

APPLICABILITY OF FORCE MAJEURE AND THE DOCTRINE OF FRUSTRATION TO CONTRACTUAL OBLIGATIONS IN LIGHT OF COVID-19

AAKASH RAMAN SINHA, ASSOCIATE



वसुधैव कुटुंबकम्
The World is a Family
SINGHANIA & CO LLP



WHAT IS FORCE MAJEURE? IS COVID-19 A FORCE MAJEURE EVENT?

Force Majeure is a Latin term that translates to “*Superior Force*”. The term finds no mention in the Indian Contract Act, 1852. Force Majeure Clauses are worded in a manner so as to include within its ambit all the events which are beyond a party’s control, be it a natural phenomenon or otherwise. A Force Majeure clause may provide for termination of the contract at the occurrence of Force Majeure event, or it may provide for an extension in completing the obligations. The clause may also provide for partial termination of obligations.

The World Health Organisation (WHO) declared Covid-19 as a Pandemic on March 11, 2020. A pandemic is an outbreak of a disease that occurs over a wide geographic area and affects an exceptionally high proportion of the population. Therefore, if a contract does include “Pandemic” as one of the Force Majeure events, then certainly the clause can be invoked if the breach is a result/by-product of Covid-19 or of the consequential lockdown. Now the question arises whether the same can be invoked if the word pandemic is not specifically mentioned in the Force Majeure clause? The answer to that will depend on the precise manner in which the FM clause has been drafted.

Type 1 : If the clause has defined a set of events, occurrences and has not left any room for adding some more, then more often than not, the said clause cannot be invoked successfully. An example of such a clause is as follows:-

“1.1 Force Majeure shall mean events such as Earthquake, floods, war, hostilities, civil war, riots and acts of terrorisms.

1.2 No party shall be liable for a breach of contract that is occasioned by Force Majeure.”

Type 2 : On the contrary, if the contract leaves ample room for adding events and it can be deciphered to be clearly an inclusive and not an exhaustive one, then the FM clause can be successfully invoked. A standard inclusive clause is as follows:-

A party shall not be liable for any failure of or delay in the performance of this agreement for the period that such failure or delay is

1. *beyond the reasonable control of a party,*
2. *materially affects the performance of any of its obligations under this agreement, and*
3. *could not reasonably have been foreseen or provided against, but*

will not be excused for failure or delay resulting from only general economic conditions or other general market effects.

Type 3: If the clause is neither as wide as Type 2, nor as narrow as Type 1, it will be somewhat loosely drafted as follows:

“1.1 Force Majeure shall include events such as Earthquakes, Floods, War, Insurgency, Riots, Terrorism etc.

1.2 No party shall be liable for a breach of contract that is occasioned by Force Majeure”

Type 3, although does resemble Type 1, is a much better clause and can be successfully invoked to avoid liability for breach of contract. The different result is a comeuppance of the substitution of the word “shall mean” by “shall include” and the use of the word “etc.” By using the word shall include, the grounds are no longer exhaustive. This, coupled with the use of the word “etc”, implies that similar events, although not specifically provided for in the contract, can most certainly be added.

REMEDIES IN THE ABSENCE OF A FORCE MAJEURE CLAUSE

The doctrine of frustration provides for impossibility of enforcement of a contractual obligation.¹ This doctrine is encapsulated in the Indian Contract Act, 1872 under Section 56.

In ***Syed Khursed Ali Vs. State of Orissa and Anr***², the court observed: “*it is clear from the facts of the case that the agreement entered into between the parties became impossible to perform as well as unlawful and, thus, amounted to of the same. S.56 of the Contract Act, 1872, as quoted above, does not cover every case of which, neither of the parties is responsible. Giving regard to the nature and circumstances of the transaction and implied terms, no doubt is cast in the present case that the performance of*

¹ *Satyabrata v. Mugneeram AIR 1954 SC 44: 1954 SCR 310*

² *AIR 2007 Ori 56, 2006 II OLR 557*

the contract on the part of the petitioner became an impossibility and such impossibility can be brought within the fold of "force majeure"."

Therefore, even if a contract does not have a Force Majeure clause or if the FM clause is rigid, exhaustive and excludes a "pandemic" from its ambit, a party can still avoid liability for the breach of contract by invoking Section 56 of the Indian Contract Act, 1852, by sufficiently establishing:-

- a) The breach proceeds from a cause not brought about by the defaulting party's default.
- b) The cause is inevitable and unforeseeable.
- c) The cause has made execution of the contract wholly impossible.

FORCE MAJEURE VERSUS DOCTRINE OF FRUSTRATION

By having a FM clause, the parties can specifically opt for the relief that they desire, rather than obtaining the relief the Court feels suitable for them. Doctrine of Frustration is applied when the FM clause has not been incorporated in the contract. It protects parties when owing to oversight or short-sightedness they fail to have the protective covering of a FM clause for events which happen after the contract is made, owing to no fault of either of the parties, and out of their control.

CASE LAWS PERTAINING TO COVID-19

In **Standard Retail Pvt. Ltd. v/s. M/s. G.S Global Corp & Ors.**³, a set of steel importers had approached the court under S. 9 of the Arbitration and Conciliation Act, 1996, seeking to restrain the encashment of their Letter of Credits by Korea-based exporters. The contention of the Petitioners was that lockdown had rendered the performance of the contract impossible.

The court noted that distribution of steel had been declared as an essential service and there existed no restrictions on its movement and all ports and port related activities. It was opined that the lockdown will be for a limited period, and it cannot come as an aid for the petitioners so as to enable them to rescind their contractual obligations. It was observed that FM clause in the present contract is applicable only to the exporters.

³ COMMERCIAL ARBITRATION PETITION (L) NO. 404 OF 2020

Ultimately, the court refused to injunct Respondent No.1 noting that it had already performed its part of the contract, disregarding the inability of the Petitioner to perform its part and the consequential damage on them.

In *M/s. Halliburton Offshore Services Inc. vs. Vedanta Limited & Anr.*⁴, the Petitioner preferred a petition under S.9 of the Arbitration & Conciliation Act, 1996, seeking an interim injunction against Vedanta Limited, injuncting it from invoking or establishing eight bank guarantees, five of which were supposed to expire on a future date, as per the instructions of Halliburton Offshore, under a contract to drill petroleum wells.

The Petitioner contended that the obligations flowing from the contract had been substantially performed, and the delay in executing the remaining part of it was attributable to the lockdown imposed in wake of spread of Covid-19 pandemic and not on them. On the other hand, the Respondent submitted that invocation of bank guarantee cannot be stayed unless the same is necessitated by exceptional circumstances like fraud. They also submitted that “Petroleum” was an exempted activity.

The Court held that encashment of bank guarantee can be stayed on ground of special equities to prevent irretrievable harm. The court observed that the imposition of lockdown was by way of a sudden and an emergent measure, of which no advance knowledge could be credited to the petitioner, or indeed, to anyone else. It was further held that the Petitioner was not involved in production of petroleum but digging of petroleum wells. After observing that the Petitioner was working on the project till the imposition of the lockdown, and that it was impeded only because of unexpected imposition of the lockdown, the court gave the benefit of Force Majeure exemption in respect of invocation of bank guarantees.

⁴ OMP.(I) (COMM) & IA 3697/2020