CONTRACTUAL PROTECTION AGAINST UNEXPECTED PRICE SPIKES

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Background facts

There has been a boom in construction industry in India and the world over in the past few decades with both private and public sector engaged in construction projects of varying scales and levels. The common thread across most of the construction activity is the need for documenting the definite legal relationship between the parties involved (the Developer and the Construction Company / Contractor) and outlining the terms of engagement between / amongst them.

Typically, in a construction contract, the land belongs to the Developer. The Developer enters into a construction contract with the Contractor for the development of the land. The broad constituents of a construction contract are: (i) designs and specifications; (ii) bill of quantities; (iii) consideration / compensation; (iv) schedule of rates / prices of the raw material; (v) timelines; (vi) quality control mechanism; (vii) responsibilities and liabilities of the Developer and Contractor; and (viii) other general conditions. Such construction contracts are generally time bound; price bound and seeks to provide for various contingencies.

When negotiating and arriving at the price, the parties do take into account reasonable price variation, such as can be expected under normal conditions. However, while drawing up the schedule of rates / price / consideration / compensation, a price spike in terms of unprecedented and exceptional increase in prices of raw material are usually not taken into account by the parties. Take for example, during the intervening construction period, the prices of major raw materials - such as, cement, steel, construction materials, aggregates etc. - increase not only beyond what can be reasonably expected but by a multiple which actually could not even be anticipated or contemplated. Such a spike in prices is very steep and unprecedented resulting in an onerous increase in the cost of construction and deeply cutting into the profit margins of the Contractor. Therefore, a perfectly viable contract entered into by the parties becomes unviable due to the intervening spike in the prices of raw material and the project remains performable by the Contractor only if he is willing to pick a loss on it.

In such a crisis situation, resulting from an unprecedented price spike, the possibilities or options that the Contractor would consider exploring are:

- Performance of the contract and claim a price adjustment from the Developer either through settlement or by resorting to the agreed Dispute Resolution Mechanism; or
- Abandonment / recession of the contract on grounds of impossibility of performance.

Performance and subsequent claim for compensation

Given that the price spikes are sudden the Contractor usually would have to work under the contracts that do not address this contingency. A typical scenario would emerge as follows: (i) an unexpected price spike occurs; (ii) the Contractor, under an obligation to perform his part of the contract, executes the project; (iii) the Contractor approaches the Developer for settlement on account of "unexpected" price spike; (iv) being a fixed price contract the Developer declines to entertain the request of the Contractor; (v) the Contractor invokes the agreed Dispute Resolution Mechanism.

Since these are independent contracts, where the parties, of their own free will, voluntarily, without any undue influence or coercion and being aware and knowing fully well the circumstances concerning the subject matter of the contract, have agreed to bind each other by entering into the contract, the courts are generally reluctant to entertain claims for compensation beyond the scope of the contract. The courts have been cautious in granting relief on grounds of equity. The Courts have adopted a strict interpretation and have confined relief based on the terms of the contract. When the Contractor has already duly performed his part of the obligation in the contract, the Courts will not step in and grant the claim for compensation. The Contractor has performed what he was duty bound to perform and any question of paying compensation beyond the terms of the contract does not arise.

In the case of *Alopi Parshad and Sons Ltd. v. Union of India*[1] the Apex Court held that, the Indian Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. Therefore, the Courts have not gone outside the terms of the contract which clearly specify the rights / obligations of each party to provide relief on the enhanced cost on the ground of equity. The escalated amount in this case was granted as the wordings of the contract allowed the Court to give such a relief to the Contractor. Though the Contractor may be able to assert several legal arguments in an attempt to claim compensation which in effect would amount to reforming the contract for unusual circumstances, the Courts are not inclined to read in terms which are not explicitly provided for in the contract. Therefore, the relief on the compensation claimed to a great extent depends upon the terms of the construction contract.

There have been instances in which claims by the Contractor though accepted by the arbitrator, in contravention of the contractual provision, have been subsequently set aside by the Courts, which are not inclined in extending relief by going beyond the contract. In the *Allahabad case*,[2] the arbitrator had awarded to the Contractor a certain amount for "de-watering", even though the Schedule of "bids and quantities" clearly stipulated that the rates included de-watering and therefore, the High Court set aside the award on the ground that it is suffering from illegality.

An interesting and possible exception, to this rule is the price is fixed depending on a third party specification. For example, an increase in the wages of labourers (engaged by the Contractor in the construction work) is often put forth by the Contractor, as a ground for proportionate enhanced payment (to the extent attributable to statutory or departmental increase in wages). How far such a claim is legally justified depends on the language employed in the particular contract. It is obvious, that if the contractual clause refers, say, to the wages fixed by the Public Works Department, and the latter Department increases the wages after the particular contract is signed, the Contractor would be entitled to claim a proportionate increase.[3] In such a case, the judges do read a "meeting of the minds" (of the parties), in so far as the claim of escalated payment on account of increase of wages is concerned, because of the wording of the contract. [4]

Drawing from the aforementioned case, the typical contracts can be modified wherein an exception is created for basic raw materials. The prices of basic raw materials can be pegged to an independent index viz. cost of steel can be pegged to the Indian Steel Price Index (ISPI). The contract can provide for a formulae for determining compensation/consideration, which would be a fixed price linked to / based on a variable to be determined by an independent third party.

Abandonment / recession of contract claiming impossibility of performance

The Contractor may alternatively explore the option of abandonment or recession of the contract on the grounds of frustration. Frustration may be defined as the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by law:

i. as striking at the root of the agreement; and

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[1] AIR 1960 SC 588.
[2] State v. Allied Construction Engineers & Contractors, AIR 1996 All. 295 (DB) at 298, 299, (Case under the 1940 Act).
[3] Tarapore & Co. v. State of M.P., (1994) 3 SCC 521.
[4] P. M. Bakshi, *Construction Contracts: Some Legal Aspects*; http://www.ficci.com/icanet/quterli/oct-dec2000/ICA_oct1.htm.

ii. as entirely beyond what was contemplated by the parties when they entered into the agreement.

Frustration may occur in a number of situations, viz.:

a. Where the contract has become illegal to perform due to a change in the law as in case of Government prohibition of exportation or importation or the out break of war; (In the case of *Easun Engineering Co. Ltd. v. Fertilizers and Chemicals Travancore Ltd.*[5], where the intervening situation was a 400% rise in price of transformer oil due to war condition, the Court held that there was frustration of contract.)
b. The commercial purpose of the contract has failed, which includes failure of an event which the contract was based upon, and where there has been government interference or delay or a strike or other industrial actions. (In the case of *Chandler v. Webster*[6], there was a contract to let rooms "to view the "first Coronation procession". The contract was held to be frustrated on the postponement of the event.)
c. Where a party to the contract, who is considered important, dies or is incapacitated somehow.
d. Where the subject matter of the contract has been destroyed, or it is unavailable and was intended by both parties to be the subject matter. (In the case of *Taylor v. Caldwell*[7]**,** a contract to hire a music hall was frustrated when the hall was destroyed by a fire.)

The doctrine of Frustration does not apply when:

1. Simply because an inconvenience has been caused, there has been an increase in expense or loss of profit.
2. The contract contains an express provision, dealing with such eventualities.
3. Frustration is self-induced and one of the parties had a choice regarding performance.
4. The event was reasonably foreseeable by either party as at the date of the agreement.

Frustration of a contract occurs only where after the conclusion of the contract a fundamentally different situation has unexpectedly emerged. To attract the plea of frustration, it must be established / shown that the situation has changed so drastically and radically that neither party to the contract could have foreseen that. Often the emergence of some new set of circumstances makes the performance of the contract more difficult, onerous or costly than what was envisaged by the parties when entering into the contract. For example, a sudden, even abnormal, rise or fall in prices or the failure of a particular source of supply requiring the seller to obtain supplies from another more expensive source. However, these events will not normally operate to frustrate a contract. Courts are not inclined to apply this doctrine to the situation where an unforeseen price spike has made the contract unprofitable to perform.

While, at the first glance, it would seem the price spikes are so severe as to meet the test of commercial impracticability / senselessness – (1) an unexpected contingency occurred; (2) the risk was not allocated by the agreement or custom; and (3) the occurrence of which rendered performance commercially impracticable – the Courts have not generally seen it this way. The reason is the general rule that, under the fixed price contract, the Contractor is considered to have assumed the risk of increase in the cost of its material and supplies and an express contractual clause shifting the risk to the owner/Developer is absent. The Courts have found material price increases of 50 percent and more as not rising to the level of commercial impracticability.

The basic and universally accepted principle of contract law is "*pacta sunt servanda*". This principle means that each party to an agreement is responsible for its non-execution, even if the cause of the failure is beyond his power and was not or could not be foreseen at the time of signing of the agreement.[8] This principle reflects natural justice and economic requirement as it binds the person to his promises and protects interest of the other party. On the other hand, practice has demonstrated

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[5] AIR 1991 Mad 158.
[6] (1904) 1 K.B. 493.
[7] (1863) 3 B. & S. 826.
[8] A.H. Peulinckx, *Frustration, Hardship, Force Majeure, imprevision, Wegfall der Geschaftsgrundlage, Unmoglichkeit, Changes Circumstances,* 1986 J. Int'l Arb. 47 (1986).

that on many occasions application of this principle may lead to the opposite of its aim.[9] That is to say, the situation existing at the conclusion of the contract may subsequently have changed so completely that the parties, acting as reasonable persons, would not have made the contract or would have made it differently, had they known what was going to happen.

Although all legal systems take notice of the situation of changed circumstances, the conditions under which they allow application of the doctrine of frustration and provide for the discharge of the duty to perform when a contract has become unexpectedly onerous or impossible to perform vary. Let us consider the approaches of legal system of India, United Kingdom and U.S.A. to the situation of changed circumstances

India:

In India, the concept of frustration of contract is covered under Section 56 of the Indian Contract Act, 1872 which is reproduced below.

> "*Agreement to do impossible act:*
> *An agreement to do an act impossible in itself is void.*
> *Contract to do act afterwards becoming impossible or unlawful: A contract to do an act which, after the contract is made, becomes impossible or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.*
>
> *Compensation for loss through non-performance of act known to be impossible or unlawful: Where one person has promised to be something which he knew or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promise for any loss which such promisee sustains through the non-performance of the promise."*

On a true perspective of section 56, three essential conditions required are:

i. a valid and subsisting contract between the parties;
ii. there must be some part of the contract yet to be performed; and
iii. the contract after it is entered into becomes impossible of performance[10]. The impossibility in the performance of the contract can be due to:
    a. an intervening circumstances,
    b. occurrence of an event not contemplated by the parties,
    c. performance of contract by one of the parties has become impossible; and
    d. there should be no default on part of the party claiming frustration of contract.

In condition (iii) aforementioned situations contemplated in (a), (b), and (d) are factual in nature. However situation (c) requires the contract to be interpreted in the manner intended by the parties. The word "impossible" in section 56 has not been used in the sense of physical or literal impossibility. The performance of an act may be literally impossible, but it may be impracticable and unless from the point of view of the object which the parties had in view; and if an untoward event or change of circumstance to tally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the act which he promised to do[11]. In *Govindbhai Gordhanbhai Patel v. Gulam Abbas Mulla Allibhai*[12] the court observed that the meaning of the expression "impossible of performance" as used in section 56 would be clear from the following observations made by, Lord Loreburn in the case of *Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd.,*[13] which is generally considered to contain a classic and terse exposition of the law relating to frustration:

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[9] Dietrich Maskow, Hardship and Force Majeure, 1992 Am. J. Comp. L. 657 at 658.
[10] Industrial Finance Corporation of India Ltd. v. Cannanore Spinning and Weaving Mills Ltd., AIR 2002 SC 1841.
[11] Satyabrata Ghose v. Mugneeram Bangur and Co., AIR 1954 SC 44.
[12] AIR 1977 SC 1019.
[13] (1916) 2 AC 397 at 403.

> "*The parties shall be excused if substantially the whole contract becomes impossible of performance or in other words impracticable by some cause for which neither was responsible*."

In *Satyabrata v. Mugneram* [14] the Court while elaborating on the doctrine of frustration observed that:

> "*The essential idea upon which the doctrine of frustration is based is that of impossibility of performance of the contract; in fact impossibility and frustration are often used as interchangeable expression. The changed circumstances make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform impossibility. The doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56. Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties. The relief is given by the Court on the ground of subsequent impossibility when it finds that the whole purpose or basis of a contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time when they entered into the agreement. When such an event or change of circumstances occurs which is so fundamental as to be regarded by law as striking at the root of the contract as a whole, it is the Court which can pronounce the contract to be frustrated.*"

The Supreme Court in *Naihati Jute Mills v. Khyaliram Jagannath*[15] further went on to observe that:

> "*Section 56 of the Contract Act lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties. Since under the Contract Act a promise may be express or implied in cases where the Court gathers as a matter of construction that the contract itself contains impliedly or expressly a term according to which it would stand discharged on the happening of certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be treated as cases of frustration, in India they would be dealt with under section 32. In a majority of cases, however, the doctrine of frustration is not applied on the ground that the parties themselves agreed to an implied term which operated to release them from performance of the contract. The doctrine of frustration cannot be availed where the contract makes full and complete provision, so intended, for a given contingency. The reason is that where there is an express term the Court cannot find, on construction of the contract, an implied term inconsistent with such express term.*"

Whether the contract has become impossible of performance can be determined with reference to the terms of the contract and the supervening circumstances. If the supervening circumstances are such which were in contemplation of the parties at the time of the contract or which could be reasonably be within their contemplation, it could take the case out of the purview of Section 56.[16] In *Easun Engineering Co. Ltd. case*[17] the abnormal increase in price due to war condition, was an untoward event or change of circumstance which as per the court "totally upset the very foundation upon which the parties rested their bargain".

The parties to an executory contract are often faced, in the course of carrying it out, with a turn of event which they did not at all anticipate – a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Take for example the event of spike in prices of raw material which is an intervening circumstance. A normal variation in the prices is contemplated by the parties in the contract itself but an event of spike in prices is not provided and contemplated by the parties. Yet this does not in itself affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract, in the light of the

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[14] See footnote 11.
[15] AIR 1968 SC 522
[16] Man Singh v. Khazan Singh, AIR 1961 Raj 277.
[17] See footnote 5.

circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has unexpectedly emerged, the contract ceases to bind at that point – not because the Court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because, on its true construction it does not apply in that situation.[18]

In India the law is well settled that there is no frustration where the performance remains physically and legally possible though commercially unprofitable. The courts have time and again asserted that performance or frustration cannot be applied to cases of commercial transaction. Mere commercial impossibility will not excuse a party from performing a contract. A man is not prevented from performing his contract by mere economic unprofitable ness.[19]

United Kingdom:

Consistent with the common law approach to strict liability for breach, the traditional common law rule was that conditions rendering performance impossible that occurred after the execution of a contract did not excuse performance.[20] Such a rigid interpretation prevailed in the Unite Kingdom until 1863. In *Taylor v. Caldwell*[21] the Court changed its traditional opinion: the strict rule should apply when the contract is positive and absolute, and not subject to any condition either express or implied. The Court held that in contracts where performance depends on the continued existence of a given person or thing, "a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance."[22] With this theory of implied condition, the doctrine of impossibility was introduced into English Law.

The concept of frustration, which developed from the doctrine of impossibility, is based on the sole interpretation of the intent of parties. According to the doctrine of frustration, the concept dealing with situation of changed circumstances in English law today, a contract can be frustrated by impossibility, physical e.g., destruction of the subject-matter, or for legal reasons, e.g. illegality, or by occurrence of a radical change in circumstances, so that the foundation of the contract has been vitiated. When a contract is frustrated the Court cannot amend or adjust it to the new situation. Frustration simply discharges the contract.

By and large the English precedents illustrate the view that impracticability is not generally sufficient to frustrate a contract in English Law. Lord Radcliffe in *Davis Contractors Ltd. v. Fareham Urban District Council*[23]**,** elaborated this principle as "frustration occurs whenever the law recognizes that without the default of either party a contractual obligation has become incapable of being performed because of the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract". He also observed that "it is not hardship or inconvenience or material loss which calls the principle of frustration into play".

In the abovementioned case, the Contractors agreed to build 78 houses for a local authority in eight months for £ 94,000. Because of labour shortages the work took 22 months and cost the Contractors £ 115,000. They claimed that the contract had been frustrated and that they were entitled to extra remuneration but the House of Lords rejected the claim as the events which caused the delays were within the ordinary range of commercial probability and had not brought about a fundamental change of circumstances.

In United Kingdom the modern test for frustration is outlined in the case of *National Carriers v Panalpina (Northern) Ltd.*[24] Frustration occurs when -

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[18] See note 4.
[19] Amuruvi Perumal Devasathanam v. A. T. Sambanda Mudaliar, AIR 1962 Mad 122.
[20] Ugo Draetta, *Force Majeure Clauses in International Trade Practice,* 5 Int'l Bus. L. J. 547 (1996).
[21] *See* note 7.
[22] *Id.* at 839.
[23] (1956) A.C. 696.
[24] (1981) 2 W.L.R. 45.

"*… there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerous ness) of the outstanding contractual rights and / or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulation in the new circumstances.*"

If a builder contracts to do work on an existing building which is destroyed during the progress of the work the contract is frustrated. In *Appleby v. Myers*[25], the plaintiff contracted to erect certain machinery upon the defendant's premises for a fixed sum, but when the machinery was only partly erected an accidental fire destroyed the whole of the buildings and the machinery thereon. It was held that since the premises were entirely destroyed without the fault of either party, the contract was frustrated and both parties were excused.

In *Brauer & Co. (Great Britain) Ltd. v. Clarke (James) (Brush Materials)*[26] Denning LJ held that the sellers of the Brazilian Pissava, a woody fibre used in making of the brush and the like, under a CIF contract containing the clause "subject to any Brazilian Export Licence" were not relieved of their obligation to procure a licence due to escalation in prices by 20% to 30% in excess of prices agreed upon with their buyers. Denning LJ, however, stated that if the price was a 100 times high as much as the contract price that would be a fundamentally different situation which had unexpectedly emerged and the sellers would not be bound to pay for the escalated price of the export licence.

United States:

Whereas the English Law envisages the doctrine of impossibility and its further development, the doctrine of frustration of contract, the American Uniform Commercial Code (UCC) provides for commercial 'impracticability' where such impracticability affects the basic assumption on which the contract was made.

The UCC, in section 2-615, entitled "Excuse by failure of presupposed conditions" reads:

"Except so far as a seller may have assumed a greater obligation and subject to preceding section on substituted performance:

(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not in breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was the basic assumption on which the contract was made or by compliance in good faith with any foreign or domestic governmental regulation or order whether or not it later proves to be invalid."

UCC Section 2-615 (b) contains an allocation requirement in the event only part of a seller's capacity to perform is affected and 2-615 (c) states a notice requirement. The concept of commercial impracticability, which discharges a party's duty although the event has not made performance absolutely impossible, has been adopted in order to call attention to the commercial character of the context in which the excuse defence is used.[27] Courts, however, have been reluctant to accept anything short of impossibility as an excuse for performance.[28]

Under the American laws no hardship, unforeseen hindrance, or difficulty will excuse the Contractor from doing what he or she has expressly agreed to do.[29] Thus, a Contractor is not excused from performing, according to the terms of the contract, because of unusual or unexpected expenses,[30] or because he or she has underestimated the cost.[31]

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[25] (1867) L.R. 2 C.P. 651.
[26] (1952) W.N. 422.
[27] P.J.M. DeClercq, *Modern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability,* 15 J.L. & Com. 213, 255 note 18 (1995).
[28] *Id.* at 222.
[29] U.S., North Shore Sewer & Water Inc. v. Corbetta Const. Co., 395 F.2d 145 (7th Cir. 1968).
[30] *Id.*
[31] Mich., Falk v. Nitz, 219 Mich. 650, 189 N.W. 921 (1922).

Where a Contractor absolutely agrees to perform the work specified by a construction contract within a certain time, the fact that a failure to do so is due to unforeseen causes or contingencies against which the Contractor could have provided in the contract will not excuse the failure to perform within the time fixed.[32] Timely performance is not excused simply because the performance is more difficult or expensive than what was expected due to a factor such as the unanticipated presence of rock.[33] However, where the contract excuses delays from unavoidable accidents or causes beyond the Contractor's control, the Contractor is not chargeable thereof.[34]

The Contractor could argue, applying the test of impracticability and the cases discussed above, that the performance of the contract subsequent to price spike would cause them extreme and unreasonable difficulties, great expense and extreme financial injuries / losses and doing so would be commercially senseless. The Contractor could also argue that such performance is beyond the scope of the bargain and not within the contemplation. However, the problem is that the Courts rarely find such price spikes as circumstances resulting in commercial impracticability and the tests are applied very strictly. The remedy of frustration of contract will not be attracted unless the change of circumstances is so fundamental that it can be regarded by the law as striking at the root of the agreement. The Courts have not been keen to expand the doctrine of frustration to encompass the spike in the price of raw material as a ground of frustration.

The inconvenience or the cost of compliance, even if resulting in hardship, cannot excuse a party from the performance of an absolute and unqualified undertaking to do something that is possible and lawful, since the Courts cannot alter contract obligations because they work a hardship on any one of the parties. The rights of the parties must be measured by the contract that they have made, and a contract is not invalid nor is the obligor discharged from its binding effect, because it turns out to be difficult or burdensome to perform.[35]

In the light of aforesaid discussion it appears that the contracting parties should in their contract itself define price spike and include sufficient provisions for the contingency of a price spike and the remedy thereof and save them from being adversely affected by abnormal price volatility.

Ways and Means

Existing / Ongoing Contracts

In order to successfully claim compensation on equitable grounds or to effectively defend a breach in Court the injury or loss has to be very severe. Further, a review of the a several legal systems reveal that the legal relief on the basis of commercial impracticability, frustration of purpose or *force majeure* in general is practically non-existent. Regardless of the legal theory that may be advanced the Contractor is not likely to obtain legal relief and the Developer with which they are negotiating is likely to know this. Therefore cooperative approach to resolving the problem may be the best bet.

Relief in Future Contracts

Going a step forward, with respect to future contracts, the Contractors should negotiate for inclusion of specific terms to provide for the contingency of a price spike. Though price spikes, which are a regular feature in today's open economy fabric which is steered by global more than domestic factors, while not legally rising to level of commercial senselessness or frustration of purpose are certainly not foreseeable and within the contemplation of any of the parties and the contract must have built-in terms providing for such a contingency. While negotiating the terms, the Contractors may point out that:

i) the price spike are extraordinary events; and

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[32] Mich., Hall v. Gargaro, 310 Mich. 693, 17 N.W.2d 795 (1945).
[33] U.S., P&Z Pacific Inc. v. Panorama Apartments, Inc., 372 F.2d 759 (9th Cir. 1967.).
[34] La. – Succession of Pailet v. Acme Realty Co., 79 So. 2d 581 (La. Ct. App., Orleans 1955).
[35] Texas Co. v. Hograth Shipping Corporation, 256 U.S. 619, 41 S. Ct. 612, 65L.Ed. 1123 (1921).

ii) it is in the parties' and projects' best interest to make adequate provisions for such contingency in the contract itself in order to avoid future serious problems, delays and disruptions.

Making provision of price spike contingency in the Force Majeure clause

The expression "*force majeure*" is taken from the Code napoleon and has a more extensive meaning than "act of god" or 'vis major" though it may be doubtful whether it includes all "causes you cannot prevent and for which you are not responsible."[36]

In normal parlance, the term "*force majeure*" would be interpreted in the manner in which it has been defined by the party themselves in the construction contract itself. In the absence of any definition, the general settled situations – such as act of God, war, natural calamity or disaster – would fall within the ambit of this term. A typical *force majeure* clause in a construction contract reads as:

> *"If the performance of this Agreement is prevented, in whole or in part, by causes beyond control of the Parties or any of the Party which they / it could not avert despite their / its best endeavour and due diligence, the causes being:*
> - *Acts of God,*
> - *Riot, war, blockade, embargo,*
> - *Flood, explosion, fire or earthquake,*
> - *Inevitable Accident,*
> - *Legal and Governmental restrictions and orders,*
>
> *either Party shall be excused from performing its obligations mentioned in this Agreement during the subsistence of the force majeure conditions provided that the occurrence of such an event and the resultant prevention is communicated to the other Party as soon as practicable with sufficient details and materials to facilitate the verification thereof.*
> *The Party prevented to carry out its obligations and responsibilities as mentioned under this Agreement due to force majeure conditions shall be obliged to carry out its best endeavour to overcome the force majeure prevention and perform its obligations and inform as soon as practicable to the other party about the cessation of the force majeure condition and the commencement of performance.*
> *However, if the conditions of force majeure continue beyond a period of sixty (60) days at a stretch, then this Agreement shall be terminable by either Party."*

The construction contracts usually include a *force majeure* clause. To invoke the *force majeure* clause following conditions must be fulfilled:

- Situation must proceed from a cause not brought about by the defaulting party's default.
- The cause must be inevitable and unforeseeable.
- The cause must make execution of the contract wholly impossible.[37]

Conventionally, the *force majeure* clause is attracted only when the performance of the contract has become impossible and not just burdensome. Judicial pronouncements have long held that a mere price rise or spike does not fall within the ambit of a *force majeure* situation. Generally a price change does not constitute a *force majeure* condition.

However, inclusion of the price spike / fall as a *force majeure* condition in the construction contract can be explored. The contract may provide as to what shall constitute a price spike / fall and also provide the remedy available to the parties if such a contingency arises in the future. The parties can negotiate and arrive at a price band and a price spike / fall can be defined to include any variations beyond and below the accepted price band. The *force majeure* clause may include the price spike / fall as a *force majeure* event. Further the procedure to be adopted by a party in the event of occurrence of such *force majeure* event i.e. price spike / fall can be specifically delineated in the *force majeure* clause itself. The clause can also provide for the remedy / relief available to the affected

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[36] Ezekiel Abraham Gubray v. Ranjusroy Golabroy AIR 1921 Cal 305 (DB).
[37] Emden's *Building Contracts and Practice*, 8th Edn., Vol 1, p. 246.

party in the event of occurrence of price spike / fall including a provision for passing off of the benefits to the appropriate party.

Therefore, considering that price spikes are a regular feature in today's market and often render the performance of the contractual obligations by the Contractor in a typical contract highly burdensome and onerous and risks the project, the way out is to specifically provide for such contingency in the contract itself. As has been rightly said by Beth Godlin:

> "*Being prepared for the unexpected is particularly important when travel is experiencing a growth, surge, as it is now. Crowds, sever weather and tight connections affect the entire travel experience, so its better to be safe than sorry.*"