
CAN A FORCE MAJEURE CLAUSE BE INTERPRETED TO COVER A ‘PANDEMIC’

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ABSTRACT

In this research paper researcher has tried to show what would be the impact of Covid-19 on the future of Contractual Habits. As the global impact of the outbreak worsens, causing disruption to international trade and other commercial activities, the risk of businesses being unable to perform their contractual obligations increases. When a breach of contract arises, the innocent party would normally sue the defaulting party for compensation. However, if the failure to perform the contract is caused by a pandemic, the defaulting party might be relieved by invoking the following as a defense: force majeure, frustration of purpose, impossibility/impracticability, illegal purpose such that the innocent party will not receive compensation for non-performance of the contract. The purpose of a *force majeure* clause is to relieve the defaulting party (or all parties) from performing the contract or the remainder of the contract when an exceptional event or circumstances beyond the reasonable control of the parties prevents or hinders the performance of the contract. Sometimes, a *force majeure* clause does not seek to relieve the parties from the contract entirely, but only suspend its performance until after that event or circumstances. A contract is frustrated when there is a supervening event that changes the nature of the outstanding contractual rights and/or obligations to the extent that the parties could not have reasonably contemplated such change at the time of the execution of the contract.^[7] In that situation, a party may be excused from performing the contract because the primary purpose of entering into the contract and its performance have been rendered radically different. Commercial impracticability arises when performance of a contract by a party has become unfeasibly difficult or costly to perform. The difference between impracticability and impossibility is that impracticability is still physically possible; however, performance will result in a substantial hardship to the performing party. Generally, an illegal contract is one that is made for an illegal purpose, and for that reason, violates law. For example, a contract that requires some sort of illegal act or conduct on the part of one or both parties will be deemed illegal in entirety.

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INTRODUCTION

"The day is gone" the learned Judge of the Court of Appeal went on to say, "*when we can excuse an unforeseen injustice by saying to the sufferer 'it is your own folly, you ought to have put in a clause to protect yourself. We no longer credit a party with the foresight of a Prophet or his lawyer with the draftsmanship of a Chalmer. We realize that they have their limitations and make allowances accordingly. The old maxim reminds us that he who clings to the letter clings to the dry and barren shell and misses the truth and substance of the matter. We have of late paid heed to this warning, and we must pay like heed now*".

And yet, the House of Lords expressed disapproval of the way in which the law was stated above with respect to unforeseen events and contractual obligations, and said, "*it is a matter of construction of the contract*".

The unanticipated coronavirus pandemic has intruded on our own, proficient, money related and business lives, to a state of forestalling best execution at all levels; even rendering execution outlandish. This article focusses on effect of Covid-19 on execution of agreements, represented by Indian law. With regards to lines cited above from an English judgment, we survey whether inconceivability of execution under Indian law is absolutely a matter of development of particular agreements, and assuming this is the case, would businesses be able to rescue their commitments and spare their agreements.

Through this research paper, we would like to help organizations re-take a gander at their agreements cautiously, and survey the degree to which their presentation can either be pardoned without risk or constrained with the power of law. At the same time, we likewise shed light on difficulty of execution in contracts represented by the oft - picked English law, and what elements could be considered by English courts or councils in circumstances, such as, these.

IMPOSSIBILITY OF PERFORMANCE AFTER EXECUTION OF CONTRACT

Covid-2019 has either made execution troublesome or outlandish. It hosts made business hardship a few gatherings in execution of their authoritative commitments, while rendering others totally unequipped for execution.

Inconceivability of execution after execution of an agreement is accommodated under Section 56 of the Indian Contract Act, 1872 (ICA). Segment 56 happens in Chapter IV of the ICA which identifies with execution of agreements and implies to manage one classification of conditions under which execution of an agreement is pardoned or abstained from. It gives:

“Section 56. Agreement to do impossible act —*An agreement to do an act impossible in itself is void.*²

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.

Pay for misfortune through non-execution of act known to be inconceivable or unlawful—Where one individual has vowed to accomplish something which he knew, or, with sensible ingenuity, may have known, and which the promisee didn't have the foggiest idea, to be outlandish or unlawful, such promisor must make remuneration to such promisee for any misfortune which such promisee continues through the non - execution of the guarantee." (Accentuation provided)

From the outset redder, the legal arrangement stressed in para 2 of Section 56 would seem to become an integral factor completely in the Covid-2019 situation. Be that as it may, would this 'inconceivability' of execution sweepingly render each agreement void under Indian law, from the date of the difficulty? What is the ambit of 'inconceivability' and who is best positioned to decide it? How is chance designated in such circumstances? Does any arrangement in the ICA license gatherings to spare their agreements from being void consequently? The ideas of unexpected agreements, power majeure and dissatisfaction are applicable to comprehend the nuanced cures accessible to parties under their agreements in the Covid-2019 situation.

Impossibility & force majeure

Dominant parts of the agreements explicitly contain a term as indicated by which the agreement would stand suspended or released on the event of specific conditions. In such cases, the disintegration of the agreement would occur under the particulars of the agreement itself. Despite the fact that in English law these cases are treated as instances of dissatisfaction as nitty gritty in Part B underneath, in India they would be managed under

² Indian Contract Act 1872, Section 56 (2019).

area 32 of the Indian Contract Act which manages unforeseen agreements or comparative different arrangements contained in the Act. Segment 32 of the Indian Contract Act is given beneath:

“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.*”³

There might be circumstances where the unanticipated occasion may render execution inconceivable just during the constrained time in which the occasion is in activity, in this manner giving a window to continuing typical legally binding commitments after the occasion stops to work. The idea of power majeure becomes possibly the most important factor in such circumstances.

As indicated by Black's Law Dictionary, the term 'power majeure' signifies an occasion or impact that can be neither foreseen nor controlled.⁴ It is utilized concerning all conditions free of the desire of man, and which, it isn't in his capacity to control and such power majeure is adequate to legitimize the non - execution of an agreement. A run of the mill power majeure proviso in contracts peruses as beneath:

"None of the Parties will be at risk for any postponement, disappointment in execution, misfortune or harm because of Force Majeure occasions. During the exhibition of the Agreement occasions of Force Majeure may happen, for example, however not restricted to, war, fire, flood, seismic tremor, mishap, revolt, strike, blast, lockout, demonstration of God, demonstration of Government authority, mishaps or potentially harm, choices from the Customer, or any occasion past the sensible control of any of the Parties, which by their belongings render inconceivable or thwart the presentation of any commitment or the activity of any rights under this Agreement or the typical activity of the Company's mechanical establishments, or cause the disappointment or exclusion to consent to this Agreement."

Under English law, power majeure is a legally binding arrangement under which a gathering is qualified for drop the agreement or is pardoned from execution upon the event of indicated occasions past the gathering's control. The key factor is to set up an immediate connection of

³ Indian Contract Act 1872, Section 32 (2019).

⁴ Black's Law Dictionary, Edition 11 (2019).

causation between the occasion and the inconceivability of execution so as to show that the occasion is the sole reason for failure of the gathering to perform under the agreement

Under Indian law, likened to English law, power majeure gets its reality from the agreement. The premise of this provision is to spare the performing party from results of penetrate emerging from an occasion over which it has no control. It is thusly a special case for break of agreement. Regardless of whether power majeure can be conjured to pardon risk for non-execution would rely upon the nature and general terms of the agreement, the occasions which go before or tail it, and the realities of the case.

In a circumstance imagining power majeure, it is upon the gathering to choose to summon the power majeure condition in the agreement so as to pardon itself from execution under the agreement.

Considering Covid-2019, on February 19, 2020, the Ministry of Finance gave an Office Memorandum on 'Power Majeure Clause' giving that "coronavirus ought to be considered as an instance of regular cataclysm and power majeure might be summoned, any place thought about proper, after the due methodology (in the Office Memorandum)".³ It gives that "a power majeure condition doesn't pardon a gathering's non-execution totally, however just suspends it for the span of the power majeure. The firm needs to pull out of power majeure when it happens and it can't be asserted ex-post fact.⁵ If the exhibition in entire or to a limited extent or any commitment under the agreement is forestalled or postponed by any explanation of power majeure for a period surpassing ninety days, either gathering may at its choice end the agreement with no money related repercussion on either side".

Despite the fact that gatherings to previously mentioned agreements should respect the Office Memorandum, it may not fill in as a coupling record. In the event that a debate emerges concerning acknowledgment or dismissal of the Office Memorandum, it will rely upon the Court or the arbitral council to decipher the power majeure proviso and survey if similar covers any arrangement for proof as far as testaments or office memoranda as above so as to demonstrate an instance of power majeure.

⁵ Office Memorandum No.F. 18/4/2020 -PPD titled 'Force Majeure Clause', issued by Department of Expenditure, Procurement Policy Division, Ministry of Finance.

Impossibility & frustration

Difficulty and disappointment are frequently utilized as exchangeable articulations.⁶ However, comprehend that the custom-based law precept of disappointment as propounded in English law is unmistakable from the legal arrangement of happening inconceivability and lawlessness under Indian law. This influences the way where agreements will be deciphered particularly under English law and Indian law.

Under English law, disappointment is such a great amount of worried about the adjustment in conditions that it drops the base of the agreement all in all or if there should be an occurrence of execution makes it diverse with that which was in thought by the gatherings at the outset and is finished up by the lawful request. In request to pardon oneself from difficulty of execution under an English law represented agreement by virtue of Covid-2019, the gathering should demonstrate dissatisfaction of agreement. Does a specific agreement prepare for utilization of the teaching of dissatisfaction relies upon legitimate hypotheses figured by English courts. These include (a) suggesting terms into the agreement; (b) vesting courts with capacity to figure out what is simply and sensible in specific situations; (c) taking part in development of the agreement dependent on goal of gatherings.

Notwithstanding, under Indian law, the legal arrangement under Section 56 sets out a positive standard of law on happening difficulty or lawlessness that renders execution outlandish in its reasonable, and not exacting sense.⁷ Relief is given by the court on the ground of ensuing inconceivability when it finds that the entire reason or premise of an agreement was disappointed by the interruption or event of a sudden occasion or change of conditions which is so major as to be viewed by law as striking at the base of the agreement all in all. The agreement would then naturally reach a conclusion.

The court without a doubt would look at the agreement and the conditions under which it was made. The conviction, information and aim of the gatherings are proof, however proof just on which the court needs to shape its own decision whether the changed conditions wrecked out and out the premise of the experience and its basic item. In such a sense, disappointment only turns into a sub - set under the bigger teaching of happening difficulty. Indian courts will apply Section 56 equitably to evaluate whether a specific circumstance has rendered execution incomprehensible and disappointed the agreement, without digging into party expectation, justness and sensibility and so on.

⁶ Satyabrata Ghose vs. Mugneeram Bangur and Others, AIR 1954 SC 44, paragraph 10.

⁷ Satyabrata Ghose vs. Mugneeram Bangur and Others, AIR 1954 SC 44, paragraph 17.

Under Indian law, the precept of dissatisfaction is a perspective or part of the law of release of agreement under Section 56 by reason of happening inconceivability or illicitness of the demonstration consented to be finished. While Section 56 visualizes difficulty of execution prompting evasion of the agreement, it doesn't statutorily embody the idea of unanticipated possibilities which bring about impermanent suspension of execution and resumption of the agreement. The idea of power majeure becomes possibly the most important factor in such circumstances. Dissimilar to a power majeure condition where the non-performing party needs to choose or decide to summon the provision, either by methods for a notification or something else, disappointment of agreement under Section 56 works naturally from the date of the difficulty and puts the agreement to an end.

Since the ICA is endless supply of execution under Section 56, it would not be reasonable to import the standards of English law on precept of disappointment and legitimate hypotheses, de hors these legal arrangements. Under Indian law represented agreements and questions, the choices of the English Courts would have just a powerful worth and might be useful in indicating how the English courts have chosen cases under conditions like those which have preceded Indian courts.

Accordingly, disappointment of agreement is a perspective (and not the be-all) of Section 56, where execution is totally outlandish and the agreement reaches a conclusion consequently from the date of difficulty. In the occasion an unexpected occasion renders execution incomprehensible, Parties should evaluate if the occasion has brought about an obliteration of the article and motivation behind the agreement, or has caused a key distinction in the manner the agreement presently remains, a long ways past the thought of the gatherings.

PRACTICAL CONSIDERATIONS

Assessment of impact of covid-19

The as a matter of first importance step before assessing the cure is to evaluate the effect of Covid-19 on the business and execution of legally binding commitments. Has Covid-19 brought about halfway disappointment of execution, complete ineptitude to perform, defers which whenever stretched out past a middle of as far as possible could strike at the foundation of the agreement, or negligible business hardship?

For example, gatherings to an executable agreement might be confronted, over the span of completing it, with an unforeseen development which they didn't at all envision, an entirely irregular ascent or fall in costs which is a startling deterrent to execution. This doesn't in

itself dispose of the deal they have made. It is just when a thought of the details of the agreement, in the light of the conditions existing when it was made, demonstrated that they never consented to be bound in an in a general sense diverse circumstance which had out of the blue developed, that the agreement stops to tie. A gathering may not be pardoned from the exhibition of its piece of the agreement only in light of the fact that its presentation has gotten grave because of an unexpected unforeseen development. In this way, few out of every odd instance of influenced execution are fit for asserting disappointment.

Regarding a power majeure statement, the provision could contain words that demonstrate the degree of effect on execution to conjure the proviso, for example, 'forestall', 'ruin', 'delay'. Courts have deciphered the words 'forestall' and 'prevent' in an unexpected way. Furthermore, Courts have additionally translated words which go before or follow words, for example, 'thwart' or 'forestall' in the condition, just as understood the nature and general terms of the agreement to decide whether the effect as asserted by a gathering empowers it to conjure the concurred power majeure clause.⁸ The significance of these words is basic to comprehend if a gathering can summon the power majeure proviso.

The ICA gives cures dependent on the impact of an unexpected occasion on the legally binding exhibition. Effect evaluation is subsequently basic to more readily illuminate the gatherings about the cures they c a look for under Indian law.

Does your contract offer a remedy?

On the off chance that your agreement doesn't mull over the event of an occasion that renders the exhibition of the agreement outlandish or unlawful, and the occasion happens, the cure may lie in Section 56 of the Contract Act. In any case, a case of disappointment It will be gainful for gatherings to look for lawful guidance on setting up or guarding a case dependent on dissatisfaction of agreement, as this will include an investigation of components, for example, the effect of the occasion, the object of the agreement and so on.

Conversely, Section 56 could have little application where parties explicitly mull over in the agreements, the plan of action to be embraced by them in the occasion there is any adjustment in conditions or an event of an occasion that renders it unimaginable for the gatherings to play out the agreement. To the degree that the gatherings have just considered the results of a happening occasion in their agreement, the equivalent would stay authoritative on the gatherings.

⁸ Energy Watchdog vs. Central Electricity Regulatory Commission and Others, 2017 (4) SCALE 580.

For example, it is open for the gatherings to concur that if because of any power majeure condition it is difficult to play out an agreement, a gathering would repay the other for the endeavors made despite that it is difficult to completely play out the equivalent. In such cases, the legally binding arrangements would beat the plain language of Section 56 of the Contract Act. Be that as it may, such cases can be safeguarded on a few checks, one being inability to meet the notification necessity.

So also, if the gatherings have mulled over the chance of an interceding condition which may influence the presentation of the agreement, yet have explicitly specified that the agreement would remain notwithstanding such conditions, there can be no instance of dissatisfaction in light of the fact that the premise of the agreement is request execution in spite of the incident of a specific occasion. It could be hard to pardon execution in such cases. By the by, safeguards are accessible to parties trying to pardon non - execution, one of them being inconsistent haggling powers between the gatherings to the agreement.

Sometimes, where gatherings may have explicitly accommodated the instance of a restricted interference through power majeure, however a happening occasion renders execution inconclusively incomprehensible for an uncertain period; a gathering could make a case for disappointment of the agreement. To survey whether Covid-19 could trigger the significant power majeure condition, or disappoint the agreement, it will be basic to assess the operational parts of the applicable business exchange and the kind of power majeure statement in the agreement.

Other terms of contract

Agreements may contain unmistakable terms managing outcomes of non-execution. For example, an agreement may contain an arrangement on obligation by virtue of postponements, or value accelerations. In the occasion postponement or value heightening happens because of event of the power majeure occasion, one would need to evaluate not just the language of the power majeure condition yet additionally explicit legally binding arrangements identifying with delays, so as to summon the fitting statement for resting their cure. In such cases, it will be imperative to evaluate if the results of non-execution because of the unanticipated occasion were in reality mulled over by the gatherings or it was a hazard that the gatherings purposely embraced and consented to cover in the agreement.

Formal requirements

In a potential instance of power majeure, agreements may require satisfaction of formal prerequisites by a gathering proposing to pardon itself from non-execution. For example, an agreement may require involved with issue a notification advising the other party that a power majeure has been activated by the event of an occasion secured under the power majeure proviso. During the activity of the power majeure occasion, a gathering may be required to report or counsel routinely with the other party. A gathering may likewise be required to show verification of moderation and evaluated timings for managing the specific occasion of power majeure. An occurrence of a power majeure statement with notice necessities is given underneath:

"The Party enduring a Force Majeure occasion will:

- inform immediately the other Party by notice, giving subtleties of the Force Majeure occasion;
- inform the other Party when the Force Majeure occasion is at an end and resume execution of this Agreement forthwith from that point except if the Parties have chosen in any case.

Should the obstacle, inconceivable execution, or deferral coming about because of such Force Majeure occasion continues past a time of ninety (90) schedule days, and the Parties have neglected to agree or discover intends to conquer the Force Majeure occasion, at that point any of the Parties may demand the end of the Agreement by method of a notification."

Can a force majeure clause be interpreted to cover a ‘pandemic’

What do you mean by “force majeure”?

The term ‘force majeure’ has been defined in Black’s Law Dictionary, as ‘an event or effect that can be neither anticipated nor controlled. It is a contractual provision allocating the risk of loss if performance becomes impossible or impracticable, especially as a result of an event that the parties could not have anticipated or controlled.’ While force majeure has neither been defined nor specifically dealt with, in Indian statutes, some reference can be found in Section 32 of the Indian Contract Act, 1872 (the "Contract Act") envisages that if a contract is contingent on the happening of an event which event becomes impossible, then the contract becomes void.⁹

⁹Poorvi Sanjanwala and Kashmira Bakliwal, What is force majeure? The legal term everyone should know during Covid-19 crisis, (June, 10, 9:32 A.M.) <https://economictimes.indiatimes.com/small-biz/legal/what-is->

The term 'Act of God' is frequently found in power majeure provisos in contracts. Demonstration of God is defined as an uncommon event or situation, which couldn't have been anticipated and prepared for, either because of common causes, straightforwardly and solely without human mediation; and which couldn't by any measure of capacity have been predicted, and whenever predicted, couldn't have been stood up to. This could incorporate floods, tropical storms, tremors and so on.

Be that as it may, power majeure is held to have a more broad importance than the oft-seen 'Act of God' term, and incorporates events, for example, strikes, riots, wars, breakdown of regulatory apparatus, lockdowns, and impacts of such occasions, for example, deficiency of gracefully inferable from war, war-time trouble in transportation, refusal of fare permit and so forth. Some power majeure provisos could contain nonexclusive terms, for example, "any or their occurring".

Regardless of whether a pandemic, for example, Covid-19 can be deciphered as a 'Act of God'? Regardless of whether the impacts of shutdowns due to Covid-19 trigger the power majeure provision in contracts? As expressed over, this would rely upon the language of the provision and the standards of legitimate translation of power majeure statements.

To terminate or not to terminate.

The impact of disappointment or power majeure could both outcome in end of agreement, contingent upon the provisions of the agreement. Truth be told, we have seen situations where an agreement containing a power majeure proviso was tried to be ended on the grounds of dissatisfaction of the agreement, in spite of the two cures being fundamentally unrelated. In this way, under what conditions can an agreement be suspended, what might be the necessities to achieve suspension, would a gathering need to choose a cure by express notification, what conditions could bring about expansion of suspension to a degree of end, when would termination be able to be looked for on grounds of dissatisfaction in spite of essence of a power majeure statement - would rely altogether upon the nature and terms of the agreement. Organizations would need to altogether examine the agreement to evaluate the cures accessible to the gatherings.

[force-majeure-the-legal-term-everyone-should-know-during-covid-19-crisis/articleshow/75152196.cms?from=mdr](https://www.force-majeure-the-legal-term-everyone-should-know-during-covid-19-crisis/articleshow/75152196.cms?from=mdr)

Renegotiation:

In any case, in situations where the presentation has simply gotten monetarily increasingly troublesome yet not feasible, gatherings could consider whether it would be economically suitable to suspend the agreement, or utilize this chance to renegotiate the agreement. A few gatherings may likewise think about this as a chance to stop an awful deal by surveying its choices to end the agreement.

Risk portion and compensation

In the greater part of the situations where execution of an agreement gets unimaginable, the gathering that has gotten any favorable position under such agreement when the understanding is found to be void, is required to reestablish such bit of leeway to the individual from whom the equivalent was gotten. This is explicitly established under Segment 65 of the Agreement Demonstration. Nonetheless, this isn't a flat out guideline. The degree of compensation will rely upon a case to case premise, including an investigation of a few components, for example, costs brought about by the non-breaking party.

Further, gatherings to contract are free and can explicitly give that the danger of happening occasions will be borne by one of them, or distribute it, or manage it in different ways, for example, suspension of execution, pay, discount, compensation or release.

DISPUTE GOALS

At last, if a Gathering neglects to concede to the occasion being a Power Majeure occasion, or neglects to conform to the arrangements of the Understanding under the relevant Power Majeure arrangements, or endeavors to set up a case of disappointment of agreement in nearness or nonappearance of a power majeure provision, gatherings should investigate the agreement and evaluate lawful hazard and cures as far as prosecution or assertion of the debate emerging out of such difference. A few agreements could cover such an inevitability explicitly, for instance:

“Nothing contained in this clause shall prevent any of the Parties from referring the question of whether or not an event of Force Majeure has occurred or whether or not this Agreement shall be terminated due to the Force Majeure event, to arbitration under Clause.”

CONCLUSION

As would be apparent, the previously mentioned contemplations are intensely actuality explicit and contract-explicit. As cited in the initial passage of this piece, Master Denning J.

expressed that gatherings can't be relied upon to have 'prescience of a Prophet, or his legal counselor with the draftsmanship of a Chalmers'. However, Equity Viscount in request prevented the job from claiming Courts in suggesting terms and what is simply and sensible into the agreement, and completely expressed that the destiny of the gatherings relies 'on the development of the agreement'. Urgent occasions, for example, that the Covid-19 pandemic may not legitimize frantic measures by parties. As the law stands, gatherings should intently take a gander at their agreements.

Notwithstanding legally binding language, it will likewise be basic to comprehend the business tasks and exchanges of the organization in the applicable business and segment, to comprehend the ambit of authoritative conditions managing difficulty of execution. For example, in the domain of mergers and acquisitions, a proviso that is like power majeure and shields parties from unexpected antagonistic changes in conditions is the Material Unfavorable Change statement. While evaluating whether the Material Unfavorable Change proviso can be conjured in a specific circumstance, for example, the Covid-19, it will be important to survey the previously mentioned down to earth contemplations with regards to mergers and acquisitions, for example, the effect of Covid-19 on the exchange, the language of the Material Antagonistic Change condition and whether it offers a reasonable cure, formal necessities, response to different cures under agreement, for example, end or offer value recipes.

Further, legal understanding of agreements in debates including unexpected occasions is writ enormous with different and nuanced approaches, exceptionally reliant on the idea of the agreement and the language of the terms. It is in this way reasonable for gatherings to look for lawful counsel and direct an intensive lawful examination of their agreements to secure themselves on either side of execution, distribute chance appropriately, detail a system for renegotiation whenever required, and spare the holiness of agreement.