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No Entitlement for Claiming Force Majeure Relief During Covid-19 With Many Case Laws. Also, Suggestions for It to Low It

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NO ENTITLEMENT FOR CLAIMING FORCE MAJEURE RELIEF DURING COVID-19 WITH MANY CASE LAWS. ALSO, SUGGESTIONS FOR IT TO LOW IT

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ABSTRACT

Apart from the divesting impact that covid-19 continues to unleash on human beings and continues worldwide, its outreach has also reached commerce and business. covid-19 has resulted in lockdown or restricted movements in countries.

Consequently, businesses have been impacted and so have operations and consequently, contracts and obligations under contracts are being revisited to assess these impacts. the term that has assumed relevance in contractual contract today for businesses today and heard most often is force majeure and how will this term be construed in a contract in the background of covid-19.

We have, through these questions and even endeavoured to demystify the concept of force majeure and frustration of a contract, the importance of the same in business, the difference between the two, key aspects that one may wish to keep in mind while drafting a force majeure clause and the repercussions of covid-19 on contracts in India in light of force majeure and frustration of a contract.

INTRODUCTION

What Do You Mean by *Force Majeure?*

The term force majeure has been defined in black laws dictionary ,as an event 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 .while force majeure has neither been defined nor specifically dealt with , in Indian statutes, some reference can be found in section 32 of the Indian contract act ,1872 envisages that if a contract is contingent on the happening of an event

which event becomes impossible , then the contract becomes void.

From a contractual perspective, a force majeure clause provides temporary reprieve to a party from performing its obligations under a contract upon occurrence of a force majeure event.

A force majeure clause typically spells out specific circumstances or events, which would qualify as force majeure events, conditions which would have to be fulfilled for such force majeure events, conditions which would have to be fulfilled for such force majeure clause to apply to the contract and the consequences of occurrences of such force majeure event. As such, for a force majeure clause to become applicable (should any force majeure event occur), the occurrence of such events should be beyond control of the parties and the parties will be required to demonstrate that they have made attempts to mitigate the impact of such force majeure event. If an event or circumstance comes within the ambit of a force majeure event and fulfils the conditions for applicability of the clause, then the consequence would be that the parties would be relieved from performing their respective obligations to be undertaken by them under the contract during the period that such force majeure events continue.

Further, consequential liabilities, depending on the language of the clause, the parties may be required to issue a notice formally intimating the other party of the occurrence of such events and innovation of the force majeure clause. some contracts also contain a provision that if such force majeure event continue for a prolonged time period, the parties may be permitted to terminate the contract.

What Would Force Majeure Clauses Typically Include and What Happens If, A Contract Does Not Include a *Force Majeure* Clause?

A force majeure clause in a contract would typically include an exhaustive list of events such as acts of god, war, terrorism, earthquakes, hurricanes, acts of government, explosions, fire, plaques, or epidemic or a non-exhaustive list wherein the parties simply narrate what generally constitute force majeure events and thereafter add and such other acts or events that are beyond the control of parties.'

As discussed above, it would also include conditions which would have to be fulfilled for such force majeure clause to apply to the contract and the consequences of occurrence of such force majeure event. Consequences would include the

suspension of obligations of the parties upon occurrence of a force majeure event. Consequences would include the suspension of obligations of the parties upon occurrence of a force majeure event.

If a contract does not include a force majeure clause, the parties would have to ascertain in light factors such as the nature of the contract, the nature of the event and so forth, as to whether section 56 of the contract act (which deals with agreements between the parties to do impossible act) and which has been briefly discussed below, can be applied to such contract so as to discharge the parties from their contractual obligations.

Why Is This Concept of *Force Majeure* Important for Businesses?

Force majeure clauses can usually be found in various contracts such as power purchase agreement, supply contracts, manufacturing contracts, distribution agreements, project finance agreements, agreement between real estate developers and home buyers, etc.

This provision is important for businesses as it relieves the parties from performing their respective obligations and which are to be undertaken under the contract and consequential liabilities, during the period that force majeure events continue provided that the conditions for clause to become applicable are met.

What Do You Mean by "Frustration of A Contract" And Why Is the Concept Important for Businesses?

If performance of an act becomes impossible or unlawful, after a contract has been executed and such impossibility is due to an event which the party undertaking the performance could not prevent, then such contract itself becomes void a one can say that the contract becomes frustrated.

Hence, frustration is the happening of an act outside the contract and such act makes the completion of performance of a contract impossible.

Under the contract act, the doctrine of frustration of contract is envisaged in section 56, which states that an agreement to do an act impossible in itself is void. On a plain reading of section-56 of the contract act. It is evident that the section envisages some impossibility or unlawfulness of the performance of the act, which the parties had not contemplated at the time when they entered into the contract. It leads to a pertinent question as that would lead to frustration of contract.

The courts in India have held that the word 'impossibility' used in section 56 of the contract act must be interpreted in a practical form and not in its literal sense. thus, a contract would come under the purview of section 56 of the contract act even if it is not an absolute impossibility, but the contract has fundamentally changed, hitch the parties had not contemplated at the time of the agreement. This principal has been upheld in *Satyabrata Ghose Vs. Mugneeram Bangur and Co. and Anr. [AIR (1954) SC 44]*.

The Concept of Restitution as Set out in section 65 of the contract act also assumes significance in the context of the frustration of contract, section 65 states that when an agreement is discovered to be void, such as in case of a contract getting frustrated, the person who has received any advantage under such agreement is bound to restore it or to make compensation for it, from who he received it. Thus, one of the consequences of frustration of a contract is restitution whereby parties are to be put in the same position they were if the contract had never been executed.

Are There Any Areas Wherein the Concept of Frustration of a Contract May Not Be Enforceable On a Particular Matter?

Frustration of a contract, my not be applicable in situation of-

(i) Self-induced frustration,

(ii) Where in a contract, parties have expressly agreed that the contract would stand despite such intervening circumstance or event.

FORCE MAJEURE IN THE TIMES OF COVID-19?

The onset of the covid-19 pandemic in INDIA has proven not only to be a humanitarian crisis, but also an economic crisis of an unprecedented scale. Specifically, restrictions on movement of persons and goods, save for those involved in essential services, have raised serious doubts on the ability of parties to perform their obligations under the contract when there are not ordinarily classified as 'essential services.' Uncertainty as to the performance of contracts has led to parties envisaging breaches of contracts and assessing their rights and remedies in relation to the same.

FORCE MAJEURE AND VIS MAJOR

'Force Majeure' means "an event or effect that can be neither anticipated nor controlled…. {and} includes both acts of nature (examples- floods and hurricanes) and acts of people (example- riots, strikes and wars)".

Vis major (meaning 'act of god' in Latin) is defined as an 'overwhelming, unpreventable event caused exclusively by forces of nature, such an earthquake, flood or tornado'.

'Force Majeure' is wider tan 'vis major'/'act of god' since the former encompasses both natural and artificial unforeseen events, whereas, the latter contemplates only natural unforeseen events. In fact, 'is major'/'act of god' actually form a subset of force majeure. The supreme court has, in *Dhanrajaural Gobindram Vs. Shivaji Kalidas and Co.* recognized the distinction between 'act of god' / 'vis major'' and 'force majeure'.

No withstanding the differences, the effect of both the term is to execute non-performance of a party and prevent a party from being liable from a breach of contract whilst also saving the non performing party from the consequences of something over which it has no control.

FORCE MAJEURE CLAUSES IN CONTRACTS

Contracts often contain a force majeure clause that is negotiated between the parties and specifies the events that qualify as force majeure events such as act of god, wars, terrorism, riots, labour strikes, embargoes, acts of government, epidemics, pandemics, plagues, quarantines and boycotts.

If the event that is alleged to have prevented performance under the contract, such as epidemic, is specifically mentioned in the force majeure clause and the event occurs, then the affected parties may be relieved from performance.

Even if such event is not specifically mentioned in the force majeure clause, many force majeure clauses contain a catch all phrase that in addition to the specifically mentioned events. A catch all phrase would have similar language to including, but not limited to or any cause /event outside the reasonable control of the parties.

Although, such catch all language is construed *Ejusdem Generis*, depending on the width of the language of the catch –all

phrase, it would be argued that an epidemic /pandemic like COVID -19 falls within the ambit of the force majeure clause. Even otherwise, i.e., even in the absence of such catch all language, if 'vis major'/'act of god' has been specifically included of a force majeure event, it can be contended that an epidemic like covid-19 is an act of god.

EPIDEMIC/PANDEMIC = ACT OF GOD

Although, Indian courts have not directly ruled on whether an epidemic /pandemic like covid-19 is an *'act of god'*, an agreement to that effect can derive support from the decision of the supreme court in the divisional controller , *KRCTC VS. Mahadana Shetty*, which holds that the expression *'act of god'* signifies the operation of natural forces free from human intervention with the caveat that every unexpected natural event does not operate as an excuse from liability if there is a reasonable possibility of anticipating their happening similar judgements have also been passed by the Madras High Court and the Kerala High Court.

However, courts in the united states of America and the United Kingdom have specifically held that the expression 'act of god' includes a pandemic/epidemic.

For instance, in *Lakeman Vs. Pollard*, a labourer at a mill left his job early during a cholera epidemic due to concerns of contracting the disease and, therefore, failed to complete his work contract. In an action, by the mill owners seeking compensation for work done by the labourers, it was argued that the work contract had been breached. The supreme court of Maine held that the cholera outbreak was an *'act of god'* and the laborers was thus not in breach of his contract since duty to perform under the contract was discharged. similarly, in *Coombs Vs. Nolan*, the district court for the southern district of New York excused a delay in the discharge of cargo where the defendant could not obtain enough horses to unload a ship on time due to then prevailing horse flu pandemic on the ground that the horse flu pandemic fell within the ambit of *'act of god'*.

In Sandry Vs. Brooklyn school district, the supreme court of North Dakota considered an appeal pertaining to claims by the school bus drivers for their wages /compensation under their transportation. contracts during the period that the schools were shut owing to the influenza outbreak. the supreme court of North Dakota discharged the school

district from paying the bus drivers during the period that the schools were hut due to the influenza epidemic. It is pertinent to note that the reasoning was based on the fact that the contract had become impossible to perform due to the shutdown.

STATUTORY PROVISIONS UNDER INDIAN LAW AND ABSENCE OF A *FORCE MAJEURE* CLAUSE

The Indian contract act, 1872 ('Act') contains two provisions which are relevant to force majeure and act of god. Section 32 of the act deals with contingent contracts and inter alia provides that if a contract is based on the happening of a future event and such event becomes impossible, the contract becomes void. Section 56 of the act deals with frustration of a contract and provides that a contract becomes void inter alia if it becomes impossible, by reason of an event which a promisor could not prevent, after the contract is made.

In a line of decisions starting from *Satyabrata Ghosh Vs. Mugneeram Bangur* to *Energy Watchdog Vs. CERC*, the supreme court has held that when a force majeure event is relatable to a clause / express or implied in a contract, it is governed by the section 32 of the act whereas if a force majeure event occurs dehors the contract, section 56 of the act applies.

HARD CASES

Notwithstanding the above, there is considerable scope for complex fact situations which could throw up interesting issues, for instance, where the contract contains a force majeure events in a restrictive manner (i.e. not specifically mentioning either pandemic/epidemic or act of god) and also does not contain any catch all language. in such case, it could be argued that section 56 of the act and demonstrate that the very foundation upon which the parties rested their bargain has been totally upset, the court can, in such a situation, considers the applicability of section 56 of the act.

Another instance is reflected in the recent decision of the Bombay high court in the case of standard retail pvt. Ltd. Vs. m/s g.s. global corp. and others, where, while refusing an injunction as prayed, the court noted that the force majeure clause was contained in the contract for sale of steel and not in the letter of credit. Although, the injunction was refused on other grounds as well, it nevertheless highlights the

difficulties that could arise when the underlying contract excuses performance but a separate / distinct ancillary contract/financing arrangement like a letter of credit or bank guarantee does not contain a force majeure clause.

CONCLUDING OBSERVATION

While several contractual parties may seek to resile from the contractual obligations in light of covid-19 pandemic, successful reliance on either the force majeure clause in the relevant contract or on section 56 of the act for doing so is not a given. the onus of demonstrating whether the covid-19 actually affected performance of the specific contractual obligations in a particular case lies heavily on the party seeking to have its non-performance excused. While checking whether the covid-19 pandemic (and/or actions by authorities in response thereto) fall within the scope of the relevant force majeure clause is a good starting point, issues such as causal link and duty to mitigate also need to be examined in order to assess the relative strengths and weaknesses of a such party's stand. relevant letters and correspondence (including force majeure notices) should also meticulously document not just the fact that a force majeure event has occurred, but also the specific effects of the same on the contractual obligation which the party seeks to be excused from performing.

SUGGESTIONS

One needs to bear in mind that proving frustration in an Indian court of law would not be easy, clearly, because of the fact that the courts would only be willing to interpret the outbreak of COVID-19 as mere hardship and in any case, the language of the force majeure clause does not specifically include the pandemic. it really will be a challenging task.

Lastly, if the contract, becomes wasteful on account of the covid-19 crisis and loses its economic value, or, if the other party wishes to repudiate or terminate the contract in order to mitigate or prevent any further losses, it is recommended that parties rely on the termination clause, 'entitlement to terminate' or any such clause as may be specified in such a contract.

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