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Force Majeure - In Context of Covid-19

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The Covid-19 outbreak has completely changed the way we look at ourselves, the way we look at others, and the way we look at the world in general. There is an increased sense of insecurity in our personal and social interaction from a public health and safety perspective. There's a great deal of uncertainty in our commercial interactions and business arrangements. Moreover, the series of lockdowns forced by the public authority to control the spread of the outbreak of Covid-19 already had far-reaching consequences on various business establishments and parties to commercial contracts. Two legal terms that have assumed the greatest significance in the present context and are being heard all the time are: -

- *The doctrine of force majeure, and*
- *Frustration of contract*

There are a plethora of judicial interpretations which explain the meaning, scope, and applications of principles to commercial arrangements. This article resolves the inquiry, no matter whether the arrangement of Force Majeure applies to this pandemic (COVID-19) or whether it'll be considered an 'Act of God'. It further clarifies the precepts that will apply in the event of the non-execution of the agreement.

Keywords: *covid-19, commercial contracts, lockdowns by government, doctrine of force majeure.*

INTRODUCTION

In the History of Contract law, this is the first time that the Force majeure clause has been pushed in limelight. As per the Black Law Dictionary¹, Force Majeure is named as an “event or effect that can neither be anticipated nor controlled. It is an exclusive provision meant to protect the parties to contract from the risk of loss arising of non-performance of the contract due to an unforeseeable or impractical event”. The expression “Force majeure” means an occurrence which is beyond the reasonable control of both the parties. The word “force majeure” springs from Latin word “vis major” (the act of God). It is an expression of wide import. It allows either party to limit their liabilities in the face of some unforeseen extraordinary event. This clause aims to allow the parties to contractually allocate their risk of occurrence of future circumstances as stipulated. Primarily, there can be two instances one can be that the determination of the Contract takes place where the entire contract gets frustrated due to non-applicability of the terms of the contract and the other can be appropriate relaxations that can be provided to the affected parties.

Typically, the Force majeure clause would cover a situation of war, natural calamities, or that changes the policies of the government.

VIS MAJOR IN INDIAN CONTRACT ACT, 1872

Interestingly, neither force majeure nor act of God is used in the Indian Contract act but the term “Vis’s major” is used which is evaluated in very different ways depending on your independent facts and circumstances. However, the exact concept of such provision is captured through the class of contracts known as contingent contracts. Section 32 of the Indian Contract Act, 1872² peruses as follows: *“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.”*³ Here, the basis of the contract that the particular event is essential

¹ 4th Edition, Black Law Dictionary ‘Force Majeure’ (St. Paul Minn. West Publishing Co. 1968)

² Indian Contract Act, 1872, s 32

³ *Ibid*

for the performance of the contract is determined by the contract itself, the uncertainty of which discharged both the parties from the obligation of performance that send all of these about the clause.

Section 56 of the Indian contract act, 1872 ⁴ is the statutory broader power of determining the impossibility of performance and the section is elaborated as follows "*Agreement to do impossible act. – An agreement to do an act impossible in itself is void.*

- *Contract to do an act afterward becomes 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 an 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 nonperformance of the promise."* ⁵

It looks at events that the parties may not have foreseen but that renders the contract impossible to perform. It is relevant to observe that demonstration of God/force majeure proviso doesn't pardon a party's execution altogether, however, just suspends it for the term of its being in real life. In any case, but the provision gives that the particular clause that goes on beyond the specified duration, then, at that point, both parties have the discretion to end the agreement with no monetary repercussion on one or the other side.

DOCTRINE OF FRUSTRATION

Under the previous English Law, which perceived the standard of outright risk on account of agreements, involved with the agreement totally will undoubtedly play out the commitment attempted by him, even though exhibition thusly becomes unthinkable. This law and order

⁴ Indian Contract Act, 1872, s 56

⁵ *Ibid*

were achieved in *Paradise v Jane*.⁶ In the resulting instance of *Taylor v Caldwell*,⁷ the regulation was formed in its suggested term and set out that the above rule is material when the agreement is positive and outright, and not exposed to any state of one or the other express or inferred. In this situation, the exhibition of the agreement had become truly unimaginable as a result of the obliteration of the topic.

DISTINCTION BETWEEN FORCE MAJEURE AND DOCTRINE OF FRUSTRATION

Most importantly, the first and foremost difference between the two is that the frustration contract can be raised due to impossibility without being mentioned in the contract whereas *the force majeure clause can be raised only if it is mentioned earlier in the contract. Secondly, if the threshold limit in the contract is higher so then the party can refer Frustration contract over Force majeure. Lastly, the frustration contract discharges all the obligations and duties of the party whereas force majeure is flexible in the rights and liabilities of the parties.*

GOVERNMENT'S TAKE ON COVID-19

The finance ministry came up with the office memorandum where they have identified Covid-19 to be part of the Force Majeure clause since there have been considered a natural calamity. It is considered the command of the Governmental ministries and authorities. It also explained that the “Vis major” clause cannot be opposed to non-performance of the contract wholly, but it can only suspend the performance only during the force majeure event. Also, the Indian government believes that the spread of Covid-19 is considered a Force majeure event and it depends upon the facts and duties of the contract, Therefore, a dispute arising out of the terms of such government contracts will be settled by the ordinary principles contract law.⁸

JUDICIAL PRONOUNCEMENTS

⁶ *Paradise v Jane* [1647] EWHC KB J5

⁷ *Taylor v Caldwell* [1863] EWHC QB J1

⁸ *Kerala SEB v Kurien E. Kalathil&Ors.* (2000) 6 SCC 293

*Satyabrataghose v Mugneerambangur & Co.*⁹: The conflict condition which was predominant while going into the agreement and the conceivable trouble in execution of the said agreement was known to the gatherings. Consequently, the demand for property by the government under protection rules doesn't influence the agreement. Since no period is specified in the contract and having respect to the overarching war circumstance the agreement was viewed as not feasible for execution under Section 56. In this manner, an agreement would come extremely close to Section 56 regardless of whether it isn't outright inconceivability yet the way that the agreement is generally changed was not considered at the hour of the understanding. In case of an express or inferred proviso in an agreement, arrangements are administered under Section 32. Force Majeure occasions happening outside the domain of the arrangements are managed under Section 56 (prevalently alluded to as Frustration of Contract).

*Alopi Parshad & sons Ltd v Union of India*¹⁰: In this case, it held that the currency depreciation, abnormal price changes, an unexpected obstacle to execute, or which will not affect the bargain that they have made. This, in this case, the contract shall not become void only just because of the sudden change of the circumstances. The performance of the contract has become difficult or impossible. It was declared that this particular contract had not become unlawful or impossible and it was held that the agents were not entitled to get the payments at the enhanced rates.

*M/S Haliburton Offshore Services v Vedanta Limited & Anr.*¹¹: (Vide its interim Order dated April 20, 2020, by Honourable High court of Delhi) held that lockdown imposed by the government due to the spread of the Covid-19 virus which has been considered a Force majeure clause. The applicable segments of this between interim order peruses are as follows:

"20. The countrywide lockdown, which came into place on 24th March 2020, was, in my opinion, prima clear within the nature of the act of God. Such a lockdown is unprecedented, and was incapable of getting predicted, either by the respondent or the petitioner.

⁹ *Satyabrata Ghose v Mugneeram Bangur & Co.* (1954), AIR 44

¹⁰ *Alopi parshad & sons Ltd, v Union of India* AIR 1960, SC 588

¹¹ *M/S Haliburton Offshore Services v Vedanta Limited & Anr.* (2020) O.M.P. (I) (COMM) & I.A. 3697/2020

.....Clear, in my view, special equities do exist, as would justify the grant of the prayer, of the petitioner, to injunct the respondent from invoking the bank guarantees of the petitioner, forming material of those proceedings, till the expiry of a period of 1 week from 3rd May 2020, till which date the lockdown has been imposed.”

“29. There shall be an ad interim stay on invocation and encashment of the eight bank guarantees.....”

In the aforementioned legal points of judgment, the force majeure regulation has not remained flexible. The courts have not permitted monetary powerlessness, burden, and trouble in execution, graveness, and many more as estates of such provision for a person to conclude or get an exception after an agreement.

*Energy Watchdog v Central Electricity Regulatory*¹²: It has been one of the important judgments of the honorable Supreme Court of India where Justice Nariman had very clearly mentioned that section 56 of the Indian contract act, 1872 will cover the force majeure clause. So, there will be the rule of positive law that will be seen here.

HAS COVID-19 CONSIDERED A FORCE MAJEURE CLAUSE?

As per the above-mentioned statutes and case laws that were discussed, it can be said that Covid-19 can be considered as the Force majeure clause. If such a clause is not mentioned previously in the contract the party cannot refer to that contract for the impossibility of performance but can have another remedy that is the frustration of contract which can be invoked if the clause is not previously mentioned in the contract. During such cases, it was seen that the contract is actually hampered due to the covid-19 epidemic and it was the cause of not performing that particular contract also the parties have not taken any other alternatives from the contractual rights and liabilities. But the party who is affected due to the impossibility of the contract has put to notice of another party within a reasonable time about the remedy of non-performance of the particular contract. The burden of proof lies with the party who is claiming the relief under that contract.

¹² *Energy Watchdog v Central Electricity Regulatory* (2017) 14 SCC 80

CONCLUSION

By the given legal arrangements, it is very well examined and expressed that the monetary interruption because of the outbreak of COVID-19 has impacted individuals, and individuals are compelled to remain inside. Individuals couldn't make determined by the above-expressed effects of COVID-19 that the undetectable hand of the 'force Majeure' condition is influencing the legally binding liabilities all through. Force-majeure or Doctrine of Frustration can't be applied as an overall guideline, the application will rely on the current realities and conditions of each case. The present resulting circumstance of the pandemic COVID-19 will fall between the said two expressions. The help of teaching dissatisfaction is emotional to specific circumstances and conditions. It is laid out that the legally binding world will go through progress post the outbreak. In any case, later on, times, we will examine the shifted translation of conditions, boundaries, and mandates of execution taken on by partners to satisfy the legally binding commitments in questionable circumstances. The approach will be formed through the terms given by the Government in this regard. "Force Majeure" will initiate its dynamic mode in the approaching times and force different legitimate ramifications on legally binding arrangements.