DECODING THE FORCE: FORCE MAJEURE AND ITS APPLICATION IN TIMES OF THE PANDEMIC

By

—P. PRATIK REDDY*

'*Force Majeure'* has suddenly become one of the most popularly searched terms on the internet. Its use in law relating to contracts has spiked by unexpected proportions, across the world, in the last few months, the courtesy for which may be attributed to the unprecedented global pandemic caused by the novel corona virus or COVID-19, as it is has been named.

Derived from French, *'force majeure'* translates to 'superior force', and is typically used to refer to an event or effect that can neither be anticipated nor controlled. *Force majeure* clauses are contractual provisions allocating the risk of loss if performance becomes impossible or impracticable[1]. In other words, they are contractual clauses which alter obligations and/or liabilities of parties under a contract, when an extraordinary circumstance beyond their control prevents one or all of them from fulfilling the obligations under the contract. The clauses provide that parties to a contract may be excused from performance, in whole or in part, or entitled to suspend or extend the time of performance, as a result of some specified event or condition. While parties may define *force majeure* as they deem fit, it has usually applied where an unforeseen and uncontrollable event prevents one party from performing its contractual obligations.

While the origins of *force majeure* are believed to go back to Roman and later, Napoleonic times[2], for the sake of our discussion, it is sufficient to limit to its common law origins. In *Paradine v. Jane*, [1647] EWHC KB J5, the House of Lords of the United Kingdom, established a rule of absolute liability for contractual debts. It was held that, 'when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.'

More than two centuries later, an exception to this apparently rigid rule was created, in the case of *Taylor v. Caldwell*, [1863] EWHC QB J1, which established the doctrine of impossibility. The true basis of the doctrine of discharge of contract when its performance is made impossible by intervening causes over which the parties had no control, was formulated. Subsequently, when the Contract Act, 1872, was legislated, the doctrine of impossibility was given statutory force under Section 56. Hence, while the frustration of contract is a common law exception under English Law, it rules as a statutory vigour, under Indian Law.

At the outset, it is important to clarify a common misconception about *force majeure* and *vis major* that are often used interchangeably. *Vis major* or 'act of god' as it is commonly called is generally taken to result from an irresistible natural cause that cannot be prevented by the ordinary exertions of human care and diligence. *Vis major* results from natural causes, such as flood, earthquake, tornado and such other

* The author is a fifth-year student of Pendekanti Law College, Hyderabad.

1. Black's Law Dictionary, Ninth Edn., Pg.718.
2. *Laurence Lieberman & Abhimanyu Bhandari*, "The forgotten Force Majeure clause and its relevance today under Indian and English Law", Bar & Bench, dated 27.3.2020.

incidents which occur without the intervention of human beings. However, *force majeure* is a phrase bearing a wider import and may include occurrences beyond those that are included under *vis major*, that may be beyond the control of the parties and stall the performance of obligations under a contract. The Supreme Court of India has alluded to the fact that incidents such as that strikes, breakdown of machinery and the like, though normally not included in *vis major,* are included in *force majeure* [3] (meaning, act of individuals, which are not acts of god, may be covered by force majeure), thereby clarifying the scope of the latter.

The principles relating to force majeure have been succinctly codified under French law, in Article 1218 of the French Civil Code, which clearly spells out three conditions that must be met for an event to qualify as a force majeure event :

* The event must have been beyond the control of the debtor. This means that the event that prevents performance must not be attributable to the party claiming force majeure.

* The event in consideration was not foreseeable to the parties at the time of the conclusion of the contract. It must be such that the parties did not foresee and could not, with the reasonable diligence, have foreseen.[4]

* The event must be irresistible. The party claiming *force majeure* must prove that the event made it impossible to perform the contract in a manner that was not preventable or insurmountable. What is vitally considered is whether the alleged effects of the event could have been avoided by appropriate measures. Curiously, *Treitel* suggests that a *force majeure* clause can apply even though the obstacle to performance which has arisen is not insurmountable. According to *Treitel*, frustration does not require an insurmountable obstacle as the alternative way will often constitute something 'radically different'.[5]

It is interesting to note that the scope of *force majeure* may differ from one jurisdiction to another. Under the English law, force majeure is a creature of a contract and not of the general common law, while under civil law, the general law defines and provides remedies for *force majeure*, which may be in addition to what is provided for in the contract. For instance, under Article 1218 of the French Civil Code, a *force majeure* event justifies suspension or termination of contract, even if the contract does not contain any provision in that regard. Where civil law applies, if the contract does not provide for *force majeure*, a party that is impeded or unable to perform its contract may still be able to rely on the general law to establish *force majeure*, unlike the system of common law, in which the party may have to rely on the principle of frustration.[6]

As is well-known, common law, subject to limited exceptions, leaves it to the contracting parties to set out in their contract, all the terms that will govern their contractual relationship, which includes expressly providing relevant clauses, in the contract, if the parties

3. 1961 AIR 1285.

4. 2017 SCC OnLine Del. 12562.

5. *Richard Backhaus*, "The Limits of the Duty to Perform in the Principles of European Contract Law", Electronic Journal of Comparative Law, Vol.8.1, dated March, 2004.

6. The classic definition of the modern idea of frustration was given by Lord *Radcliff* in *Davis Contractors v. Fareham Urban DC*, [1956] AC 696, as 'Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.'

wish to future-proof their contract to deal with changes in circumstances that may occur during the term of the contract. In the absence of express provisions in this regard, in the contract, *force majeure* is not ordinarily implied in the contracts and there are very limited circumstances in which the law will come to the aid of a party whose ability to perform its contractual obligations is impacted by external supervening events. One exception to this rule is the doctrine of frustration.

It is to be noted that a *force majeure* clause cannot be implied under Indian law. It must be expressly provided for under the contract and protection afforded will depend on the language of the clause. Determining whether a force majeure clause can be invoked is a fact intensive inquiry. Where the contract defines the contours of *force majeure*, those contours dictate the application, effect, and scope of *force majeure*[7]. Where the contract makes provision (that is, full and complete provision, so intended) for a given contingency, it is not for the Court to import into the contract some other different provisions for the same contingency called by different name[8], or a different contingency altogether.

Another important facet is that of the impossibility of performance of the contract. The International Chamber of Commerce has attempted to clarify this, by applying a standard of 'impracticability', meaning that it would be, if not impossible, unreasonably burdensome and expensive to carry out the terms of the contract. The event that brings this situation about must be external to both parties, unforeseeable, and unavoidable. The principle in Indian law differs on the ground of impossibility because it states that impracticability of performance and difficulty to perform the obligations of the contract are not grounds to employ force majeure, even if the event was an external and unforeseeable force, as long as there is an alternative mode of performance of the contract. The Courts have no general power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events[9].

It is worthy of note here that French law, under the Civil Code, provides a statutory hardship provision, which the parties may rely on when an event does not meet the conditions to qualify as a *force majeure* event or in the case of *force majeure,* the performance of the contract is highly onerous. Under Article 1195 of the French Civil Code, a party to a contract entered into on or after October 1, 2016, may ask its co-contractor to renegotiate the contract if a change of circumstances, unforeseeable at the time of the conclusion of the contract, renders its performance excessively onerous, unless otherwise agreed upon in the contract. If the contract is silent on this point, then ordinarily it is interpreted in favour of the debtor.

Yet another important factor is that of the exercise of due diligence by the parties. The event must not only cause non-performance of the obligations under the agreement, but also must be such that could not have been avoided even if the affected party had taken reasonable care. It is incumbent on the parties to exercise due diligence and take reasonable care, if possible, to ensure that the contract is honoured and the performance of the same is carried out. Interestingly, under Texas law, as in some other jurisdictions, unless expressly included in a contract, parties seeking to invoke a

7. *Akerman*, "The Coronavirus and Force Majeure Clauses in Contracts", accessed May 2, 2020, https://www.akerman.com/en/perspectives/the-coronavirus -and-force-majeure-clauses-in-contracts.html.

8. AIR 1968 SC 522.

9. 2018 SCC OnLine Del. 13102.

force majeure clause to excuse non-performance are not required to exercise reasonable diligence to perform or overcome the force majeure event.

Clauses such as 'duty to mitigate', 'exercise of due diligence' and 'best endeavour' often have a role to play in this regard. The duty to mitigate is a universally accepted principle of contract law requiring that each party exert reasonable efforts to minimize losses whenever intervening events impede contractual objectives. It is known that due diligence in law means doing everything reasonable, not everything possible. 'Due diligence' means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs[10]. The 'best endeavour' clause was, traditionally, viewed as a fairly onerous obligation but is now judged by standards of reasonableness, requiring an obligor to take all reasonable steps or all those steps in his power which a prudent and determined man acting in his own interest and anxious to achieve what is required would have undertaken[11]. This can involve the obligor sacrificing its own commercial interest. The question of whether, and to what extent, a person who has undertaken to use best endeavours can have regard to his own financial interests will depend on the nature and terms of the contract and the facts and circumstances of the case. It is, however, not an absolute obligation.

These clauses may play a crucial role to define the ambit and implications of the *force majeure* clause, as the presence of the such clauses might mitigate the effects of the *force majeure* clause. However, even in the absence of such clauses, for *force majeure* to be raised, it has to be proved that the non-performance would have been caused even in the event of due diligence being exercised.

According to *Chitty on Contracts*, it is for a party relying upon the *force majeure* clause to provide the facts bringing the case within the clause. He must further prove that there were no reasonable steps that he could have taken to avoid or mitigate the event or its consequences.

It is interesting to know that the Singaporean Court of Appeals found the above proposition to be too broad and opined that, 'whether the affected party must have taken all reasonable steps before he can rely on the *force majeure* clause depends, in the final analysis, on the precise language of the clause concerned. Nevertheless, it might well be the case that, atleast where the clause in question relates to events that must be beyond the control of one or more of the parties, then the party or parties concerned ought to take reasonable steps to avoid the event stipulated in the clause. In such a situation, there is, a persuasive case for requiring the affected party to take reasonable steps to avoid the effects of the event in question. The rationale for this approach is a simple and common-sensical one: to the extent that the party or parties concerned do not take reasonable steps to avoid the event or events in question, it cannot be said that the occurrence of the event or events was beyond the control of the party or parties concerned-in which case the clause would not apply'.[12] It was further held that where the clause in question relates to events that must be beyond the control of one or more of the parties, then the party or parties concerned ought to take reasonable steps to avoid the event or events stipulated in the clause. However, absent this particular situation, this requirement to take reasonable steps is not a blanket one as such and whether or not such a requirement obtains in the particular situation at hand would depend on the precise language of

10. 2013 SCC OnLine Bom. 485.

11. *IBM United Kingdom Ltd. v. Rockware Glass Ltd.*, CA (1980) FSR 335.

12. (2011) 2 SLR 106.

the clause itself (which language embodies the intention of the parties themselves).

Force majeure clauses frequently provide for renegotiation in contracts where, due to the complexity and financial obligations incurred, it is unsuitable to cancel the contract. According to the Supreme Court of India, if the performance of a contract becomes impracticable or useless having regard to the object and purpose the parties had in view then it must be held that the performance of the contract has become impossible. The supervening events should take away the basis of the contract and it should be of such a character that it strikes at the root of the contract[13]. An interesting addition to this practice in German law, that is codified, is that the provision for renegotiation of the contract. Section 313(1) of the German Civil Code states that a contract must principally be renegotiated if an event occurs which 'fundamentally alters' the present contract and places an excessive burden on one of the party's performance making the adherence to the contract unreasonable. In case renegotiation is impossible, the disadvantaged party can withdraw from the contract[14].

An extension of this may be found in the French Civil Code. Article 1195 of the French Civil Code stipulates that if a change in circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract. In the case of refusal or the failure of renegotiations, the parties may agree to terminate the contract from the date and on the conditions which they determine. In the absence of an agreement within a reasonable time, the Court may, on the request of a party, revise the contract or put an end to it, from a date and subject to such conditions as it shall determine.

Under the Indian law of contract, there are no express provisions that confer power on the Courts to direct parties to renegotiate contracts; the directions, if any, will revolve around the stipulations of the contract. The Court, however, may hold a contract to be frustrated and relive the parties of their obligations, in case of a dispute in that regard.

In India, it is generally opined that the concept of *force majeure* is dealt with under Section 32 and Section 56 of the Indian Contract Act, 1872. *Force majeure* is the cause and frustration, which is a manner of discharge of the contract, is a possible effect, in the case of the lack of an alternative mode of performance of the contract. Section 32 of the Contract Act will apply if the contract is discharged by its own internal force (for example, if the uncertain future event upon which the contract is contingent becomes impossible) whereas Section 56 will apply when the contract is discharged by an outside impact or a supervening impossibility that never within the contemplation of the parties at the time of making their contract[15]. This frustration or discharge of contract occurs immediately at the time of the occurrence of the event, and does not depend upon the whims of the parties to the contract. It is important to note that for frustration to occur under Section 56, the contract as a whole, should have become impossible to perform.

However, tracing the doctrine of *force majeure* to Section 32 of the Contract Act may not be accurate. The concept of *force majeure* is related to the concept of frustration, and both work as an exception to the general rule of *pacta sunt servanda*[16]. The effect of

13. (1971) 2 SCC 288.

14. *Lorenz Partners*, "Comparison of commonly-used Force Majeure and Hardship Clauses in International Contracts", dated March, 2020.

15. (2019) 7 SCC J-1.

16. Latin for 'agreements must be kept'. The universally accepted rule that agreements and stipulations must be observed.

both the doctrines leads to the relieving of parties from a contract on occurrence of an unforeseeable event, that is beyond the control of the party. Contingent contracts on the other hand are contracts which come into effect on the occurrence of a foreseeable (as contemplated by the parties), yet uncertain future event. Therefore, Section 56 of the Contract Act takes precedence here.

As held by the Supreme Court, Section 56 laid down a rule of positive law and did not leave the matter to be determined according to the intention of the parties[17]. Since under the Contract Act a promise may be expressed or implied, in cases where the Court gathers as a matter of construction that the contract itself contains impliedly or expressly a term according to which it would stand discharged on the happening of certain circumstances the dissolution of the contract would take place under the terms of the contract itself and such cases would be outside the purview of Section 56. Although in English law such cases would be treated as cases of frustration, in India they would be dealt with under Section 32[18].

It is trite law that the *force majeure* clauses are to be narrowly construed. The language of the *force majeure* clause itself is vital in determining the remedies available to the parties. In cases where a party is able to rely on a *force majeure* clause, the relief to be obtained is derived completely from what has been specified in the contract. Some contracts may provide for immediate termination of the contract upon the happening of the *force majeure* event. Others may provide that the contract will be put on hold until the *force majeure* event is resolved. Some contracts may provide for limitations in time after which either party may terminate the agreement with written notice to the other (*i.e.*, if non-performance caused by the event is prolonged or permanent). Others may require the contract to remain in effect until the *force majeure* event is resolved. Some contracts will only allow for certain obligations to be suspended. Such clauses enumerated in the contract may limit the application of Section 56 to the contracts. Though obvious, it is pertinent to mention that contracts in which time is the essence will suffer and bear the brunt of an unforeseen event like the pandemic.

The effect of the COVID-19 pandemic on the contract will be interpreted from the construction of the *force majeure* clause, in case it is present in the contract. There are two possibilities, which may suggest that a *force majeure* clause includes a pandemic :

(1) if the contractual definition of a force majeure event expressly includes a pandemic; or

(2) if the force majeure clause has a general clause covering extraordinary circumstances beyond the reasonable control of the parties.

On the other hand, if the definition is exhaustive, *i.e.*, clearly excluding certain events or including 'only' certain events as *force majeure*, and pandemic featuring in the former or not featuring in the latter, will preclude the parties from invoking the *force majeure* clause in case of non-performance of the contract because of the occurrence of the pandemic. If the contract does not include a force majeure clause, the affected party could claim relief under the doctrine of frustration under Section 56 of the Indian Contract Act, 1872.

The effective judicial interpretation of force majeure, in India, may be said to have begun with the seminal case of *Satyabrata*[19], that laid down the law, as is followed till

17. *Satyabrata Ghose v. Mugneeram Bangur & Co.*, AIR 1954 SC 44.

18. *Naihati Jute Mills Ltd. v. Khyaliram Jagannath*, AIR 1968 SC 522.

19. *Satyabrata Ghose v. Mugneeram Bangur & Co.* (supra).

date. While interpreting Section 56 of the Contract Act, the Supreme Court that the word 'impossible' used in Section 56 has not been used in the sense of physical or literal impossibility. It ought to be interpreted as impracticable and useless from the point of view of the object and purpose that the parties had in view when they entered into the contract. The said impracticability or uselessness could arise due to some intervening or supervening circumstance which the parties had not contemplated. As envisaged by Section 56, impossibility of performance would be inferred by the Courts from the nature of the contract and the surrounding circumstances in which it was made that the parties must have made their bargain upon the basis that a particular thing or state of things would continue to exist and because of the altered circumstances the bargain should no longer be held binding. The Courts would also infer that the foundation of the contract had disappeared either by the destruction of the subject-matter or by reason of such long interruption or delay that the performance would really in effect be that of a different contract for which the parties had not agreed[20]. It is not hardship or inconvenience or material loss which brings about the principle of frustration into play. There must be a change in the significance of obligation that the thing undertaken would, if performed, be a different thing from that which was contracted for.

While it has been observed that a *force majeure* clause cannot be implied under Indian law, the doctrine of frustration works on a different footing. The Supreme Court ruled in *Naihati*[21] that since under the Contract Act a promise may be expressed or implied, in cases where the Court gathers as a matter of construction that the contract itself contains impliedly or expressly a term according to which it would stand discharged on the happening of certain circumstances the dissolution of the contract would take place under the terms of the contract itself and such cases would be outside the purview of Section 56. There would in such a case be no question of finding out an implied term agreed to by the parties embodying a provision for discharge because the parties did not think about the matter at all nor could possibly have any intention regarding it.

In the most recent decision in *Energy Watchdog*[22], the Supreme Court recognised the test of 'radically different' for the purpose of deciding practical impossibility, while relying on the English *Sea Angel* case[23]. It was held that for frustration to occur, there has to be a break in identity between the contract as provided for and contemplated, and its performance in the new circumstances.

From the discussion and authorities cited above, it may be concluded that the employment of the *force majeure* clause to counter the effects of the pandemic rests on the language of such clauses. In cases where the impossibility, whether expressly mentioned or impliedly was or could have been within the foreseeability of the parties at the time of conclusion of the contract, the dissolution of the contract would be governed by Section 32 of the Contract Act. On the other hand, to facilitate the application of Section 56, the supervening impossibility resulting in the discharge of a contract by operation of the doctrine of frustration should have been beyond the contemplation of the parties at the time of entering into the contract.

———————

20. *Naihati Jute Mills Ltd. v. Khyaliram Jagannath* (supra).
21. Supra.
22. *Energy Watchdog v. Central Electricity Regulatory Commission and others*, (2017) 14 SCC 80.
23. *Edwinton Commercial Corpn. v. Tsavliris Russ (Worldwide Salvage and Towage) Ltd.*, 2007 EWCA Civ. 547.