

VOLUME 3 | ISSUE 1

INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

**FORCE MAJEURE, ACT OF GOD AND DOCTRINE OF
FRUSTRATION CONCERNING COVID-19 PANDEMIC**- Harsh Nassa¹**ABSTRACT**

Businesses throughout the world are facing productivity challenges as a result of employees self-quarantining to avoid exposure to the coronavirus (COVID-19) and facilities being shut down to slow the virus' spread. As a result, many firms are attempting to decide if they are required to perform under their contracts or whether they can utilise a force majeure clause to excuse performance temporarily or permanently. Below, we examine force majeure, how it applies in different jurisdictions, the investigation corporate companies must conduct before using it, and the alternatives to force majeure.

INTRODUCTION

Since March 2020, *COVID-19* has wreaked havoc on the health and livelihoods of people all across the world. The pandemic caused various disruptions in almost every field be it economics, politics, businesses, legal, or policies. It had its effects on businesses locally or globally. Due to frequent lockdown, government restrictions, and strict transportation guidelines, the flow of goods and services was set back. Then, it was nearly impossible for the different companies to execute the contracts they had entered into. There were either delays or payment lapses, which ultimately led to failure or more likely refusal of contractual obligations and stipulations.

With this view about the legality of contracts, principles or concepts like *Force Majeure* (describing supreme force) and *Doctrine of frustration* came into the picture. These two concepts are primarily mentioned in *section 32*² and *section 56*³ of the Indian Contract Act, 1872.

¹ Student at NMIMS School of Law Bengaluru

² 32. Enforcement of contracts contingent on an event happening, Indian Contract Act 1872

³ 56. Agreement to do impossible act, Indian Contract Act 1872

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

<https://www.ijalr.in/>

INVOLVEMENT OF LEGAL PRINCIPALS

The Black's Law Dictionary defines the term force majeure as

*'an event or effect that can be neither anticipated nor controlled. It is a contractual provision allocating the risk of loss if performance becomes impossible or impracticable, especially as a result of an event that the parties could not have anticipated or controlled.'*⁴

The question here arises, whether COVID 19 can be placed under the ambit of the Force Majeure event? Now to prove that your company is immune against the legal obligations arising from the breach of contract due to the pandemic, it must satisfy four conditions that are mentioned below ~

1. The event which occurred affected the contract because it was impossible to perform the contractual obligations.
2. Non-performance of the contract was a direct result of the event which occurred.
3. The party did not have control over the event that occurred which resulted in the non-performance of the contract.
4. There did not exist any alternative or substitutive way of fulfilling the contractual obligation.

One can immune their contracts through the Force Majeure clause by stating that the COVID-19 pandemic could not be reasonably foreseen. Scientists have found that pandemics are "*inevitable*" and quite "*unpredictable*". However, the contracting parties should not use this clause as a tool to escape the contractual obligations. *The Court of Appeal of Saint-Denis de la Réunion*⁵ held that a contract that was entered in June 2006, was allowed to use the Force Majeure clause against the epidemic of Chikungunya which began in January 2006. Yet another case that supported the execution of the force majeure clause was, *Energy Watchdog v. CERC and Ors*⁶, which stated that if the contractual terms become impractical and impossible to perform regardless of what was the intention of the party at the time of entering into the contract then the clause of force majeure can be executed. Similarly, COVID-19 made the performance of the contract impossible and there did not exist any alternative remedies to execute the same.

⁴ Black's Law Dictionary

⁵ Court of Appeal of Saint-Denis de la Réunion, Dec. 29 2009, no. 08/02114; see also Court of Appeal of Besançon, Jan. 8, 2014, no. 12/02291

⁶ Energy Watchdog v. CERC &Ors. (2017) 14 SCC 80

BURDEN OF PROOF

The burden of proof lies upon the party which is invoking the clause and thereby excusing itself from performing the contractual obligations. To invoke the clause, the parties need to substantiate it through evidence.

CONSEQUENCES

There may be six consequences that can arise when a party invokes the clause, that is,

1. Contract Suspension for the time being: when a party successfully invokes the clause the contract would imply the application of *Section 32*⁷ of The Indian Contract Act, 1872. The parties for an interim period would be given a break for performing contractual obligations, however the parties are expected to fulfil the contractual obligations once the force majeure event ceases.
2. Permanent termination of the contract: wherein if the event lasts long than the amount of time specified in the contract the parties may be able to get out of the contract. A memorandum issued through the finance ministry stated that, "*If the performance in whole or in part or any obligation under the contract is prevented or delayed by any reason of force majeure for a period exceeding ninety days, either party may at its option terminate the contract without any financial repercussions on either side*".
3. Renegotiation of Contractual Terms: after invoking the clause the parties are given the option to renegotiate. The contracting parties can comply to COVID 19 measures and then through mutual understanding alternate the contractual terms. In this manner the contractual obligations will be continued according to new contractual conditions.
4. Risk allocation and restitution: in case the parties fail to renegotiate the contractual terms or a party has received undue profit because of the contract becoming void, they are obliged to restore the advantage to the other party. As a result, both parties are free to divide the cost amongst themselves as long as the loss was caused by the occurrence of the event.
5. Dispute Resolution: the parties after exhausting the options may turn to legal remedies through arbitration or litigation as mentioned in the contractual terms.

⁷ 32. Enforcement of contracts contingent on an event happening, Indian Contract Act 1872

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

<https://www.ijalr.in/>

6. Dependent upon the terms of the Agreement: if the contract mentions the Force Majeure clause then the parties are prohibited to resort to the *Section 56⁸* of The Indian Contract Act, 1872¹⁸ and therefore claiming supervening impossibility in order to suspend the contract as held in *Satyabrata Ghose v. Mugneeram Bangur⁹*.

DOCTRINE OF FRUSTATION

The doctrine of frustration discharges a contract when an unforeseen event makes performance impossible. Frustration prevents injustice when circumstances change and neither party is at fault. A frustrating circumstance automatically terminates a contract by law without party action.

The test in order to satisfy frustration has a very high bar. In the following situations a contract may be frustrated.

1. After the contract has been entered into, the frustrating event takes place.
2. The incident is so crucial to the contract that it goes beyond what the parties anticipated when they entered into the contract.
3. The fault is of neither of the parties.
4. The event makes it illegal or impossible to carry out the contractual terms.

FORCE MAJEURE OR FRUSTRATION?

Frustration will not apply if a contract has an existing Force Majeure clause that specifically addresses the problems caused by the COVID-19 outbreak. This is because the parties have already thought about the problem and provide solutions for it in the contract. However, if the force majeure is not complete or explicit enough it may still be feasible to invoke frustration.

JUDICIAL PRECEDENTS AND CENTRAL GOVERNMENT NOTIFICATIONS

1. SATYABRATA GHOSE V/S MUGNEERAM BANGUR ¹⁰

⁸ 56. Agreement to do impossible act, Indian Contract Act 1872

⁹ Satyabrata Ghose v. Mugneeram Bangur 1954 AIR 44 : 1954 SCR 310

¹⁰ Satyabrata Ghose v. Mugneeram Bangur 1954 AIR 44 : 1954 SCR 310

The Supreme Court in this case defined that the cause-and-effect relationship of the event occurring and the possibility of performance of contractual terms is of vital consideration. The court provided another interesting statement with reference to the term “impossible” mentioned in *Section 56* of the said act. The court observed that, “*This 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 literally 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 upset the very foundation upon which the parties rested their bargain it can very well said that the promisor found it impossible to do the act which he promised to do.*”

2. M/s. ALOPI PARSHAD & SONS, LTD.THE UNION OF INDIA

The Apex Court mentioned that, “*Parties to an executable contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, for example, a wholly abnormal rise or fall in prices which is an unexpected obstacle to execution. This does not in itself get rid of the bargain they have made.*” Contracts will not be considered frustrated until there is a significant change in the event and not just a change in the circumstance.

Ministry of Finance office memorandum dated 19th February 2020,¹¹ Ministry of New and Renewable Energy notice dated March 20, 2020¹² and Ministry of Road Transport and Highways notice dated May 18, 2020¹³ declared Covid as a Force majeure event and granted various relief measures.

CONCLUSION

One can assess the ability to sue or the culpability for COVID-19-related occurrences right now and can manage any risks accordingly. This pandemic should make courts more sensitive to claims of frustration or the Force Majeure clause. Furthermore, the case laws should serve as the basis of our understanding of the Force Majeure clause and Frustration Doctrine for decades to come.

¹¹ Office Memorandum No.F.18/4/2020-PPD, dated 19.2.2020

¹² Office Memorandum No. 283/18/2020-GRID SOLAR, dated: 20.03.2020

¹³ No. COVID-19/RoadMap/JS(H)/2020 Government of India Ministry of Road Transport & Highways (Highways Division) Transport Bhawan 1, Parliament Street, New Delhi-110001, dated: 3.06.2020

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

<https://www.ijalr.in/>