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Contract Law in India: Coronavirus & Force Majeure

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The danger of Coronavirus (Covid-19) is clear and present, so are its implications in our everyday life. As lockdown is exercised on a massive scale across the country of India and across many jurisdictions, this rapid virus outbreak has far reaching and extraordinary effects not just socio-economically but also legally. As is known, Coronaviruses (CoV) are a large family of viruses that cause illness ranging from the common cold to more severe diseases such as Middle East Respiratory Syndrome (MERS-CoV) and Severe Acute Respiratory Syndrome (SARS-CoV). Coronavirus disease (COVID-19) is a new strain that was discovered in 2019 and had not been previously identified in humans[1]. On March 11, 2020 the World Health Organization characterized this virus as a "pandemic"[2]. In Milan, Northern Italy, where a particularly large cluster of infections have occurred, many law firms have shut their offices[3]. Depending on the magnitude of impact, the emergency measures taken by different countries has not only made it difficult to execute any commercial transactions within the country but disrupted international trade with a complete slowdown in distribution channels of export and import, hindrance in access to cheap labour and manpower from other countries and shut down of workplaces with major financial ramifications.

The Legal Possibilities

Under the English Law there are two major mechanisms to be taken into account. The first is the *Principle of Frustration* and the second is *Force Majeure.* Unlike many civil law countries, there is no codified laws in relation to the doctrine of *Force Majeure* under English law, it's the facts and circumstances that is taken into account. Rather, the treatment of an event of *Force Majeure* comes from the contract entered into between the parties. The English courts generally apply contracts strictly, according to the wording and respecting the parties' freedom to contract on their terms & conditions

[1]https://www.who.int/health-topics/coronavirus
[2]https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020.
[3] https://www.thelawyer.com/coronavirus-and-the-courts-a-boost-for-online-reform/

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Origin of the 'Principle of Frustration'

The principle of *Frustration* was initially recognised in the case ***Taylor v. Cradwell***[4] where the Claimant had agreed to hire a musical hall from the defendant. However, prior to the grand concert, the hall was destroyed by fire. Now the legal issue that arose was whether the rights and liabilities of the parties to the contract could be excused owing to the fire in the hall. If the *Doctrine of Obligation* is taken into consideration then the defendant would be liable to the claimant because they would no longer be able to perform their obligation for which the whole contract was entered into.

However, in the instant case Justice Blackburn described the harshness of the Doctrine of Obligation and released the defendant under the *Principle of Frustration*. Further it was clearly stated that if the parties were forced to continue their obligations even though the musical hall no longer existed, then the performance would be different when the parties agreed to undertake at the time of existence of the musical hall. Further in the case ***Krell v. Henry***[5] where the 'Principle of Frustration' was set forth and it was laid down that a party's obligations are discharged where a party's purpose is frustrated without fault by the occurrence of an event, which the non-occurrence of which was a basic assumption on which the contract was made.

Doctrine of Frustration under the Indian Contract Act, 1872

Section 56 of the Indian Contract Act, 1872 enshrined the '*Doctrine of Frustration'*. In ***Satyabrata Ghose v. Mugneeram Bangur & Co.***[6], the Hon'ble Supreme Court of India dealt with the aforesaid doctrine and expressed as follows:

"The word "impossible" has not been used in the Section 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 of the parties. If an untoward event or change of circumstance totally upsets the very foundation upon which the parties entered their agreement, it can be said that the promisor finds it impossible to do the act which he had promised to do."

It has also been held by the Supreme Court that applying the doctrine of frustration must always be within narrow limits by referring to an instructive English judgment namely, ***Tsakiroglou & Co. Ltd. v. Noblee Thorl GmbH***[7]**,** wherein despite the closure of the Suez canal, and despite the fact that the customary route for shipping the goods was only through the

[4] [1863] 3 B&S 826.
[5] [1903] 2 KB 740
[6] 1954 SCR 310
[7] 1961 (2) All ER 179

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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*.

Force Majeure

The word '*Force Majeure' or 'Vis Major*' has been derived from the French Language which means 'A superior force'. It cannot be defined as an even or effect that can be anticipated or controlled by a human being. The term includes both Acts of nature i.e. floods, hurricanes etc. and Acts of humans i.e. strike, riots etc. In other words, '*force majeure*' refers to "events outside the control of the parties and which prevent one or both the parties from performing their contractual obligations"[8]. Unlike civil law countries where the concept of force majeure is codified, in common law countries it is introduced by way of contract i.e. agreement between the competent parties.

In India, a common law country, the '*force majeure'* clause is generally included as and when there is a written contract between parties. The reason behind incorporating such clause is to save the party from the consequences of any event or effect taking place and that is out of the control of the performing party. In the event of any delay in performing of obligations by any or all the parties, such parties are excused owing to the operation of such clause. In some cases, depending of course on the wording of the agreement in question, existence or arising of any such *force majeure* may even lead to the termination of the contract itself in case the event triggering the clause continues for a prolonged period of time.

In India '*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 envisaged in Section 32. In so far as a force majeure event occurs de hors (outside the scope) the contract, it is dealt with by a rule of positive law under Section 56 of the Indian Contract Act, 1872[9].

[8] Black's Law Dictionary, 11th Edition

[9] Energy Watchdog vs. Central Electricity Regulatory Commission & Ors; [*2017) 14 SCC 80.*], Para 32.

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Could coronavirus be a legally frustrating event or* force majeure *under the Indian Contract Act, 1872

Sections 32 and 56 are set out herein:

"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.

56. Agreement to do impossible act - An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible. 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, 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 promise for any loss which such promisee sustains through the non-performance of the promise[10]."

Thus it can be concluded that if 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 (i.e. Force Majeure) of the Act. If, however, frustration is to take place de hors (outside the scope) the contract, it will be governed by Section 56[11] (Doctrine of Frustration).

Law of Limitation amidst the outbreak

The Law of Limitation prescribes the time limit for different suits, complaints, petitions, appeals within which the plaintiff/petitioner can approach the Court to seek justice or an efficacious remedy. The suits/cases filed after the prescribed time period is barred by the Law of Limitation. Amidst this virulent outbreak of Covid-19 where the whole country is in mandatory lockdown with no appropriate platform available or open to take the course of justice and even lawyers are required to ensure to stay at home, there was a concern about the many difficulties faced by the litigants across the country in filing cases e.g. suits, complaints, petitions, appeals or even filing pleadings (affidavits, applications) in existing cases within the stipulated time. As failure to file any cases or pleadings within the limitation period could effectively render their cases infructuous. In such circumstances, in a welcome

[10] Ibid.

[11] Satyabrata Ghose v. Mugneeram Bangur & Co. [1954 SCR 310]

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move, the Hon'ble Supreme Court of India, while **exercising the powers under Article 142 read with Article 141 of the Constitution of India,** has *Suo-moto* taken the cognizance of the difficulties faced by the litigants to file within the prescribed Law of Limitation and to mitigate such difficulties ordered that a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws, whether condonable or not, shall stand extended w.e.f. March 15, 2020 till further order/s to be passed by this Court in present proceedings[12].

Conclusion

In light of the current lockdowns, it is obvious that the shutdown of the industries in various sectors shall not only cause an adverse effect in the supply chain but also have a great effect in the cross-border transactions which will lead to the downward slope of the graph in foreign investments or cross border transactions and many other commercial activities. For instance, as reported in the Wall Street Journal, China's exports declined 17.2% in the January-February 2020 period compared with a year earlier—the biggest decline in nearly a year.

In India, the Department of Expenditure, Ministry of Finance issued an Office Memorandum on February 19, 2020, in relation to the Government's 'Manual for Procurement of Goods, 2017', which serves as a guideline for procurement by the Government. The Office Memorandum effectively states that the COVID-19 outbreak could be covered by a *force majeure* clause on the basis that it is a 'natural calamity', caveating that 'due procedure' should be followed by any Government department seeking to invoke it[13]. However, if the contract does not include a force majeure clause, the affected party could claim relief under the *doctrine of frustration* under Section 56 of the Indian Contract Act, 1872. However, in order to claim that the contract is frustrated, it must be established that the performance of the contractual obligations has become impossible by reason of some event which the claiming party could not prevent and that the impossibility is not self-induced by the claiming party or due to his negligence.

Therefore Courts, while determining contracts or their breach or enforceability, will have to scrutinise how this dangerous Covid-19 (Coronavirus) outbreak has prevented parties from performing their obligations envisaged in a particular contract. The step taken by the government, vide the above mentioned Office Memorandum dated February 19, 2020, is of course important as it provides clarity to courts with regards to the issue of non-performance under a contract amidst the virus outbreak.

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[12] https://main.sci.gov.in/supremecourt/2020/10787/10787_2020_1_12_21570_Order_23-Mar-2020.pdf
[13] https://doe.gov.in/sites/default/files/Force%20Majeure%20Clause%20-FMC.pdf

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It may also be seen as an opportunity for parties in countries affected by the virus outbreak to even consider reviewing their contracts in order to find a suitable way ahead rather than just concentrate on creating a dispute. As and when the party will invoke the *force majeure* clause to justify non-performance of any obligations under a contract, such party shall have to justify in that court of law as to how this outbreak qualifies as a *force majeure*. At every such dispute before the adjudicating authority, the party will give appropriate reasons in their pleadings as to how the outbreak has impacted their performance in terms of issues like ban on exports or imports, visa bans, closure of airports and sea ports, restriction on interstate travel, government authorised lockdowns and quarantines or any such events which are outside the control thereby necessitating the invoking of *force majeure*.

To conclude, the rights and liabilities of contracting parties shall be determined by the inspection of the provisions of the contracts on a case per case basis. However, prima facie it seems that considering global precedents in other previous outbreaks e.g. the Ebola outbreak in African nations, it will surely be a more than plausible argument that this current situation with the Covid-19 qualifies as a *force majeure* which in turn would entitle contracting parties to seek various reliefs from courts like escape from liabilities owing to non-performance of covenants and obligations, entitlement for additional timelines to perform obligations, monetary relief or any such reliefs depending on the facts and circumstances.