

COVID-19 INDIA: A CURIOUS CASE OF FORCE MAJEURE

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ABSTRACT

The global Covid-19 outbreak has disrupted workforce, lives and business operations on a global scale in an unprecedented manner and majorly impacted existing industries and contracts. Due to the sudden and unexpected change in the working pattern and the lockdown, it becomes impossible to perform the contractual obligations. This paper attempt to review the provision of force majeure clause and doctrine of frustration, what are the government notifications and the options available in lieu of force majeure. The sole motive of this article is to create awareness and to protect those parties who are not able to perform their contractual obligation due to the corona outbreak.

Keywords: Force Majeure, Covid-19, Doctrine of Frustration, Contractual.

Introduction

Covid- 19 has been officially declared as a Pandemic by the World Health Organization on March 11, 2020. The spread of Covid- 19 pandemic and lockdown imposed by several countries have made the performance of contracts challenging and impossible. Except few essential services, all the commercial activities were suspended. This pandemic has not just resulted in loss of the lives of the people but it also adversely impacts on the businesses all over the world. According to section 37 of the Indian Contract Act, parties to a contract must either perform or offer to perform their respective promises, unless such performance is excused under the Indian Contract Act or any other law. With the onset of the pandemic, the situation may arise where the parties are not able to perform the part of their contract without their fault. The term that has gained relevance and heard mostly in the contractual context for business is "Force Majeure".

In this current scenario, it is important to analyse whether the current covid situation can be considered as force majeure or not?

Force Majeure

The word Force Majeure is a French phrase that means a 'superior force'. It is embodied under Sections 32 and Section 56 of the Indian Contract Act, 1872. It is a provision agreed upon between parties during making of a contract. The force majeure event saves a party from liability for its failure to perform a contractual obligation. Basically, force majeure events include an Act of God, natural disasters, war or wars, strikes, riots, epidemics, pandemics, etc. A company may insert a force majeure clause in the contract to remit itself from the liability in the event it cannot fulfil the terms of a contract due to reasons beyond its control.

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Doctrine of Frustration

Section 56 of the Indian Contract Act, 1872 deals with the 'Doctrine of Frustration' as being acts which cannot be performed. It says that any act which has to be performed after the contract is made becomes unlawful or impossible to perform, and which the promisor could not prevent, then such an act which becomes impossible or unlawful will become void.

This section only deals with cases of subsequent impossibility and not the initial impossibility. Frustration of Contract can be given in various circumstances such as death or insanity of parties, frustration due to change of circumstances, destruction of subject matter, frustration by virtue of legislation etc. Section 56 is based on the maxim "les non cogit ad impossibilia" which means that the law will not compel a man to do what he cannot possibly perform.

The doctrine of frustration is applicable:

- If the object of the contract has become impossible to perform.
- If an event has occurred making the performance of the contract to be impossible beyond the control of the promisor.

Conditions for the applicability:

- Existence of a valid contract
- The contract is not yet performed
- The performance of the contract has become impossible
- The impossibility has occurred due to event uncontrollable by both the parties

Distinction between Doctrine of Frustration and Force Majeure

Often, people get confused between the clause of force majeure and doctrine of frustration and consider it as both the same but is not true.

- The concept of doctrine of frustration is exceedingly common wherein the force majeure clause is a part of the contract.
- Force Majeure has no legal concept as such and it has to be expressly outlined during a contract while in the doctrine of frustration, an occurrence of an unforeseen event is directly linked with the impossibility to perform the contract.
- When a contract doesn't contain a force majeure clause, the contracting parties might claim a frustration of a contract and if the supervening event is roofed within the force majeure clause in a contract, the frustration of such contract can't be claimed.

Is Covid-19 Considered under the Force Majeure Clause in India?

So, here are some Government notification in the light of force majeure clauses during Covid-19:

- The Ministry of Finance noted on February 19, 2020 vide its Memo No. F 18/4/2020 clarifies the doubts regarding disruption of supply chain due to the spread of the corona virus. They stated that the disruption of the supply chains due to the spread of coronavirus in China or any other country should be considered as a case of natural calamity and Force Majeure Clause (FMC) may be invoked, wherever considered appropriate.
- The Ministry of New and Renewable Energy (MNRE) noted on March 20, 2020 vide its Memo No. 283/18/2020- GRID SOLAR has stated time extension in Renewable Energy Projects. It has decided to grant time extensions in scheduled commissioning date of RE Projects considering disruptions of the supply chain due to spread of corona virus in China or any other country as a force majeure event.

However, these notifications and memorandum do not have a binding effect for all contracts, but have special provisions for certain contracts which bring covid-19 under the ambit of force majeure and these will also depend on the nature of party's obligations and the contractual provisions of the Contracts. If the Contract does not include a force majeure clause, the affected party could claim relief under the doctrine of frustration under section 56 of the Indian Contract Act, 1872.

Force Majeure Clause in Different Countries

As Covid-19 (Coronavirus) pandemic spread across the Globe, the outbreak has severely stopped business activities in many countries both at the national and international level.

Force Majeure related language used in most contracts vary widely. Some Clauses depend upon the generic language included while others automatically meet the standard upon happening of such event.

- **China**

As the first country to face the pandemic, China may find difficult or impossible to fully perform the commercial contracts under the laws of People Republic of China (PRC Law). Under the PRC Laws, both the General Rules of the Civil Law and the Contract Law define “force majeure events” as unforeseeable, unavoidable and unconquerable situations, viewed objectively.

- **UK**

Force majeure clause are common in commercial contract, but there is no generic definition in common law. For a force majeure clause to engage performance must become physically and legally impossible upon contractual obligation of occurrence of an event. Covid- 19 may be captured under Act of God, pandemic, or act of government and it is a party's obligation to establish a direct link between Covid- 19 and force majeure. The court will assume that the parties only intending to grant relief where the event was outside of their control.

Conclusion

Covid-19 is the major event happened throughout the last decade, which has taught us the importance of preparing for the unexpected. As this epidemic has shaken the lives of every individual in every aspect, whether it is personal life or professional life. Following the situation, on March 11,2020 the World Health Organization has announced COVID-19 as a pandemic and the Country was in complete lockdown and due to which the contractual obligations of the parties, the performance under many contracts got delayed, interrupted or even cancelled. A force majeure clause in the contract provide relaxation to those who can't perform their contractual obligation due to this unfortunate situation which is actually not under the control. But if there is no force majeure clause in the contract, one can excuse themselves from contractual obligation by taking the ground of the doctrine of frustration which is mentioned under sec. 56 of the Indian contract Act,1872. However, the disruptive events reiterate the importance of all clauses for both now and, in the future, especially the often-overlooked ‘force majeure’ clause.

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