



The enforceability of the *force majeure* clause in commercial contracts amid the destructive covid-19: An Indian perspective

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Abstract

The authors have discussed the impact of the pandemic on commercial contracts in India in light of the provisions of law and the law laid down by the Hon'ble Supreme Court in India. The presence of the Force Majeure clause is essential in a contract as the Indian law does not provide implied defence for the non-performance. It would not be out of place to state that in the case of non-performance of the contractual obligation by the party, the language of the clause, individual nature of commercial contract will become the key factor in granting any kind of protection as such there cannot be any straight jacket formula. The doctrine of Force Majeure has a limited and restrictive application and owing to which the parties are at the liberty to find a way round to doctrine of frustration and can claim frustration of contract in non- performance of the contract. In the humble opinion and understanding of the authors, the grave character of the pandemic will also help the parties to receive a generous attitude from the Courts across the country.

Keywords: force majeure, contract, clause, COVID-19, commerce

Introduction

The world is undergoing a large-scale global crisis and outbreak of COVID- 19 which is wreaking havoc worldwide and turns out to be an unprecedented and a 'beyond farsightedness event' in world history. The World Health Organisation (WHO) on March 11, 2020, declared the COVID-19 as a pandemic stating that "Pandemic is not a word to use lightly or carelessly. It is a word that, if misused, can cause unreasonable fear, or unjustified acceptance that the fight is over, leading to unnecessary suffering and death" ^[1]. As India has officially announced a "complete national lockdown" on March 25th, 2020, to seek measures to control the spread of an ongoing global pandemic, with nearly 400,000 people tested positive for the virus worldwide, and around 17,000 have died worldwide ^[2].

COVID – 19 can be seen as a killer blow not only on human health but also on the economic health of the entire world causing the economy to face an unprecedented market crash resulting into poor financial health. With the advent of events going on the closing down of market and breakdown of the supply chain, creates questions on the performance of contracts of varied nature executed between parties at various levels leading to delays, obstruction and even suspension of the contracts. In the light of rapid spread of the outbreak and the response as undertaken by the government, this article covers the enforceability of the '*Force Majeure*' clause in commercial contract and also discusses the approach of the Indian Courts towards the same going by the law as laid down in The Indian Contract Act, 1872.

The Concept of Force Majeure

'Force Majeure' is the French term that can be translated as "*irresistible compulsion or coercion*." ^[3] 'Force Majeure' is a legal term and was derived from the code of Napoleon and was codified for the first time in the Civil Code of France.

Force Majeure takes place when the law gives it recognition to the fact that a contractual obligation has become inept of being performed owing to certain circumstances rendering the performance impossible and unattainable, otherwise possible, without their being any default on the part of either party,. According to Black's Law Dictionary, Force Majeure is defined as "*An event or effect that can be neither anticipated nor controlled*." ^[4]

P Ramnath Iyer defines Force Majeure as "*events outside the control of parties and which prevent one or the both of the parties from performing their contractual obligations*."

The essential ingredients of the Force Majeure include:

- *the event must be beyond the reasonable control of the affected party;*

¹Coronavirus disease (COVID-19) Pandemic, World Health Organisation (Mar 28, 16:30), <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019>>.

²Coronavirus: India enters 'total lockdown' after spike in cases, BBC News Services, (Mar 28, 16:30), <<https://www.bbc.com/news/coronavirus>>.

³Oxford dictionary of Law, 9th Edn. (2003)

⁴Black's Law Dictionary, 11th Edn. (2019)

- *the affected party's ability to perform its obligations under the contract must have been prevented, impeded or hindered by the event; and*
- *the affected party must have taken all reasonable steps to seek to avoid or mitigate the event or its consequences.*

It is also essential to observe that the presence of the Force Majeure clause does not entirely excuse a party's performance, but only suspends it for an epoch only till the subsistence of such event which essentially makes the performance of the contract impossible. However, if the Force Majeure clause provides that where Force Majeure continues for more than a stipulated period then either party may at its own option terminate the contract without any financial repercussion on either side that will absolve either party from mandatory performance of such contract without any dispute arising out of such non-performance.

The presence of the Force Majeure clause is essential in a contract as the Indian law does not provide implied defence for the non-performance. It would not be out of place to state that in the case of non-performance of the contractual obligation by the party, the language of the clause will become the key factor in granting any kind of protection, more particularly in the event such as the unforeseen of the outbreak of COVID-19.

Key Aspects in Claiming a Relief Under Force Majeure Clause in India

It is needless to mention that the Indian Government is considering the outbreak of COVID-19 as Force Majeure event which no human could have anticipated. Not only this, in furtherance of such consideration and to officially declare the same admits the panicky situation, the Ministry of Finance of India has issued a clarification through an office memorandum as below:

"A doubt has arisen if the disruption of the supply chains due to the spread of corona virus in China or any other country will be covered in the Force Majeure Clause (FMC). In this regard, it is clarified that it should be considered as a case of natural calamity and FMC may be invoked, wherever considered appropriate, following the due procedure as above."^[5]

As COVID-19 pandemic has made it more difficult for the parties to honor their contractual obligations, there are two possible situations, i.e. if the contractual definition of a Force Majeure event expressly includes a pandemic or if the Force Majeure clause covers extraordinary events or circumstances beyond the reasonable control of the parties.

Such general, catch-all 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^[6]. Further, the relief from the Force Majeure event can be attained by providing certificates issued by the Government agencies to the affected parties yet they are not determinative in nature. The WHO's categorization of the outbreak as a "pandemic" may be noteworthy and of high persuasive value in

cases where the Force Majeure provision does not contain the word 'pandemic' in the Force Majeure clause.

A contract could also place a duty on performing party to mitigate the effect of its non-performance on the other party. This duty could be contained in a 'best endeavours' clause. In order to successfully invoke a Force Majeure clause to excuse liability for non-performance, a party under a contractual duty to mitigate or make best endeavours will be required to demonstrate the efforts it undertook to mitigate the impact of its non-performance^[7]. The burden of proof is on the non-performing party to put forth instances and prove the validity of its claim for Force Majeure relief. It has to adduce evidence that an event of Force Majeure occurred, which was beyond its reasonable control and which prevented or delayed its performance of the affected obligations and even after showcasing best endeavour to perform the obligation, the same could not be accomplished and as such thus the party has not breached the contract and it is entitled to the relief of Force Majeure.

The Indian Jurisprudence Covering Force Majeure in Commercial Contracts

The Indian Contract Act, 1872, does not expressly define the term 'Force Majeure', however, there are two sections that are germane to the dogma of Force Majeure. Firstly, Section 32^[8] which covers Contingent Contracts under which the performance of a particular contract is contingent on happening or non-happening of a particular event. Secondly, the practical utility of Force Majeure contrasts with the rigid common law doctrine of frustration, although they are similar in the sense that they both deal with occurrences beyond the control of parties to an agreement laid down in Section 56^[9].

Apropos to the above, the doctrine of frustration transpires that where after the execution of a contract, the emergence of supervening circumstances beyond the control of the parties renders further performance of the contract impossible or radically different from what had been contemplated in the contract, the contract will be terminated and the parties will be discharged from the requirement of further performance. The Supreme Court of India has reiterated the notion of Doctrine of Frustration, Impossibility and Force Majeure in a plethora of judgments. In *Satyabrata Ghose v. Mugneeram Bangur and Co. and Anr*^[10], Mukherjee J., the Hon'ble Supreme Court illustrated the doctrine of frustration and also dealt with Section 56 at length as under:

"The first paragraph of the section lays down the law in the same way as in England. It speaks of something which is impossible inherently or by its very nature, and no one can obviously be directed to perform such an act. The second paragraph enunciates the law relating to the discharge of contract because of supervening impossibility or illegality of the act agreed to be done. The wording of this paragraph is quite general, and though the illustrations attached to it are not at all happy, they cannot derogate from the general words used in the enactment. This

⁵ Office Memorandum No. F. 18/4/2020-PPD titled 'Force Majeure Clause', issued by Department of Expenditure, Procurement Policy Division, Ministry of Finance, Government of India.

⁶ Corona virus, *Force Majeure and impact on Commercial Contracts*, Bloomberg Quint, (Mar 28, 16:30) <<https://www.bloombergquint.com/coronavirus-outbreak/covid-19-coronavirus-force-majeure-and-impact-on-commercial-contracts>>

⁷ Impact Of Covid-2019 On Contracts: *Indian Law Essentials*, (Mar 28, 16:30 PM), <<http://www.nishithdesai.com/information/news-storage/news-details/article/impact-of-covid-2019-on-contracts-indian-law-essentials-1.html>>

⁸ Section 32, The Indian Contract Act, 1872

⁹ Section 56, The Indian Contract Act, 1872

¹⁰ AIR 1954 SC 44

much is clear that the word 'impossible' has not been used here in the sense of physical or literal impossibility. The performance of an act may not be impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor found it impossible to do the act which he promised to do."

Arguendo, the Supreme Court in *Dhanrajamal Gobindram vs. Shamji Kalidas & Co.*, dealing with Force Majeure held that "*McCardie J. in Lebeaupin v. Crispin* ^[11] has given an account of what is meant by "Force Majeure" with reference to its history. The expression "Force Majeure" is not a mere French version of the Latin expression "vis major". It is undoubtedly a term of wider import. An analysis of rulings on the subject into which it is not necessary in this case to go shows 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. This is the widest meaning that can be given to "Force Majeure", and even if this be the meaning, it is obvious that the condition about "Force Majeure" in the agreement was not vague. The use of the word "usual" makes all the difference, and the meaning of the condition may be made certain by evidence about a Force Majeure clause, which was in contemplation of parties ^[12]."

More recently, the Hon'ble Supreme Court in *Energy Watchdog vs. Central Electricity Regulatory* ^[13], observed that "*In so far as a Force Majeure event occurs de hors the contract, it is dealt with by a rule of positive law under Section 56 of the Contract. The performance of an act may not be impossible but it may be impracticable and useless from the point of view.*"

Though holding a higher degree of standard to decide the same, the Indian Courts have been more inclined towards the frustration of contracts. The most important factor in demanding relief by the parties for the non-performance of contract amid COVID-19 will be the difficulty in the circumstances falling outside the reasonable control of the parties which led to the frustration of contract. Though, the reasons mentioning the cost of performance leading to frustration of the performance would not fall under the ambit of Force Majeure. The grundnorm test which will be necessary for the parties to pass for the non-performance of the contract would lie around establishing that whether it was the hardship or the impossibility of the circumstances which led to non-performance of contract and the latter would be at a better stance to get a positive nod from the Courts. It would not be out of place to mention here that, impossibility of performance owing to price/cost escalation would not save the skin of the parties from acting upon the agreed obligations as the parties are required to keep their eyes open and is understood to have taken into consideration while executing the contract. The Hon'ble Supreme Court has held that "*It is clear that an unexpected rise in the price of coal will not absolve the generating companies from performing their part of the contract for the very good reason that when they submitted their bids, this was a risk they knowingly took.*"

To persuade the courts, in *Tsakiroglou & Co. Ltd. v. Nolee Thorl* ^[14] it was observed that mere closure of the Suez Canal, when there is alternative way of transporting goods through the Cape of Good Hope, does not qualify as a condition for the frustration of contracts just because the alternative route is longer than the original one.

Similarly, in *Satyabrata Ghose v. Mugneeram Bangur & Co* ^[15] the court held that "*The Courts have no general power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events.*"

Not only this, recently the Hon'ble Delhi High Court, in *Coastal Andhra Power Limited vs. Andhra Pradesh Central Power Distribution Limited* ^[16] held that price escalation and change in the foreign law cannot be considered as a force majeure event.

Concluding Remarks

The doctrine of Force Majeure has a limited and restrictive application and owing to which the parties are at the liberty to find a way round to doctrine of frustration and can claim frustration of contract in non- performance of the contract. Although the overall enforceability of the clause of Force Majeure to be invoked will depend on the individual nature of commercial contract and as such there cannot be any straight jacket formula. In the humble opinion and understanding of the authors, the grave character of the pandemic will also help the parties to receive a generous attitude from the Courts across the country. After all, the government pursuing a complete lockdown of a country as big as India surely counts as it might lead to material adverse effect on the economy. It would be reasonable for the commercial entities to be ready with a contingency plan while considering the alternative ways for the performance of the obligations in case the situation gets worse as India is still witnessing the early phases of the pandemic. It would be just and proper that a fact-specific analysis of the commercial entity's contractual relationship should be done by the executives, as a precautionary measure to reduce the aftermaths of COVID-19.

Looking into the present scenario, it seems inevitable that India as an economy is going to witness a slowdown and therefore, the parties and commercial entities should make the prior arrangement to endure the lowest financial loss by keeping a detailed review of their supply chain, making the essential correspondences and communications in case the dispute arise, amongst others. This shall too pass! To sum up:

References

1. Coronavirus disease (COVID-19) Pandemic, World Health Organisation (Mar 28, 16:30), <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019>>.
2. Coronavirus: India enters 'total lockdown' after spike in cases, BBC News Services, (Mar 28, 16:30), <<https://www.bbc.com/news/coronavirus>>.
3. Oxford dictionary of Law, 9th Edn, 2003.
4. Black's Law Dictionary, 11th Edn, 2019.

¹¹ (1920) 2 K.B. 714

¹² AIR 1961 SC 1285.

¹³ (2017) 14 SCC 80

¹⁴ GmbH, 1961 (2) All ER 179

¹⁵ AIR 1954 SC 44],

¹⁶ FAO (OS) No. 272/2012, Judgment delivered on 15.01.2019

5. Office Memorandum No. F. 18/4/2020-PPD titled 'Force Majeure Clause', issued by Department of Expenditure, Procurement Policy Division, Ministry of Finance, Government of India.
6. Corona virus, *Force Majeure and impact on Commercial Contracts*, Bloomberg Quint, (Mar 28, 16:30) <<https://www.bloombergquint.com/coronavirus-outbreak/covid-19-coronavirus-Force-majeure-and-impact-on-commercial-contracts>>
7. Impact of Covid-2019 On Contracts: *Indian Law Essentials*, (Mar 28, 16:30 PM), <<http://www.nishithdesai.com/information/news-storage/news-details/article/impact-of-covid-2019-on-contracts-indian-law-essentials-1.html>>
8. Section 32, The Indian Contract Act, 1872.
9. Section 56, The Indian Contract Act, 1872.
10. AIR 1954 SC 44
11. (1920) 2 K.B. 714
12. AIR 1961 SC 1285.
13. (2017) 14 SCC 80
14. GmbH, 1961 (2) All ER 179
15. AIR 1954 SC 44],
16. FAO (OS) No. 272/2012, Judgment delivered on 15.01.2019