FORCE MAJEURE AMID COVID-19 CRISIS: LEGALLY EXPLAINED

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We are witnessing an unprecedented situation on account of Covid-19 which has affected almost all the countries around the globe and has officially been declared as a pandemic by the World Health Organization on March 11, 2020. Covid – 19 has disrupted almost all business operations and economic activities and its impact continues.

Due to the ongoing pandemic, many of the parties to a Commercial Contract are not being able to perform their part of obligations under the contact. In such a scenario, it is important to analyze whether a party to a contract can take recourse to force majeure clause contained in their contracts and also the effect of force majeure not specifically mentioned in the contract.

Force Majeure as defined in the Black's Law Dictionary is "an event or effect that can be neither anticipated nor controlled". The said terminology includes both acts of nature (e.g. Floods, hurricanes and earthquakes) and acts of people (e.g. Riots, strikes and wars).

The concept of force majeure has been dealt under Section 32 of the Indian Contract Act, 1872 dealing with contingent contracts. The contents of Section 32 reads as follows: -

"*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 had happened. If the event becomes impossible, such contracts become void."*

Further, it would also be important to analyze Section 56 of the Indian Contact Act, 1872 which reads as follows: -

"*56. Agreement to do impossible act – An agreement to do an act impossible in itself is void. Contract to do an act afterwards becoming impossible or unlawful- 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. Compensation for loss through non-performance of act known to be impossible or unlawful – Where one person has promised to do something which he knew, or with reasonable diligence, might have known, and which the promise did not know, to be impossible or unlawful, such promisor, must make compensation to such promise for any loss which such promise sustains through the non-performance of promise.

Now having gone through the provisions available under the Indian Contract Act, 1972 the question arises as to whether Covid-19 would qualify as force majeure event?

Answer to this would depend upon contents of each particular contract i.e. the description of force majeure clause in the Contract, what all contingencies have been covered under force majeure event. The burden of proof lies upon the party invoking the force majeure clause. The said burden of proof is efficiently discharged if the force majeure clause provides for epidemics, pandemics and government restrictions. However, it becomes diluted when the clause mentions and uses standard terms such as "act of God" or "any event beyond the control of parties to the contract."

Further, various other factors would become important to extend the benefit of Force Majeure to the party invoking it which would include adequate appraisal to the opposite party within stipulated time regarding the force majeure event. Immediate communication of the said event would also keep the possibility of minimizing damages and mitigating costs.

If the contract does not exclusively mention the Force Majeure clause then Doctrine of Frustration would come into the picture. Frustration is an English Contract Law doctrine that acts as a device to set aside contracts where an unforeseen event either renders contractual obligations impossible or radically changes the party's principal purpose for entering the contract. Frustration of Contract is impossibility of performance of contract and has been dealt under Section 56 of the Indian Contact Act, 1972.

In ***Satyabrata Ghose vs. Mugneeram Bangur & Co; AIR 1954 SC 44*** it was observed by the Apex Court that "….in cases, therefore, where the Court gathers as a matter of construction that the contract itself contained 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 altogether. Although in English Law these cases are treated as cases of frustration in India they would be dealt with under, Section 32 of the Indian Contract Act which deals with contingent contracts or similar other provisions contained in the Act.

In ***Alopi Parshad & Sons Ltd. vs. Union of India; 1960 (2) SCR 973*** it was observed that "…no matter that a contract is framed in words which taken literally or absolutely, cover what has happened, nevertheless, if the ensuing turn of events was so completely outside the contemplation of the parties that the court is satisfied that the parties, as reasonable people, cannot have intended that the contract should apply to the new situation, then the court will read the words of the contract in a qualified sense; it will restrict them to the circumstances contemplated by the parties; it will not apply them to the uncontemplated turn of events, but will do therein what is just and reasonable."

In ***Dhanrajamal Gobindram vs. Shamji Kalidas & Co.; AIR 1961 SC 1285*** it was laid down that the principal underlying the aforesaid judgment is where in a contract, the reference is made to force majeure, the intention of the parties is to save the performing duty from the consequences of anything over which it has no control. If this is the underlying meaning that comes out from the specified contractual provision, that condition about force majeure cannot be considered vague. Even if there lies some vagueness in such a clause, it is capable of being made certain and definite based on the dealings of the parties in the ordinary course of business and other related proofs.

In ***Naihati Jute Mills Ltd. vs. Hyaliram Jaganath; AIR 1968 SC 522*** it was observed that a contract is not frustrated merely because the circumstances in which it was made are altered. The performance cannot be discharged merely it has come erroneous for one of the parties to perform.

In ***Energy Watchdog vs. CERC; (2017) 14 SCC 80*** the Apex Court held "…… Force Majeure is governed by the Indian Contract Act, 1872. In so far as it is relatable to an express or implied clause in a contract… it is governed by Chapter III dealing with the contingent contracts, and more particularly, Section. 32 thereof. In so far as a force majeure event occurs

de hors the contract, it is dealt with by a rule of positive law under Section 56 of the Contract Act……

….It was further held that where the Court finds that the contract itself either impliedly or expressly contains a term, according to which performance would stand discharged under certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be dealt with under Section 32 of the Act, if however, frustration is to take place de hors the contract, it will be governed by Section 56…..

… the force majeure clause does not exhaust the possibility of unforeseen events occurring outside natural and/or non-natural events. But the thrust of their argument was really that so long as their performance is hindered by an unforeseen event, the clause applies."

Analyzing the above rulings, the Courts have consistently ruled that the concept of frustration of contract can only be called into help when there is no any force majeure clause in the contract. Further, the Apex Court has had a view that the contract is not frustrated merely because its performance has become onerous on account of turn of events.

Due to outbreak of corona virus, subsequent lockdowns and restricted movement as per directions issued by Governments, economic activities and commercial contracts have been impacted which none of the contracting parties could have foreseen. Keeping the above discussion into consideration, the implications of Covid 19 would have to be decided on case to case basis and is matter of interpretation by the Courts.