
Challenges in Commercial Contracts- Force Majeure, Indian Scenario, International Scenario and the learnings

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COVID-19

- These are tough times for businesses
- Unprecedented/ unanticipated circumstances of COVID-19 and thereafter compulsory complete lockdown has led to failure in fulfilment of the Contractual obligation in large cases
- Whether non fulfilment of obligation would be considered as a breach of contract?
- Can resort be made to the Force Majeure Clause?
- Doctrine of frustration at rescue?
- Negotiation between the parties
- Out of box thinking for a win –win situation for both the contracting parties
- Coordination, cooperation and Communication is important in the time of severe economic recession (as can be contemplated as of now) that would follow the COVID-19 pandemic.

Doctrine of Frustration in English law

- ***Taylor v. Caldwell (1863) 3 B. & S. 826***

Facts: A music-hall in which one of the contracting parties had agreed to give concerts on certain specified days was accidentally burnt by fire.

Held: Such a contract must be regarded as subject to an **implied condition** that the parties shall be excused, in case, before breach, performance becomes impossible from perishing of thing without default of the contractor

- ***Krell v. Henry 2 K.B. 740 (1903)***

Facts: Plaintiff entered into contract for renting of flat to Defendant to watch the coronation of the King. However, on sudden illness of the King, the coronation could not take place.

On suit for breach of contract, the Kings Bench ruled in favour of the Defendant holding that the **contract is frustrated**. It was held that both parties recognized that they regarded the taking place of coronation procession as the **foundation of the contract**.

Doctrine of Frustration in English law (Contd..)

- ***Robinson v. Davison L.R. (1871) 6 Exc. 269***

Facts: Court was dealing with a case of breach of contract filed by the Plaintiff on non performance of obligation to play the piano at a concert to be given by the Plaintiff on a specified day. On the day in question she was unable to perform due to illness. The contract did not contain any term as to what was to be done in case of her being too ill to perform.

Held: The illness and the consequent incapacity excused her and that the contract was in its nature **not absolute but conditional** upon her being well enough to perform.

Discharge of Contract by frustration: Statutory Provisions

- **Chapter III: Of Contingent Contracts**
- **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.
- **31. “Contingent Contract” defined-** A “contingent contract” is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.

Discharge of Contract by frustration: Statutory Provisions

- **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 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.

Contours of Section 32

- Where there is an **express term in the contract**, according to which the Contract would stand discharged on the happening of certain circumstances, the dissolution of the contract would take place under the terms of the contract itself.
- Such cases 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.

Satyabrata Ghose vs. Mugneeram Bangur and Company and Ors. (16.11.1953 - SC) : AIR 1954 SC 44

- Force Majeure clauses are to be **narrowly construed**.
Energy Watchdog v. CERC (2017) 14 SCC 80

Contours of Section 56

- Section 56 would be applicable where there is a **supervening event** which was **not contemplated** by any of the parties to the Contract, which frustrated the implementation or performance of the contract.

DDA v. Kenneth Builders (2016) 13 SCC 561

Discharge of Contract by frustration

- **Meaning of Impossibility**
- The word “impossible” has not been used in the sense of physical or literal impossibility.
- The performance of an act may not be literally impossible but it may be **impracticable and useless** from the point of view of the object and purpose which the parties had in view;
- If an untoward event or change of circumstances totally **upsets the very foundation** upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the act which he promised to do.
- When such an event or change of circumstance occurs which is so fundamental as to be regarded by law as **striking at the root of the contract** as a whole, it is the court which can pronounce the contract to be frustrated and at an end.
- The belief, knowledge and intention of the parties are evidence, but evidence only on which the court has to form its own conclusion whether the changed circumstances destroyed altogether the basis of the adventure and its underlying object.

Satyabrata Ghose vs. Mugneeram Bangur and Company and Ors. (16.11.1953 - SC) : AIR 1954 SC 44

Discharge of Contract by frustration (Contd..)

- The impossibility contemplated by Section 56 of the Contract Act is not confined to something which is not humanly possible. 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. But 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**.
Sushiladevi v. Hari Singh (1971) 2 SCC 288
- The test of "**radically different**" is important: 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.
Energy Watchdog v. CERC (2017) 14 SCC 80

Discharge of Contract by frustration (Contd..)

- When a contract contains a force majeure clause which on construction by the Court is held attracted to the facts of the case, Section 56 can have no application.

Energy Watchdog v. CERC, (2017) 14 SCC 80

- Section 56 lays down **rule of positive law**.
- Doctrine of frustration is required to be narrowly construed.
- Doctrine of frustration makes the act or part thereof, void and thus, has the effect of termination of reciprocal promises. There is no scope for temporary suspension of contract under Section 56.

• Practical Issues

Where there is change in law and resultantly, performance becomes unlawful

Mugneeram Bangar & Co. v. Gurbachan Singh, AIR 1965 SC 1523

- **Facts:** Buyer entered into agreement to purchase parcel of land. Appellant was responsible for developing the land by construction of road and drainage. As a result of requisition order, it became unlawful to do any activity on the land.
- **Held:** It was observed that activities which were rendered unlawful were not forbidden for all time but only temporarily. Observing that in the instant case, **time was not of essence in the contract**, it was held that the contract would not stand discharged.

Lease

- *Raja Dhruv Dev Chand v. Raja Harmohinder Singh AIR 1968 SC 1024*
- **Facts:** Contract of lease was entered into by the parties which was duly registered. Security in the form of earnest money was deposited by the lessee, and thereafter due to partition, the land became part of Pakistan while the parties went to India. The lessee filed suit claiming refund of security.
- **Held:** The Hon'ble Court held that **Section 56 of contract act is not applicable** where rights and obligations of parties arise under a transfer of property under lease.

Lease (Contd..)

- *Sushiladevi v. Hari Singh (1971) 2 SCC 288*
- **Facts:** In this case, there was agreement for lease which was not got registered by the parties. Due to supervening event making the performance of Contract impossible, the party claimed refund of security along with damages.
- **Held:** The Hon'ble Court held that where **there is no lease but only an agreement to lease**, Section 56 would be applicable.
- Thus, the **Courts give effect to the doctrine of frustration in case of executory contracts, and not in the case of executed contracts.**

Lease (Contd..)

- *Li Ching Wing v Xuan Yi Xiong [2004] 1 HKLRD 754*
- **Facts:** A tenant claimed doctrine of frustration as a defence when on account of SARS epidemic he was subjected to 10 day SARS related isolation order. The Court considered whether the Severe Acute Respiratory Syndrome (SARS) epidemic in 2003 operated as a frustrating event.
- **Held:** It was held that a 10-day period was insignificant in view of the 2-year duration of the lease, and although SARS may arguably be an unforeseeable event, it did not “*significantly change the nature of the outstanding contractual rights or obligations*” of the parties in this case.

Payment of wages

- If contract expressly provides for temporary discharge on account of force majeure, then the obligation to make payment will temporarily be suspended.
- **In reality, most contracts do not provide for such a clause.**
- Under Section 56, Frustration cannot be pleaded as there is no radical different change in circumstances affecting the foundation of the contract.
- Moreover, the halt in activity is only temporary.

Loan Agreements

- Generally, force majeure clause is not provided for in the loan agreements.
- **Interest liability would be attracted** even in case of events like COVID-19.
- RBI has provided relief from payment of loan installments for a period of three months but the interest meter would still continue.

When an event is contemplated under the Contract

- *Naihati Jute Mills v. Khyalliram Jagannath AIR 1968 SC 522*
- **Facts:**
- Respondents agreed to supply 2000 bales of jute. As the import of Pakistan jute required an import license, the Appellant bore the burden for the same.
- **Express provision in Contract that failure to provide import license on time, would render the Appellant liable to damages on the basis of prevailing price.**
- There was a change in Indian policy prohibiting issue of import license for import of Jute from Pakistan.
- The Appellant plead frustration as defence in suit for damages.

When an event is contemplated under the Contract (Contd..)

- *Naihati Jute Mills v. Khyalliram Jagannath AIR 1968 SC 522*
- **Held:**
- Because the consequences were contemplated in the Agreement, the Contract is not frustrated.
- In cases where a contract is frustrated, it would not become ab initio void.
- It is the performance of the contract which comes to an end, but the contract would still be in existence for purposes such as the resolution of disputes arising under or in connection with it.

When an event is contemplated under the Contract (Contd..)

Mary v. state of Kerela 2014 2 SCC 272

- A statutory contract in which **party takes absolute responsibility cannot escape liability** whatever may be the reason.
- In such a situation, events will not discharge the party from the consequence of non-performance of a contractual obligation.
- Further, in a case in which the consequences of non-performance of contract is provided in the statutory contract itself, the parties shall be bound by that and cannot take shelter behind Section 56 of the Contract Act.

Effect of Void Agreement

- In cases under Section 56, i.e where an agreement becomes void due to:
 - to do an act which is impossible is void, and
 - where a supervening event makes an act impossible or unlawful,
- Then Courts have held that where party had received any advantage under such contract at the time when the agreement is discovered to be void, is required to **restore such advantage** to the person from whom the same was received. This is expressly enacted under Section 65 of the Contract Act.
- **65. Obligation of person who has received advantage under void agreement, or contract that becomes void.—**
- **When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it.**

Effect of Void Agreement (Contd..)

- ***DDA v. Kenneth Builders (2016) 13 SCC 561***
- **Facts:** Amount of Rs. 450.01 crore was deposited by Kenneth Builders with DDA. Certain circumstances intervened, making it impracticable for Kenneth Builders to commence the construction activity on the project land.
- **Held:** DDA was directed to refund the deposit made by Kenneth Builders with interest at 6% p.a. calculated from 11.09.2006 till realization.

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- Situations where Contract does not stand frustrated

Outline of situations where Contract does not stand frustrated

1. Where time is not of essence or where no time limit is provided in the Contract for performance of reciprocal promises.
2. Where there is alternative mode of performance of contract.
3. Where parties provide for force majeure, but agree that contract would be liable to be proceeded with notwithstanding the event
4. Where the non-performance or failure to perform the contract is attributed to the Party, in the absence of force majeure
5. Where it became economically difficult/ onerous to perform the contract.

Where time is not of essence

- *Satyabrata Ghose v. Mugneeram Bangur & Co AIR 1954 SC 44*
- **Facts:**
- Parties entered into contract for sale of land.
- The contract envisaged development of land by construction of road and drainage by the developer before handing over the same to the buyer. The Collector issued an order requisitioning the land for defence purposes.
- Requisition orders are primarily temporary in nature.
- **Held:**
- On plea that the contract was frustrated, the Hon'ble Court held:
- In view of the nature and terms of contract, the actual existence of war conditions at the time when contract was entered into, the extent of the work involved in the development scheme and the total absence of any definite period of time agreed to by the parties within which work was to be completed, it cannot be said that requisition order vitally affected the contract or made its performance impossible.

Where there is alternative mode of performance of contract

Tsakiroglou & Co Ltd v Noblee Thorl GmbH, The Law Report 1962 at Page 7

- **Facts:**
- Supply of Sudanese groundnuts was interrupted due to closure of Suez Canal for navigation. But the goods could have been shipped round the Cape of Good Hope.
- **Held:**
- On plea of frustration, it was held that route via Cape of Good hope involved a **change in the method of performance, it was not such a fundamental change** from that undertaken under the Contract as to entitle to the seller to plead frustration.
- It was held that **shipment via the alternative route was not substantially different performance, i.e. no radically different performance, and that the contract had not been frustrated.** Increased costs did make the contract onerous but did not make the contractual performance radically different from the performance contemplated under the Contract.

Where parties provide for force majeure, but agree that contract would be liable to be proceeded with notwithstanding the event

- ***Energy Watchdog v. CERC, (2017) 14 SCC 80***
- **Facts:** There was increase in price of Indonesian coal as a result of which the Party plead frustration and invoked Section 56.
- **Held:** Rise in the price of fuel cannot be regarded as a force majeure event contractually.
- Since Clause 12.4 is applicable, it is difficult to appreciate a submission that in the alternative Section 56 will apply.
- As has been held in particular, in *Satyabrata Ghose case* [*Satyabrata Ghose v. Mugneeram Bangur & Co.*, 1954 SCR 310 : AIR 1954 SC 44] , when a contract contains a force majeure clause which on construction by the Court is **held attracted to the facts of the case**, Section 56 can have no application. On this short ground, this alternative submission stands disposed of.
- ***Satyabrata Ghose vs. Mugneeram Bangur and Company and Ors. (16.11.1953 - SC) : AIR 1954 SC 44***
- If the parties contemplate the possibility of an intervening circumstance which might affect the performance of the contract, but expressly stipulate that the contract would stand despite such circumstance, there can be no case of frustration because the basis of the contract being to demand performance despite the happening of a particular event, it cannot disappear when that event happens.

Where it became economically difficult/ onerous to perform the contract.

Alopi Parshad and Sons v. Union of India AIR 1960 SC 588

- **Facts:** Contract was entered into between parties, with understanding of prevalent circumstances, i.e. the occurrence of World War-II. Party agreed to supply Ghee at pre-determined price including cost of labour and other indirect expenses.
- Due to war, there was phenomenal increase in cost of inputs and cost of labour. The party plead frustration.
- **Held:** Parties are not absolved from liability merely because performance has become onerous. Furthermore, the parties understood the prevailing situation and expressly agreed for supply of Ghee at pre-determined price. Unlike the present case, where there is a fundamentally different situation, having unexpectedly emerged, the contract ceases to bind at that point

Where the non-performance or failure to perform the contract is attributed to the Party, in the absence of force majeure

Ganga Saran v. Ram Charan Ram Gopal, MANU/SC/ 0022/1951 = AIR 1952 SC 9

- **Facts:** The erring party failed to place order with Victoria Mills whose goods were to be supplied to the buyer. In a suit for damages, the supplier plead frustration as defence.
- **Held:** The doctrine of frustration cannot avail a defendant where non-performance of a contract is attributable to his own default.
- **Note:** In case the supplier/ promissor would have agreed to obtain performance from third party only on a best efforts basis, then he could plead impossibility if he is unable to obtain performance despite best efforts.

Where the non-performance is attributed for the reasons beyond control, even where all possible measures are taken

- *Sannidhi Gundayya case AIR 1927 Mad 89*
- **Facts:** There was a contract to supply imported rice. Contract contemplated delivery by railway wagons. Due to the impending war, the Government imposed “wagon restrictions” which interfered with the free and easy transport of rice.
- The existence of these restrictions was well known to all the parties.
- Owing to the shortage of wagons on account of the enforcement of the rules the defendant was not able to perform his contract. The plaintiffs sued the defendant-appellant for damages for breach of contract to deliver certain bags of rice.
- **Held:** In view of the Court, reasonable view of the contract in this case is that the seller agreed to supply the promised number of bags of rice if **after using best endeavours**, he was able to secure the necessary number of wagons.
- **The obligation to perform the contract was not absolute, but impliedly conditional.** It was held that the contract is frustrated.

- Force majeure clauses in specific Industries

Force Majeure Clause –Power sector

Example 1 - Ultra-mega power plant (UMPP) contract- PPA

Definition

“Force Majeure” or “Force Majeure Event” shall, save and except as expressly provided otherwise, mean occurrence in India of any or all of **Non-Political Event**, Indirect Political Event and Political Event, if it affects the performance by the Party claiming the benefit of Force Majeure (the “Affected Party”) of its obligations under this Agreement and which act or event

- (a) is beyond the reasonable control of the Affected Party, and
- (b) the Affected Party could not have prevented or overcome by exercise of due diligence and following Good Industry Practice, and
- (c) has Material Adverse Effect on the Affected Party

Force Majeure Clause – Power sector (Contd..)

Non-Political Event	Indirect Political Event	Political Event
<ul style="list-style-type: none"> Act of God, epidemic.. Strikes or boycotts (other than Concessionaire or Contractors) Delay /failure of overseas contractor to deliver equipment in India <p>Impact: the Parties shall bear their respective Force Majeure Costs and neither Party shall be required to pay to the other Party any costs thereof</p>	<ul style="list-style-type: none"> Any act of war... Industry wide strikes... Any civil commotion , boycott or political agitation <p>Impact: all Force Majeure Costs shall be borne by the Concessionaire till Insurance Cover limit, and to the extent Force Majeure Costs exceed such Insurance Cover, one half (50%) of such excess amount shall be reimbursed by the Utility to the Concessionaire</p>	<ul style="list-style-type: none"> Change in Law Expropriation, compulsory acquisition in national interest.. Unlawful or unauthorized or without jurisdiction revocation of or refusal to renew or grant without valid cause, any clearance, license, permit.. <p>Impact: Force Majeure Costs attributable to such Political Event shall be reimbursed by the Utility to the Concessionaire.</p>

For the avoidance of doubt, **Force Majeure Costs** may include interest payments on debt, O&M Expenses, any increase in the cost of Construction Works on account of inflation and all other costs directly attributable to the Force Majeure Event, but shall not include loss of Tariff, revenues from sale of electricity to other Distribution Licensees and Buyers or debt repayment obligations.

Force Majeure Clause – Power sector (Contd..)

Duty to report Force Majeure Event

- Upon occurrence of a Force Majeure Event, the Affected Party shall by notice report such occurrence to the other Party forthwith.
- The Affected Party shall not be entitled to any relief for or in respect of a Force Majeure Event unless it shall have notified the other Party of the occurrence of the Force Majeure Event as soon as reasonably practicable, and in any event **no later than 7 (seven) days** after the Affected Party knew, or ought reasonably to have known, of its occurrence

Termination Notice for Force Majeure Event

- If a Force Majeure Event subsists for a **period of 180 (one hundred and eighty) days or more within a continuous period of 365 (three hundred and sixty five) days**, either Party may **in its discretion** terminate this Agreement by issuing a Termination Notice to the other Party
- Upon issue of such Termination Notice, this Agreement shall, notwithstanding anything to the contrary contained herein, stand terminated forthwith; provided that before issuing such Termination Notice, the Party intending to issue the Termination Notice shall **inform the other Party of such intention and grant 15 (fifteen) days time to make a representation**, and may after the expiry of such 15 (fifteen) days period, whether or not it is in receipt of such representation, in its sole discretion issue the Termination Notice.

Force Majeure Clause – Power sector (Contd..)

Excuse from performance of obligations

If the Affected Party is rendered wholly or partially unable to perform its obligations under this Agreement because of a Force Majeure Event, **it shall be excused from performance of such of its obligations to the extent it is unable to perform on account of such Force Majeure Event; provided that:**

- a) the suspension of performance shall be of no greater scope and of no longer duration than is reasonably required by the Force Majeure Event;
- b) the Affected Party shall make all reasonable efforts to mitigate or limit damage to the other Party arising out of or as a result of the existence or occurrence of such Force Majeure Event and to cure the same with due diligence; and
- c) **when the Affected Party is able to resume performance of its obligations under this Agreement, it shall give to the other Party notice to that effect and shall promptly resume performance of its obligations hereunder.**

Force Majeure Clause – Power Sector (Contd..)

Example 2 – Power Purchase Agreement for a 2.400 MW thermal power plant

Definition

Neither party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of the Agreement to the extent that such a failure is due to force majeure events such as war, rebellion, mutiny, civil commotion, riots, strike, lock-out, **forces of nature**, accident, act of God and **any other reason beyond the control of concerned party**.

Impact

- Any party claiming the benefit of this clause shall **reasonably satisfy the other party** of the existence of such an event and given written notice within a reasonable time to the other party to this effect.
- Generation / drawl of power shall be started as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist.

Force Majeure Clause – Power Sector (Contd..)

Example 3 - EPC Contract for a Hydro Power Plant

Definition

“Force majeure” means any of the following events which affects a Party in performance of its obligations under the Contract:

- Act of God, earthquake, fire etc.
- Radioactive contamination
- **Epidemic**; and
- A situation beyond the control of and not particular to either Party resulting from war, civil commotion, nationwide strike, **blockade** or revolution

Impact

If the Contractor is prevented from performing any of its obligations under the Contract by Force Majeure, and suffers delay, **the Contractor shall be entitled to extension of time for any such delay if Commercial Operation is or will be delayed**

The Contractor is entitled to extension of time and/or any additional payment, the Contractor will give a notice to Employer for additional claim. Employer to respond with approval, and with disapproval and detailed comments.

Force Majeure Clause – Power Sector (Contd..)

Notice of Force Majeure

- If a party is or will be prevented from performing any of its obligations under the contract by Force Majeure, it shall give **a notice to other party within five (5) days** after the Affected Party becomes aware, or should have become aware of relevant event constituting Force Majeure.
- The Contractor must notify the Employer in writing of **cessation** of Force Majeure within five (5) days of such cessation
- Notwithstanding any other provisions of the Clause, **Force Majeure shall not apply to obligations of either Party to make payments to the other Party under the Contract.**

Force majeure affecting sub-contractor

If any Subcontractor is entitled under any contract or agreement relating to Works to relief from Force Majeure on terms additional or broader than those specified in the EPC contract, such additional or broader Force Majeure events or circumstances **shall not** excuse the Contractor's non-performance or entitle him to relief under this clause

Force Majeure Clause – Power Sector (Contd..)

Optional Termination and Release

If the execution of substantially all the Works in progress is prevented for a continuous **period of 180 (one hundred and eighty) consecutive days** by reason of Force Majeure, then either party may give to the other Party and the Lenders a notice of termination of the Contract. In this event, the termination shall take effect seven (7) days after the notice is given.

Payment Upon Termination

Upon such termination, the **Contractor shall proceed in accordance with Sub-Clause 16.3 [Cessation of Work and Removal of Contractor's Equipment] and shall be paid:**

- a) the amounts payable for any work carried out for which the price is stated in the Contract; and
- b) the Cost of Plant and Materials ordered for the Works which have been delivered to the Contractor, or of which Contractor is liable to accept delivery, provided this Plant and Materials shall become the property of the Employer

Force Majeure Clause – Real Estate

Example 4 - Buyers' Agreement (Residential Housing Project)

Definition

The **handover of the Unit shall be subject to force majeure clause** which includes delay on account of

- non-availability of steel and/or cement and/or other Building materials,
- water supply or electric power or slow down strike
- due to a dispute with the construction agency employed by the Company, civil commotion,
- by reasons of war, enemy action, earthquake or **any act of god**.

Impact

- If there is a delay in delivery of possession of Unit or the Company is unable to deliver the due to force majeure, the Company shall be entitled to a **reasonable extension of time** for delivery of possession of Unit
- If due to any force majeure conditions, the whole or part of the Project **is abandoned or abnormally delayed**, the Allottee shall not be entitled to prefer any claim whatsoever except that the Company shall, on demand, **refund the Allottees' money** without any interest

Force Majeure Clause – Real Estate (Contd..)

Example 5 – Collaboration Agreement

Definition

The execution and completion of the Project shall be subject to Force Majeure Event including by way of example but not by way of limitation

- political non-clearance of the project, strikes, **lockouts**,
- fires, floods,
- delay in availability of materials, riots,
- **acts of God**
- the public enemy or acts of the Sovereign Power,

Impact

- In case of any delay in completion of construction and development of the Project on account of any Force Majeure Event, **the development period shall be deemed to have been extended by the period during which the Force Majeure Event was in force.**

Force Majeure Clause – Construction of Road

- *Example 6 – construction of highway*

Release
from
Performa
nce

If the Contract is frustrated by the outbreak of war or **by any other event entirely outside the control of either the Employer or the Contractor** the Engineer shall certify that the Contract has been frustrated. The Contractor shall make the Site safe and stop work as quickly as possible after receiving this certificate and shall be paid for all work carried out before receiving it and for any work carried out afterwards to which commitment was made.

- Note: If only temporary inability to perform, then ordinarily construction contracts would not be construed as where time is of so much essence that the contract itself would get frustrated. Hence, when the normalcy returns, the contract would be required to be performed. (Refer *Satyabrata Ghose*)

Force Majeure Clause – Construction of Road (Contd..)

- *Example 7 –construction of highway*

Definition

The expression “Force Majeure” or “Force Majeure Event” shall mean occurrence in India of any or all of Non-Political Event, Indirect Political Event and Political Event, as defined in Clauses 21.2, 21.3 and 21.4 respectively, if it affects the performance by the Party claiming the benefit of Force Majeure (the “Affected Party”) of its obligations under this Agreement and which act or event:

- (i) is beyond the reasonable control of the Affected Party, and
- (ii) the Affected Party could not have prevented or overcome by exercise of due diligence and following Good Industry Practice, and
- (iii) has Material Adverse Effect on the Affected Party.

Force Majeure Clause – Construction of Road (Contd..)

Non-Political Event	A Non-Political Event shall mean one or more of the following acts or events: (a) act of God , epidemic , extremely adverse weather conditions, lightning, earthquake, landslide, cyclone, flood, volcanic eruption, chemical or radioactive contamination or ionising radiation, fire or explosion (to the extent of contamination or radiation or fire or explosion originating from a source external to the Site);
Political Event	A Political Event shall mean one or more of the following acts or events by or on account of any Government Instrumentality: (a) Change in Law, only if consequences thereof cannot be dealt with under and in accordance with the provisions of Clause 19.17;
Effect	(a) upon occurrence of a Non-Political Event, the Parties shall bear their respective Force Majeure costs and neither Party shall be required to pay to the other Party any costs thereof; (b) neither Party shall be liable in any manner whatsoever to the other Party in respect of any loss, damage, cost, expense, claims, demands and proceedings relating to or arising out of occurrence or existence of any Force Majeure Event or exercise of any right pursuant hereto.

Force Majeure Clause – Construction of Road (Contd..)

Effect	<p>(a) Upon the occurrence of any Force Majeure Event during the Construction Period, the <u>Project Completion Schedule for and in respect of the affected Works shall be extended on a day for day basis for such period as performance of the Contractor's obligations is affected on account of the Force Majeure Event or its subsisting effects.</u></p> <p>(b) If a Force Majeure Event subsists for a period of 60 (sixty) days or more within a continuous period of 120 (one hundred and twenty) days, either Party may in its discretion terminate this Agreement by issuing a Termination Notice to the other Party without being liable in any manner whatsoever</p> <p>(c) The Party intending to issue the Termination Notice shall inform the other Party of such intention and grant 15 (fifteen) days time to make a representation, and may after the expiry of such 15 (fifteen) days period, whether or not it is in receipt of such representation, in its sole discretion issue the Termination Notice.</p>
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Force Majeure Clause – Construction of Road (Contd..)

Excuse from performance of obligations

If the Affected Party is rendered wholly or partially unable to perform its obligations under this Agreement because of a Force Majeure Event, it shall be excused from performance of such of its obligations to the extent it is unable to perform on account of such Force Majeure Event; provided that:

- (a) the suspension of performance shall be of no greater scope and of no longer duration than is reasonably required by the Force Majeure Event;
- (b) the Affected Party shall make all reasonable efforts to mitigate or limit damage to the other Party arising out of or as a result of the existence or occurrence of such Force Majeure Event and to cure the same with due diligence; and
- (c) when the Affected Party is able to resume performance of its obligations under this Agreement, it shall give to the other Party notice to that effect and shall promptly resume performance of its obligations hereunder.

- India's response to COVID-19

Steps taken by Indian Government in response to COVID-19: IBC

- **Increased threshold of invoking insolvency to Rs 1,00,00,000 (Rupees one crore only) from the earlier amount of Rs 1,00,000 (Rupees one lakh only).**
- An ordinance would be promulgated to suspend three sections of IBC for up to one year and a decision in this regard was taken by the Union Cabinet. **Section 7, 9 and 10** of the IBC would be suspended for six months and the suspension time can be extended up to one year.

Steps taken by Indian Government in response to COVID-19 on payment of wages (Contd..)

- **Order No. 40-3/2020-DM-I(A) dated 29.03.2020** issued by Chairperson, National Executive Committee under Section 10(2)(1) of the Disaster Management Act
- With the object towards effective implementation of the lockdown measures, and to mitigate the economic hardship of the migrant workers, direction have been issued that **all employers, be it in the industry or in the shops and commercial establishments, to make payment of wages of their workers**, at their work places, on the due date, without any deduction, for the period their establishments are under closure during the lockdown.
- Section 10(2)(1) provides for direction by Executive Authority to States/ Union Territory Governments and State/ Union Territory Authorities. **This is not a direction to the business per se. Therefore, a view is clearly possible that qua business, this has no binding force.** Further, Section 10(2)(1) is regarding measures to be taken by them in response to any threatening disaster situation or disaster. It thus contemplate action to be taken by the authorities, and not by the Employers.

Steps taken by Indian Government in response to COVID-19 on force majeure clause(Contd..)

- *Office Memorandum No. F. 18/4/2020-PPD dated 19.02.2020 issued by Department of Expenditure, Procurement Policy Division, Ministry of Finance, Government of India.*
- Spread of Corona virus is a natural calamity and qualifies as force majeure (“FM”) event
- As per the Government policy manual used in Government contracts, a **FM clause frees both parties from contractual liability or obligation** when prevented by such events from fulfilling their obligations under the contract. **FM does not excuse performance entirely but suspends it for duration of FM**, provided notice of it is given as soon as it occurs.
- **MNRE vide Press release dated 21.04.2020**
- **Lock down to be treated as force majeure**
- The Ministry issued the following direction internally:
 - extension of time for Renewable projects (“RE”) projects on account of lockdown for period of lock down plus 30 days- blanket extension
- All implementing agencies of MNRE will treat lockdown as force majeure

Steps taken by Indian Government in response to COVID-19: Ministry of Shipping (Contd..)

- The Ministry of Shipping, vide Order No. PD-14300/4/2020-PD VII dated 31.03.2020 issued direction to all ports to ensure that **no penalties, demurrage, charges, fee, rentals are levied by Major Ports** on any port user (Traders, Shipping lines, concessionaires, licensees, etc.) for any delay in berthing, loading/ unloading operations or evacuation/ arrival of cargo caused by the reasons attributable to lockdown measures from 22.03.2020 to 14.04.2020.
- Vide order No. PD-13/33/2020-PPP/e-339106 dated 20.03.2020 and letter dated 24.03.2020, the Ministry of Shipping, has intimated all major ports that COVID-19 pandemic can be considered as '**Natural Calamity**' that would entitle invocation of 'force majeure' provisions inasmuch as obligations under various contracts (involving the major ports) are concerned.

- International response to COVID-19

International response to Force Majeure Event- Singapore

- **COVID-19 (Temporary Measures) Act 2020** enacted by the Parliament of Singapore on 07.04.2020 to provide temporary measures, and deal with other matters, relating to the COVID-19 pandemic, and to make a consequential amendment to the Property Tax Act.
- By virtue of the enactment, additional relief is provided in cases of construction and supply contracts.
- Section 6(5) provides that where subject inability occurs on or after 01.02.2020 but before the expiry of the prescribed period, then any period for which the subject inability persists and falling within that period, shall be disregarded in determining the period of delay in performance. This clause shall operate despite anything in the contract.
- In this respect, Section 5(3) provides that party (B) to Contract may not take any action inter alia commencement of any action in Court or enforcement of security over any immovable property or commencement of arbitral proceedings..

International response to Force Majeure Event- China

- In China, it is now possible to obtain “**Force Majeure-certificates**” from **CCPIT** (China Council for the Promotion of International Trade).
- The said Certificate can be utilized as proof in court proceedings vis-à-vis contracting partners and the Companies would save themselves from the damage claims raised by the other party.
- As of 3-Mar-20, CCPIT has issued 4,811 force majeure certificates due to the epidemic which covered contracts worth 373.7 billion Chinese yuan (\$53.79 billion).

International response to Force Majeure Event- United Kingdom

- **Coronavirus Act, 2020** has been brought into force w.e.f. 25 March 2020.
- Section 81, 82 and 83 relates to tenancy (business and residential) : **protection from eviction/ forfeiture**. In terms of the said sections landlord's ability to take forfeiture action for business tenancies is suspended for three months (ending on 30 June 2020 – date capable of being extended by the government)
- This means that business tenants who cannot pay their rent (which is defined to include all sums payable under a lease) will be protected from the action of forfeiture (re-entering the premise without notice) by the Landlords.
- In the case of residential tenancies, landlords will be required to give at least three months' notice for any notice seeking possession or notice to quit until 30 September 2020
- The Coronavirus Act 2020 merely suspends a landlord's ability to forfeit a lease during the suspension period. It does not prevent rent and other sums due under the lease from accruing.

Force Majeure Clause: International Chamber of Commerce

- Recently, the International Chamber of Commerce has created force majeure clauses, in order to assist parties in drafting and negotiating such clauses.

Definition.	“Force Majeure” means the occurrence of an event or circumstance (“Force Majeure Event”) that prevents or impedes a party from performing one or more of its contractual obligations under the contract, if and to the extent that the party affected by the impediment (“the Affected Party”) proves: a) That such impediment is beyond its reasonable control; and b) That it could not reasonably have been foreseen at the time of the conclusion of the contract; and c) That the effects of the impediment could not reasonably have been avoided or overcome by the Affected Party.
Non-performance by third parties.	Where a contracting party fails to perform one or more of its contractual obligations because of default by a third party whom it has engaged to perform the whole or part of the contract, the contracting party may invoke Force Majeure only to the extent that the requirements under paragraph 1 of this Clause are established both for the contracting party and for the third party

Force Majeure Clause: International Chamber of Commerce (Contd..)

- **Presumed Force Majeure Events.**

In the absence of proof to the contrary, the following events affecting a party shall be presumed to fulfil conditions (a) and (b) under paragraph 1 of this Clause, and the Affected Party only needs to prove that condition (c) of paragraph 1 is satisfied:

- a) war (whether declared or not), hostilities, invasion, act of foreign enemies, extensive military mobilisation;
- b) civil war, riot, rebellion and revolution, military or usurped power, insurrection, act of terrorism, sabotage or piracy;
- c) currency and trade restriction, embargo, sanction;
- d) **act of authority** whether lawful or unlawful, compliance with any law or governmental order, expropriation, seizure of works, requisition, nationalisation;
- e) plague, **epidemic**, natural disaster or extreme natural event;
- f) explosion, fire, destruction of equipment, prolonged break-down of transport, telecommunication, information system or energy;
- g) general labour disturbance such as boycott, strike and lock-out, go-slow, occupation of factories and premises.

Force Majeure Clause: International Chamber of Commerce (Contd..)

<ul style="list-style-type: none">• Consequences of Force Majeure	<p>A party successfully invoking this Clause is relieved from its duty to perform its obligations under the Contract and from any liability in damages or from any other contractual remedy for breach of contract.</p> <p>The other party may suspend the performance of its obligations, if applicable, from the date of the notice.</p>
Contract termination.	<p>Where the duration of the impediment invoked has the effect of substantially depriving the contracting parties of what they were reasonably entitled to expect under the contract, either party has the right to terminate the contract by notification within a reasonable period to the other party.</p> <p>Unless otherwise agreed, the parties expressly agree that the contract may be terminated by either party if the duration of the impediment exceeds 120 days.</p>
Unjust enrichment.	<p>Where paragraph pertaining to Contract Termination applies and where either contracting party has, by reason of anything done by another contracting party in the performance of the contract, derived a benefit before the termination of the contract, the party deriving such a benefit shall pay to the other party a sum of money equivalent to the value of such benefit.</p>

Hardship Clause: International Chamber of Commerce (Contd..)

- **Hardship Clause**
- When the **performance of contract becomes onerous**, the parties may negotiate inter-se to arrive at solutions. But where such negotiations fail, then more often, the only remedy before the affected party is to terminate the contract.
- With the object in view, **ICC has created a Hardship clause** to provide for either adaptation of contract with a view to restore equilibrium, or termination of contract.
- The hardship clause provides in Para 1, as a general rule that a party to a contract is bound to perform its contractual duties even if events have rendered performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract.
- Thereafter, a non-obstante clause is created, providing that, notwithstanding Para 1, where:
 - a) the continued performance of its contractual duties has become **excessively onerous** due to an event beyond its reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract; and that
 - b) it could not reasonably have avoided or overcome the event or its consequences, the parties are bound, within a reasonable time of the invocation of this Clause, to negotiate alternative contractual terms which reasonably allow to overcome the consequences of the event, then in situation where parties are unable to agree alternative contractual terms, party may agree to inter-alia provide for three types of situations. (Paragraph 2)

Hardship Clause: International Chamber of Commerce (Contd..)

3A Party to terminate	3B Judge adapt or terminate	3C Judge to terminate
<p>Where paragraph 2 of this Clause applies, but where the parties have been unable to agree alternative contractual terms as provided in that paragraph, the party invoking this Clause is entitled to terminate the contract, but cannot request adaptation by the judge or arbitrator without the agreement of the other party.</p>	<p>Where paragraph 2 of this Clause applies, but where the parties have been unable to agree alternative contractual terms as provided for in that paragraph, either party is entitled to request the judge or arbitrator to adapt the contract with a view to restoring its equilibrium, or to terminate the contract, as appropriate.</p>	<p>Where paragraph 2 of this Clause applies, but where the parties have been unable to agree alternative contractual terms as provided in that paragraph, either party is entitled to request the judge or arbitrator to declare the termination of the contract.</p>

- Learnings from COVID-19

Way Forward: Existing Contracts

- At this time, the need of the hour is that Government to come out with a statutory force majeure balancing interests of different stake holders:
 - Redefining the interest/ Principal repayment obligations
 - Rental obligations
 - Wage and salaries
 - Tax payments.
 - Creative solutions like allowing tax collection on cash receipt basis, tax deferments etc. may be adopted.
 - Schemes like Vivaad se Vishwas and Sabka Vishwas can be extended further with wider coverage.
- For the parties:
 - Wherever applicable, Notices for invocation of force majeure be issued.
 - Negotiations should immediately begin.
 - Party unable to perform his obligation must put the fact in writing.
 - Humane approach is required.
 - Parties to come out with creative contractual solutions resulting in win win situation.
 - Mutual approach would be the best approach considering Indian Legal system.

Way forward: Future contracts

- Drafting of Agreements are crucial.
- Force majeure clause should be well drafted in the manner that it should take into account the situation like COVID-19.
- The force majeure clause should properly provide for the consequences if the force majeure event happens. As far as possible, nothing should be left for interpretation by the parties.
- Even in the lease contracts, force majeure clause should be incorporated that clearly provides that if a force majeure event happens due to which it is not possible to use the rented property, then the rent will be paid at reduced rates.
- In line with the force majeure, and hardship clause provided by the International Chamber of Commerce, the hardship clause may be included in the Contract which would trigger in case the contract becomes excessively onerous.
 - It may be provided that the party may renegotiate alternate terms to deal with the said situation.
- In the arbitration clause, Arbitrator should be identified and agreed, and his details should be stated in the contract itself.

THANK YOU

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