FORCE MAJEURE DECODED IN THE TIMES OF COVID-19: COMPLETE EXPLAINER

1. Legal Background

1.1. Force Majeure (literally translates as "superior force" in French) is a term derived from the Napoleonic Code. Under French Law, it means "irresistible" and "unforeseeable event" which makes the performance of a contract impossible. The rule of Force Majeure is an accepted concept in Indian and English Law and the absolute burden to prove Force Majeure is on the party who invokes it.

1.2. To fully appreciate the concept, and various aspects, of Force Majeure and to identify the remedies available to parties under a contract in case of an intervening event making the performance of the contract impossible, it is important to understand the following three concepts of law:

2. Contingent Contracts

2.1. Section 32 of The Indian Contract Act, 1872, which Section articulates the concept of "contingent contracts", is reproduced below:

> "*32. Enforcement of Contracts contingent on an event happening - Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened.* ***If the event becomes impossible, such contracts become void.***"

Simply stated, a contingent contract is a contract to:

i. do or not to do anything;
ii. dependent on the occurrence of an uncertain future event; and
iii. the contract cannot be enforced by law unless and until that "uncertain future" event has happened.

2.2. The Section goes on to state that if the occurrence of the "uncertain future" event becomes impossible, the contract itself becomes void. It may be noted that the contract becomes "void" without anything more being required of either party to the contract as opposed to "voidable", which would be dependent on the choice of a party being exercised.

2.3. The important aspect is that the future event is foreseen or expected, even though its occurrence may be uncertain. Thus, Section 32 provides for an escape route to the parties to a contract, with respect to their obligations, in the sense that the contract

may not kick in at all and performance may be excused upon the occurrence of the agreed and defined "uncertain future event".

3. Frustration of Contract

3.1. In contradistinction to "Contingent Contracts" is the concept of "Frustration of Contract" – a concept covered under Section 56 of the Contract Act.

> *"56. Agreement to do impossible act - An agreement to do an act impossible in itself is void.*
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> *Contract to do act afterwards becoming impossible or unlawful. A contract to do an act which, after the contract 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 do 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."*

3.2. As would be noticed, "Frustration" applies in different forms in two different circumstances:

3.2.1. The first, where both parties to the Contract are aware that the performance is impossible. In such a case, the Contract is void. It may be noted that : (i) the impossibility existed before the Contract was made; and (ii) either both Parties knew it to be impossible or both Parties did not know it to be impossible.

3.2.2. The second, where the performance becomes: (i) impossible or unlawful; (ii) after the contract is made; and (iii) for a reason which the promisor could not prevent. It may be noted that for this second circumstance to apply it would be necessary that the impossibility or the illegality must arise because both the pre-requisite conditions are met – namely, the event must occur after the contract has been made and the Promisor could not have prevented it. The burden being case on the Promisor alone defers to the legal concept that no man should stand to benefit from his own mistake. The requirement that the event must occur after the contract is made considers the absence of knowledge with either Party.

3.3. The third part of Section 56 deals with the compensation that the Promisor would be liable to pay provided: (i) the Promisor knew, or could have known, the act to be impossible or unlawful – presence of knowledge; and (ii) the Promisee did not know the act to be impossible or unlawful – absence of knowledge. The third part specifically takes care of the circumstance that would not be covered in the first part – namely, one party having knowledge.

3.4. Where "Frustration" applies, the contract is automatically discharged – i.e., any future performance that would otherwise have happened under the contract is released or cancelled.

3.5. The origins of the Doctrine of Frustration, under English Law, lie in the case of *Taylor v. Caldwell*[1], where it was decided that circumstances beyond the control or fault of two contracting parties excused performance under their contract. Prior to the decision in Taylor vs. Caldwell, (1861-73) All ER Rep 24, the law in England was extremely rigid. A contract had to be performed, notwithstanding the fact that it had become impossible of performance, owing to some unforeseen event, after it was made, which was not the fault of either of the parties to the contract. Thus, it was not enough that a contract becomes more expensive or onerous than originally contemplated or where the matters relied on were the fault of one of the parties or where the risk has been contemplated and has also been expressly or impliedly allocated under the terms of the relevant contract. Mere hardship to perform or economic loss did not dispense the performance of the Contract under Section 56 of the Contract Act. The law on the Frustration of Contract developed, and is articulated, by the following landmark cases in India:

Satyabrata Ghose vs Mugneeram Bangur & Co & Anr[2]:

"*16… 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 unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time when they entered into the agreement.*

Naihati Jute Mills Ltd. vs Khyaliram Jagannath[3]:

[1] [1863] EWHC QB J1
[2] 1954 SCR *310*
[3] AIR 1968 SC 522

"10… A contract is not frustrated merely because the circumstances in which it was made are altered. The Courts have no general power to absolve a party from the performance of his part of the contract merely because its performance has become onerous on account of an unforeseen turn of events. The question would depend upon whether the contract which the appellants entered into was that they would make their best endeavours to get the license or whether the contract was that they would obtain it or else be liable for breach of that stipulation."

Energy Watchdog vs Central Electricity Regulatory Commission & Ors[4]:

"41…Since the subject matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less defined matters such as "the contemplation of the parties", the application of the doctrine can often be a difficult one. …that mere incidence of expense or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstance."

3.6. It is important to note that the concept of a Contract is the "allocation or assumption of risk". To begin with, prior to the development of the Doctrine of Frustration, all risk associated with the performance of a contract was presumed undertaken by the party promising such performance. With the passage of time and recognizing the vagaries of nature and legislatures, the Doctrine of Frustration developed. Thus, the Doctrine of Frustration again provides an escape route to the Parties to a contract, with respect to their obligations, in the sense that even though the contract has kicked in, performance may be excused upon the occurrence of a future event that renders the performance impossible or unlawful.

3.7. Given the rigidity and the very limited scope of its application, the Doctrine of Frustration has ceded, in a limited manner, to the concept of "Force Majeure". Again, a contractual concept.

4. Force Majeure

[4] (2017) 14 SCC 80

4.1. Force Majeure is a contractual provision in terms of which a party is entitled to suspend the performance of the contract or is entirely excused from its performance, of course, upon the occurrence of specified events beyond a party's control. The basis of this Doctrine is to save the performing party from consequences of breach arising from an event over which it has no control. It is therefore an exception for breach of contract. Whether Force Majeure can be invoked to excuse liability for non-performance would depend on the nature and general terms of the contract, the events that precede or follow it, and the facts of the case. It is important to note that unlike the Doctrine of Frustration, Force Majeure does not immediately terminate or excuse the requirement for performance and typically requires the affected party to continue to perform its obligations to the extent not prevented by the event of Force Majeure or upon its cessation. In some contracts, after a period of prolonged event of Force Majeure, parties may be permitted to terminate the contract leaving the questions of damage / compensation being payable open, depending on the nature of the Force Majeure event and the provisions of the particular contract.

4.2. This article seeks to lay out: (i) the contours of what would constitute a Force Majeure event; (ii) the general elements of a typical clause encapsulating Force Majeure in a contract; (iii) the burden of proof attached to the invocation of the clause; and (iv) the duty to mitigate the loss on the non – defaulting party.

4.3. **Elements of Force Majeure Event**

4.3.1. The crucial elements that need to be satisfied for an event to qualify as a Force Majeure event are: (i) it should be an "unforeseen" event; (ii) it's occurrence could not have been prevented; and (iii) there should be a direct link between the occurrence of the event and consequent impossibility of perform under the contract.

4.3.2. **Unforeseen Event or the Foreseeability of the Event**

4.3.2.1. The first requirement is of the event being "unforeseen" or "unforeseeable". At this juncture, it would be fruitful to consider the dictionary meaning of the following terms:

Foreseen – to be aware of the reasonable possibility of (as an occurrence *or development) beforehand.*

Foreseeable risk – a danger which a reasonable person should anticipate *as the result from his / her actions.*

4.3.2.2. Thus, what could be foreseen or what would be foreseeable would obviously not be "unforeseen" or "unforeseeable". Similarly, a possible eventuality that is considered between the contracting parties and the "risk" associated with it is allocated to any party would not be a "unforeseen" event. Since contracts are essentially "allocation of risk", therefore, that which is considered accounted for and allocated, would not be an unanticipated risk constituting an unforeseen possibility giving rise to a Force Majeure event. It is only an unknown variable that could possibly qualify as a Force Majeure.

4.3.2.3. Foreseen or Foreseeable events would arise out of essentially two scenarios – (i) natural causes; and (ii) unnatural causes. Of natural causes, certain natural events have an element of unforeseeability inherently attached to them. Events such as earthquakes or floods or lightning or storms etc. However, many natural events also have a degree of predictability attached to them. For instance, monsoon rains in India or the seismic zoning of a particular area in a State or Country or the occurrence of an earthquake of a small or middle level magnitude in a high seismic zone (4 or 5 on the Richter Scale in Japan or California).

4.3.2.4. Similarly, of unnatural causes, principal amongst them being actions (legislative or otherwise) by the State or strikes or war or riots, there is a degree of secrecy or unforeseeability inherently attached to them. However, in given circumstances, such events also have a degree of predictability attached to them. For instance, the expectation of a civil strife where the political environment is disturbed (as in Kashmir) or the anticipation of an unexpected event (for example a fatal strike during the Sri Lankan Civil War).

4.3.2.5. Thus, what event would be "unforeseen" or unforeseeable" would depend on the event and the scenario in which it is played out. Not every event that is not accounted for in the contract would qualify as "unforeseen" or "unforeseeable".

4.3.2.6. In light of the above legal backdrop, we have to now evaluate whether the COVID-19 situation is an unforeseen situation.

4.3.2.7. It may be accepted that India, as any tropical Country, is prone to viral infections. Over the years there have been several viral infections – such as, dengue, chickengunya, conjunctivitis etc. – that have come to be expected

along with the season they are identified with. Thus, the mere occurrence of a "viral infection" would possibly not qualify as an "unforeseen event" that could trigger a Force Majeure event.

4.3.2.8. What sets the present situation apart, amongst many other reasons, is: (i) the virulent strain of the COVID-19 virus; (ii) its exponential contagiousness; and (iii) the fact that there is no known vaccine or cure. Undoubtedly, the above factors, supplemented by the extreme measures adopted by the various Governments, clearly indicate that : (i) the nature, extent and reach of the COVID-19 was completely unforeseeable and was, indeed, unforeseen; (ii) there is no standard template of response to this kind of a contagious disease; and (iii) the societal risk outweighs any individual or entity level risk. Given the above paradigm, there can be little doubt that the COVID-19 virus is an unknown variable that would qualify as an unforeseen or unforeseeable occurrence that could trigger a Force Majeure event.

4.3.3. **Prevention or Avoidance**

4.3.3.1. This brings us to the second element – namely, that it could not have been avoided. Again, there are two parts to this requirement. The first addresses the causative reasons for the occurrence. Thus, any role a contracting party had to play in the reasons that cased the unknown variable to occur would be a relevant factor in determining whether it qualifies as a Force Majeure event or not. The second part addresses the possibility of the contracting party avoiding the effect of such occurrence.

4.3.3.2. As would be apparent from the situation unfolding around us, the origins of this problem lie beyond our national boundaries and it was impossible for any of us to act, or abstain from acting, in such manner as could have altered the causative reasons of the COVID-19 situation. The second part is even more interesting in as much as what is required of us presently is "not to act" – i.e., isolate ourselves – to break the chain and consequentially, arrest the spread of the virus. Thus, rather than expecting a positive act, the situation warrants that we refrain from carrying out our normal activities. Both factors viewed together would mean that suspension of the contract is the only way forward for both parties.

4.3.4. **Direct Link**

4.3.4.1. This also deals with the third crucial element of Force Majeure – namely, a direct link between the occurrence of the event and the inability to perform the contractual obligation. As explained above, suspension – of any activity and, therefore, of the contract – is the only possibility presently. The linkage is explicit and evident.

4.4. **Typical Elements of Force Majeure Clause**

4.4.1. Traditionally, Force Majeure clauses deal with unforeseen acts of God, Government or Legislations. A common construction of the Force Majeure clause, usually in three parts, in a Contract would be as under –

4.4.1.1. The first part: would be where the performance of the contract would be agreed, and stated, to be subject to the Force Majeure clause. What would be the general commercially understood contours of "Force Majeure" have already been discussed above.

4.4.1.2. The second part: would be where Force Majeure events could be enumerated – such as, *"**Force Majeure** means ..... and includes ....."* – thus, making the list illustrative or exhaustive. This part would usually state possible scenarios as:

- An act of God – i.e., fire, drought, flood, earthquake, tsunami, or any other natural calamities;
- Explosions or accidents, air crashes and shipwrecks;
- Strikes or lock outs, industrial dispute, act of terrorism, war and hostilities of war, riots, civil disturbances, etc.;
- Change in legislation, Government actions, judicial intervention, etc.
- And, all similar situations."

4.4.1.3. The third part: would be where certain exceptions are carved out. These could be in terms of caveat imposed to trigger the clause or events agreed to be excluded from the scope of Force Majeure.

4.4.2. While the above elements illustrate a usual Force Majeure clause, as would also be apparent, whether an event is included or excluded from the ambit of the clause would depend on the words of the contract. This would, of course, be on a case to case basis.

4.4.3. Aside the above substantive contents of a typical Force Majeure clause, many a time it is associated with a procedural requirement also. If an event qualifies as

Force Majeure, it is imperative for the affected party to adhere to and abide by the procedural pre-requisites, usually mandatory in nature, for invoking the Force Majeure clause. While there is no standard procedure to be followed before invoking the Force Majeure clause, it varies from contract to contract. Typically, a contract provides a procedural mechanism to be followed while invoking the Force Majeure clause, wherein the affected party is required to promptly notify the counter-party of the relevant Force Majeure event(s) and condition(s).

4.4.4. The procedural requirements of notifying the counter party usually cover the following aspects:

- method of notice: is a written mandatory or not;
- period of notification: notice to be given within a specified period of time of the occurrence of the Force Majeure event(s) or, in some contracts, within a reasonable time;
- mode of service: registered post / courier / email / speed post including other methods as agreed in the contract;
- details of the event: specific conditions leading up to the Force Majeure event(s);
- anticipated consequences: does it terminate or suspend the contract;
- expected duration: if it is a temporary occurrence.

4.4.5. Some contracts may require the affected party to provide regular updates and / or specify the steps being taken by the affected party to mitigate / remedy the event(s) and its effects.

4.4.6. Failure to comply with the strict procedure and timelines by the affected party may result in a waiver or an exclusion to obtain relief for delayed performance or non-performance of contractual obligations under the Force Majeure clause. Thus, it is imperative to bear in mind the mandatory pre-requisites of the Force Majeure clause to claim relief under Force Majeure clause.

4.4.7. In an event the contract is silent on any requirements, and does not specify the procedural mechanism for invoking the Force Majeure clause, the affected party

should, nevertheless, issue a notice to the counter-party of the occurrence of the Force Majeure event(s) and condition(s) and the invocation of the clause.

5. Burden of Proof

5.1. The affected party carries the burden of proving the validity of its claim for the application of, and relief under, the Force Majeure clause.

5.2. It has to adduce evidence that an event of Force Majeure occurred, which was beyond its reasonable control and which prevented or delayed its performance of the affected obligations. It also has to prove that it has followed, in a timely manner, the full procedure stipulated in the contract and discharged its responsibility there.

6. Duty to Mitigate

6.1. This brings us to the final point of what would be relief claimed.

6.2. In order to successfully invoke a Force Majeure clause to excuse liability for non-performance, a party is under a contractual duty to mitigate or make best endeavours to demonstrate the efforts it undertook to mitigate the impact of its non-performance. Thus, the extent of Force Majeure relief sought by a party will be depend on considerations of the principle of Mitigation of Damage. And, that, would be another topic for discussion dependent on the facts and circumstances of each case.

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