

**“Covid-19: Impact on Commercial Contracts”**

*\*Chandramouli Ghoshal  
Amity Law School,  
Amity University,  
Kolkata*

*\*\*Priyanka Bhattacharyya<sup>1</sup>  
Amity Law School,  
Amity University,  
Kolkata*

**ABSTRACT**

With the outbreak of COVID-19, which has spread globally has wreaked havoc losses at an international level and has been termed as a pandemic by the World Health Organisation. The pandemic has created social barrier in trade, impacted the economy, imposed ban on travel and has restricted the movement of people by temporary lock downs and has disturbed the domestic market in pursuance to the supply chain. COVID -19 has also caused catastrophic effect to even commercial contracts as the parties to the contract are unable to perform the contract.

Onus to prove that the COVID-19 outbreak is within the purview of the force majeure clause mentioned within the contract and if there happens to take place any delay or failure to abide with the terms of the contract, the burden to proof of such clauses of force majeure will lie on the party seeking such relief. In the failure to prove such clause, the doctrine of frustration shall be applicable and would create the contract void. Finally, it can be considered that COVID-19 has indeed impacted and can affect the execution of commercial contracts significantly within the near future, but such impacts are often mitigated by the supply within contract agreement itself and also by the law being in effect.

**Keywords:** Force Majeure, Doctrine of Frustration, Covid-19, Commercial Contracts

**INTRODUCTION**

COVID-19 has set its foot in India like the other countries and the 'deep impact' has affected the Indian economy, businesses, trade and will also affect several jobs. It is been further surveyed that; 70 percent of the firms are expecting an extreme fall in the growth sales in the fiscal year 2020-21. The Hon'ble Supreme Court of India has invoked Article 142 of Constitution of India which vests unfettered independent jurisdiction to pass any order in public interest to do complete justice, if exercise of such jurisdiction is not contrary to any express provision of law.<sup>2</sup>

Commercial contract are contracts between two parties, where the terms and conditions of the contract are set by one of the parties, and the other party accepts the proposal to contract. The

---

<sup>1</sup> STUDENTS OF BBA. LLB. (HONS.), 3<sup>rd</sup> Year, AMITY LAW SCHOOL, AMITY UNIVERSITY KOLKATA.

<sup>2</sup> Academy of Nutrition Improvement v. Union of India, (2011) 8 SCC 274: JT 2011 (8) SC 16: (2011) 7 SCALE 307.

Commercial Contracts are binding on both the parties engaged in an activity to do something. These can either be verbal or written and formal or informal. The COVID-19 has caused enormous impact even on the Commercial Contracts. When the parties to contract are not able to perform their contract, the liability arising out of the contract shall not affect the party and it shall be considered as it is either leading to the 'force majeure' or 'Doctrine of frustration.'

### **FORCE MAJEURE**

Force Majeure is a French concept whereby the parties to contract are unable to perform their obligation for completing the contract. Force Majeure is a common clause in the contract which generally frees both the party to carry out their obligation in certain unforeseen circumstances which occurs due to Act of God. In English and Scots law, Force Majeure is basically a clause in contract and not a general common law. It is generally unavoidable, and it is a chance occurrence. Its occurrence is an extraordinary one or circumstantial which is beyond the control of the parties such as flood, earthquake, volcanic eruption, riot, pandemic or any other situation by act of god where it is not humanly possible for both the parties to fulfil the obligations of their contract as the circumstances becomes inevitable or beyond control but the Force Majeure doesn't excuse the parties for non-fulfilment of contract's obligation rather they suspend it till a duration of time. It generally occurs due to a natural and unavoidable catastrophe that obstructs the normal course of events and prevent participants from fulfilling obligations. The Court may declare COVID-19 as a clause of Force Majeure as it is preventing the parties from fulfilling their obligation due to the unavoidable circumstances.

### **DOCTRINE OF FRUSTRATION**

Doctrine of Frustration is an English doctrine and is basically applied when both the party to the contract are unable to fulfil the contract, as the essence of the contact becomes void or there is a change in situation which make the contract impossible for the parties to comply with.

The Doctrine of Frustration is defined under Section 56 of the Indian Contract Act,1872<sup>3</sup> which states that "an agreement to do an Act impossible in itself is void.". It means when an Act which was to be performed after the formation of the contract becomes impossible to perform or the performance of such contract is physically possible but has failed to materialise the objective or any condition which the promisor could not prevent, such Act will become void. Due to the commercial hardship caused by the outbreak of the COVID-19, the parties have been discharged from their liabilities to perform such contract under this section.

---

<sup>3</sup> Indian Contract Act,1872, ACT NO. 9 OF 1872. uputd.gov.in, 26-27.

For Example, in the English case of **Krell vs Henry**<sup>4</sup> the defendant bought a flat from the plaintiff for the purpose of spectating the coronation process of the King which was supposed to happen around the place that very day. The defendant had already paid the advance in lieu of the commencement of the contract. The process of coronation was cancelled due to the illness of the King and the defendant refused to pay the due as the purpose for which the contract was contracted for was not fulfilled and the contract became frustrated. In this case, the plaintiff was not entitled to recover any amount from the defendant as the situation of the contract had changed.

In the Indian case of **M/S Alopi Parshad & Sons Ltd vs Union of India**<sup>5</sup>, which had taken place during the Second World War, the plaintiff acted as an agent to the Government of India for the supply of ghee to Army personnel. The contract was such that the plaintiff was paid based on his performance. When the Second World War broke down, the rates fixed for the plaintiff got suppressed due to the total alteration of the condition caused by the war. Government terminated the contract and the plaintiff filed a suit before the Court requesting for the fixed rate. The Court dismissed the plea and held that the agent can only receive remuneration when the terms of the contract is fulfilled. As the agent failed to fulfil the terms of the contract due to the unforeseen circumstances the plea was terminated under Section 56 of the Act

Similarly, in the present scenario of COVID-19 pandemic, the completion of a commercial contract may become impossible and it may lead to Doctrine of Frustration under Section 56 of Indian Contract Act, 1852.

### **IMPACT OF COVID-19 ON COMMERCIAL CONTRACTS**

The worldwide impact caused by the COVID-19 outbreak has caused a disturbing disruption of commercial exercises and commercial exchanges taking place on a day to day basis. It is imperative to record that, there has been a significant lockdown and suspension implemented by different Governments vide explicit laws and general government orders. In this way, it is totally reasonable to state that the outcomes of the pandemic have an effect of a rigid interference.

The scope and extent of a Force Majeure clause in the situation of such a pandemic must be evaluated on the "definition of force majeure" under the agreement of the parties and the parties also on the jurisprudence relating to the terms 'extraordinary events' and on the term 'circumstances beyond the reasonable control of the parties'. However, regardless of whether the Force Majeure clause within the agreement is inclusive of the term pandemic or epidemic or not, it is also essential that the parties affected by such an event have to generally prove the interference of such an event based on the performance of the contractual portion.

In the light of the COVID-19 pandemic, few safeguards to be given to commercial contracts are: -

---

<sup>4</sup> Krell vs Henry (1903) L.R. 2 K.B. 740(CA)

<sup>5</sup> M/S Alopi Parshad & Sons Ltd vs Union of India (1960) AIR 588, 1960 SCR (2) 793

- Reviewing and re-assessing the contract where the clause of force majeure exists and analysing the relevant factors and issues stated to initiate the 'rule to excuse'.
- To ensure 'all' or 'any' notification procedure which has been prescribed in the condition of the contract and to strictly comply with the formalities of the notice.
- Mutually (alongside different gatherings to the agreement) break down the effect of the episode of COVID-19 on the agreement and its exhibition.
- Analyse the impact of the COVID-19 outbreak on the performance of the contract mutually or along with the other parties.
- Lookout for any probability to perform the contract in any other favourable manner, also a failure will rule out the future 'defence' with respect to an alternative method of performance.
- In the situation of the COVID-19 pandemic, collect evidences with respect to the non-performance of the obligations related to the Force Majeure.
- All records related to the un-avoidable expenditures incurred must be maintained.

In the present COVID - 19 pandemic, the Government of India has additionally found out additional ways to protect the interest of the parties in the commercial contracts. The Ministry of Finance, Government of India vide an office notice dated 19.02.2020<sup>6</sup> as of late explained as for 'Manual for Procurement of Goods, 2017', and announced that in case of any disruption in the supply chains due to the spread of Coronavirus from China or some other nation, all such circumstance will be covered under the Force Majeure Clause (FMC) in the contract.

It is further clarified that such a circumstance ought to be considered as a national calamity and Force Majeure provision might be invoked, whenever it is found suitable, after the due method. The said Manual is to be issued by the Ministry of Finance for several Ministries/Departments who have been designated forces to make their own arrangements, acquirement of the goods under the Delegation of Financial Force Rules, which must be exercised in similarity with the 'Procurement Guidelines'.

Such initiative by the Government of India is a major relief on such occasions. Simultaneously, even within the sight of such evidenced events, the question of Force Majeure and its application to a specific contract would need to be looked independently once more at the phase of litigation or arbitration. There must be abundant evidence to show that there were no alternative methods or strategy for performing the party's obligation under the contract.

Other than Force Majeure, Counterparties may likewise try to invoke other contractual clause such as limitation or exclusion clause, clauses to adjust price or to limit liability for non-performance. The capacity to invoke such different grounds will rely upon the wording of the significant condition, and how the provision is understood by courts. Further, it depends on

---

<sup>6</sup> 'The Manual for Procurement of Goods,2017' issued under Notice No. F. 18/4/2020-PPD Para 9.9.7

the organization's relevant clause, and how the Courts construct the clause, such as liquidated damages caused by the amount of non-performance of the contract.

### **CONCLUSION**

As we conclude, we need to mention that the frustration as a result of COVID-19 is safeguarded by this contractual law. When in situations where it is physically impossible to perform a contract because of restrictions imposed on individual or a section, say, delivery of products within a locality where all movement of individuals are restricted will fall within the purview of this law, and both promisor and promisee would be relieved from any contractual duty and liability just in a case of such non-performance. Similarly, although where the performance of the contract is possible, but such performance has lost the force to fulfil the very object of the contract itself would again incorporate application of Section 56 and Doctrine of Frustration. Also, when we are talking about Section 56 we must also make a note of Section 65 of the Act which states that it lies as the duty of the party to return back any benefit or facilities he may have received because of any such void contract. Thus, while a contract 'becomes' frustrated at a later stage where at the time of its inception it had been indeed possible to execute, and if any benefit or advantage comes by any party through this contract which became void because of frustration must be reverted back to the opposite party to bring everything back in its place.

Therefore, nobody has to worry about any liability arising out of contractual relationship when such relationship is tainted by an intervening impossibility like COVID-19 and also about any right he had over any amount, which is now with the opposite party to the contract where contract is now frustrated.

If there remains a chance of a clause related to force majeure be present at the time of the commercial contract, then doctrine of frustration shall not be applicable as far as the said clause is applicable during a given situation. The concept is straightforward, wherein parties to a contract agree beforehand and figure out a way to proceed or execute the contract under certain specified circumstances which may prevent execution of a contract. These circumstances may be anything like natural calamity or unforeseeable circumstances such as Covid-19 that will be mentioned exclusively within the contract.