ISSN 2582 - 211X

LEX RESEARCH HUB JOURNAL

ON LAW & MULTIDISCIPLINARY ISSUES

VOLUME I, ISSUE IV

JULY, 2020

Website - journal.lexresearchhub.com
Email - journal@lexresearchhub.com

DISCLAIMER

EDITORIAL BOARD

Assistant Editors

ABOUT US

Lex Research Hub Journal On Law And Multidisciplinary Issues (ISSN 2582 – 211X) is an Online Journal is quarterly, Peer Review, Academic Journal, published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essays in the field of Law and Multidisciplinary issues.

Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. **Lex Research Hub Journal On Law And Multidisciplinary Issues (ISSN 2582 – 211X)** welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

COVID-19: A FORCE MAJEURE EVENT OR A SIMPLE PANDEMIC?

Author –

Srishti Talwar

Student, BALLB (H)

Chanderprabhu Jain College of Higher Studies and School of Law, GGSIPU

ABSTRACT:

The behemoth of COVID-19 has put an unprecedented pause to all the activities happening across the globe. Not only has it caused a disastrous impact on human lives but has paralyzed trade and commerce and many other activities due to the consequent lockdowns and restricted movements. Many facets of our system find themselves presently disrupted due to the unparalleled scenario which has emerged as a result of imposition of the lockdown. In this regard, the completion of many contracts would standstill or may have to be postponed or cancelled. A doctrine which has widely come into implementation at this point of time is 'force majeure' because of the consequent shutdowns and interruption in supply chains. Albeit the Ministry of Finance vide an Office Memorandum has proclaimed Covid-19 as a force majeure situation however the same cannot be construed as a grundnorm for each and every case. An important question which thus arises here is whether coronavirus has to be treated as a simple pandemic or a force majeure situation, whether parties who will plead force majeure as a justification for non-performance of their contractual obligations will be discharged from their liability to perform the contract or not?

INTRODUCTION:

Force majeure literally means an unanticipated or unexpected event or happening such as earthquake, epidemic, plague, cyclone, war, rebellion, or riot which is beyond the control of the parties to contract. It is included as a clause in contracts which spells out particular situations and circumstances which would render the performance of contract impossible and which are to be considered as force majeure if such a situation arises. It is a provision in contract which appropriates the risk of loss when performance becomes impossible. It is pertinent that for an event to qualify as force majeure, it must be uncertain, supervening and beyond the control of the parties. To make the force majeure clause applicable, the party invoking the said clause must establish that there were no reasonable measures that could have been taken to prevent the occurrence of the event and its consequences and that the performance of contractual obligations had become legally impracticable.

The doctrine of force majeure is envisaged in Indian Contract Act to a certain extent. Section 32 deals with the cases where performance of the contract is based on the happening of an uncertain future event, and if such an event becomes impossible, the contract becomes void.

Section 56 provides for the situation where a contract after it is made becomes incapable of performance due to the happening of some unforeseeable event which is beyond the control of the promisor. Thus, where force majeure event is associated with a clause which is incorporated either expressly or impliedly in a contract, the case is governed by section 32. However, where a force majeure event is dehors of the contract, the case is governed through section 56.

WHETHER COVID-19 QUALIFIES AS A FORCE MAJEURE EVENT OR NOT?

An Office Memorandum[1] dated 19th February, 2020 was issued by the Department of Expenditure under the Ministry of Finance declaring disruption of supply chains due to spread of coronavirus in China or any other country as a force majeure event. In this regard, further clarification was made that it should be considered as a state of natural calamity and force majeure clause may be invoked, wherever considered appropriate. Following which several notifications were also issued by other Government agencies but such notifications are of persuasive value and are not binding on the parties. The application of the doctrine would vary according to the facts and circumstances of each and every case and in order to claim the benefit of the doctrine, party pleading the invocation of doctrine has to prove that there exists a vital link between the pandemic and the party's inability to discharge its obligations under the contract and that duties of mitigation were observed by them. It is significant in order to claim the benefit of the doctrine, party invoking the said doctrine shall undertake steps to mitigate the consequences of the event.

DUTIES OF MITIGATION:

It is pertinent to ensure that the party claiming the benefit of force majeure must have taken all reasonable measures to avoid or make less severe the impact caused or likely to be caused to the opposite party. It is one of the imperative factors which must be established before the court otherwise the relief under the said doctrine cannot be claimed easily. The duty of mitigation is subjective affair which must be determined meticulously keeping in mind the facts and circumstances of every case.

[1] https://doe.gov.in/sites/default/files/

In common parlance, contracts contain explicit terms requiring the parties to take specific measures of mitigation in line with the force majeure event. In case, such measures are not mentioned in the contract, then the claimant party is reasonably expected to take appropriate actions, for instance, any alternative way of discharging the contract so as to make the impact of the event less acute.

Further, it must be proved clearly that force majeure event was the predominant element causing the breach of contract. Where any other factors are involved and force majeure event is not a substantial cause of non-performance, relief will not be granted. Mere occurrence of the event is not sufficient; parties claiming relief must establish that occurrence of the event has prevented the performance of legal obligations concluding the contract. Establishing causation is crucial to obtain the relief. For example, it might be possible that a contract had become incapable of performance due to change in price of an essential commodity, however the party is claiming non- performance stating covid-19 as the sole cause. In such a situation, if relief is granted then such relief would cause grave injustice to the opposite party.

LANGUAGE OF THE CLAUSE:

Furthermore, the answer to the aforesaid question has to be construed in accordance with the language and nature of force majeure clause and legal rules governing the interpretation of force majeure principle. Sometimes contracts contain explicit list of circumstances to be considered as force majeure events and do not cover epidemics, pandemics and other health emergencies, the interpretation of said clause is done scrupulously in such cases according to what is mentioned in the contract and not beyond that. The exclusion of a particular event will be considered deliberate and inability to perform will be excused only on the basis of what is precisely mentioned in the contract. The situation becomes complicated where along with a specific list of events; a catch-all phrase is given as well. In those cases, only such events which are identical to those already mentioned will be considered valid by the court. Catch-all phrases are generally interpreted stringently by the courts, a liberal interpretation of such phrases will otherwise cause serious implications upon opposite parties and can further become a precedent which can be misapplied subsequently.

Thus, there are two broad situations where application of the said doctrine comes into play: First, where force majeure clause is contained in the contract itself and second where contract does not contain the said clause.

- **Contract including Force Majeure Clause:**

Where the contract is inclusive of force majeure clause, the party pleading such clause as an excuse for non-performance of the contract has to prove the occurrence of the force majeure event and the direct link between the happening of such event and party's consequent inability to perform the contract. The burden of proof thus lies on the party pleading the invocation of the doctrine.

- **Contracts excluding Force Majeure Clause:**

In cases where the performance of contract becomes impossible due to an event which is not contained in the contract and is beyond the foreseeability and control of the promisor, such cases are governed by the 'doctrine of frustration' enshrined in section 56 of the Indian Contract Act. Generally, in such cases the doctrine is interpreted in the stricter sense and performance of contract is encouraged. This can be inferred through various landmark and leading judgments delivered by the court explaining the application of the doctrine.

In *NAIHATI JUTE MILLS CASE*[2], *the Supreme Court emphasized that a contract is not frustrated merely because the circumstances in which it is made are altered – the courts having no general power to absolve a party from the performance of his or her part of the contract, merely because its performance has become more onerous on account of an unforeseen turn of events.*

In a very recent judgement of *ENERGY WATCHDOG V. CENTRAL ELECTRICITY REGULATORY COMMISSION*[3], *the court observed that the rise in price of coal consequent to change in Indonesian Law, which though admittedly rendered the contract commercially impossible, was not treated as a force majeure event by the Supreme Court as neither was the fundamental basis of the contract was shown to be dislodged nor was any frustrating event, except for a rise in the price of coal, pointed out.*

[2] 1968 AIR 522.
[3] (2017) 14 SCC 80.

CONCLUSION:

One must bear in mind the fact that application of force majeure does not necessarily mean that parties are permanently discharged from their legal obligations arising out of the contract. The liabilities may only be suspended temporarily and as soon as the situation is brought back to normal, parties will have to complete their pending obligations. However as per the Office Memorandum[4] issued by the Ministry of Finance, where performance of contract is delayed or prevented either partly or in whole for a period beyond ninety days, contract can be terminated in those cases by either party to contract without causing any pecuniary ramifications on either side.

It is a settled position in law that mere physical and economic difficulties coming between the ways of parties to discharge their obligations towards the contract wouldn't suffice as a valid excuse to invoke the doctrine. The onset of a pandemic cannot be treated as an excuse for nonperformance of a contract for which the target date was given much earlier.

There is no doubt in the fact that Covid-19 has brought a halt to all economic activities and has caused several disruptions in supply chains. However, the same cannot be conveniently pleaded as an excuse for non-performance having regard to the temporariness of the situation. Through its various judgments, the courts have escalated the criterion for the application of doctrine. The purpose behind the same is that force majeure shall not become an instrument in the hands of parties to escape from their obligations under the contract and that they must put their best possible endeavors to complete the performance of the contract in order to preserve the sanctity of the contract.

[4] Id. at 1.