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COVID 19 AND FORCE MAJEURE

INTRODUCTION

The world is struggling with the COVID 19 pandemic. Globally, businesses are accounting their worst losses and many are declaring bankruptcy. A number of contracts are being left unperformed, owing to a disturbed supply chain. Demand too has been shaky. It is in times such as this, that the contracting parties seek refuge under the force majeure clause in their agreement.

Force majeure is an event or effect that can neither be controlled nor anticipated. Section 56 of the Indian Contract Act, 1872, deals with the concept of force majeure. The said provision grants the parties, protection against an agreement guaranteeing to perform an impossible act, or to perform an act, whose performance becomes impossible subsequently.

It is important to understand the distinction between 'force majeure' and 'Vis major' i.e. an act of God. Vis major means overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado. Since Vis major only covers those unprecedented and unexpected events that occur as a result of nature's doing, it is narrow as compared to force majeure. Force majeure grants protection against any event which is unanticipated and uncontrollable, be it natural or otherwise. Even though the means are not the same, both force majeure and vis major are headed towards one end. The principles aim to protect the party who could not hold up his promise as a result of a genuine inability

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Generally, the parties to a contract discuss, negotiate and finalise the force majeure clause. The clause specifies what all events qualify under force majeure. Additionally, there will be an all-inclusive phrase in the clause, just in case there surfaces a situation which is unprecedented. The COVID 19 pandemic is one such situation, which may be covered by the force majeure clause. If Vis major is specifically included as a force majeure event, then COVID 19 may be covered under the clause. But that is not the case in every contract.

A contract becomes void if its performance is based on the happening of a future event, when such future event becomes impossible to perform or unlawful. This is held in section 32 of the Indian contract act, 1872. Among other things, Section 56 talks about contracts entered into to perform an act, which subsequently becomes impossible or unlawful subsequent to entering into the agreement. If a force majeure event falls directly under a specified clause, section 32 will come into force, whereas, when the event described as force majeure fall dehors the contract, it is covered by section 56.

Section 56 uses the term 'impossible' in the practical sense. A contract may well be physically performable, but not so in practicable sense. For force majeure clause to become applicable, this impossibility must be of such a magnitude that the very foundation of the contract is affected. There are three aspects that a situation needs to fulfil to attract the force majeure clause:

- The test of externality.
- The test of unpredictability.
- The test of irresistibility.

The test of externality implies that the event which makes the performance of the contract impossible must not be the doing of either parties of the contract. It should be the result of an external event over which the parties have no control. As the name suggests, the test of unpredictability requires that the occurrence of the event must be unpredictable in the usual course of nature. The event must make the performance of the contract absolutely impossible. This is required as under the test of irresistibility.

The lockdown, due to COVID 19 pandemic has made it very difficult, and in certain cases, impossible to perform some contracts. The government suspended almost all commercial

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activity, and some essential services. As a result, there has been a surge in the number of cases involving contractual disputes regarding the doctrine of frustration in general, and force majeure in particular.

JUDICIAL STAND

The Courts have not taken a definitive and uniform stand while defining what all comes under the force majeure clause. It has been left to the interpretation of the individual courts, with regard to the contractual basis. Let us now look at some of the judicial decisions that revolve around force majeure and its applicability.

The Indian Supreme Court, in a parade of decisions, from **Satyabrata Ghosh v. Mugneeram Bangur**¹ to **Energy Watchdog v. CERC**², has held that if there is a clause in a contract which is relatable to the force majeure event, it falls under section 32 and the event falls under section 56 when the event is outside the purview of the contract.

Standard Retail Pvt. Ltd. v. M/s G.S. Global Corp & Ors.³

The force majeure clause was present in the contract for the sale of good, but not for the letter of credit part of the contract. The court refused to grant injunction on payment as the force majeure clause was not specifically mentioned to have affected the contract relating to letter of credit.

Rural Fairprice Wholesale Ltd. & Anr v. IDBI Trusteeship Services Ltd. & Ors⁴

The High Court of Bombay admitted the poor market and collapse in share values post COVID 19 and held that it is fair to restrain the bank from acting upon the sale notices and also issued instructions to withdraw the pending sales order for the pledged shares.

Indrajith Power Private Limited v. Union of India⁵

The petitioner had not fulfilled his obligation even after being granted an extension of 12 months. The contract pertained to payment of a bank guarantee. The petitioner sought the cover under force majeure. The court held that the impossibility to

¹ [1954] SCR 310.

² (2017) 14 SCC 80.

³ Commercial Arbitration Petition (L) No. 404 of 2020.

⁴ Commercial Suit (L) 307 of 2020.

⁵ CrI. M.A.10268-69/2020

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perform the contract did not arise as a result of the COVID 19 pandemic. Hence, the petitioners position was unaffected by the lockdown and pandemic. The plea was turned down.

CONCLUSION

In this article, we have discussed the concept of force majeure. By defining what constitutes a force majeure event, we have tried to relate it to the current pandemic situation. We have also looked at recent judicial decisions to find out that there is no straight jacket formula to decide which cases fall under force majeure. The courts have to apply the law to each case, and decide accordingly after examining the factual matrix.