Page 1755 - 1765

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 3 | Issue 3

2020

Force Majeure: A Way to Look Forward in Covid-19

SUNNY VERDANI[1]

ABSTRACT

The World Health Organisation (WHO) which has affirmed the COVID-19 as "pandemic" which was declared on March 11, 2020. The concept of force-majeure which has been throughout history connected to "hardship of performance." FM clause while interpreting narrowly, and the party who are evoking such clause have to pardon their performance which must prove the occasion being referred to falls within the extent of the clause. It seems to be reasonably evident that the World Health Organization's recent division of COVID-19 as a "pandemic" would bring in this outbreak as being within the extent of at least those force majeure clauses that incorporate "pandemic" and even "epidemic." The effect of such occasion could result in termination of an agreement, which additionally relying upon the particulars of the agreement. What had to be analysed which depend upon the case-to-case. Whether the contractual proviso could have be completed in spite of the interruptions caused by COVID-19. In this procedure, it is fundamental to ensure that parties do not use COVID-19 and the lockdown as a blanket to cover a disguise a contractual breach that would have happened in irrespective of the occurrence of such events. Through this research, researcher also aim to analysis the International prospective of force majeure clause.

Keywords: *Covid-19, WHO, Pandemic, Force Majeure, Epidemic.*

I. AIM

- To analyse the Force Majeure clause in the situation of Pandemic.
- To Review the role of the legislature in respect of this research.
- To analysis the International prospective of force majeure clause.

II. HYPOTHESIS

- Whether Contract renders the performance of the contract in Pandemic.
- Whether Force Majeure be interpreted to embrace a 'Pandemic'.

[1]Author is a student at University of Petroleum and Energy Studies, Dehradun, Uttrakhand, India.

 [ISSN 2581-5369]

III. LIMITATIONS

The only difficulty to complete my project to an accurate level is no access to primary data only having reach to the secondary sources.

IV. INTRODUCTION

Coronavirus disease (COVID-19) is a communicable disease spread by a new virus that has taken over the world economy since its outbreak in Wuhan, China in December 2019. Within a span of few months due to lockdowns and turmoil in several parts of these countries, they have moved into a phase of a serious recession. Subsequently, Organisations have been affected by this and so have performance and wherefore the agreements, and the accountability under contracts which are being returned to revisit these effects and its affects.

The World Health Organisation (WHO) which has affirmed the COVID-19 as "pandemic" which was declared on March 11, 2020. The flare-up and the quick spread of the COVID-19 which makes the trauma across worldwide. A pandemic which has been exemplify by World Health Organisation as *"an epidemic occurring worldwide, or over a very wide area, crossing international boundaries and usually affecting a large number of people."*[2] This implies that such a disease flare-up will be set apart as a pandemic when it's spreading across the world which is generally influencing a numerous people which are seems to be countless.

Given the supply chain disturbance which is affected by the pandemic as an outbreak, almost certainly that fulfilment of duty under many contracts will be postponed or put off, obstructed, or an even of dropped. Counter parties to such contracts or an agreement may look to defer and/or to avoid the performance and execution of their contractual accountability and/or discharge the contracts, as the COVID-19 has restricted the parties from carrying out their contractual duty, or in light of the fact that they are trying to blame or making excuse to extricate themselves from making an unfavourable deal which is subject to loss.

Furthermore, organisations will most likely unable to carry out their obligations and commitments and may thusly look to setback as well as to avoid to carry out their contractual which is binding obligations and additionally to discharge their contracts. In this scenario, it's significant to determine whether COVID-19 which is to be expressed as a '**force majeure**' event. In this context there is a judgement[3] that "we assess whether impossibility of

[2]Last JM, editor. *A dictionary of epidemiology*, 4th edition. New York: Oxford University Press; 2001.
[3] British Movieto-news Ltd. v. London and District Cinemas Ltd. L.R., (1952) A.C. 166.

 [ISSN 2581-5369]

performance under Indian law is purely a matter of construction of respective contracts, and if so, can businesses salvage their obligations and save their contracts".

V. FORCE MAJEURE

The concept of force-majeure which has been throughout history connected to *"hardship of performance."* The idea behind force-majeure evolve from French civil law, and the expression's etymological roots get evolve from Latin which implies as a "superior force." In legal contracts it implies that those impossible to repress or control events such as state of war, obstruction, or extraordinary circumstances which are not in the hold of any party that making it tough or troublesome to accomplish the ordinary business.

According to Black's Law Dictionary, the term 'force majeure' means *"an event or effect that can be neither anticipated nor controlled, is unexpected and which prevents someone from doing or completing something that he or she had agreed or officially planned to do".*[4]

(A) ESSENTIAL REQUISITE OF FORCE MAJEURE EVENT:

1. The event and performance were due to circumstances beyond a party's control.
2. The unexpected event made contractual performance impracticable
3. No reasonable impression could have been taken to avert or mitigate the event or its outcomes.

As usually, force majeure clause under contracts reads as underneath: "*Neither party is responsible for any failure to perform its obligations under this contract, if it is prevented or delayed in performing those obligations by an event of force majeure.*"

By Considering the Covid-2019, the Ministry of Finance come forth an Office Memorandum on February 19, 2020, 'Force Majeure Clause' which states that "*A Force Majeure means* ***extraordinary events or circumstance beyond human control*** *such as an event described as* ***an act of God*** *(like a natural calamity) or events such as war, strike, riots, crimes (but not including negligence or wrong-doing, predictable or seasonal rain and any other events specifically excluded in the clause).* ***An FM clause in the contract, frees both parties from contractual liability or obligation when prevented by such events from fulfilling their obligations under the contract****. A force majeure 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 give notice of force majeure as soon as it occurs and it cannot be claimed ex-post facto****…If the performance in whole or in part or any obligation under the contract is*

[4]Black's Law Dictionary, 10th ed., 2014.

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 repercussion on either side"[5].

VI. An Outlook Of Force Majeure Clause

The FM clause could either incorporate quite specific occasions which are fire, explosions, wars, strikes, legislative and executive interference or any other generic terms which are term as occasion or an event which is not under the reasonable control or as an act of God or an economic hardship.

FM clause while interpreting narrowly, and the party who are evoking such clause have to pardon their performance which must prove the occasion being referred to falls within the extent of the clause. It seems to be reasonably evident that the World Health Organization's recent division of COVID-19 as a "pandemic" would bring in this outbreak as being within the extent of at least those force majeure clauses that incorporate "pandemic" and even "epidemic." In spite of this, certain other aspects of this crisis, such as the day by day extension of the government lockdowns which having ultimate aimat slowing down the pandemic's spread in country, may likewise fall within the scope of force majeure clauses.

However, the Courts may likewise apply the rule of '*ejusdem generis'which implies that is of same kind* to determine the contractual intention which rule also implies that a general term which following a specific term would be limited or confined to the similar meaning as the former specific terms.

VII. Explicit Requisite Vis-À-Vis Force Majure

In a likely instances of FM, contracts or an agreement may ask for the satisfaction of explicit requisite by a party who urge to pardon from non-performance of contractual obligation. For example, an agreement or contract might ask the party to send a notice through which the counter party is informed that a clause has been activated by the event covered under the FM clause.

VIII. Indian Legal Provision Vis-À-Vis Force Majure

The FM clause can't be constructive under Indian law. It shall be explicitly under the Indian contract act which safeguarding the afforded and willbe subject to the language of such FM clause. In the instance of a conflict arising with respect to the scope and extent of such FM

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

 [ISSN 2581-5369]

clause, the courts will be most probably apply the standard principles of statutory interpretation.

While an outbreak of the COVID-19 which has been affirmed asa pandemic by the WHO with effect from 11th March 2020 alongside the lockdown which may have impeded the parties from performing the part of their obligations under a contract, so it cannot be said that COVID-19 would always be enable the force majeure in each and every situation. There might be a force majeure clause which explicitly makes the references or words 'pandemic' or 'epidemic' which would likely to bring COVID-19 comes within its ambit or could use terms such as 'regulation or law of the legislature or any statutory authority' which could cover the decision of the lockdown imposed. The bone of conflict or which can be said that contention would be a general force majeure clause where it would need to be seen whether the occasion caused by the pandemic were beyond or not in hands and the reasonable control of the party which were asserting the benefit of force majeure clause.

The Section 56 under the Chapter IV of the Indian Contract Act which deals with instances where the performance of a contract is discharged or dispensed with.

> "***Section 56. Agreement to do impossible act*** *—An agreement to do an act impossible in itself is void. Contract to do act afterwards becoming impossible or unlawful—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. Compensation for loss through non-performance of act known to be impossible or unlawful—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.*[6]"
>
> **(Emphasis)**

- The **1st paragraph** which is mentioned above lays down the simple principle of initial impossibility.
- The **2nd paragraph** which is lays down the outcome of the subsequent impossibility.

"The principles laid down in the above decisions clearly indicate that unless the competent authorities have been moved and the application for consent/permission/sanction have been

[6]The Indian Contract Act, 1872 s. 56, No. 09, Acts of Parliament, 1872 (India).

rejected once and for all and such rejection made finally became irresolutely binding and rendered impossible the performance of the contract resulting in frustration as envisaged under Section 56 of the Contract Act, the relief cannot be refused for the mere pointing out of some obstacles"[7].

It was upheld in the ***Satyabrata Ghose v.Mugneeram Bangur and Others***[8] 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 be said that the promisor found it impossible to do the act which he promised to do.*"

In ***Sushila Devi v. Hari Singh***[9]**,** It was pointed out by the Supreme Court that it was incorrect to say that section 56 of the Indian Contract Act applied to cases of physical impossibility only, but it also covers the cases where performance become impracticable or useless having regard to the object and purpose of the contract.

IX. TWO TALES VIS-À-VIS PARTIES

(A) CONTRACTS CONTINGENT ON HAPPENING OF AN EVENT

Section 32 of The Indian Contract act with respect:

"*32. Enforcement of Contracts contingent on an event happening - Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void.*"[10]

Major part of the contracts which explicitly mention an 'expression' in the light of which the contract's status on contingent events or situations will be suspended. In such cases, contract termination would be taking place in the light of the terms of the agreement or contract. Under these conditions an interpretation of force majeure will come to light.

(B) DOCTRINE OF FRUSTRATION

Sometimes, the enforcement of contract is capable of be existing but later point of time it is impossible or unlawful upon happening of such an occasion which couldn't have been avoid.

[7]*NirmalaAnand vs. Advent Corporation Pvt. Ltd., A.I.R. 2002 S.C. 2290 (India).*
[8]SatyabrataGhose v.MugneeramBangur and Others, A.I.R. 1954 S.C. 44 (India).
[9]Sushila Devi v. Hari Singh, A.I.R. 1971 S.C. 1756 (ndia).
[10]The Indian Contract Act, 1872 s. 32, No. 09, Acts of Parliament, 1872 (India).

 [ISSN 2581-5369]

The above doctrine is called the Doctrine of Frustration. Impossibility and frustration are often used as interchangeable expressions.[11]

The concept of 'frustration of a contract' was first recognised by English Courts in the year 1863[12]. Until this time the English common law was based on the rules of *"**absolute contract**"* that when a duty was cast upon a person who bound himself by contract absolutely to do a thing, he could not escape liability for damages for breach by proof that as events turned out performance was futile or even impossible.[13]

Under Indian Statute with respect to doctrine of frustration prospective it was held that, "*In India the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in section 56 of the Contract Act taking the word "Impossible" in its practical and not literal sense. It must be borne in mind, however, that **section 56** lays down a **rule of positive law** and does not leave the matter to be determined according to the intention of the parties."*[14]

X. FORCE MAJEURE CLAUSE COME WITHIN AMBIT OF 'PANDEMIC'

ACT OF GOD	FORCE MAJEURE
• It is constituent as any Act or force which are happens which are not under the human control and there is no responsibility and duty of any individual or corporation. • Where act of God includes incorporated such events which are an unforeseen incident which occur due to external forces but not having relation with human agency either directly or an indirectly. • *"Act of God"* is large extent put upon in worldly concern of legal practices by respondent or said to defendant side to keep themselves away from the charge for convicted on the accusation they are	• The term *'Force Majeure'* is more comprehensive than the term 'Act of God' because it's not only incorporates the natural forces but incorporates unusual forces which might not to be associated with the nature and could be having a relation to human interference either directly or indirectly, but also humans involvement within the incident in which they don't have dominance or the instances where the happening of an event was unforeseen and which cannot be prevented. • On the other side, further defence term

[11]SatyabrataGhose v. MugneeramBangur and Others, A.I.R. 1954 S.C. 44 (India).
[12] Taylor v Caldwell [1863] EWHC QB J1.
[13]Paradine v. Jane, (1647) Aleyn 26.
[14]SatyabrataGhose v. MugneeramBangur and Others, A.I.R. 1954 S.C. 44 (India).

confronting.	that used under the proviso of unforeseen events which is *"Force Majeure".* It is having wider ambit than act of god.

XI. Claiming The Benefit Of An Event Of Force Majeure

The party asserting the advantage of FM clause under a duty to establish that every sensible or reasonable means to avert or mitigate the occasion and its outcomes have been taken. The said party additionally need to establish that there is a causative connection to the contractual breach which implies that it is in the light of a FM instance (and not otherwise) party is not in a standing situation to perform its part of the bargain under a contract. Subsequently, the party claiming the advantage would need to establish that it would have been able to perform its commitmentsor an obligation but the FM event and also that the force majeure event alone which was sufficient to obstruct the hindrance to performance of the contractual obligations.

What had to be analysed which depend upon the case-to-case. Whether the contractual proviso could have be completed in spite of the interruptions caused by COVID-19. In this procedure, it is fundamental to ensure that parties do not use COVID-19 and the lockdown as a blanket to cover a disguise a contractual breach that would have happened in irrespective of the occurrence of such events.

XII. Dilemma vis-à-vis whether to terminate or not?

The consequence of such occasion could result in termination of an agreement, which additionally relying upon the particulars of the agreement. As we have looked that the circumstances where an agreement which comprise of a force majeure that was supposed to be terminated on the legitimate grounds of the agreement 's dissatisfaction, regardless of the two remedies being chosen at a very basic stage. Thus, under what conditions can an agreement be suspended, what may be the perquisites to achieve suspension:

- The standard FM proviso in agreement which accommodates the end of an agreement if anevent proceed in a particular timeframe.
- If parties provides an underlying notice by detailing the incompetence in implement the duties and responsibilities under a contract because an event of force majeure, in such case the party could also end agreement by providing subsequent notice, even if event still proceeds.

XIII. Force Majeure – Whether is A Duty To Mitigate?

The parties which are affirming the FM proviso is under an obligation to establish that parties have taken every reasonable efforts to prevent or mitigate the occasion and its impact. It is an abstract norm and to be interpreted in accordance with case.

XIV. Dispute Resolution – Whether Is An Another Key?

Toward the end, if a Parties frustrate to concur on the occasion being the FM event, or neglect or disappoint to accord with the pertinentForce Major provisions under the Agreement or Contract, or attempts to settle a claim of neglect or disappointment of the Contract in the absence of an FM clause, the Contracting Party would be encouraged to observe the Contract and assess the legal risk and relief in the event of a conflict arising out of such a contradiction.

XV. International Prespective

(A) Under The U.S. Legislation

In the U.S., force majeure is to a great extent a creature of contract. Henceforth, an instances of FM has, in fact, happened, the parties' obligations in the instance of FM event to a greater ambit depends upon the contract rather than law. As an outcome, an explicit force majeure clause is required to soothe parties of contractual obligations.

In the event, an unavailability of force majeure proviso in agreement or contract, in such instance the parties may look for protection under the doctrines of impossibility of performance, or frustration of contract.

(B) Under Italian Legislation

The aim of FM Clause is to safeguard a parties from the obligation where a contractual duty is not performed by the parties due to the happening of an event that was not under the party's control and as well as not capable of being attributable to that party.

It is worthy of being recommended in Italy to consider general expression of words as Force Majeure clause such as "and any other Force Majeure proviso which is not under the limit of the parties". The Courts would also decide on the case to case basis if an event come within ambit of a force majeure event.

(C) Under French Legislation

The Force Majeure is said to be an event which is unforeseen and averted even if reasonable and appropriate measures had been adopted. The exemption is being the only one effective

measure so long as the FM occasion lasts, even if the party have settle to terminate the contract. Any of the party might affirm exemption in the Force Majeure occasion, even if the absence of Force Majeure proviso.

XVI. CONCLUSION

To conclude researcher wants to say that the outbreak of corona virus and the lock down has definitely affected the contractual obligation and there are some positive as well as some negative impact. The situation of lock down has made the people to rethink on what they are doing and what they must do. The researcher also saluted the doctors, nurses, police and the community workers who are helping and standing with us for us during this extreme situation.

Such a Pandemic plays as a game twister in numerous ways as regardless it will overturn its overreaching Doctrine of *force majeure* under the contracts by the outcome of its "impossibility" remnant yetto be seen. The extant legislative statutes as well as the legal jurisprudence encompassing the similar seem powerful enough to make a reference to the enormous and having greater extent legislative outcome of the expanding pandemic.

Regardless, the specific event whose outcome would prompt lead to parties from having the option to successfully avoid their commitments, despite it proceed to relying upon the reliablebenchmarks of each case .

XVII. SUGGESTIONS

The researcher would like to point out with a legal maxim on the doctrine of frustration: "***les non cogit ad impossibilia***" which implies that "a man cannot be compelled by law to do what he cannot possibly perform. The performance of impossible duty may be excused[15]. People must follow the government directives and need to respect the nature. The researcher point of view is that future is uncertain and what the court will do in such matter or event is equivalently uncertain. Therefore, if force majeure clause invoke in such case be certain of the circumstances necessary for performance to be excused or delayed. The researcher also pointed out that consider options available such as Mediation, arbitration and be flexible. Therefore it is reasonable for the parties to endeavour for the legal apprise and also to safeguard the sanctity of contract. The Force Majeure clause goes a step ahead and provides for plague as of presumed impediments to trigger the use of force majeure clausedefined in the Act. The SFIO upon the completion of the investigation assigned to it shall submit a

[15]Cochin State Power & Light Corpn. Ltd. v. The State of Kerala A.I.R. 1965 S.C. 1688 (India).

 [ISSN 2581-5369]

report to the Central Government within such period as may be specified. If directed by the Central Government, an interim report shall also be submitted.

The Central Government may also direct the SFIO to take steps for the prosecution of the company and its officers or employees (past or present) or any other person directly or indirectly involved in the affairs of the company. The investigation report filed with the special court for framing charges shall be deemed to be a report filed by police officers under 173 of Cr PC, 1973.

*****

 [ISSN 2581-5369]