

IS CORONA PANDEMIC YOUR FORCE MAJEURE EVENT?

(This article analyses the concept of Force Majeure and the Doctrine of Frustration of Contracts against the backdrop of the ongoing Covid-19 Pandemic. The article also discusses the triggering effects which may result from the application of the doctrine in different jurisdictions.)

“When the unprecedented ‘Act of God’ pauses the reckless march of the mankind...”

The on-going Covid-19 Pandemic and the ensuing mass business disruption worldwide, the innocuous Force Majeure clause existing in most of the contracts, has generated a lot of interest. Hitherto considered as a “miscellaneous” condition, the clause has now become the proverbial “last straw to be clutched” amongst the beleaguered businesses. Based on the universally acknowledged Doctrine of Frustration, the Force Majeure condition may well extensively be used as a tool mitigate liability by promoters, guarantors, suppliers, and others.

The Chinese government took unprecedented step of issuing “Force Majeure Certificates” to certain companies. Likewise, the Indian Government, vide circular No F 18/4/2020-PPD dated 19.2.2020 extended the limitation and clarified that the disruption of supply chains will be covered under the Force Majeure Clause, wherever applicable and gave official recognition to the application of Force Majeure in various other situations. However, the validity of these certificates or circulars is yet to withstand the scrutiny of the courts in different jurisdictions and there may be several other situations which may or may not qualify as Force Majeure events.

In the aforesaid scenario, a common question being asked is whether and in what manner, the protection of Force Majeure can be sought by the parties on account of the New Corona Pandemic?

What is Force Majeure?

A French term, “Force Majeure” literally means a “superior force”. The term is used to describe situations which prevent continuation or compliance of a contract amidst the parties, on account of occurrence of an unforeseen event which may be beyond the control of the parties. Black’s Law Dictionary defines Force Majeure as “An event or effect that can be neither anticipated nor controlled.” Force Majeure as an enabler for rescission of a contract without suffering any damages, depends in part on the governing law of the contract, and in part on the construction of the contract.

Construction of the Force Majeure Clause in Contracts

Force Majeure clauses are often included in contracts to excuse a party to the contract from performing its obligations under the contract under certain conditions outside the party’s control. Force Majeure clauses allocate

risks between the contracting parties if performance becomes impossible or impracticable because of an unforeseen event. A party may well be allowed by the courts to use the doctrine to seek a discharge of its obligations when faced with an external event that may make its performance under a contract onerous, impracticable, or even impossible.

Typically, a standard Force Majeure clause includes riots, earthquakes, fire, wars, floods, epidemics, explosions, hurricanes, prolonged shortage of goods, strikes & lockouts, slowdowns, governmental action, or any other event beyond the control of a party, impeding or prohibiting it from performance of its obligations under the contract.

The clause may be contractually limited by the parties, by making a specific provision dealing with the supervening event, thereby allocating risk in terms of that occurrence, or the scope of the clause may be specifically expanded by including certain events within its scope, which may otherwise not be strictly covered as Force Majeure events. Some contracts may even contain a waiver of the Force Majeure conditions and may make the operation of the contract absolute, notwithstanding the change in the circumstances.

Under the Indian law, Section 56 of the Indian Contract Act, 1872 provides protection to a party in case of the non-performance of a contract, if the contract, after it is made, becomes impossible or unlawful, for reasons beyond the control of the promisor. The said provision under the Contract Act simultaneously limits the scope of Force Majeure to only unforeseen events, and not such events which a promisor may have known, with reasonable diligence, at the time of making the contract. The Indian law further allows the parties to the contract to limit or expand the scope of the Force Majeure clause. Likewise, in France, Netherlands, Germany and various other civil law jurisdictions, the concept is admissible, subject to the twin test of “unforeseeability” and “impossibility to perform” as the fundamental requirements for an event to be considered Force Majeure.

As distinct from the aforesaid civil law jurisdictions, under the English law, Force Majeure is not specifically defined in the statutes. Further, there is no implied application of the concept into a contract, and the parties can only place reliance on an express condition, the formulation of the clause and the non-exhaustive list of events that are often included in a Force Majeure clause. For an event to be held frustrated, it has to be shown that the event was unforeseen, and not attributable to the party seeking to rely upon it and that the contract’s performance had been rendered impossible or that the fundamental purpose of the contract stands destroyed.

Would Corona Trigger Force Majeure?

So, would the mere happening of an event which is unforeseen, such as the current ongoing pandemic, give a party a sufficient reason to rescind or terminate the contract? The answer is “not necessarily”. Depending on the applicable laws and the situation, triggering of a Force Majeure event could lead to any of the possible outcomes, viz. Suspension of Contractual Obligations, Extension of Time to Perform, Retroactive Cancellation, Termination

without Liability, Reduction or alteration in the Scope of the Agreement, Closure of Claims & Counter Claims under the Agreement.

During the SARS outbreak in China, the Court in Hong Kong in *Li Ching Wing v. Xuan Yi Xiong* ([2004] 1 HKLRD 754) had rejected the plea of a tenant who had pleaded frustration and discharge of lease due to mere 10 days isolation ordered by the Government. It held that isolation was only for a limited period as juxtaposed to the period of lease given in the contract.

The Supreme Court of India in its several decisions viz., *Satyabrata Ghose vs. Mugneeram Bangur and Company and Ors.* (AIR 1954 SC 44), *Govindbhai Gordhanbhai Patel and others vs. Gulam Abbas Mulla Allibhai and others* (AIR 1977 SCC 1019), *Smt. Sushila Devi v. Hari Singh* (AIR 1971 SC 1756), has held that “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 found it impossible to do the act which he promised to do.”

In *Taylor v. Caldwell* (3 B. & S. 826, 122 E.R. 309 (Q.B.) [Taylor]), Blackburn J. excused non-performance of both parties i.e., liability of defendant for supply of music hall and obligation of payment by plaintiff where it was shown that the subject matter (Theatre Hall in this case) had itself been destroyed on account of fire.

Pre & Post Pandemic Contracts

In the Pre-Covid outbreak period, there may be a chance that if the clause had been strictly formulated and had been designed to make its application limited, then the non-defaulting party may claim that the risks had been allocated and the other party had agreed to cover the epidemic. If the contract includes pandemics, epidemics, or quarantine then it will be more likely for the courts to accept application of Force Majeure applicable to such contracts, given that the World Health Organisation on 11 March declared COVID-19 a pandemic and several countries have imposed quarantines in attempts to contain the spread of the virus. However, the disruption resulting from coronavirus, is now a known situation and may not be capable of triggering a Force Majeure clause in the contracts which are now being executed or which are yet to be entered into.

Notwithstanding the inclusion of a Force Majeure clause in the contract, the courts ordinarily will look for existence of certain indices for permitting the application of the doctrine to a given situation, which inter alia may include conduct of the parties, endeavor to mitigate losses, Force Majeure condition being the sole effective cause leading to impossibility to perform, alternative methods of performance etc. In *Seadrill Ghana Limited v Tullow Ghana Limited*, Teare J, held that the party relying on the doctrine, had to show that it had undertaken “reasonable endeavors” to tide over the Force Majeure condition.

The courts may look at the conduct of the party, that seeks to take the plea of Force Majeure for negating its contractual obligations. Thus, it would be essential for the party to show that it was ready and willing to perform

the contract, had it not been for the Force Majeure event occurring, and further that the Party had taken all reasonable steps to mitigate the losses when it became aware of the event.

In respect of most jurisdictions, it is generally seen that the courts are more inclined to adhere to the principle of pacta sunt servanda (Latin: “agreements must be kept”), arguably the oldest principle of the International Law. Thus, wherever possible, the courts insist on performance of the contract, and may permit suspension of the contract for the duration of the intervening period, rather than upholding a complete frustration of the contractual obligations.

In the aforesaid scenario, whether the Covid-19 disruption is capable of triggering the Force Majeure effect, cannot be answered with a single standard response. The issue of applicability of the condition, and consequences thereof may give rise to different outcomes, various permutations are likely to result, if at all the application of the Force Majeure and Doctrine of Frustration of Contract are found permissible. Disputes impacting declarations of Force Majeure as a causation of the New Corona virus, seem inevitable. It would thus be advisable for parties to undertake a risk-cost analysis of their particular circumstances, to understand if the current crisis can act as their Force Majeure event to mitigate their liabilities and losses.

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