

# SCOPE OF FORCE MAJEURE AND DOCTRINE OF FRUSTRATION IN LIGHT OF COVID-19

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## ABSTRACT

Recently, Coronavirus or COVID-19 has not only emerged but has rapidly become a worldwide problem. The Coronavirus (COVID-19) pandemic has impacted the business capabilities around the world where from a small activity of selling newspapers on the streets to big stock market offices, factories, etc. are facing a lock-down. Governments have laid proclamations on 'quarantine-when-healthy' rather than 'quarantine-when-infected' to reduce the pace and scope of the spread of infection. As the severity of COVID-19 increases and continues to haunt, companies are grappling to maintain regular business operations. The rapid progression and spread of the COVID-19 virus have created a situation where parties are unable to keep up with contractual obligations owing to a wide range of issues, including, government directives, social distancing, closure of ports, and terminals and disruption of supply chains. The inability to thus fulfil these obligations has become a matter of concern as many parties to contracts have already become unable, and more are likely soon to become unable, to perform their duties and meet their contractual obligations. Undoubtedly, the current situation raises important questions pertaining to the performance of contractual obligations. Whether a party can be excused for delayed or non-performance on Doctrines of Force Majeure and Frustration will depend on their ability to prove utter helplessness to fulfil their obligations during the raging pandemic. While this may seem like an obvious plea, it cannot easily be asserted. Certain requirements and conditions need to be asserted with. These steps and conditions are what this paper seeks to analyse, drawing from the current global situation

## INTRODUCTION

In 2020, who would have thought that the world would be faced with such a global threat that is not a nuclear war instigated by North Korea, or an Alien Invasion but an invincible biological threat. The outbreak of COVID-19 has disrupted most of the economic activities around the world and has also put a significant population under lockdown. COVID-19 has prevented the business to run efficiently, disrupted various commercial and operational activities, interrupted supply chains, and made contractual obligations impossible to perform. Owing to the current pandemic being faced by nations around the world, it has become clear and incontrovertible that the clarity of contractual terms is as important as the contractual obligation. On considering the issue of contracts, many new aspects have been brought by this outbreak, one of which includes the application of the Force Majeure clause in contracts that has an impact over the formal contracts and helps mitigate or excuse delay or non-performance of the contract.

## DOCTRINE OF FORCE MAJEURE

The Doctrine of Force Majeure has its origin in French law based on the Roman Doctrine of vis major. The vis major concept was defined by the English House of Lords<sup>i</sup> as- “a circumstance which no human foresight can provide against and of which human prudence is not bound to recognize the possibility.”<sup>76</sup>

The Black’s Law Dictionary defines “Force Majeure” as; “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.”<sup>iii</sup>

As defined in para 9.7.7 of the Manual for Procurement of Goods 2017<sup>iii</sup>, the Force Majeure clause means extraordinary events or circumstances beyond human control such as an event described as an act of God (like a natural calamity) or events such as a war, strikes, riots, crimes (but not including negligence or wrong-doing, predictable/seasonal rain and any other events specifically excluded in the clause).

Force Majeure generally means the events or circumstances that are unforeseeable or not reasonably foreseeable at the time of execution of the contract. This is a clause with the essence of the universal concept of Pacta Sunt Servanda (an agreement must be kept) and is included during the drafting of a contract to state that a party shall not be liable for the failure of or any

delay in performing his own obligations in the contract so far as the failure or delay is as a result of an event beyond the reasonable control of a party and could not reasonably have been foreseen or provided against. However, such failure to perform will not be excused for failure or delay resulting from only general economic conditions or other general market effects such as an increase in the cost of delivery as a result of the event.

The Force Majeure clause frees both parties from contractual liability or obligation and avails a temporary break to the party from performing the contractual obligations upon the occurrence of the Force Majeure event. The occurrence of the Force Majeure event must be beyond the control of the parties to the contract and they should have tried to lessen the impact of that event, for the application of the Force Majeure clause. When the conditions required are fulfilled, the Force Majeure clause would be applied by which the parties to the contract would be excused from performing the contractual obligations that were to be undertaken by them till the Force Majeure event took place. The intention of a Force Majeure clause is to save the performing party from consequences of something over which it has no control and is an exception to what would otherwise amount to a breach of contract. However, this clause does not excuse a party's non-performance entirely, but only suspends it for the duration of the Force Majeure. The firm has to notify of Force Majeure as soon as it occurs and it cannot be claimed ex-post facto. Also, the effected parties have to keep a documentary record as to why the performance was hindered or delayed as the case may be. The law relating to Force Majeure is embodied under Section 32 of the Indian Contract Act, 1872.

Whether a contractual obligation can be evaded on the grounds of Force Majeure is a factual determination based on the specific terms of the contract. Force Majeure related language used in most contracts varies widely and, therefore, it is important to review these clauses carefully. Some contracts specifically mention examples of Force Majeure events that automatically meet the standard upon the happening of such event, while remaining rely on generic language usually included in such Force Majeure clause. A Force Majeure clause cannot be implied under law, it must be expressly provided for under the contract, and protection afforded will depend on the language of the clause. In the event of a dispute as to the scope of the clause, the courts are likely to implement the usual principles of contractual interpretation.

The language of the Force Majeure clause will also determine the remedies available to the parties. Some contracts may lay down for immediate termination of the contract upon the happening of the Force Majeure event while others may lay down that the contract will be

suspended until the Force Majeure event is resolved. Some contracts specificize for limitations in time after which either party may terminate the agreement with written notice to the other (i.e. if non-performance caused by the event is prolonged or permanent) while others may require the contract to remain in effect until the Force Majeure event is resolved

## **COVID-19 AND DOCTRINE OF FORCE MAJEURE**

Whether COVID-19 is a Force Majeure event is a matter of construction of the contractual terms and will largely depend on the scope of the event addressed by the clause in the agreement. The importance of legal skills in drafting this clause, therefore, comes into play so as to be able to adequately capture unforeseeable and external events which though occur are outside the control and intention of the parties.

Also, COVID-19 should have not only been unforeseen and beyond control but also should have made the performance of the contract materially impossible, while the party should have neither contributed to the situation nor should have anticipated the risk of COVID-19.

COVID-19 is a pandemic which would make it difficult for parties to perform their contractual obligations. There are two probable scenarios, which may suggest that a Force Majeure clause covers a pandemic:

- i. If the contractual definition of a Force Majeure event expressly includes a pandemic. Inclusion of pandemic to the list of Force Majeure events will cater clarity pertaining to whether the COVID-19 outbreak would trigger a Force Majeure clause in a contract; or
- ii. If the Force Majeure clause covers extraordinary events or circumstances beyond the reasonable control of the parties. Such generalized wording may be invoked if it is determined that the factual circumstances caused by the pandemic are beyond the reasonable control of the affected party.

Having said that whether a party can be excused from a contract on account of COVID-19 being declared a pandemic is a fact-specific determination that depends on the nature of the party's obligations and the explicit provisions of the contract. Force Majeure to be applicable, there must be a causal connection between the Force Majeure event that made it physically or legally impossible to perform the contractual obligations. It, therefore, suffices to state that before a party to a contract can escape liability for the non-performance of a contractual

obligation, the affected party must show that the COVID-19 and the consequent governmental actions are such as to prevent the affected party from performing his part of the contract.

Also relying on the Force Majeure provisions, the Force Majeure event must not have been foreseen by the parties. For example, a party which entered into a contract since the outbreak in China came to light shouldn't rely on the widely drafted and non-specific Force Majeure clause entered as they may find it difficult to coax into a judge that the parties did not foresee the risk of COVID-19 impacting the contract. There ought to be a genuine or liable failure to perform and it must be established that COVID-19 resulted in the failure to perform i.e. the simple fact of the existence of COVID-19 will not be substantial enough to be able to rely upon the Force Majeure provision if the impact of the outbreak in actuality did not cause the party's failure to execute the obligations

Generally, the party claiming for invoking the Force Majeure has the burden of proof to establish a Force Majeure event and is required to prove that it has taken all reasonable measures to reduce the effect of the event. This Force Majeure event must be the reason for the non-performance of the contractual obligations and the one claiming for the Force Majeure clause must show that the Force Majeure event was the causative to the contractual breach. It is similar in the case of COVID-19 too. The party invoking the clause will have to bear the burden of proving the impact of the COVID-19 pandemic and also should explain the mitigations taken preventing the impact of the COVID-19 outbreak on performing the contractual obligations.

For the Force Majeure clause to be invoked:

- i. The contractual compliance should have been disrupted only by the outbreak of COVID-19 and the COVID-19 advisories and the subsequent announcement for the lockdown of the country through the Government Orders.
- ii. The party must not use the Force Majeure clause to defend from the non-performance of the contract, which would have occurred even in the absence of the COVID-19 crisis COVID-19 advisories, and the order of lockdown.
- iii. The Force Majeure clause should be read harmoniously with the other clauses of the contract to identify the intention of the parties to the contract. So, even when an event has been held as a Force Majeure event and there is a specific provision giving out the risk in relation to

the event, this specific provision will overrule any other general provision based on the rule, *lex specialis derogat legi generali* -meaning the special prevails over the general.

It is required that the counterparty must be notified accordingly. Then based upon the construct of the Force Majeure clause in the contract, the remedies would be determined. The remedies could be ranging from the delay in the performance of the contractual obligation to the termination of the contract.

In India, the notification of the Ministry of Finance on 19<sup>th</sup> Feb 2020, declared that the disruption of supply chains due to the spread of the corona virus should be considered as a case of natural calamity and following the due procedures, the Force Majeure clause shall be invoked wherever necessary.

## **DOCTRINE OF FRUSTRATION**

If the contract does not have a Force Majeure clause included with it, the party shall claim a remedy under the Doctrine of Frustration under Section 56 of the Indian Contract Act, 1872.

The Doctrine of Frustration will also be applicable when there has been an event that occurs through no fault of either party and where such an event was neither contemplated nor reasonably foreseeable when the parties entered into the contract. The distinguishing factor between the Application of Frustration in a Contract and the Force Majeure clause is that where a contract fails to integrate a Force Majeure clause, the Doctrine of Frustration would apply to the non-performance of the contract.

The Doctrine of Frustration can be traced back to the English Common Law as a principle that will generally come into effect and apply to a contract that has been made impossible for parties to perform their obligations in the contract. This means that a contract's performance will be rendered impossible because of some intervening or supervening event after the contract has been made. The application of the Doctrine of Frustration has the effect of terminating the contract and relieving both parties from their contractual obligations. The Doctrine of Frustration applies in case of events which happen after the contract is made and for which neither any party is responsible nor can they prevent it from happening and thus to claim that the contract is frustrated, the party must prove that an event which could not be prevented by them was responsible for the contractual breach. The party must also establish that this event

was the reason for the impossibility in performing the contract which is not self-induced by the party claiming relief or due to the party's negligence.

## **COVID-19 AND DOCTRINE OF FRUSTRATION**

Whether COVID-19 is an event owing to which Doctrine of Frustration can be applied depends on if COVID-19 was neither contemplated nor reasonably foreseeable when the parties entered into the contract and it occurred after the parties entered into contracts and that the "principal purpose" of the contract was frustrated by COVID-19. Resembling the Force Majeure context, the performance of the contract must become impossible; it is not enough that the contract becomes more onerous, or even significantly more difficult, but still possible to perform

## **CONCLUSION**

The outbreak of COVID-19 is an unexpected event that hit the whole world and has put a hinge on so many contracts, and business operations. Whether parties will be liable for default in the non-performance of their contractual obligation will largely depend on the tenor of the Force Majeure clause embedded in the agreement. If most of the contracts have invoked the Force Majeure clause or any other remedy in order to avoid or delay their obligations, then ultimately the invocation would have led to an unavoidable increase in the payment defaults. Thus, Parties should negotiate and look for amicable ways to fulfil or remedy their own contractual obligations and minimize losses and damages during this time as it will be counter-productive for parties to play the blame game which could possibly ruin business relationships.

## **ENDNOTES**

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<sup>i</sup> Tennent v. Earl of Glasgow, (1864) 2 M. (H.L.) 22.

<sup>ii</sup> Bryan A. Garner, Black's Law Dictionary (8<sup>th</sup> ed. 2004)

<sup>iii</sup> Manual for Procurement of Goods 2017, Act of Parliament, 2017 (India)