Force Majeure in the current Covid -19 lockdown

1. Background

1.1 On March 11, 2020, Covid was declared a pandemic by the World Health Organisation (WHO). In the wake of its growing threat, a nation-wide lockdown was declared by the Government of India w.e.f. March 24, 2020.

The impact of Covid is being felt all over the world. This Memo briefly addresses the questions of '*Force Majeure*' in commercial and other contracts, leading to interruptions, delays and avoidance in performance of obligations and/ or cancellation.

1.2 Force majeure clauses usually find place in contracts and provide protection from liability arising in circumstances beyond control of parties. Force Majeure events usually include acts of God, natural disasters, war-like situations, labour unrest, strikes, epidemics, pandemics and so on.

Black's Law dictionary defines 'Force Majeure' as *an event or effect that can be neither anticipated nor controlled; esp., an unexpected event that prevents someone from doing or completing something that he or she had agreed or officially planned to do. The term includes both, acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes and wars).*

2. *Force majeure under Indian law*

2.1 The Indian Contract Act, 1872 in particular, Sections 32[i] and 56[ii] become relevant. If a force majeure event is not expressly covered by contract it may still be excused if it was "frustration".

2.2 The Supreme Court[1] while referring to Section 56, held that the word 'impossible' has not been used in that Section in the sense of physical or literal impossibility. To determine whether a force majeure event has occurred, it is not necessary that performance of an act becomes impossible. A mere impracticality of performance, considering object of the agreement, will also be covered. Where an untoward event or unanticipated change of circumstance upsets the foundation on which the parties entered the agreement, the same may be an "impossibility".

2.3 The Supreme Court, referred to the English law[2] on frustration and concluded that a contract is not frustrated merely because circumstances in which it was made have

[1]Satyabrata Ghose v. Mugneeram Bangur & Co. [1954 SCR 310]
[2]Naihati Jute Mills Ltd. v. Hyaliram Jagannath, [1968 (1) SCR 821]

altered. Courts have no power to absolve a party from performance merely because performance has become onerous.

In a matter[3] decided 3 years ago, the Supreme Court observed that:

> *"37. It has also been held that applying the doctrine of frustration must always be within narrow limits. In an instructive English judgment namely, Tsakiroglou & Co. Ltd. v. Noblee Thorl GmbH, 1961 (2) All ER 179, despite the closure of the Suez canal, and despite the fact that the customary route for shipping the goods was only through the Suez canal, it was held that the contract of sale of groundnuts in that case was not frustrated, even though it would have to be performed by an alternative mode of performance which was much more expensive, namely, that the ship would now have to go around the Cape of Good Hope, which is three times the distance from Hamburg to Port Sudan. The freight for such journey was also double. Despite this, the House of Lords held that even though the contract had become more onerous to perform, it was not fundamentally altered. Where performance is otherwise possible, it is clear that a mere rise in freight price would not allow one of the parties to say that the contract was discharged by impossibility of performance.*
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> *38. This view of the law has been echoed in 'Chitty on Contracts', 31st edition. In paragraph 14-151 a rise in cost or expense has been stated not to frustrate a contract. Similarly, in 'Treitel on Frustration and Force Majeure', 3rd edition, the learned author has opined, at paragraph 12-034, that the cases provide many illustrations of the principle that a force majeure clause will not normally be construed to apply where the contract provides for an alternative mode of performance. It is clear that a more onerous method of performance by itself would not amount to a frustrating event. The same learned author also states that a mere rise in price rendering the contract more expensive to perform does not constitute frustration. (See paragraph 15-158).*
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> *39. Indeed, in England, in the celebrated Sea Angel case, 2013 (1) Lloyds Law Report 569, the modern approach to frustration is well put, and the same reads as under:*
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> *111. In my judgment, the application of the doctrine of frustration requires a multi-factorial approach. Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of the contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances. Since the subject matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and*

[3]Energy Watchdog v. CERC (2017) 14 SCC 80

> *since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as "the contemplation of the parties", the application of the doctrine can often be a difficult one. In such circumstances, the test of "radically different" is important: it tells us that the doctrine is not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances."*
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> [Emphasis supplied]

3. Govt. Memo

On February 19, 2020 the Government of India issued an Office Memorandum[4] which provides that Covid should be considered a natural calamity and force majeure may be invoked, wherever appropriate, by following due procedure. It further stated that a force majeure clause does not excuse non-performance entirely, but only suspends. Notice of force majeure has to be given as soon as it occurs. It cannot be claimed ex-post facto. If performance, in whole or in part, of any obligation under the contract is prevented, or delayed, by reason of a force majeure for a period exceeding ninety days, either party, may at its option, terminate the contract without financial repercussions.

The above Govt. Memo is with reference to Government procurement contracts. It is of no consequence on other contracts.

4. Conclusion

i. Where a contract contains a force majeure clause and its definition expressly includes pandemics, the force majeure may come to rescue.

ii. If the definition is in broader terms such as "*unforeseeable or not reasonably foreseeable, extraordinary events or circumstances beyond reasonable control of parties*", the clause may still be invoked, depending on the facts of the case and intention of the parties.

iii. Where a contract does not have any such clause, the affected party may still be able to claim relief under the common law doctrine of frustration as embodied in Section 56 of the Contract Act.

iv. The onus to prove is always on party claiming such a benefit.

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

V. Whether or not Covid will is considered a force majeure event will depend on factors such as terms of contract, context, parties' expectations, assumptions and contemplations, as to risk at the time of making the contract.

5. ***English Law***

As we understand it, applicability of force majeure is contractual. There is no generalised doctrine and it is up to the parties to define events which will preclude or excuse performance.

English Courts have generally interpreted such clauses narrowly[5]. Unless a particular event clearly falls within ambit and scope of a force majeure clause, Courts will not accept an event to be a trigger. The primary focus, (while interpreting such clauses), ought to be on whether the clause encompasses the type of event a contractual party claims is causing its non-performance. Force majeure will also not include economic problems like insufficient funds.[6]

6. **New York *Law***

Here also, as we understand, there is no automatic protection[7]. US Courts require specific trigger event(s) for a force majeure clause to come into play. Also, such an event must be unforeseeable. However, if such an event becomes foreseeable during the course of the performance of a contract, inclusion of a force majeure clause is no guarantee that the Court would provide relief[8].

In *Kel Kim Corp. v. Cent. Markets, Inc.*[9], the Court held, '*a party's non-performance will be excused "only if the force majeure clause specifically includes the event that actually prevents a party's performance.*'

In *Gulf Oil Corp. vs FERC*[10], a US Court held that to use force majeure clause as an excuse to non-performance, the event must be beyond party's control and without its fault or negligence. A party seeking to invoke force majeure must also show that there is no alternative means of performance under the contract.

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[5]Bank Line Ltd. vs. Arthur Capel & Co, (1919) A.C. 435; Kel Kim Corp. v. Cent. Mkts., Inc.,(holding that force majeure defense is narrow and excuses non-performance 'only if the force majeure clause specifically includes the event that actually prevents a party's performance').
[6]The Concadoro [1916] 2 AC 199
[7]Gen. Elec. Co. vs. Metals Res. Grp. Ltd., 741 N.Y.S.2d 218, 220 (N.Y. App. Div. 2002)
[8]United States vs. Brooks–Callaway Co., 318 U.S. 120, 122–23, 63 S.Ct. 474, 475–76, 87 L.Ed. 653 (1943)
[9]Kel Kim Corp. vs. Cent. Markets, Inc., 70 N.Y.2d 900
[10]Gulf Oil Corp. vs. Federal Energy Regulatory Commission, 706 F.2d 444, 452 (3rd Cir.1983)

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[i] **Section 32 of the Contract Act, 1872**

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.

Illustrations

(a) A makes a contract with B to buy B‟s horse if A survives C. This contract cannot be enforced by law unless and until C dies in A‟s lifetime.
(b) A makes a contract with B to sell a horse to B at a specified price, if C, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to buy the horse.
(c) A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.

[ii] **Section 56 of the Contract Act, 1872**

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 promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

Illustrations

(a) A agrees with B to discover treasure by magic. The agreement is void.
(b) A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.
(c) A contracts to marry B, being already married to C, and being forbidden by the law to which he is subject to practise polygamy, A must make compensation to B for the loss caused to her by the non-performance of his promise.
(d) A contracts to take in cargo for B at a foreign port. A‟s Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.
(e) A contracts to act at a theatre for six months in consideration of a sum paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void.