movement, performance of the contract was not affected¹⁵.

The parties must make reasonable efforts to perform contractual obligations by alternate means even if the Force Majeure clause is incorporated in it. Even if there is no express provision in the contract, the party seeking to rely on a force majeure event to defend its non-performance will have to prove that it was unable to perform its obligations in spite of taking reasonable steps to mitigate the effect of the force majeure event. The House of Lords in *Tsakiroglou & Co. Ltd. v. Noble Thorl GmbH*¹⁶ found that contract was not frustrated in a situation where the closure of the Suez Canal led to a longer and more expensive shipping route around the Cape of Good Hope. The contract has only been fundamentally altered and became more onerous to perform.

CONCLUSION

In order to resile from the contractual obligations, the contracting parties may successfully invoke the Force Majeure clause if it is present in the contract or they can rely on section 56 of the Indian Contract Act, 1872. The burden of proof as to whether the COVID-19 pandemic has resulted in non-performance of contractual obligations lies on the party seeking the relief. The Governments of different nations are providing certain reliefs with respect to certain sectors but the main question pertaining in the minds of everybody is whether such reliefs are enough or not to fight the current pandemic. The courts have tried all the methods to provide specific benefits to the contracting parties that are available for them either under the contractual terms

¹⁴ 1998 85 CLT 79.

¹⁵ Standard retail(supra)

¹⁶ [1961] 2 All ER 179.

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or any notification released by the government, while keeping in mind that there is no breach by the contractor and the aggrieved party has truly raised the force majeure clause.



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