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Should Covid-19 be considered a Force Majeure Event or Not?

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Covid-19 is considered a global pandemic around the world. It has caused significant disruption within the market ranging from travel restrictions, and supply shocks to the downfall of aggregate demand in the Indian Economy which led to the unfulfillment of contractual obligations by most of the companies and businesses. However, was the situation of travel restrictions, supply shocks, etc actually causing the business to not fulfill their liabilities, or were they exploited in the Covid situation to escape from their liabilities? Thus, this paper will comprehensively analyze the application of the Force Majeure Clause in Indian Contracts that were being used as a defense by various companies, by regarding the COVID-19 epidemic as an 'Act of God'. Force Majeure clauses generally state that events 'including, but not limited to, or any cause/event beyond the reasonable control of the parties' can be a legitimate reason to escape from their liabilities. Thus, this paper will try to answer using the Indian Case Laws to ascertain what constitutes an 'Act of God' and whether COVID-19 can be categorized as an 'Act of God' within the context of the Indian Contract Act.

Keywords: *force majeure, act of god, contractual obligation, covid-19.*

INTRODUCTION

The COVID-19 pandemic has resulted in unparalleled disruptions to global company business and commercial contracts. The implementation of the lockdown by the Government of India has

not only constrained the mobility of individuals but has also caused disruptions in the global supply of goods and services. The phenomenon has had a significant influence on the capacity of business professionals to fulfill their contractual duties, leading to operational delays or failure to meet these responsibilities. In situations of this nature, the contractual parties have the option to invoke the current pandemic as a legitimate basis for releasing themselves from contractual obligations or for renegotiating certain provisions of the contract, such as the performance timeline and the agreed-upon considerations. In the absence of consensus among the contractual parties, one party has the option to raise the defense of an act of God or the Force Majeure clause as a means to exempt himself or herself from fulfilling their obligations under the contract.

In the context of contractual performance in India, the court's judgment will involve an analysis of the contractual conditions, taking into consideration both the factual circumstances and the relevant legal provisions. The fundamental principle that governs contracts is *pacta sunt servanda* that translates to the notion that agreements must be upheld. Therefore, when parties voluntarily choose to enter into a contractual agreement, unless there is evidence of deceit or unlawful activity, they are generally not permitted to terminate the contract or avoid responsibility for failing to fulfill their contractual obligations.

LITERATURE REVIEW

The consequences of the COVID-19 epidemic on contractual agreements have sparked much discourse among legal scholars. Numerous researchers in the field of studies such as Claudea

Petcu¹, Abhishek Iyer², Akber Ahmad, Maria Fatima³, Archana K and Sujit Kumar Mishra⁴, have researched the phenomenon of COVID-19 as a force majeure event and its impact on contractual obligations.

Claudea Petcu's article explores how judges interpreted force majeure provisions during COVID-19. Courts have mostly followed standard contract interpretation guidelines, even in light of the pandemic's unique nature. Force majeure provisions were examined closely, and their application varied depending on the exact wording used in the contracts, as shown by the study of many cases. The article provides the point that parties to contracts and lawyers should continue to be careful in creating agreements that consider potential interruptions. The COVID-19 outbreak put contractual relations to the test, but courts' commitment to established rules provides a platform for upcoming obstacles.

Akber Ahmed and Maria Fatima discuss the applicability of force majeure in India. The Ministry of Finance explained that, after following the proper processes, interruptions caused by COVID-19 might be classified as an act of force majeure. Parties may easily seek remedies if a contract specifically addresses pandemics. Nevertheless, there are issues when the clause mentions 'beyond reasonable control'. For a speedy settlement of disputes, documentation like newspaper articles and official notifications becomes essential.

Archana K⁵ has posed significant questions about the classification of the pandemic as a valid basis for non-performance within the framework of force majeure or Act of God, as well as the

¹ Claudia Petcu, 'Force Majeure & COVID-19: A Clause Changed?' (2022) 21(1) DePaul Business & Commercial Law Journal <<https://via.library.depaul.edu/cgi/viewcontent.cgi?article=1411&context=bclj>> accessed 05 November 2023

² Abhishek Iyer, 'Impact of Covid-19 on Contracts - Force Majeure as a Tool to Save from Frustration?' (2021) 3(2) Corporate Law Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3872414> accessed 05 November 2023

³ Akber Ahmad and Maria Fatima, 'Covid-19 Pandemic: Whether a Force Majeure Event? A Legal Analysis' (SCC, 23 May 2020) <<https://www.sconline.com/blog/post/2020/05/23/covid-19-pandemic-whether-a-force-majeure-event-a-legal-analysis/>> accessed 05 November 2023

⁴ Sujit Kumar Mishra, 'COVID-19 INDIA: A CURIOUS CASE OF FORCE MAJEURE' (2020) 3(3) International Journal of Advanced Research in Commerce, Management & Social Science <<https://www.inspirajournals.com/uploads/Issues/461892297.pdf>> accessed 05 November 2023

⁵ Archana K, 'Implications of Covid-19 Pandemic on the Contractual Obligations in India' (2021) 3(1) CMR University Journal for Contemporary Legal Affairs <<https://www.cmr.edu.in/school-of-legal->

judicial interpretation of these contractual provisions. Furthermore, she emphasized the significance of both the contractual nature and the parties' intents when determining the applicability of COVID-19 as a defense for non-performance. Furthermore, the existence of circumstances causing irritation is a determining factor in effectively asserting the defense of force majeure for failure to fulfill contractual obligations.

Adarsh Saxena, Dristi Das, and Aditya Sikka⁶ all talked about how COVID-19 has a big impact on contractual obligations. In the setting of case laws, they talked about the 'force majeure' phrase and the idea of an 'Act of God' that can include pandemics.

All of the writers listed above agree that the language used in different parts of the contract is very important in figuring out if the parties can use 'force majeure' to get out of their responsibilities under the contract because of the COVID-19 pandemic. The appropriate commercial agreement's exact language is the most important factor in deciding whether COVID-19 is a force majeure event. The research gap that I find in the article of Claude Petcu and Archana K's article is that the majority of the instances in the article of Claude Petcu are from the legal system in the United States; however, a comparison study with situations of force majeure in other jurisdictions would yield more insights that are comprehensive. Examining the various ways in which other legal systems addressed comparable matters during the outbreak might enhance a worldwide outlook. Further research on how laws, financial aid, and government policies influence disputes over contracts and remedies may provide useful details, whereas the article by Archana K lacks a thorough examination of rulings by courts that demonstrate analysis of Force Majeure provisions in the context of the Covid-19 outbreak. Voidness exists in addressing the concerns of e-contracts and their enforcement during the pandemic, as well, as considering the growing dependence on digital transactions.

[studies/journal/wp-content/uploads/2022/02/10-Implications-of-Covid-19-Pandemic-on-the-Contractual-Obligations-in-India.pdf://www.cmr.edu.in/school-of-legal-studies/journal/](https://www.cmr.edu.in/school-of-legal-studies/journal/wp-content/uploads/2022/02/10-Implications-of-Covid-19-Pandemic-on-the-Contractual-Obligations-in-India.pdf)> accessed 05 November 2023

⁶ Adarsh Saxena et al., 'Force Majeure in the Times of Covid -19' (Cyril Amarchand Mangaldas , 30 April 2020) <https://corporate.cyrilamarchandblogs.com/2020/04/force-majeure-in-the-times-of-covid-19/#_ftnref6> accessed 05 November 2023

ANALYSING HOW THE COVID-19 PANDEMIC FITS INTO THE CRITERIA OF A FORCE MAJEURE EVENT

Force Majeure is defined as ‘an unexpected event or situation that can neither be anticipated nor controlled, which prevents the person from doing or completing the promise he or she had promised to under the contract’. Most business contracts have ‘Force Majeure clauses’ that allow them to back out of their agreements if something happens that they can’t control. Any party that chooses to put one of these provisions into the contract shall be bound by its terms, including any adverse consequences. Natural disasters, wars, strikes, epidemics, etc., are some of the common Force Majeure occurrences specifically included in these types of provisions.⁷ Contracts that include the terms ‘epidemic’ or ‘pandemic’ in their Force Majeure clauses are null and void under Section 32 of the Contract Act if the occurrence of such an event was an unforeseeable future event at the time the contract was entered into.⁸

To determine whether COVID-19 meets the requirements of force majeure in India, it is necessary to analyse the effects of the pandemic on contractual commitments, including supply chain interruptions, travel restrictions, and lockdown measures. The COVID-19 pandemic had a profound and immediate effect on supply chains, resulting in severe disruptions. The aforementioned disruptions had a significant impact on diverse sectors, including manufacturing and retail, and resulted in wide-ranging implications for contractual commitments. In this particular situation, it is crucial to examine the alignment of COVID-19 with the criteria of force majeure.

Firstly, at the time of contract formation, the occurrence and subsequent worldwide spread of COVID-19 were not reasonably predictable. Business enterprises were unable to foresee the magnitude of supply chain disruptions caused by an unexpected pandemic outbreak. Secondly, the sudden fall of supply chains resulted in the inability of several enterprises to fulfill their obligations under agreements, hence highlighting the concept of impossibility of performance.

⁷ ‘History and Mordern Evolution of Transnational Commercial Law’ (Translex) <https://www.translex.org/944000/_/force-majeure/> accessed 05 November 2023

⁸ *Ibid*

The closure of manufacturing units, the ensuing transportation difficulties, and the unavailability or delayed arrival of raw supplies posed significant challenges. The execution of this task was rendered unattainable and delayed. Thirdly, the contractual parties had no control over the global epidemic that caused interruptions in the supply chain, hence they cannot be held responsible for the situation. There was no way for either the customer or the supplier to have stopped or minimized the effect that the virus had on the supply chain. The implementation of travel limitations was not the responsibility of either the service provider or the consumer. The restrictions were governmental measures implemented to manage an outbreak of the virus. Fourthly, the pandemic made it impossible to fulfill contractual obligations that required timely and continuous delivery of commodities. For instance, a manufacturer could not have been able to get the necessary components, which would have rendered it impossible for the company to make and deliver items following the terms of the contract.

The determination of whether the travel restrictions, quarantine measures, and other associated limitations implemented in response to the COVID-19 pandemic would meet the criteria for force majeure is contingent upon the principles of legal interpretation and that particular phrase of the force majeure provision. Additionally, even if the event is not specifically stated in the clause, the inclusion of a general term, such as words indicating 'including, but not limited to, or any cause/event beyond the reasonable control of the parties' would encompass such an event within the scope of the clause. Even though this type of terminology is commonly interpreted as *ejusdem generis* ('of the same kind'), the inclusion of Covid-19 inside the force majeure clause might be contended based on the extent of the catch-all phrase.⁹ Moreover, it may be unequivocally argued that the COVID-19 pandemic can be classified as an 'act of God' since it falls within the purview of *vis major*, which has been specifically incorporated in the force majeure provision.

⁹ Saxena (n 6)

GOVERNMENT DEPARTMENTS THAT CONSIDERED COVID-19 A FORCE MAJEURE EVENT

A notification, which was released by the Ministry of Finance at the beginning of 2020, also stipulated that the inclusion of a force majeure provision would not completely absolve a party from their obligation to perform, but rather, it would only be temporarily deferred for the length of the force majeure event. ‘The Ministry of Finance has classified the delays in supply chains caused by the pandemic as a natural calamity’.¹⁰ In response, the ministry has issued a clarification to ensure that the Force Majeure provisions are implemented by all central government ministries. In the case of *The Divisional Controller, KSRTC v Mahadava Shetty*¹¹, the Supreme Court established that the term ‘Act of God’ refers to natural forces that are independent of any human control. Moreover, in cases when the occurrence of such an event might be reasonably foreseen, the Court established that the occurrence of an unforeseen natural event does not serve as a valid justification.

*R. Narayan v State of Tamil Nadu & Ors.*¹² is another case where the Madras High Court ruled in favor of the plaintiff and ordered the Municipal Corporation not to pay the licensing fee for operating a business near a bus stop, noting that: Accordingly, the Court has the authority to rule that the lockdown qualifies as an act of God that excuses the licensee from fulfilling his obligations. The court further stated, ‘The respondents (The Government of Tamil Nadu & Ors.) have chosen to treat the lockdown restrictions as a force majeure event’. The licensees’ responsibility to pay the fees has been waived, but only for two months.

ANALYSING HOW THE COVID-19 PANDEMIC DOES NOT FIT INTO THE CRITERIA OF A FORCE MAJEURE EVENT

In addition to the points mentioned above, whether the COVID-19 outbreak, along with its resulting measures such as quarantines, travel restrictions, and other government-imposed

¹⁰ ‘Performance Security in terms of Rule 171 of General Financial Rules, 2017 (GFR) - Guidelines Regarding’ (Ministry of Finance, 19 May 2020) <https://www.dcmsme.gov.in/ppp_policy_13052020.pdf> accessed 05 November 2023

¹¹ *The Divisional Controller, KSRTC v Mahadava Shetty* App (Civ) 5453/2003

¹² *R. Narayan v State of Tamil Nadu & Ors* MANU/TN/0330/2021

limitations on regular business operations, would be considered force majeure is contingent upon the specific wording of the contractual clause and the principles governing the interpretation of force majeure clauses in legal contexts.¹³ Therefore, the language used in various provisions of the contract becomes significant in determining whether the contracting parties can invoke force majeure as a means of being released from their contractual obligations due to the circumstances arising from the COVID-19 pandemic. The key element in establishing whether COVID-19 meets the criteria for being classified as a force majeure occurrence is contingent upon the precise wording employed within the relevant contractual agreement. Force majeure provisions are often seen in several contracts, whereby they expressly enumerate the specific events or situations that activate its applicability. In the absence of explicit provisions about pandemics, epidemics, or similar occurrences within the contractual agreement, the use of force majeure becomes less definitive. In the Indian legal system, contractual interpretation typically relies on the specific terms outlined within the contract itself. Consequently, in instances where the COVID-19 pandemic is not referenced, parties may encounter difficulties in invoking force majeure purely on the grounds of the pandemic. COVID-19 was heavily influenced by human actions. The transmission of the virus was impacted by a combination of government efforts, public health measures, and individual behavior. Governments throughout the globe have adopted various measures, including lockdowns, quarantines, and travel restrictions, to alleviate the impact of the situation. These activities show the exercise of human agency in addressing the crisis, separating it from occurrences that are completely independent of human influence.

In the case of *Energy Watchdog v CERC*¹⁴, the court looked at the force measure events and section 56 of the Indian Contract Act. The facts of this case were that Adani Power was declared as a successful bidder in Haryana for the supply of electricity. However, there was a change in Indonesian law that raised the coal prices to the international market price. The previous price which was lower than the international market price was prevalent for 40 years based on which

¹³ Fredrick Polloch and Dinshaw Farduraji Mulla, *Indian Contract Act, 1872* (16th edn, Lexis Nexis 2021)

¹⁴ *Energy Watchdog v CERC* (2017) 14 SCC 80

Adani power guaranteed the Haryana government of unscalable tariff. However, the increase in prices made the tariff scalable. Thus, Adani's power wanted relief under force majeure event or doctrine of frustration under section 56 of the Indian Contract Act. The court on the point of force majeure held that the performance of an act may not be impossible, but may be impractical and useless from the point of view of the object and purpose of the parties. The court held that the Impossibility of performance under this doctrine did not discharge the performance under the contract on the basis that it has become onerous to one of the parties and that they can discharge the performance of the contract to get rid of the bargain that they have made. In this case, the abnormal price rise was unexpected. However, the performance was not impossible. The mere rise in price cannot lead to discharge by the possibility of performance.

If the contract itself mentions in clear words the possibility of performance of the parties, a Mere rise in prices cannot constitute impossibility of performance. The court held There must be something that partly prevents or wholly prevents the performance of the obligation under the agreement, a mere rise in price cannot constitute a hindrance. The court laid down force majeure exclusions: Unavailability of late delivery changes in cost of the plant machinery equipment materials spare parts fuel or consumables for the project and not treated as force majeure events as per the PPA contract in this case.

Thus force majeure cannot be used as a relief if one of the parties does not get what they had expected from the contract Even if there an unforeseen or unexpected circumstances. In such a situation the force majeure can only be granted if such unexpected circumstances have been explicitly stated in the contract.

In the case of *Satyabrata Ghosh v Mugneeram Bangur & Co.*¹⁵, the Supreme Court of India provided clarification on the notion of frustration within the realm of contract law. The court established that the term 'impossible' was not employed about physical or literal inability. In instances where an unforeseen event or alteration in conditions significantly undermines the fundamental purpose of a contract, it may be seen as a case of 'impossibility' to fulfill the agreed-upon obligations. Historically, the Supreme Court of India has set an extremely high bar for

¹⁵ *Satyabrata Ghosh v Mugneeram Bangur & Co* (1954) SCR 310

applying the idea of force majeure, requiring evidence that the entire basis of the contract has been proved to be destroyed.

In the case of *M/s. Halliburton Offshore Services Inc. v Vedanta Limited & Anr*,¹⁶ The Delhi High Court issued a ruling on whether or not COVID-19 constitutes a force majeure event under the terms of the contract at issue. This is an important ruling because the judge made clear that just because something was treated as a force majeure event in one contract doesn't mean it would be in another. The determination of whether or not COVID-19 qualifies as a force majeure event will depend on the specific facts and circumstances of each instance and will apply only if the parties can prove that their failure to perform was caused by the pandemic. This ruling makes it quite evident that COVID-19 cannot be considered a force majeure occurrence in every possible scenario. Therefore, this ruling implies that the parties do not have the right to terminate the contract on the grounds of force majeure or frustration only because a pandemic occurs. The criteria will remain as the 'impossibility of performance'.

The case of *Ramanand v Dr. Girish Soni RC*.¹⁷ brought up several points about the lawfulness of tenants' decisions to stop paying rent during the COVID-19 lockdown situation. The Delhi High Court, in an order dated 21 May 2020, determined that lease agreements fall within the scope of sections 32¹⁸ and 56¹⁹ of the Act, and while it was found 'that suspension of rent on the grounds of force majeure is not permissible under the circumstances, the court allowed relaxation in the schedule of payment of the outstanding rent due to the lockdown'.

The order issued in the case of *Standard Retail Pvt. Ltd. v M/s. G. S. Global Corp & Ors*²⁰ is noteworthy as it represents the initial instance where an Indian Court, in the context of dismissing a Commercial Arbitration petition, has determined that the lockdown cannot serve as a means for the Petitioners to evade their contractual responsibilities. To clarify, it is important

¹⁶ *Halliburton Offshore Services Inc. v Vedanta Limited and Ors* OMP (I) (COMM) & IA 3697/2020

¹⁷ *Ramanand and Ors v Girish Soni and Ors* Crim App 10848/2020

¹⁸ Indian Contract Act 1872, s 32

¹⁹ Indian Contract Act 1872, s 56

²⁰ *Standard Retail Pvt. Ltd. and Ors v G.S. Global Corp. and Ors* Comm Arb P (L) No 404/2020

to note that the implementation of a lockdown during certain exceptional circumstances does not provide a legal foundation for the termination or repudiation of a contract.

CONCLUSION

In conclusion, the categorization of COVID-19 as a force majeure occurrence within the framework of Indian legislation presents a complex matter that needs comprehensive examination. The global pandemic has had a significant and indisputable influence on contracts and companies on a global scale. The Covid-19 epidemic has prompted a few companies to consider terminating their contractual commitments. On the other hand, many companies may potentially use the force majeure provision, even in cases where the occurrence in question did not impede or obstruct the fulfilment of their contractual duties. Hence, the presence of challenges, difficulties, or delays in fulfilling contractual commitments solely attributable to the COVID-19 epidemic and the resulting limitations does not serve as a valid justification for releasing a party from their responsibilities. As a result, the burden of proof lies on the party seeking relief during the pandemic to show that COVID-19 has prevented them from meeting their contractual duty, either under the force majeure clause of Section 56 of the Act or under other applicable provisions of law. This circumstance could be able to be used as a defense for non-performance of the contract, but it will depend on the details of the agreement. Many countries saw it as a Force Majeure occurrence back in the day when it was an outbreak of a disease like Ebola or SARS that prevented them from fulfilling their contractual obligations.

In my perspective, COVID-19 should not be regarded as a case of force majeure, and the primary reason for this is that it cannot be categorized as an 'Act of God'. Even though the phrase 'Act of God' is not specifically defined under Indian law, it is commonly believed to relate to natural catastrophes or occurrences that are beyond the control of humans. Some examples of these kinds of calamities are earthquakes, floods, storms, and lightning strikes. COVID-19 does not correspond to the usual definition of an 'Act of God' and there are various grounds to support the view that are discussed above.