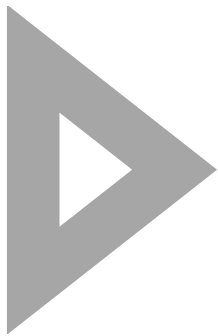


March, 2020

TIME IT OR TIME OUT **FORCE MAJEURE**



Legal intelligence Series-COVID | Part I

AHMEDABAD | BENGALURU | NEW DELHI | KOLKATA | MUMBAI

Force Majeure Evaluation

Is your business immune to covid-19 **risk implications**?

Have you **rightly invoked** the force majeure?

Have you **correctly identified** the events of the force majeure?

The background for this evaluation can be understood with the aid of legislation, precedents, recent developments, contract, etc.



What's Force Majeure in Indian law?

Force majeure means extraordinary events, situations or circumstances beyond human control such as an event described as an act of God or superior force. They obstruct the continuation or lawful existence of a contract amidst the parties.

A force majeure clause in a contract is an expressed provision to identify those circumstances or situations in which performance under the contract by either one or both the parties become impossible to be carried out.

In other words, a force majeure clause in the contract frees both parties from contractual liability or obligation when prevented by stipulated or specified events from fulfilling their obligations under the contract.



Parties to the contract mutually decide over the list of events to be categorized under this clause which includes acts of war, riots, fire, flood, hurricane, earthquake, explosion, strikes, lockouts, slowdowns, prolonged shortage of supplies, governmental action prohibiting or impeding any party from performing its respective obligations under the contract causing its frustration.

It is pertinent to note that a force majeure clause does not excuse a party's performance entirely, but only suspends it for the duration of the force majeure.

However, if the force majeure clause provides that where force majeure continues for more than a stipulated period then either party may at its own option terminate the contract without any financial repercussion on either side.

ac-tiv-ity (ak
normal power of
act of God n. As
happening caused
tor (ak'tor) n. A

What is the legal provision of claims for Force Majeure in Indian law?

The provision of force majeure is provided under Section 56 of the Indian Contract Act, 1872 ('the Act'). The relevant portion of the Section 56 is reproduced as under:


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

Contract to do 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.

Invocation of force majeure

The sine qua non for invocation of Section 56 is as below:

- *an existence of a valid contract between the parties;*
- *the contract is yet to be performed; and*
- *the contract after it is entered into becomes impossible to perform due to fact or law.*

A close-up photograph of a person's hand holding a white rectangular card. The word 'Impossible' is written on the card in a large, blue, cursive script. The background is a dark, textured wooden surface.

It is imperative to note that force majeure is present in common law as the doctrine of contract. In other words, Doctrine of Frustration is an inbuilt factor in Section 56 of the Act. However, it can neither be invoked in case of commercial hardship nor can be used as a device to avoid a bad bargain.

In Ganga Saran v. Ram Charan [1952] S.C.R. 36 at 52, where Fazl Ali J speaking for the three member bench of Supreme Court held that;

“It seems necessary for us to emphasise that so far as the courts in this country are concerned, they must look primarily to the law as embodied in sections 32 and 56 of the Indian Contract Act, 1872.”

The heart to the Doctrine of frustration travels through Section 32 and hence it should be read together for the purpose of Section 56.

According to Chitty-

Frustration is so much concerned with the change in circumstances that it cancels the base of the contract as a whole or in case of performance makes it different with that which was in consideration by the parties in the beginning and is concluded by the legal order.



Analysis of Section 56

In Satyabrata Ghose Vs. Mugneeram Bangur and Co. and anr. AIR 1954 SC 44, Mukherjee J., a Single bench of Supreme Court illustrated the doctrine of frustration and also dealt with Section 56 at length as under:

On Section 56

“The first paragraph of the section lays down the law in the same way as in England. It speaks of something which is impossible inherently or by its very nature, and no one can obviously be directed to perform such an act. The second paragraph enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done. The wording of this paragraph is quite general, and though the illustrations attached to it are not at all happy, they cannot derogate from the general words used in the enactment. This much is clear that the word 'impossible' has not been used here 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; and 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.

Sec. 56 laid down a rule of positive law and did not leave the matter to be determined according to the intention of the parties. Since under the Contract Act a promise may be expressed or implied, in cases where the court gathers as a matter of construction that the contract itself contains 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 sec.”

Impossible & frustration

“Although various theories have been propounded by the Judges and jurists in England regarding the juridical basis of the doctrine of frustration, yet the essential idea upon which the doctrine is based is that of impossibility of performance of the contract; in fact impossibility and frustration are often used as interchangeable expressions. The changed circumstances, it is said, make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility.

The parties shall be excused, as Lord Loreburn says, *Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd.* [1916] 2 A.C. 397, 403, 'if substantially the whole contract becomes impossible of performance or in other words impracticable by some cause for which neither was responsible.'”

“We hold, therefore, that the doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act. It would be incorrect to say that Section 56 of the Contract Act applies only to cases of physical impossibility and that where this section is not applicable, recourse can be had to the principles of English law on the subject of frustration. It must be held also that to the extent that the Indian Contract Act deals with a particular subject, it is exhaustive upon the same and it is not permissible to import the principles of English law de hors these statutory provisions.

The decisions of the English courts possess only a persuasive value and may be helpful in showing how the courts in England have decided cases under circumstances similar to those which have come before our courts.”

Under Indian laws, whether proving the existence of force majeure can release the duty?

Yes, the onus lies on the party who wants to invoke the force majeure clause to establish an existence of such events, circumstances or conditions which result into force majeure.

Once it is established, the burden of proof stands discharged for the stipulated or specified period of force majeure.



How do the Indian precedents define Force Majeure?

Over the years, Courts in India have dealt with various situations where they have defined or illustrated force majeure in different manners. Some of those are enlisted below.

a. In *Dhanrajamal Gobindram vs Shamji Kalidas And Co.*, AIR 1961 SC 1285, the Supreme Court dealing with force majeure held that,

"19. McCardie J. in Lebeaupin v. Crispin ([1920] 2 K.B. 714), has given an account of what is meant by "force majeure" with reference to its history. The expression "force majeure" is not a mere French version of the Latin expression "vis major". It is undoubtedly a term of wider import. Difficulties have arisen in the past as to what could legitimately be included in "force majeure". Judges have agreed that strikes, breakdown of machinery, which, though normally not included in "vis major" are included in "force majeure". An analysis of rulings on the subject into which it is not necessary in this case to go, shows that where reference is made to "force majeure", the intention is to save the performing party from the consequences of anything over which he has no control.

This is the widest meaning that can be given to "force majeure", and even if this be the meaning, it is obvious that the condition about "force majeure" in the agreement was not vague. The use of the word "usual" makes all the difference, and the meaning of the condition may be made certain by evidence about a force majeure clause, which was in contemplation of parties.

b. In *Energy Watchdog vs Central Electricity Regulatory*, Civil Appeal Nos.5399-5400 of 2016, the Supreme Court held that,

"Force majeure" is governed by the Indian Contract Act, 1872. The Supreme Court held: "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. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view".

c. Similarly, in *Alopi Parshad & Sons Ltd. v. Union of India*, [1960 (2) SCR 793], the Supreme Court observed that,

"the Act does not enable a party to a contract to ignore the express covenants thereof and to claim payment of consideration, for performance of the contract at rates different from the stipulated rates, on a vague plea of equity. Parties to an executable contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, for example, a wholly abnormal rise or fall in prices which is an unexpected obstacle to execution. This does not in itself get rid of the bargain they have made."

At various points of time, different Courts of India and England have dealt with the subject matter but the concept and substance of the entire concept more or less remains the same subject to facts and contracts which vary from case to case.



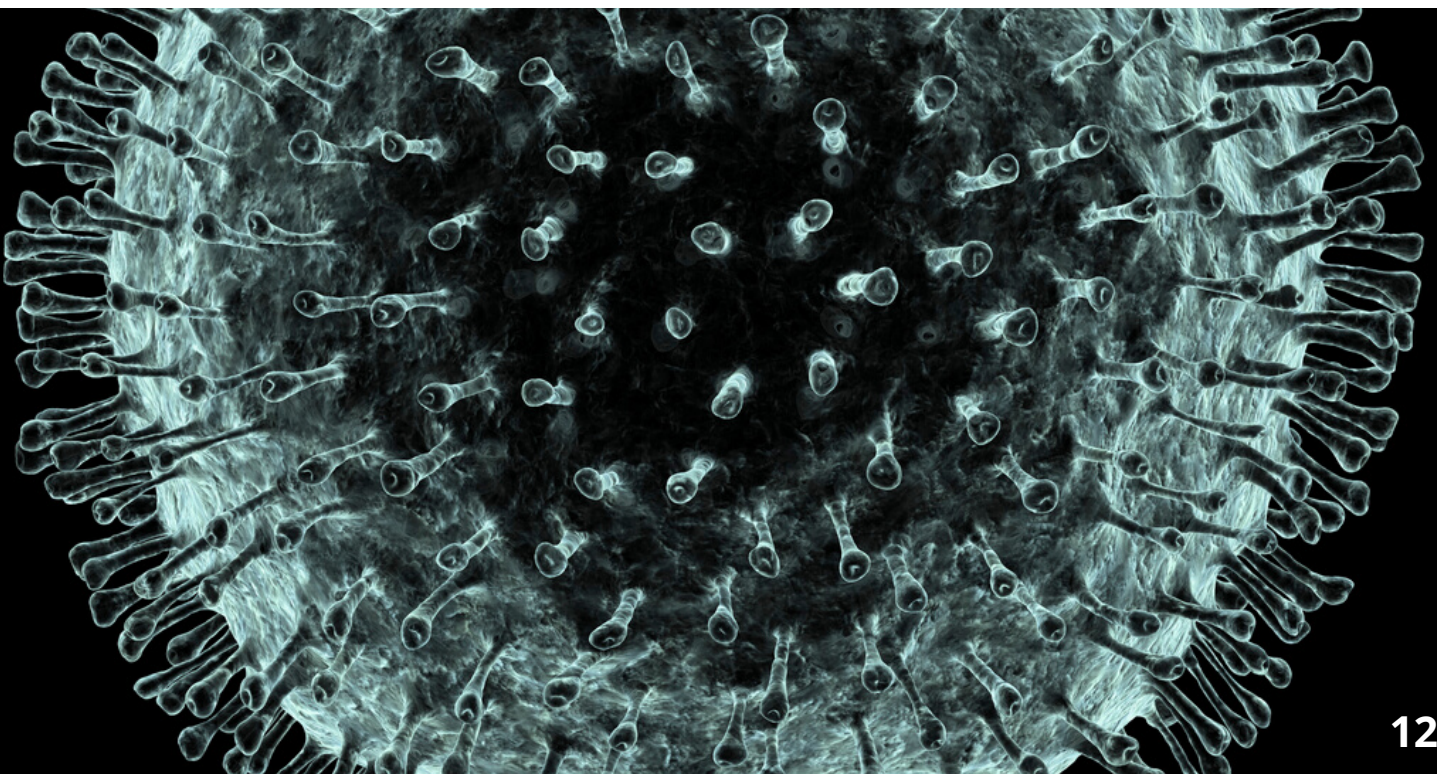
Whether or not the Indian government or relevant departments regard COVID-19 as force majeure?

Yes, the Indian Government has considered the outbreak of COVID-19 as force majeure.

The Ministry of Finance of India has issued a clarification through an office memorandum vide F.18/4/2020-PPD as below:

“2. A doubt has arisen if the disruption of the supply chains due to spread of corona virus in China or any other country will be covered in the Force Majeure Clause (FMC). In this regard it is clarified that it should be considered as a case of natural calamity and FMC may be invoked, wherever considered appropriate, following the due procedure as above.”

The epidemic COVID-19 has globally impacted almost every industry in India. It has also derailed the growth of economies of many countries.



Force Majeure Dilemma

The multi billion dollar questions which are hitting most of the industry are as below;

a. When to invoke force majeure?

b. How to invoke force majeure?

c. Even if the contract does not include pandemic under force majeure clause, can it be invoked?

d. Can force majeure notice be sent through e-mail?

e. Can lockout still result into force majeure?

f. Can there be series of events leading to force majeure? etc.,

Industry must realise the correct course of action for them.



ABOUT US

AMLEGALS is a multi-specialised law firm. We would love to hear your views, queries, feedback and comments on anand@amlegals.com or shailesh.dalvi@amlegals.com.

AHMEDABAD

201 - 203, WestFace, Opp. Baghban Party Plot,
Zydus Hospital Road, Thaltej, Ahmedabad – 380 054,
Gujarat, India.
+91 - 84485 48549 | +91-83478 53565 | +91- 84605 48996
www.amlegals.com | info@amlegals.com


MUMBAI

1207, Dalamal Tower, Nariman Point, Mumbai – 400 021,
Maharashtra, India.
+91 - 84485 48549 | +91-88511 67622 | +91-22-6666 6265
www.amlegals.com | mumbai@amlegals.com

KOLKATA

3rd floor, Surabhi Building,
8/1/2 Loudon Street, Beside Birla high School for Girls,
Kolkata- 700017, West Bengal, India
+91-9999764317 | +91-84485 48549
www.amlegals.com | kolkata@amlegals.com

NEW DELHI | BENGALURU | JAIPUR | PUNE | CHENNAI | ALLAHABAD



“Correct Knowledge & Legal Strategy matters the most in law.”

© Copyright **AMLEGALS**.

Disclaimer: The information contained in this document is intended for informational purposes only and does not constitute legal opinion, advice or any advertisement. This document is not intended to address the circumstances of any particular individual or corporate body. Readers should not act on the information provided herein without appropriate professional advice after a thorough examination of the facts and circumstances of a particular situation. There can be no assurance that the judicial/quasi-judicial authorities may not take a position contrary to the views mentioned herein.