

## Lex Lexicon Journal

---

### Force Majeure Clause impacted by COVID 19- Old Wine in New Bottle or Ability to stand the test of Time?

By- V. Krishna Laasya

---

#### ABSTRACT

*Force Majeure clause, an aspect of contractual obligation that dissolves a party from the fulfilment of obligation due to unforeseen circumstances, is slowly but surely gaining momentum during the current Covid-19 Pandemic.*

*The essay unfolds the aspects of the Indian Jurisprudence provisions, namely S. 32 and 56 of the Indian Contract Act, 1872 with ample focus on English Law. The Ramifications of the Force Majeure clause involve the intrinsic nuances of the scenario and are aided by the Practical Considerations of the same. Assessment of the Risk faced is important, and this essay aims to throw light on the same.*

*The Contract Act resolves the issue through dual effects of S. 32 and 56, by providing a generalised view of a contingent or dependent contracts and the void aspect of clauses in the contracts. When a party is not aiming to deceive the other and is working towards the fulfilment especially when it is not at fault, the obligations of the contract must be taken into account and performance must be paid heed to accordingly.*

*This essay seeks to establish the structure of intricacy that is adding to the long list of society's woes. Though there are judicial interpretations and contractual provisions governing the clause, the parties must be careful in drafting the same diligently.*

## INTRODUCTION

COVID-19 has brought a commercial hardship era where the performance of a contract has never been tougher. Covid-19 has affected the economy and market, not only in India but also UK, USA. Adding to the humanitarian woes, travel bans, access restriction and lockdown measures, parties' contractual capacity and ability have also been hugely impacted.

Today, parties to the contract must be able to deal with unforeseen possibilities and adverse changes and must analyse on what they can do to reduce the contractual obligations.

Business enterprises require that the contracts entered into, must be discharged and the reciprocal obligations be fulfilled. S. 37 of the Indian Contract Act requires that the parties involved in the contract be able to offer to perform (or perform) their respective obligations, unless the parties are not able to do so on account of the pandemic<sup>1</sup>. The parties are now in a situation where they are not able to fulfil the obligations, without any wrong on their behalf.

A Reservoir of Socio-legal Discourse

## CONCEPT

Force Majeure, a term from “Vis Majeure” refers to “superior force” and is defined as an event that cannot be controlled nor foreseen<sup>2</sup>. The term ‘Force Majeure clause’ refers to that provision that provides for the risk allocation in case of the occurrence of a non-anticipated event<sup>3</sup>.

---

<sup>1</sup> Tarun Dua and Geetanjali Sethi, Force Majeure in Times of Covid-19: Challenges and The Road Ahead, Mondaq (May 11, 2020) <https://www.mondaq.com/india/litigation-contracts-and-force-majeure/930674/force-majeure-in-times-of-covid-19-challenges-and-the-road-ahead>.

<sup>2</sup> Black's Law Dictionary Eighth Edition, First South East Asian Edition 2015.

<sup>3</sup> For the definition “Force Majeure clause” see Black's Law Dictionary Eighth Edition, First South East Asian Edition 2015.

Generally, a force majeure clause is inserted or drawn in a contract to absolve the parties from liability of non-fulfilment of terms of the contract, especially when the reasons for such breach, are beyond the controlling capacity. When a force majeure clause is involved, the parties are relieved from their liability and performance of the terms of the contract is impossible. There is considered an intervention from a superior force, and this plays a significant factor in justifying the breach of the contract.

Force majeure clause has gained a significant momentum today, owing to the performance of the contracts affected by the onset of the Covid-19 pandemic. The effects of the clause include temporary suspension, waiver of obligations completely for unfathomable reasons on the part of the party in default<sup>4</sup>. The parties may exonerate themselves from the liability arising out of the non-performance of the contract.

### INDIAN JURISPRUDENCE

Essentials of a valid contract is enunciated in S. 10 of the Indian Contract Act, 1872 as

- Free Consent of parties (without the presence of Coercion, Undue Influence, Fraud)
- Competency to contract (Position of Minor, Person of Unsound Mind)
- Lawful consideration (minimum consideration)
- Lawful object (contracts not forbidden by law or opposed to public policy)

Performance of the Contract involves the fulfilment of the essentials and causing the undertaking of performance of the contractual obligations of the parties.

---

<sup>4</sup> Preetam D'Souza and Ranjit Mahishi, Covid-19: Impact of Force Majeure in Indian Commercial Contracts (Nov 1, 2020, 10:06 PM) <https://www.worldservicesgroup.com/publications.asp?action=article&artid=15081>.

Impossibility of rendering performance of a contract involves the applicability of S. 56<sup>5</sup> of the Indian Contract Act, 1872 where the Section unfolds through three subdivisions

(i). If an agreement is drawn between parties in such a way that the act by itself is impossible, then the agreement is void.

(ii) If a contract is drawn in such a way that initial performance was possible, but after the contract is made, there is an impossibility, or for reasons, the promisor could not fulfil, or the contract turns unlawful, then the contract turns void and impossible to perform.

(iii) Where if the person knew that the promise made was impossible to fulfil and the promisee was not aware of the same, such promisor must compensate the promisee for the loss occurred due to such non- Performance.

Comments- Section 56 brings out an analysis into the interpretation of performance of a contract in its impossibility. It unfolds itself into three subdivisions, and each aspect relating to contract possibility is intricately brought out. Thus, the concept of voidability in volition with the impossibility of a certain act which renders the performance itself non-valid can be visualised.

Almost all contracts provide for a suspension of contract performance on the happening of specified or certain events. In English Law, the dissolution through the contract terms would be treated as a case of frustration and in Indian law, Section 32 of the Indian Contract Act, 1872 would come into effect.

---

<sup>5</sup> For Verbatim Reading of S. 56 of the Indian Contract Act, 1872, see the Central Government Act (Nov 01, 2020, 10:08 PM ) <https://indiankanoon.org/doc/648614/>.

S. 32<sup>6</sup> take into account the cases of enforcement which are contingent and dependent on the happening of an event. The contracts that are dependent on a future event happening or not happening, the enforceability is possible only when the event has happened, and if the event becomes impossible to perform, then the contract turns void.

Comments- The existence of a force majeure clause is derived from the contract existence and arises in a situation where an unpredictable event may render performance impossible during a stipulated time of the operation of the event such that the contractual obligations may be performed after the unforeseen event stops.

Ministry of Finance issued an Office Memorandum<sup>7</sup> on the Force Majeure clause and stated that Covid-19 must be considered as a national and natural calamity and force majeure clause can be invoked after adhering to the procedure.

- It was also clearly stated that the clause does not excuse performance completely; rather, it only provides a temporary suspension for the duration of the calamity.
- The contracting parties' firm must give a notice, and this cannot be claimed with a retrospective effect.
- It was also mentioned that if the performance has been delayed due to the operation of force majeure clause for a time period of more than 90 days, either party may terminate the contract and there would be no monetary repercussion on the same.

---

<sup>6</sup> For Verbatim Reading of S. 32 of the Indian Contract Act, 1872, (Nov 01,2020, 10:08 PM)  
<https://indiakanon.org/doc/124768/>.

<sup>7</sup>Office Memorandum issued by the Ministry of Finance, Department of Expenditure and Procurement Policy Division, No. F. 18/4/2020-PPD (Nov 01, 2020 10:09 PM), see  
<https://doe.gov.in/sites/default/files/Force%20Majeure%20Clause-%20FMC%20.pdf>

Though if there is a conflict on a given contract's terms, the court or a jurisdiction based tribunal's decision will interpret the clause, the Office Memorandum can be considered a binding document<sup>8</sup>.

## ENGLISH LAW

In English Law, a test of frustration generally applies and it holds that the parties who have entered into a contractual obligation with each other to make sure they perform the same even if the performance is rendered difficult or costly. The exception to the rule is the concept of frustration.

As per the English law, the doctrine of frustration is different from the provisions stipulated under Indian Law. Frustration is relatable to the change in the circumstances in such a way that the foundation or base of the contract by itself stands cancelled either fully or the difference in the consideration by the parties and is ended by legal order<sup>9</sup>. Thus the theories applied by the English Courts involve aspects of underlying implications in the contract, courts vested with the power of determination (just and reasonable) and construction based on the intention of parties.

## RAMIFICATIONS

The judiciary will have to take into account, circumstances that led to forced closures and impossibility of performance of the contracts. The courts' discretion would generally lie towards relaxing the fulfilment of obligations of the contract, in favour of those contracts which have been entered into in before or on the early onset of the pandemic.

---

<sup>8</sup> Nishith Desai Associates, Impact of Covid-19 on Contracts- Indian Law Essentials (Nov 01,2020 10:10 PM) [http://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/Research\\_Papers/Impact\\_of\\_Covid-2019\\_on\\_Contracts.pdf](http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Impact_of_Covid-2019_on_Contracts.pdf)

<sup>9</sup> 1 Professor Hugh Beale, Chitty on Contracts, Sweet and Maxwell (31<sup>st</sup> Edition 2008)

Generally, it is expected that the performance of the contract is null totally and not just temporary or partial. It is a well known notion that temporary suspension of the contract fulfilment leads to suspension of obligations and so, there will be no need to invoke the express use of the force majeure clause.

The debtors are not relieved from the fulfilment of the terms of the contract because they may not be able to perform, but they may be relieved from the performance due to the loss of the component of viability<sup>10</sup>. Legal unpredictability relief can, however, be sought by the parties when the parties are not able to invoke the force majeure clause.

### **PRACTICABILITY OF THE FORCE MAJEURE CLAUSE IN LIGHT OF COVID-19**

Before dealing with a question on applicability, it is important to analyse whether the impact of Covid-19 has resulted in:

- a) Failure of fulfilling part of the contract obligations
- b) Complete failure in fulfilment (complete incapacity)
- c) Mere commercial lacuna or hardship

Impact assessment of the above factors is necessary as it provides on acting as a remedy to nullify the effect of the contractual performance and to overcome the change in the impact of the unforeseen event. With special emphasis on the force majeure clause, it is important that the terms used in the contract are pertinent. The terms ‘prevent’, ‘hinder’ and ‘delay’ are interpreted differently by different

---

<sup>10</sup> Luther Rechtsanwaltsgesellschaft, see [Impact of Covid-19 on Contractual Obligations: Force Majeure and Case Law](#) (Nov 01, 2020 10:15 PM)

judicial institutions, and so, the construction of the same is material to determine the general and specific impact of the clause invoked by the party<sup>11</sup>.

Remedial contract- if the contract does not render a contract impossible to perform on the grounds of occurrence of an event, then the remedy to the same can be claimed under S. 56<sup>12</sup>.

Miscellaneous terms- Sometimes, contracts may be framed in such a way that there are different terms with effect to non-performance. In such cases if the event occurs due to a force majeure clause, then not only the clause must be taken note of, even specific obligations relating to non-performance must be invoked.

Compliance to Requirements- The party who is invoking the force majeure clause must satisfy the dual norms of informing the details to the other party and also mentioning the end of the event to resume the contractual obligations to the other party.

## INFERENCE IN ITS SUBTLETY

In such testing times, this article aims to analyse as to whether the impact of COVID-19 has had a mushroom growth or a relatively thinner growth on the performance of a contract.

Though there have been significant tie-ups and nuances drawn on the relation between Force Majeure clause and Sections 56 and 32 of the Indian Contract Act, 1872, the very purpose of establishment of the Sections and their co-operative correlation with the Force Majeure clause is left to the imagination of those authoring various commentaries and journals.

---

<sup>11</sup> Energy Watchdog v. Central Electricity Regulatory Commission and Ors, 2017 (4) SCALE 580.

<sup>12</sup> *Supra* Note 5



There is no explicit provision underlying the intricacies of the clause, and this may prove to be a burden, as every person is free to decide on the concept according to their own whims and fancies.

Thus, when it has been established that COVID-19 has ruined the efficacy relating to the force majeure clause, the very concepts of collective responsibility and ‘light at the end of the tunnel’ may be embodied to show that the trying times may be crossed with utmost perseverance and dedication.

## CONCLUSION

It is evident that the fate of the parties lies in the ways the contract is constructed. Parties will now have to place a closer look, and the ambit of impossibility is definitely tested here. It is always material that the parties insert a force majeure clause so that any changes in terms underlying the contract be analysed, the parties who are unable to fulfil their share of the terms be benefitted.

Judicial interpretation of the force majeure clause, irrespective of the pandemic, has always been diverse and different according to the circumstances of the case. It is therefore important that the parties subject their contracts to an expert reading and conduct a thorough search on the intricacies of the contract.

If there is no presence of force majeure clause, the parties may turn to the frustration of contract, and this is tough as the principle is subject to a high threshold. Such clauses will be under close investigation and scrutiny, especially during such testing times and so, it is important that the inclusion of clauses is done at the risk of the parties in an efficient manner.