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Validity of Contract in event of Force Majeure with reference to Pandemic in India and Singapore

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ABSTRACT

Purpose- The purpose of this paper is to understand the applicability of clause of Force Majeure in India and how was it dealt by the country in pandemic times. The paper also examines laws of Singapore and drew a comparative analysis of Singapore and Indian laws.

Research Implications- This research provides a preliminary understanding of applicability of force majeure clause in India as well as Singapore. It also examines the validity of contract in absence of force majeure clause and how it was useful in pandemic times.

Findings – The clause of Force Majeure has played a crucial role in the contracts especially during the lockdown when it was impossible to honor the contract due to physical disabilities. The clause exempts parties to perform their duties till the situation is back to normal. It was found that it is very important to have the clause of Force Majeure in contract to take defense under this clause in both the countries.

Originality/ Value- The paper presents a detailed analysis of Force Majeure clause and its applicability in India as well as Singapore. It also covers the validity of contract in pandemic times and how both countries dealt with the issue. The paper is based on various research papers, articles and journals which has helped to understand the different approaches of both countries in the prevailing pandemic times. As a result, whether a party may be excused from a contract because COVID-19 has been designated a pandemic is a fact-specific judgement that will be based on the nature of the party's responsibilities as well as the Contract's specific provisions.

Keywords: Force Majeure, India, Singapore, Pandemic

I. INTRODUCTION

One of the most extensively debated topics since the outbreak of Covid-19 is the application of

force majeure, particularly in business contracts. The phrase "force majeure" is a French term borrowed from the Latin expression "vis major,"

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however the French term is understood to have a broader connotation than the Latin expression.² The French phrase "force majeure" literally means "more/greater force." It's connected to the idea of a natural disaster, such as a storm or tornado, for which no one can be held responsible. Human activities, such as armed rebellion, are also covered under force majeure.

A force majeure clause is a contractual term that exempts one or both parties from performing their duties when event is beyond the parties' control, rendering contract execution impracticable or impossible. Although force majeure is not statutorily defined and the parties are free to agree contractual conditions, the law acknowledges that a force majeure provision is obligatory. There are 2 sections relevant under Indian Contract Act, 1972- Section 32 (Enforcement of Contracts contingent on an event happening) and Section 56 (Agreement to do Impossible Act).

Unlike many civil law systems, English law does not have a general notion or definition of force majeure, and it only applies to the degree that it is contractually accepted. As a result, a party's capacity to claim force majeure (and the impact on the contract in issue) will be determined by the inclusion of a force majeure provision and its specific wording.

With the nation-wide lockdown, businesses have faced recession for more time than ever. As a result, many firms are attempting to establish if they are required to comply under their contracts

or whether they may utilize a force majeure provision to temporarily or permanently excuse performance. In this paper, researcher studies the laws of force majeure, how is it applied in various jurisdictions, the circumstances where companies should claim force majeure with special reference to covid-19, as well as the alternatives accessible in the event of force majeure. Apart from this, the paper also involves a comparative analysis of Indian and Singapore laws related to Force Majeure.

(A) Research Problem

With the advent of Covid-19, it is becoming very difficult for businesses to fulfil their contractual obligations. Firms are trying to shrug off their responsibilities claiming Force Majeure but can this term be used to frustrate the contract. This is big question which needs an in-depth analysis of force majeure clause and its relation to pandemic Covid-19.

(B) Literature Review

1. J. Hunter Robinson (2020) in "Use of Force? Understanding Force Majeure Clauses" studies the history of Force Majeure, which dates back to the mid-sixteenth century in Europe, and then moves on to some of the underlying reasons and popularity of force majeure provisions in various sectors. Following that, paper also examines the use of force majeure in Indian law, with an emphasis on important cases and events in contemporary history. The researcher also examines what courts may investigate in force majeure litigation and the sorts of evidence

² Prithviraj Senthil Nathan (2020), India: Legal Principles in Invoking Force Majeure Clause <https://www.mondaq.com/india/litigation-contracts->

[and-force-majeure/926356/legal-principles-in-invoking-force-majeure-clauses-case-law-analysis](https://www.mondaq.com/india/litigation-contracts-and-force-majeure/926356/legal-principles-in-invoking-force-majeure-clauses-case-law-analysis)

claimants and defendants may marshal to prove their arguments, using the COVID-19 crisis.

2. Akshaya Chintala (2020) in “The Concept of Force Majeure in Pandemic” deals with the interpretation of word “Force Majeure” in the context of Covid-19. The researcher feels that it is important to determine the meaning and scope of Force Majeure in order to deal with the prevailing situations. The implications of the epidemic on company performance are discussed in this legal article, as well as potential contract choices that firms should consider moving ahead. This paper then continue with the Covid-19 warning about Force Majeure, taking into account recent developments and their impact on the parties' right to invoke force majeure.

3. Raj Kumar et al. (2020), in “Principle of Force Majeure - An Assessment of Commercial Contracts in India in Context of Covid -19” provide a comprehensive overview of the idea of force majeure, analyze its legal framework in India, and discuss the importance of the theory of frustration. The research goes on to look at Indian business contracts to see if Covid-19-related interruptions may be classified as Force Majeure Events. In order to understand the worldwide attitude on force majeure, this study also offers a comparative analysis from an international perspective.

4. Renjith Mathew (2021) in “Force Majeure under Contract Law in context of Covid-19 pandemic” study the clause of Force Majeure and state that there is no express provision related to the said terms in India. Following this, paper also includes judicial pronouncements on invocation of force majeure and frustration of contract. The research also includes the use of

force majeure with special reference to Covid-19 pandemic. Lastly, the researcher concludes that application of force majeure can be possible in India only if the contract has pre-mentioned the clause of force majeure.

5. Nicole Lin (2020) in “COVID-19, Implications for Contract under Singapore and English Law” examines two major paths of contractual relief: force majeure clause and doctrine of frustration of Singapore and English laws. While Singapore's stance in these two areas of law is similar to that of the English, local jurisprudence clarifies the legal situation for parties. In addition, new legislation recently passed by the Singapore Parliament provides impacted firms and people with interim relief in regard to specific contracts.

6. Wanjing Goh (2020) in “Singapore: Force Majeure and COVID-19 – Finding relief under current contracts and preparing for future events” concentrate on (a) obtaining relief under a force majeure provision in your present contract and (b) factors to consider when assigning contractual risk and drafting force majeure clauses in future contracts in Singapore. The researcher concludes stating it depends on the contractual bargain that parties are attempting to reach, and who is in a better position to bear the risks.

II. ELEMENTS OF FORCE MAJEURE

According to Black's Law Dictionary the word “Force Majeure” is defined as “an event or effect that can neither be anticipated nor be controlled. The term includes both action of nature and actions of people.”

There are no express laws specific to Force Majeure in Indian Contract Act but some sections have provision related thereto. The phrase "force majeure" is used to protect the performing party from the repercussions of something over which he has no control, according to the Hon'ble Supreme Court of India.

In *Satyabrata Ghosh v. Mugneeram Bangur*³, the SC of India recognized that when a force majeure event occurs with an express or implied clause in a contract, it is governed by Section 32 of the Indian Contract Act, whereas when a force majeure event occurs outside of the contract, it is governed by Section 56 of the Contract Act.

Section 32

It states that "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."⁴ A party to a contract with a Force Majeure provision must establish the following under Section 32:

- the force majeure clause must include the event that caused non-performance;
- the non-performance was caused by the aforementioned event;
- the non-performance was beyond the party's control; and
- there was no other method of performance.

Section 56

It states that "A contract to do an act which, after the contract 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."⁵

III. CASE LAWS (INDIA)

What constitutes force majeure under Indian contract law varies greatly according to the kind of contract agreed upon. The courts have adopted a very restricted approach to construing force majeure provisions, ruling that they can only be used if the duties have truly become impossible to fulfil, not only when they have become more onerous or less profitable. Here are some case laws to substantiate the facts.

In *Satyabrata Ghose v. Mugneeram Bangur & Co*⁶ lawsuit over the non-completion and non-allotment of a real estate project owing to the government's temporary seizure of property for military use during World War II was resolved. The question that was examined was whether the fact amounted to contract frustration. The court ruled that a contract might be declared frustrated if its fulfillment is "impractical" and "useless" in terms of parties' goals and purpose, despite it being not literally impossible. This was also the landmark case for force majeure as here court observed that section 32 and section 56 can be used for determining the application of force majeure.

In the case of *Dhanrajamal Gobindram v. Shamji*

³ *Satyabrata Ghosh v. Mugneeram Bangur* AIR 1954 SCR 310.

⁴ Indian Contract Act, 1872

⁵ Ibid

⁶ *Supra* at,2

Kalidas & Co.⁷, an agreement was made for purchase of 500 bales of cotton which was not performed. After providing notice, the seller had exercised its right of resale but buyer returned indicated that the contract was unlawful and illegal, and that they were not obligated to carry further. The phrase "ordinary force majeure clause" were used in this contract. The current appeal was dismissed by the Hon'ble Court. The argument that the contract is unclear because of the ambiguity and vagueness in the aforementioned wording in the contract's "typical force majeure provision" was rejected.

IV. FORCE MAJEURE WITH REFERENCE TO COVID-19

Legal provisions, common practice related to force majeure clauses, appraisal of Covid-19 as force majeure, condition precedent to activate the defense, and related judicial inter in the Indian context are all detailed in this section.

It should be noted that the Ministry of Finance's Department of Expenditure published an office memorandum on February 19, 2020, indicating that COVID-19 should be treated as a "natural catastrophe" and that force majeure may be used wherever it is deemed suitable.⁸ In light of Covid-19, a significant point that may emerge here is whether the shutdown of Covid-19 will be treated as a Force-Majeure event for all contracts, allowing the parties to claim impossibility of performance leeway. The next question is whether non-compliance with the agreement's

provisions will be considered a "default by either party" or a "breach of contract."

Force Majeure can be invoked in pandemic if any of the two situations mentioned below are fulfilled. Firstly, If a pandemic is explicitly included in the contractual definition of a force majeure occurrence. The addition of pandemic to the list of force-majeure occurrences will clarify if the Covid-19 pandemic will trigger a contract's force majeure provision.

Secondly, If the force majeure clause applies, it covers unusual occurrences or situations that are beyond the parties' reasonable control. If it is proven that the factual conditions created by the pandemic are beyond the affected party's reasonable control, such broad, "catch-all" language may be utilized.

As a result, whether a party may be excused from a contract because COVID-19 has been designated a pandemic is a fact-specific judgement that will be based on the nature of the party's responsibilities as well as the Contract's specific provisions.

If Covid-19 is not designated as a force majeure event, or if the contract does not contain an express force majeure provision, an injured party may seek relief under Section 56 of the Indian Contract Act, 1872 for frustration/impossibility (to perform an obligation)

V. JUDICIAL TRENDS

Here are some case laws related to Force Majeure in context with Covid-19 pandemic and in what

⁷ Dhanrajamal Gobindram v. Shamji Kalidas & Co., AIR 1961 SC 1285

⁸ Dr. Raj Kumar, *Principle of Force Majeure - An*

Assessment of Commercial Contracts in India in Context of Covid -19, (2020)

circumstances has the court allowed force majeure and in which cases has the court rejected.

In one of the present cases, *Halliburton Offshore Services Inc. v. Vedanta Limited & Anr.*,⁹ was heard by the Delhi HC, in which the petitioner claimed protection under force majeure. In this case, the petitioner requested an injunction to prevent the defendants from cashing bank guarantees that the petitioner had provided to them in support of a development work contract. The victim filed an application for an interim injunction, claiming that the petitioner was unable to execute its share of the contract due to the total lockdown and restricted movement caused by the Covid-19 pandemic in the first quarter of 2020. The Court granted the petitioner's request, acknowledging that such a lockdown is unprecedented and in the nature of force majeure, that none of the parties could have predicted this event, and that it is only fair to grant ad-interim relief for one week after the lockdown ends.

In *Ramanand and Ors v. Dr. Girish Soni & Anr.*,¹⁰ the Delhi High Court clarified its position on the meaning of force majeure in the absence of a contractual connection. The tenant in this case was renting a business space in Khan Market, Delhi, for a meagre price of Rs. 300/- per month under a lease document signed on February 1, 1975. In a review appeal filed by the landlord, the Delhi High Court delayed the eviction pending payment of Rs. 3.5 lacs in monthly rent. To determine the legal position, the court considered a number of criteria, and found

that the parties had not entered into a rent agreement or lease deed. In the lack of any contractual duty between the parties, the renter had no recourse to force majeure protection.

VI. ELEMENTS OF FORCE MAJEURE (SINGAPORE)

The phrase "force majeure" is generally recognized in Singapore to refer to a specific sort of provision that excuses a party from performing in the case of certain types of neutral occurrences, and it has a contractual origin. In Singapore, Force Majeure is largely a civil law theory, therefore it does not exist as a separate legal doctrine.

In Singapore, the theory of frustration comes closest. In general, an agreement will be automatically discharged if a frustrating event happens, which is an unanticipated event that occurs through no fault of either party and renders the parties' contractual duties impossible to execute. A simple inconvenience or additional expense in contractual performance is inadequate to make an occurrence frustrating.

In essence, Force Majeure and frustration are similar in that they both deal with circumstances that are beyond the parties' control and make it impossible for them to fulfil their contractual commitments.

The fundamental distinction is that frustration can be invoked even if the contract does not have a frustration provision, but force majeure clause cannot be invoked unless the contract has a force

⁹ *Halliburton Offshore Services Inc. v. Vedanta Limited & Anr O.M.P. (I)(COMM) & I.A. 3697/2020*

¹⁰ *Ramanand and Ors v. Dr. Girish Soni & Anr., RC. Rev. 447/2017, Delhi High Court*

majeure clause, at least under Singapore law.¹¹ Furthermore, unlike this provision, which generally offer for temporary relief with the possibility of termination in the case of protracted force majeure, frustration discharges the contract entirely.

Despite parties having complete discretion over what events will lead to invoking the clause, what repercussions or reliefs will be provided, and/or whether parties must follow a specific procedure to invoke the provision, such clauses are rarely used in negotiations because they are typically triggered only in exceptional circumstances. There are four standards forms where force majeure can be claimed.

1. FIDIC (Federation International des Ingénieurs Conseils)¹²

War, conflicts, invasions, actions of foreign adversaries, revolt, terrorism, insurgency, riots, war weapons, or natural disasters such as earthquakes all come under natural events.

2. PSSCOC (Public Sector Standard Conditions of Contract)

Certain occurrences that are typically regarded to be force majeure events are also included as "excepted risks" and/or grounds for time extensions on the public sector standard condition of contract forms. It covers unique grounds such as foreign adversaries' actions, seized power, electromagnetic radiations, or pollution by radioactivity from nuclear source, as

well as pressure waves generated by supersonic aerial devices.

3. GAFTA (Grains & Feed Trade Association)

This clause covers acts like riots, civil unrest, group of workers, mechanical failure, fire, or any unexpected and unavoidable barrier to navigation.

4. ICC (International Chamber of Commerce)

This Force Majeure Clause of 2003 includes acts which are already covered in the above-three sections. Some of them are natural disasters like cyclone, tsunami, flood etc. It also includes epidemic but does not highlight pandemic.

JUDICIAL TRENDS

In the present case of *Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd*¹³ [2014] 3 SLR 857), Singapore court observed that ban imposed by Indonesian government on sand exports was a disappointing occurrence and will constitute the frustration of contract. The court also confirmed request for compensation to sand and concrete providers.

In *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*¹⁴ a deal is signed between an English firm and a Polish company for the delivery of machinery. A \$1000 deposit is paid by the Polish firm to the English firm. War broke out between Germany and Poland where Poland was invaded by Germany. As a result of the

¹¹ Mahesh Rai, *COVID-19 – Frustration, Force Majeure or Simply Frustrating?* Legal Update (2020) https://www.drewnapier.com/DrewNapier/media/DrewNapier/3Mar2020_Covid19-frustration,-Force-Majeure-or-simply-frustrating.pdf

¹² Clause 19 of the FIDIC Red Book 1999

¹³ *Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd*. [2014] 3 SLR 857

¹⁴ *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*. [1942] UKHL 4

outbreak of war, the contract was not fulfilled. The contract stated that if the contract was frustrated (for example, if war broke out), it would be suspended for a reasonable period of time. The Polish firm sued for the \$1000 back. The court agreed with defendant allowing the contract to be frustrated.

FORCE MAJEURE WITH REFERENCE TO COVID-19 (SINGAPORE)

With the advent of Covid-19, Singapore to control the spread of disease declared a nation-wide lockdown. This led to increase in business debts and contract liabilities which the firms tried to avoid. The COVID-19 (Temporary Measures) Act (the "Covid-19 Act") was approved on April 7, 2020, and offered much-needed relief to parties unable to fulfil their contractual commitments owing to the outbreak. The provision of the act apply to certain contracts which where entered into before 25th March, 2020.

It's worth noting that the COVID Act doesn't prevent parties from acting under the Frustrated Contracts Act or under a contract's force majeure provision. This means that the non-performing party might claim compensation from the court through the clause of force majeure or frustration.¹⁵ In any case, this Act is only designed to give short-term relief, and parties will need to refer to their contractual agreement to determine where their rights will ultimately fall.

¹⁵ Nicole Lim, *COVID-19: Implications for Contracts Under Singapore & English Laws*, SINGAPORE

Requirements for Force Majeure to be Applied

COVID-19 is a virus that caused a pandemic. The exact language of the force majeure clause in question determines the application of force majeure clauses in situation of this pandemic. If the contracting parties have clearly mentioned "epidemics" or "pandemics" they stand best chance of qualifying for force majeure relief, whereas ambiguous words like "Act of God" may take more persuading. If no specific definition of force majeure is supplied, the non-performing party must determine whether the incident falls under that criterion.

Equally crucial is demonstrating that the outbreak has impacted contractual compliance in some way, according on the criteria set out in the applicable force majeure provision, whether that threshold be full "prevention," "delays," or higher cost. In reality, when the contract is governed by a law other than Singapore law, force majeure remedy as a civil law theory may be possible. As a result, conflicts of laws principles will play a role, especially if the contract in question lacks a choice of law clause.

Other big question is relief granted under Force Majeure. The courts have held that temporary relief like extension of time, reduced cost, suspension/termination of contract can be awarded depending on the case.

VII. COMPARITIVE ANALYSIS

The above sections deal with laws of Force Majeure in India as well as Singapore with

reference to Covid-19. This section will compare the laws of both countries and analyze which country dealt with the issue effectively.

As mentioned above both countries India as well as Singapore do not have any laws specific to Force Majeure. But in India, there are some sections like Section 32 and 56 in Indian Contract Act, 1872 which can be used to rule for matters related to Force Majeure. On the other hand, Singapore does not have any sections in their Contract Act which includes force majeure. The closest they have is the theory of frustration. There are separate acts and statues formed for force majeure but those are not incorporated as laws.

Both the countries are similar in dealing with the clauses of Force Majeure to some extent. The judges accept the rule of Force Majeure in both the countries if the said clauses is already agreed upon by both the parties and listed as a ground for frustration or relief in the contract. But in India if the said provision is not there, parties can seek relief under Section 56, frustration of contracts. On the other hand, in laws of Singapore force majeure clause cannot be invoked unless the contract has a force majeure clause.

Further, if we analyze the way countries dealt with Covid-19, it is quite astonishing to note that both countries dealt with pandemic in different yet effective manner. In India, an office memorandum was issued, indicating that COVID-19 should be treated as a "natural catastrophe" and that force majeure may be used wherever it is deemed suitable. On the other hand, in China the COVID-19 (Temporary

Measures) Act was approved, and offered much-needed relief to parties unable to fulfil their contractual commitments owing to the outbreak. When a counterparty receives a notification of relief, they are barred from taking certain measures, including starting court proceedings, enforcing security over immovable and movable property used for business and commerce, and terminating leases of non-residential premises.

VIII. CONCLUSION

The Covid-19 epidemic is a once-in-a-lifetime occurrence that has sparked conflicts over performance, invocation of force majeure defenses, and dissatisfaction in business contracts in India. It is a temporary obstacle that will clear itself with time. Since this is not a permanent impossibility, employing force majeure provisions where time is not of the importance of the contract looks to be a last resort that will avoid a slew of lawsuits.

Courts have played a very important role in taking a sensible approach when dealing with contracts in terms of liberal interpretation, flexibly determining impracticalities, trying to establish a link between pandemic and non-performance, mitigation efforts, granting provisional injunctions, and so on in India as well as in Singapore.

As India and Singapore both lack laws specific to force majeure, it is proposed that they develop a specific codified law dealing with force majeure events that addresses various contractual issues. Until then, parties should be cautious when including a force majeure clause in their contracts and dealing with the situation.

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