FORCE MAJEURE CLAUSE AND CONTRACTUAL OBLIGATIONS DURING COVID-19

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Abstract
The COVID-19 epidemic shook employees, businesses, and people's lives in an unprecedented way, and it will be remembered as a devastating event with terrible consequences not only for human lives, but also for business, trade, and the global economy. Many contractual commitments were difficult to fulfill due to the unanticipated and abrupt change in working paradigms, as well as the economic standstill caused by lock-down and limited travel. The continuous COVID-19 epidemic is having a major knock-on effect on businesses and industries all around the world1. Governments around the world have enacted national lockdowns, barred international mobility, and closed international borders. As a result, economic activity has stalled, and businesses are facing a massive financial load as well as imminent uncertainty regarding their fulfilment. The specific impact of the COVID-19 outbreak on the parties' contractual commitments is unknown. Many contracting parties are at risk of being unwilling or unable to meet their obligations due to the wide range of resources and services required to fulfill contractual duties. Furthermore, in light of the COVID-19 outbreak2, it investigates how force majeure claims may be filed while taking into account the potential consequences. This study also defines India's perspective on the concept of Force Majeure and2 briefly discusses the Indian government's numerous strategic objectives.

Keywords: Covid 19, contractual, Force Majeure


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Introduction

The entrance of Covid 19 in India\(^3\) has proven to be a tremendous economic disaster. Restrictions on the movement of people and products have raised concerns about parties’ capacity to fulfil contractual obligations if they are not classified as "essential services." Apprehensions regarding contract performance have caused parties to consider contract violations and associated remedies. Pandemic Covid 19 and the response by countries like India have decimated businesses and disrupted organisational structures. During these disruptions, companies actively assessed their risk exposure, liabilities, and defences related to probable contractual breaches induced by Covid-19, as well as developed mitigation measures. We looked at force majeure terms in existing contracts. The Covid-19 epidemic demonstrated the value of using force majeure to avoid costly contractual obligations. Covid-19 or similar state-controlled public health\(^4\) and sanitary measures may be held accountable for violation of contract. COVID-19's extreme volatility has impeded routine contractual performance. Life and business were formerly devoid of logistical issues, health and safety concerns\(^5\), or government-imposed "lock-downs." Post-Covid, delays, payment failures, and non-fulfilment of contractual obligations and requirements remain. Contracting parties want to know their current rights and remedies.\(^6\) If the doctrine of force majeure or frustration can legally relieve parties from contractual commitments, In fact, a contractual duty is 'force majeure.' To decide if the exclusion rule tackles the impacts of an epidemic like COVID-19, parties, lawyers, and finally tribunals must examine contracts. "Doctrine of frustration" applies if no COVID-19 exceptions. The Indian Contract Act of 1872\(^7\) allows for frustration


(Act). A party cannot use either ideology to avoid legally bound commitments. Case-specific facts, contract stipulations, event(s) and loss causation will all be factors in determining who is responsible for what. In general, courts interpret such utterances with care, i.e. Businesses are scrambling to figure out how to view Covid-19. Article covers several Indian approaches to force majeure and important developments in regard to Covid-19.

**Force Majeure**

"Force majeure" is a legal word inherited from Roman law that is incorporated into several civil systems, most notably the French system. The occurrence of an incident beyond a party's reasonable control that prohibits that party from fulfilling its contractual obligations is referred to as force majeure. The ability to assert force majeure is governed by applicable law and the language of force majeure. A Party affected by force majeure is excused from performing its contractual commitments to the extent permitted by the contract. In the lack of a stated word, the force majeure is determined by the legislation governing the parties' contractual relationship. “In English common law, the term "higher force" is not defined. In this regard, the concept of Force Majeure was not incorporated in the common law, but was considered as an intruder smuggled into the common law by the inclusion of terms in trade contracts.” In this restricted sense, it differs from other legal systems such as China and France, where the word "major force" is a codified legal term and judges are empowered to identify occurrences such as the COVID-19 epidemic as such. Most legal systems around the world have created guidelines on the lawfulness or fulfilment of legal duties in situations where supervening circumstances are irresistible, unexpected, or incomplete. These regulations are referred to as "major force," "pleasant event," "impossibility," "acts of God," "unavoidable necessity," "physical necessity," "frustration," and "impracticability." According to Article 7.1.7 of the UNIDROIT Principles of International Business Contracts, Force Majeure is defined as "a party proving that the non-performance was a result of a non-controlled impediment that it could not reasonably have taken into account the impediment or avoided, or overcome the impediment or its consequences at the time of contract

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9Rukumani, Dr.J. (2020). ANALYTICAL STUDY ON ROLE OF NURSING OFFICERS IN CURING COVID PANDEMIC.

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In general, a substantial force event is an occurrence over which the contracting party has no control and which impairs the contracting party's ability to perform its contractual obligations. To prevail on a Force Majeure claim, it must be established that the event in question is critical to the contractual obligation and that the resulting damage/failure would not have occurred in the absence of the Force Majeure event. Force Majeure clauses are typically stated explicitly in contracts and are not implied.

Force Majeure can be invoked for a specific event:

- If the contract's force majeure clause expressly or tacitly refers to the condition as a force majeure occurrence;
- where contractual obligations are rendered impossible as a result of the incident and
- Where the parties have no influence over the event's continuation.

**Force Majeure Clauses in Contracts**

Force majeure is defined differently in each contract and is determined by the events covered by the provision. Each sentence describing a substantial force is phrased differently and comprehended differently in each language. Certain regulations specify the kind of events that constitute force majeure and are beyond the parties' control. Terrorism, political or military instability, natural calamities, and mechanical breakdowns or failures are all common occurrences. On the other hand, the majority of force majeure clauses provide wide definitions for circumstances that are frequently beyond the parties' control. These broad definitions may include expressions such as "acts of God," which might refer to a variety of different types of events. If the force majeure clause clearly mentions the occurrence that the contract presumably prevents, such as an epidemic, and the event occurs, the parties may be excused from performance. Along with the circumstances outlined above, many force majeure agreements include wording that applies even if the force majeure provision does not directly specify the occurrence. The term "including but not limited to" or "any cause or occurrence beyond the parties' reasonable control" may be included in a statement. The implied terms are not protected under the 1950 Contracts Act. When writing a contract, it is common knowledge that the parties' intentions must be contained inside the contract documents' four walls. In the absence of a force majeure provision, failure to carry out any

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circumstance impairing the execution of a party not in charge is not pardoned.\textsuperscript{11} If the contract does not include such a clause, the force majeure defence is effectively null and void. If the contractual parties wish to be excused from performing their responsibilities because of unforeseen circumstances, this must be indicated in the contract. As a result, if force majeure is not indicated in the contract, the parties cannot assert it. Contracts contain terms of force majeure that prohibit one or more parties from performing their commitments in the event of a specified event (s). COVID-19's wording, as well as the circumstances surrounding it, dictate whether it is a major force. The following elements must be considered when determining if force majeure applies:

\textit{The specific terms of the clause}

Clauses defining force majeure often provide a list of events that fall under this category. Thus, concepts such as "pandemic" and "epidemic" will be critical in determining whether COVID-19 is a large-scale outbreak. The vast majority of contracts signed prior to COVID-19, in particular, do not include it. As a result, the parties must decide whether the exclusion clause's list of events is exhaustive or merely descriptive.

\textit{Numerous-purpose}

COVID-19's use of the terms "unforeseen," "extraordinary," and "out of the parties' reasonable control" may be considered as a critical factor in a favourable court decision, particularly in light of government decrees that shut down all but core corporate operations. The Indian government declared COVID-19 a disaster under the 2005 Disaster Management Act. However, because the definition of exclusion varies according to circumstance, the implementation of force majeure rules is not universal.

\textit{Requirements Invocation}

Additionally, many contracts have conditions that must be completed before a force majeure declaration may be made, despite the use of broad exclusionary language. For instance, the condition could stipulate that the supervening occurrence must impair or obstruct contract

performance in some way. Much will rely on how the Court views the party attempting to use COVID-19 as a substantial force event, as well as whether COVID-19 effectively prevented or used the party to reject a contract. Previously, the following principles were established:

- The difficulty of performing a contract will not suffice to satisfy the requirement of inability to execute. As a result, the incapacity to do business during COVID-19 may not be enough to justify the use of additional force.
- A rise in contract compliance costs does not necessarily indicate that performance is impractical or unachievable.
- During COVID-19, the cost of conducting business increased considerably. This, however, may not be sufficient to justify the imposition of force majeure.
- The parties must establish that the failure was solely the result of an unforeseeable supervening occurrence.
- If further causes led to the default, the courts will not discharge the parties' responsibilities. An alternative term for the 'but' test. The court must be convinced that, in the absence of the intervening event, the parties would have fulfilled their responsibilities; 5 and
- The unanticipated incident that rendered the mission impossible had to occur independently of the party.

This is true for large businesses like shipping, which can operate (with some restrictions) after obtaining special government licenses. If a party fails to obtain such authorization, the court may not release the party from contractual obligations if the failure to obtain such authorization caused the supervening event.

Statutory provision

The Indian Contract Act of 1872 (the "Act") has two provisions dealing to God's principal force and acts. “Article 32 of the Act deals with contingent contracts, among other things, and provides that where a contract is based on an improbable future event, the contract is null and void. Section 56 of the Act addresses contractual frustration, stating that a contract is

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legitimate if it cannot be completed due to an occurrence that the pledgee could not have prevented." The Supreme Court determined that when an occurrence of force majeure is connected to an explicit or implicit term of the contract, it is managed by section 32 of the Act; nevertheless, when the occurrence of force majeure occurs outside the contract, it is handled by section 56 of the Act. The inferred terms and conditions are not protected under the 1950 Contracts Act. It is general knowledge that whenever a contract is written, the parties' objectives must be contained inside the four walls of the contract agreements. In the case of “BIG Industrial Gas SdnBhd v Pan Wijaya Property SdnBhd” and other, the Court of Appeal maintained the judgement. Without a force majeure clause, failure to perform as a result of any incident impairing the performance of a party not affected by the event is not excused. The defence of force majeure is, by definition, ineffectual unless it is expressly provided for in the contract. “Despite the foregoing, there is considerable room for complex circumstances that can raise interesting issues, such as when the contract contains a force majeure clause that defines force majeure events narrowly (i.e. does not specifically mention pandemics/epidemics or God's Act) and does not contain any catch-all language. In that case, one could argue that Section 56 of the Act justifies performance because the epidemic is unrelated to the contract's force majeure provision.” In such a case, if the relying party meets the high standard set forth in Section 56 of the Act and establishes that the entire foundation of the discussions was destroyed, the Court may consider Section 56's applicability. If the contractual parties seek to excuse themselves from fulfilling their obligations owing to events beyond their control, this must be specified in the contract. As a result, unless expressly stipulated in the contract, the parties cannot assert force majeure.

**Contractual Obligation**

The 1872 Indian Contract Act does not mention Force Majeure. To the extent that an agreement has an explicit or inferred force majeure clause, it is referred to as a "contingent contract," and its performance is conditional on the occurrence or non-occurrence of an event. But courts have frequently found that Force Majeure provisions should be read narrowly and contracts should be treated strictly in light of the agreed-upon circumstances. However,

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Courts have regularly determined that contractual clauses must be construed in order to be effective. Notably, proving force majeure in the COVID-19 pandemic will take more than just hardship. Because a positive finding of impossibility or frustration fulfills the contract in every way, courts and tribunals tread carefully. COVID-19 outbreak and subsequent nationwide lockdown seem unlikely to be deemed a Force Majeure event for all contracts. In actuality, this is a unique tragedy with no evident cause. As a result, each contract will need to be scrutinised and construed to see if the Force Majeure clause is triggered.

**Impact of Covid 19 upon the clause**

COVID19 has put the entire country on lockdown since March 25, 2020. This once-in-a-lifetime event has captivated the world. Contractual obligations have been ruled impossible to fulfil or put on hold indefinitely. Probably the most problematic clause in COVID-19. It has gone from being the least inspected and invoked contract clause to the most recently. Contracts rarely included a force majeure provision. An excerpt from an earlier contract, which may or may not be relevant to the current deal. A force majeure clause relieves contractual parties of their responsibilities in the event of certain uncontrollable situations. Most contracts describe force majeure. Any contract might be terminated due to force majeure. It may also include a time limit for terminating the contract if force majeure occurs. The contract's nature and the parties' obligations determine the force majeure provision. Some force majeure agreements specify the events that trigger the clause's implementation. Certain clauses have a broad scope that extends beyond the intended user.

**Conclusion**

Inadequate and open-ended contracts have already resulted in huge financial losses for corporations globally due to the pandemic. New techniques must be welcomed post-COVID. Learn from our mistakes and prepare for life after COVID. Force Majeure and contract termination are rarely straightforward processes. The main rationale for activating these clauses is market volatility, which will result in many lawsuits. Parties to a contract must exercise prudence and foresight before claiming force majeure or cancelling the contract. If you have any doubts, get legal advice. It allows the party to cancel the contract (according to contract provisions) and be released from any claims for damages or liabilities, if the

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procedures are followed and force majeure is successfully demonstrated. Invoking a COVID-19 Force Majeure provision is one way for parties to evade their responsibilities. Contractual parties who lack or may not incorporate specifications such as COVID-19 in their force majeure clause may argue other defences such as negative material consequences or frustration theory. Concerned businesses should seek legal assistance regarding their existing contracts.
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