

ISSN: 2582 - 2942



# LEX FORTI

---

LEGAL JOURNAL

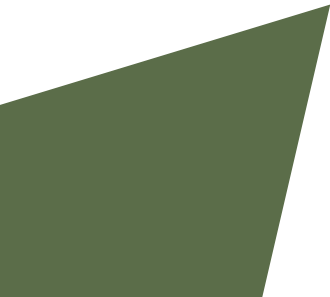
VOL- I ISSUE- V

JUNE 2020

# DISCLAIMER

---

NO PART OF THIS PUBLICATION MAY BE REPRODUCED OR COPIED IN ANY FORM BY ANY MEANS WITHOUT PRIOR WRITTEN PERMISSION OF EDITOR-IN-CHIEF OF LEXFORTI LEGAL JOURNAL. THE EDITORIAL TEAM OF LEXFORTI LEGAL JOURNAL HOLDS THE COPYRIGHT TO ALL ARTICLES CONTRIBUTED TO THIS PUBLICATION. THE VIEWS EXPRESSED IN THIS PUBLICATION ARE PURELY PERSONAL OPINIONS OF THE AUTHORS AND DO NOT REFLECT THE VIEWS OF THE EDITORIAL TEAM OF LEXFORTI. THOUGH ALL EFFORTS ARE MADE TO ENSURE THE ACCURACY AND CORRECTNESS OF THE INFORMATION PUBLISHED, LEXFORTI SHALL NOT BE RESPONSIBLE FOR ANY ERRORS CAUSED DUE TO OVERSIGHT OTHERWISE.



ISSN: 2582 - 2942

# EDITORIAL BOARD

---

## EDITOR IN CHIEF

ROHIT PRADHAN

ADVOCATE PRIME DISPUTE

PHONE - +91-8757182705

EMAIL - LEX.FORTII@GMAIL.COM

## EDITOR IN CHIEF

MS.SRIDHRUTI CHITRAPU

MEMBER || CHARTED INSTITUTE  
OF ARBITRATORS

PHONE - +91-8500832102

## EDITOR

NAGESHWAR RAO

PROFESSOR (BANKING LAW) EXP. 8+ YEARS; 11+ YEARS WORK EXP. AT ICFAI; 28+ YEARS WORK EXPERIENCE IN BANKING SECTOR; CONTENT WRITER FOR BUSINESS TIMES AND ECONOMIC TIMES; EDITED 50+ BOOKS ON MANAGEMENT, ECONOMICS AND BANKING;



ISSN: 2582 - 2942

# EDITORIAL BOARD

---

## EDITOR

DR. RAJANIKANTH M

ASSISTANT PROFESSOR (SYMBIOSIS  
INTERNATIONAL UNIVERSITY) - MARKETING  
MANAGEMENT

## EDITOR

NILIMA PANDA

B.SC LLB., LLM (NLSIU) (SPECIALIZATION  
BUSINESS LAW)

## EDITOR

DR. PRIYANKA R. MOHOD

LLB., LLM (SPECIALIZATION CONSTITUTIONAL  
AND ADMINISTRATIVE LAW)., NET (TWICE) AND  
SET (MAH.)

## EDITOR

MS.NANDITA REDDY

ADVOCATE PRIME DISPUTE

# ABOUT US

---

LEXFORTI IS A FREE OPEN ACCESS PEER-REVIEWED JOURNAL, WHICH GIVES INSIGHT UPON BROAD AND DYNAMIC LEGAL ISSUES. THE VERY OBJECTIVE OF THE LEXFORTI IS TO PROVIDE OPEN AND FREE ACCESS TO KNOWLEDGE TO EVERYONE. LEXFORTI IS HIGHLY COMMITTED TO HELPING LAW STUDENTS TO GET THEIR RESEARCH ARTICLES PUBLISHED AND AN AVENUE TO THE ASPIRING STUDENTS, TEACHERS AND SCHOLARS TO MAKE A CONTRIBUTION IN THE LEGAL SPHERE. LEXFORTI REVOLVES AROUND THE FIRMAMENT OF LEGAL ISSUES; CONSISTING OF CORPORATE LAW, FAMILY LAW, CONTRACT LAW, TAXATION, ALTERNATIVE DISPUTE RESOLUTION, IP LAWS, CRIMINAL LAWS AND VARIOUS OTHER CIVIL ISSUES.

**COVID-19: Impact on Commercial Contracts**

**Niharika Sharma**

## ABSTRACT

---

*The outbreak of COVID-19 around the world has not only caused the economic loss but also loss of numerous lives all over the globe. The direct impact of the pandemic can be observed as disturbed supply-chain of goods and services and performance of contractual obligations. This article briefly studies the impact of COVID-19 on commercial contracts, especially focussing upon the Force Majeure and Doctrine of frustration. The concept, application and prerequisites of the Force Majeure is explained with the help of several precedents. The article also provides with the measures taken by the state and private organizations to cope up with this deadly situation.*

---

## INTRODUCTION

---

COVID-19, the pathogen causing deadly 'Coronavirus' has spread all over the globe leaving behind its consequences every day. The World Health Organisation has declared the outbreak as a pandemic.<sup>1</sup> This virus has compelled the countries around the world to impose travel restrictions and temporary lockdowns. Human movement is limited to mere survival activities. Along with the effects on human health, the domestic and transnational trade has come to an unprecedented standstill. The virus has already got the legal industries in wrangles. Recently, the Supreme Court of India had invoked its plenary powers under Article 142 of the Constitution to extend the 'limitation period' in all cases against the usual timeline as enumerated under the Limitation Act, 1963.<sup>2</sup>

The adverse impact on the world economy has affected the domestic markets at its core. The instant impact of this outbreak can be seen as the disturbed supply-chain, imminent delay in performance and carrying forward the contractual obligation. Undoubtedly the variety of contracts affected by the spread of COVID-19 is humongous and swallowed several commercial contracts ranging from manufacturing contracts to supply agreements and construction contracts.

In this unfortunate situation, parties to commercial contracts and legal experts on national and international levels are continuously assessing and reviewing their contractual provisions for exercising suitable rights in order to render obligations, focussing on the routes to discharge the commercial arrangement or contract, particularly *Force Majeure* and *Frustration of Contract*. These effectively form a defence against the grunt norm of *pacta sunt servanda* (Latin for "agreements must be kept").

## FORCE MAJEURE AND DOCTRINE OF FRUSTRATION IN INDIAN CONTRACTUAL JURISPRUDENCE

---

Force Majeure is a contractual provision agreed upon by the parties to a contract, which liberates a party from the liability of failure to perform its contractual obligations due to the occurrence of certain events, which could neither be anticipated or controlled.<sup>3</sup> Typically, Force Majeure events include an Act of God or natural disasters, war or war-like situations, labour unrest or strikes, epidemics, pandemics, etc. The expression *force majeure* is borne out from the "Code Napoleon" and has a wider meaning than "act of God", though it may be unclear if this includes all "causes

---

<sup>1</sup> <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen>

<sup>2</sup> The Limitation Act, (1963).

<sup>3</sup> Black's Law Dictionary 1183, 9th ed., (2009).



you cannot prevent".<sup>4</sup> It is an exception to what would otherwise amount to a breach of contract.<sup>5</sup> Force Majeure cannot be found in its skeleton form under Indian laws, its conceptual presence can be observed under section 56 of the Indian Contract Act, 1872. The law in India regarding this has been laid down in a ground-breaking decision of the Supreme Court in *Satyabrata Ghose v. Mugneeram Bangur & Co.*<sup>6</sup> and Justice R.F. Nariman has summarised the entire jurisprudence in a recent decision passed by the Supreme Court of India.<sup>7</sup> The terms regarding Force Majeure must be expressly provided in any contracts as the laws in India and principles laid down so far does not allow it to be interpreted as an implied provision.

The burden is upon the party claiming the Force Majeure to prove that the failure of performance is a result of none other than the events occurred. It is a duty of the party claiming Force Majeure to show that it has duly taken all the possible diligence to avoid or mitigate the event and its effects. It is commonly observed that Force Majeure clauses contain a prompt and time-bound notification requirement, which operates as a contractual condition precedent to relief or not.

### **CAN A FORCE MAJEURE CLAUSE BE SUCCESSFULLY INVOKED IN LIGHT OF COVID-19 BEING DECLARED A PANDEMIC?**

There can be two possible instances which suggest that a pandemic can be covered under Force Majeure: (a) if its contractual definition expressly includes pandemic; and (b) if the clause covers extraordinary circumstances that are beyond the reasonable control of the parties. The Department of Expenditure, Procurement Policy Division, Ministry of Finance issued an Office Memorandum on Feb. 19, 2020, concerning 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.<sup>8</sup> However, while such a certificate might be used as a weapon to argue for non-performance of the contract, it is unlikely that each contract could be defended by invoking Force Majeure due to the outbreak of COVID-19, as different contracts and governing laws stipulate different requirements for different situations. The contracting parties ought to

---

<sup>4</sup> Elzekiel Abraham Gubray Vs Ramjusroy Golabroy, AIR1921, Cal 305:33 CLJ 151:63 IC 267 (DB), (Cal 1921).

<sup>5</sup> <https://www.bloomberqint.com/coronavirus-outbreak/covid-19-coronavirus-force-majeure-and-impact-on-commercial-contracts>.

<sup>6</sup> *Satyabrata Ghose vs Mugneeram Bangur & Co.*, AIR 1954 (SC 44 1954).

<sup>7</sup> *Energy Watchdog vs CERC* 14 SCC 80, (2017).

<sup>8</sup> Ministry of Finance, Office Memorandum No.F. -PPD titled 'Force Majeure Clause', issued by Department of Expenditure, Procurement Policy Division, 18/4/2020.

honour the aforesaid memorandum, but it would not be serving as a binding document and the court and arbitral tribunal would interpret and assess the force majeure clause accordingly.<sup>9</sup>

## **FRUSTRATION OF CONTRACT AND IMPOSSIBILITY TO PERFORM DUE TO COVID-19**

Impossibility and frustration are often used as interchangeable expressions.<sup>10</sup> However, it is of great importance to understand that the common law doctrine of frustration as propounded by English law is different from the statutory provision of impossibility under Indian laws. Under English law, 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 from that which was in consideration by the parties in the beginning and is concluded by the legal order.<sup>11</sup> For imposing impossibility of performance due to COVID-19 a party needs to prove frustration of contract. The statutory provision under Section 56<sup>12</sup> sets out a positive rule of law on supervening impossibility or illegality that renders performance impossible in its practical, and not literal sense.<sup>13</sup> The relief is provided by the court on the ground of subsequent impossibility when the very basis or purpose of the contract is found to be frustrated by certain intrusion or occurrence of an unexpected event that has changed the circumstances in its entirety.

## **IMPACT OF COVID-19 ON COMMERCIAL CONTRACTS**

While evaluating the impact of COVID-19 on businesses and performance of contractual obligations, it must be deeply studied if it has resulted in complete incapability to perform, the partial failure of performance, delayed the performance which if extended to a limit can reach the root of the contract or mere commercial hardship? Every case of affected performance would not fit for claiming frustration.

Both frustration of contract and force majeure could result in the following situations:

- **Termination of contract-** Terminating or not terminating the contract in such unfavourable circumstances is the most crucial decision to be made by contractual parties. Despite all diligent efforts when the performance of contractual obligation becomes

---

<sup>9</sup> Kshama Loya Modani and Vyapak Desai Impact of COVID-2019 on Contracts: Indian Law Essentials, India Law Journal, at p 2, 2020.

<sup>10</sup> Satyabrata Ghose vs. Mugneeram Bangur and Others, AIR 1954 SC 44, 17, (1954).

<sup>11</sup> Sweet & Maxwell, Chitty on Contracts, Volume I, 31st Edition, 2013.

<sup>12</sup> Indian Contract Act, Section 56 (1872).

<sup>13</sup> Satyabrata Ghose vs. Mugneeram Bangur and Others, AIR 1954 SC 44, (1954).

impossible and ways of rendering performance cease to exist, termination is the only way out to prevent from suffering any further losses.

- **Renegotiation-** It refers to a slight change in terms of the contract and duties of all the parties. There are cases where adhering to one's contractual obligations becomes difficult but not impossible, in such cases renegotiating the terms and contractual provisions could be opted rather than terminating the contract. Parties may seek to rely upon Limitation or exclusion clauses to limit or exclude liability for non-performance, or there might be situations where the outbreak of COVID-19 triggers a Material Adverse Change (MAC) clauses or Change in Law clauses.<sup>14</sup>
- **Risk allocation and restitution-** Section 65 of the Contract Act<sup>15</sup> provides a rule of restitution. It implies that in the cases where performance has become impossible, the party that has received any advantage under such a contract at the time when the agreement is discovered to be void is required to restore such an advantage to the person from whom the same was received. However, this is not an absolute rule. The parties will analyse several factors, such as expenses incurred by the non-breaching party and the extent of restitution will depend upon the same.

Further, the parties are free to decide the terms regarding the risk of supervening events and by whom these risks will be borne. The situation can be dealt with in several ways, such as by suspension of performance, providing with compensation or restitution and discharge of duties.

- **Dispute resolution-** If the parties to a contract fails to reach to the agreement if the event occurred is a force majeure, or if there is failure to comply with the provisions provided for force majeure, parties will be required to look into the contract and evaluate the risk and remedies in terms of litigation and arbitration of the dispute.
- **Price adjustment clauses-** As a result of COVID-19, parties may seek to adjust whole or part of the contract price for a commodity due to inflated costs (eg. Due to increased supply chain strain).
- **Employer duty of care-** Whenever a situation of risk and distress arises, the duty of the employer towards its employees' health and safety comes into play. They are required to do whatever is reasonably required for the welfare of their employees. This pandemic has

---

<sup>14</sup> **Natasha Johnson, Robert Moore**, COVID-19: Pressure points: Will this be a valid basis for avoiding contractual obligations, Global, 25 march 2020.

<sup>15</sup> Supra note 12 section 65.

resulted in cancelling various work trips, shutting down the workplaces and various other measures to maintain social distancing.

- **Disruption of supply chain logistics-** The outbreak of COVID-19 has failed existing supply chains and forced businesses to find an alternative solution. There are reports which suggest that several major automotive manufacturers are flying components to its factories in suitcases. These lockdown in factories has opened the doors leading towards a drastic downfall in businesses and economies.
- **Distress/ Insolvency-** The ongoing situation has already resulted in an increase in companies experiencing financial distress due to disrupted supply chain coupled with lower customer demand. It has been observed that companies are filing for Chapter 11 protection, citing COVID-19 as contributing to supply chain problems (see, for example, the recent bankruptcy filing of Valeritas Holdings Inc.). Plans of refinance and distressed M&A activity is being delayed (due to travel restrictions), resulting in more challenging execution of time-bound turnaround plans. As a result, companies are forced to seek protection from their creditors and we can expect to see more increased insolvency on the horizon in more distressing cases.<sup>16</sup>

## **MEASURES TAKEN BY STATE TO COPE UP WITH THE CONSEQUENCES OF COVID-19**

The novel coronavirus is spreading all over the world at a whirlwind rate. A situation that began with resulting in the suspension of all the existing visas, except those of diplomatic, official, UN/International organizations, has now reached a point where the Indian Government has declared a complete lockdown all over the country. Several measures such as shutting down all the public places, imposing a ban on mass travels and public gathering and closing all the manufacturing units (except those of essential goods) have being taken by the state to avoid spreading COVID-19 among a huge population of 138 crore. The consequent results of the same have already been discussed above in this article. It was necessary to look after the companies, businesses and other commercial units which are adversely affected by the same. To safeguard the interests of commercial contractual parties and the rest of the population, certain emergency measures are taken by the central as well as state governments.

---

<sup>16</sup> <https://www.herbertsmithfreehills.com/latest-thinking/covid-19-pressure-points-will-this-be-a-valid-basis-for-avoiding-contractual>

*The Order No. 2020-306 of 25 March 2020 relating to the extension of deadlines that expire during the period of the state of health emergency and to the procedural adjustment of proceedings during that same provides that for all obligations imposed by law and regulation, there should be an interruption to deadlines expiring between the 12 March 2020 and one month following the end of the state of health emergency<sup>17</sup> (i.e. 24 June 2020 except in case of amendment). For those deadlines, the legal timeframe for such action shall extend 24 June 2020, up to a maximum of two months from the end of the state of health emergency<sup>18</sup>. The principle, therefore, remains unchanged as to the execution by companies of their contractual obligations.*

Weakening the principle of contract enforcement, the aforementioned *Order No. 2020-306* suspends the effects of some contractual provisions that aim at sanctioning the debtor's failure to perform the agreement (such as lump sum indemnity per day of delay, liquidated damages, unilateral termination and forfeiture provisions). If the duration of the state of health emergency remains the same, these penalties and provisions will start to produce their effects on 24 July 2020 if the debtor has still not performed its obligations at that time. Delay penalties and liquidated damages provision that had been triggered before 12 March 2020 have been suspended until 24 June 2020.<sup>19</sup>

A similar moratorium has been enacted by *Order No. 2020-316 of 25 March 2020 relating to the payment of rent, water, gas and electricity bills relating to the business premises for the companies whose business is affected by the spread of the COVID-19*), specifically concerning the effects of non-payment of rent and charges (particularly those relating to gas, water and electricity).

---

<sup>17</sup> Except in case of amendment, the state of health emergency shall end on 24 May 2020.

<sup>18</sup> Article 2 of Order No. 2020-306 relating to the extension of deadlines that expire during the period of the state of health emergency and to the procedural adjustment of proceedings during that same period.

<sup>19</sup> Article 4 of Order No. 2020-306 relating to the extension of deadlines that expire during the period of the state of health emergency and to the procedural adjustment of proceedings during that same period.

## CONCLUSION

---

Due to the alarming rate of the spread of COVID-19, medical professionals and state authorities are implementing new strategies for treatment and containment of this disease. Along with the medical and health conditions, the economy all around the world is dramatically affected. On one hand, parties to commercial contracts are trying to get away with their responsibilities and contractual obligations, while on the other, there are some obligations that have become impossible to perform. In addition to contractual language, it will also be critical to understand the commercial operations and transactions of the company in the relevant industry and sector, to understand the ambit of contractual clauses dealing with the impossibility of performance. There has been a continuous debate regarding the application of *Force Majeure* or *Doctrine of Frustration* on contracts. This article has therefore, elaborated upon the requirements to be fulfilled for applying Force Majeure and Frustration of contracts, the impact of frustration and impossibility to perform contractual obligations and the remedies available to the aggrieved parties.

To fight against this difficult situation everyone is joining hands to move forward together and not put anyone in harm's way. Although the economic sector has suffered huge losses, there are several remedies proposed by the state. Patience, Precautions and Protection are the key necessities for the moment.