



THE CONCEPT OF FORCE MAJEURE IN THE PANDEMIC

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ABSTRACT

Force Majeure clause has become the talk of the town since the offset of the unfortunate outbreak of COVID-19. Many commercial contracts have hit a bulwark because of the uncertainty that has arisen by the nationwide lockdown. This has led to non-performance of a contractual obligation by the parties due to restrictions laid down by the Central Government. This article focuses on the importance of a Force Majeure clause and whether or not the present situation meets the requirements of a Force Majeure event. It also talks about the jurisprudence that stands and is developing to cater to the complexities and perplexities associated with the situation.

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INTRODUCTION

"There's no going back to the 'normal' – all we should focus on is building for the 'new normal.'"

- Deepinder Goyal, Zomato

Having said so, the urgency and emergency of the matter can very well be sensed.

December 2019 saw the outbreak of 'never before seen' species of coronavirus in humans in the population of Wuhan, a large and densely populated province in Hubei, China.¹ After the report of the outbreak, there has been a visible spread of the virus across the globe. Seeing the exponential upsurge in the spread of the virus, on January 30, 2020, World Health Organisation (WHO) declared this as a global pandemic, as it was considered a Public Health Emergency of International concern.² As of June 4, 2020, 215 countries have reported about 6,574,585 active cases of coronavirus, and 388,047 people have succumbed to the disease.³ In India, as of June 4 2020, there are 2,16,919 cases, with 6,075 reported deaths.⁴

Sensing the severity of the situation and the vulnerability it creates for human life, a nationwide lockdown was declared by the Central government of India from March 25 2020, which saw its extension and varying effects in four phases.⁵ A similar situation was seen worldwide, as different countries enforced some preventive measures to limit the spread of the virus. As a result of this mandatory lockdown being enforced in almost all the nations, the entire business sector across the globe has been facing several financial and physical hardships. The unavailability of a cure of any form increases the uncertainty of the situation, forcing people to adapt to what is now being considered as the 'new normal.'

¹*Novel coronavirus: Your questions, answered*, Medical News Today (June 4, 2020, 12:01 pm), <https://www.medicalnewstoday.com/articles/novel-coronavirus-your-questions-answered>.

² *Rolling updates on Coronavirus disease (COVID-19)*, World Health Organization (June 4, 2020, 12:08 pm), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen>.

³*Covid-19 Coronavirus Pandemic*, Worldometer (June 4, 2020, 12:14 pm), <https://www.worldometers.info/coronavirus/>.

⁴India's single-day Covid-19 spike crosses another grim milestone, 260 fatalities in 24 hours, Hindustan Times, June 4, 2020.

⁵Nistula Hebbar, *Coronavirus | Narendra Modi hints at a 14-day extension of nationwide lockdown*, THE HINDU, April 11, 2020.

This brings into the focus whether the situation will see the light of normalcy, and if so, will the parties abide by the contractual obligations laid down before the storm of uncertainties had a landfall. A bigger question that comes into the picture is whether this global health concern can be categorized as an 'Act of God' or 'Force Majeure' event, a relief that the contracting parties can seek for not performing their contractual duties. In the ongoing situation, it is necessary to look into the commercial complications of COVID-19 in order to anticipate what roles the court will play in a matter pertaining to breach of contract.

UNDERSTANDING THE CONCEPT OF FORCE MAJEURE

"Force Majeure" is a concept of civil law, which originated from the French law known as Code Civil.⁶ In French, it is called "*Vis Majeure*" in Latin, which means "superior force".⁷ According to Black's Law Dictionary, "Force Majeure" is defined as "*an event or effect that can be neither anticipated nor controlled. This includes the acts of nature (e.g., floods, hurricanes, earthquakes, etc.) and acts of people (e.g., riots, strikes, and wars).*"⁸

The Black's law dictionary describes the Force Majeure clause as "*a contractual provision allocating the risk if performance becomes impossible or impracticable, exp. as a result of an event or effect that the parties could not have anticipated or controlled.*"⁹

A relief against Force Majeure can only be taken if the clause is inserted in the contract. Parties with such a contractual arrangement can pardon themselves from any liability that arises in such an event, which occurred due to reasons beyond human control. Thus, a Force Majeure clause releases a party from their stipulated contractual obligations, which were rendered impossible due to the intervention of a superior force. What needs to be focused here is that a Force Majeure clause does not absolve the parties from the performance of the contract completely. There exists a fine line difference between Force Majeure and Frustration of contract. The same has been explained in the following section.

⁶A. Ezeldin & Amr Abu, *Proposed Force Majeure Clause for Construction Contracts under Civil and Common Laws*, J. Leg. Aff. Dispute Resolute. Eng. Constr., (April 28, 2018).

⁷Taren Due, Geetanjali Seth, *Force Majeure In Times Of COVID-19: Challenges And The Road Ahead*, Mondaq, (May 24, 2020, 5:37 pm), <https://www.mondaq.com/india/litigation-contracts-and-force-majeure/930674/force-majeure-in-times-of-covid-19-challenges-and-the-road-ahead>.

⁸Force Majeure Definition, Black's Law Dictionary (8th ed., 1st South Asian ed. 2015).

⁹Force Majeure Clause Definition, Black's Law Dictionary (8th ed., 1st South Asian ed. 2015).

FORCE MAJEURE V. DOCTRINE OF FRUSTRATION

The **force majeure** clause discharges a party, to a contract, of its performance when certain unanticipated events occur, which are beyond the control of the party. The term has a wider ambit than its Latin counterpart *vis major*, the same was held in the landmark decision of *Lebeaupin v. Crispin*,¹⁰ where the court observed that the force majeure clause includes any unexpected circumstances over which the performing party exercises no control. The clause has not been expressly dealt with in Indian statutes but, Section 32 of the Indian Contract Act, 1872 lays down the concept to some extent, it states that:

*"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. —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."*¹¹

Such contracts are rendered void on the occurrence of such an event.

This provision can be exhaustive, including events like- Act of Gods, terrorism, war, strike, natural calamity, fire, etc. or it can be non-exhaustive wherein, the parties to a contract simply propose circumstances that can be termed force majeure and include these events in the contract, before its implementation. In order to take benefit of the clause, a party needs to fulfill the specific conditions given as per the force majeure clause. The aggrieved party will be required to show whether it acted diligently in mitigating the effect of such force majeure event. The affected party would be exempted from its contractual obligations only during the period when the unanticipated event persists. After such an event ceases to exist, the party has to perform its duties, as mentioned in the contract.

Thus, the essentials of the Force Majeure clause are as under:

- The occurrence of an unanticipated event;
- The contract has a provision catering to such an event, i.e., the Force Majeure Clause;
- Happening of this unforeseen phenomenon renders the performance of the contract impossible or impracticable;

¹⁰*Lebeaupin v. Crispin*, 2 K.B.714 (1920).

¹¹Indian Contract Act, Legislative Department, Ministry of Law, and Justice 20 (1872).

- The parties took measures needed for the fulfillment of the obligations under the agreement; and
- The burden of proof lies on the party claiming relief under the Force Majeure clause.

The Doctrine of Frustration was, for the first time, endorsed effectively in the English case of *Taylor v. Caldwell*,¹² where two parties contracted for an opera hall, which was hired for performance, but before the performance could be done, the hall burnt down. The Court held that since the subject matter of the contract, i.e., the opera hall ceased to exist, the contract was impossible to perform. Hence, it stood frustrated. In India, the frustration of contract is enumerated in Section 56 of the Indian Contract Act, 1872, it states:

*"56. Agreement to do impossible act.—An agreement to do an act impossible in itself is void. Contract to do an act afterward 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 an 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, 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."*¹³

The frustration of a contract occurs when an event happens after the execution of the contract. Such an event could not have been prevented by the party. If the performance of an act becomes impossible or illegal after the contract's been concluded, then the contract stands void. The fundamental rationale of the concept of frustration is that, when the essence or basis of the contract is destroyed, the contract becomes void, consequently exempting the parties from their contractual responsibilities. Certain well-established grounds for the frustration of contract are the destruction of subject matter,¹⁴ death or incapacity of a personal

¹²Taylor v. Caldwell, 3 B & S 826 (EWHC:1863).

¹³Indian Contract Act, Legislative Department, Ministry of Law, and Justice 25-26 (1872).

¹⁴ Taylor v. Caldwell, 3 B & S 826 (EWHC:1863).

THE CONCEPT OF FORCE MAJEURE IN THE PANDEMIC

service¹⁵, a particular state of things has ceased to exist,¹⁶ a legislative or executive authority intervention,¹⁷ and an outbreak of war.¹⁸

Thus, the essentials of Section 56 of the Indian Contract Act, 1872 are:

- Existence of a valid contract;
- The contract is being performed or yet to be performed;
- The performance has become impossible due to facts or laws.

The concept force majeure has caught the limelight in the present COVID-19 pandemic. Up till now, courts have not been quite flexible in the interpretation of the doctrine.

INDIAN JURISPRUDENCE ON FORCE MAJEURE

As mentioned earlier, the approach of Indian courts towards the concept of Force Majeure has been quite rigid. There has been a myriad of cases discussing the extent of the applicability of the Force Majeure clause. Few landmark cases form part of the discussion under this section.

- ***Dhanrajmal Gobindran v Shamji Kalidas***¹⁹

The facts of the case are as follows:

In this case, the appellants (buyer) entered into an agreement with the respondents (sellers) for the purchase of raw cotton. The contract was confirmed by both the parties. It was also subjected to a certain "usual force majeure clause." The contract was not performed, and the buyers stated that the "usual force majeure" clause as subjective and vague. This held the contract void *ab initio* due to the absence of consensus ad idem between the parties.

The honorable Supreme Court concurred with Justice McCardie's decision in the seminal case of ***Lebeaupin v. Crispin***,²⁰ which defined the purview of the term "force majeure" while also citing its history. In ***Lebeaupin v. Crispin***, the court said that "*the expression "force majeure" is not a mere French version of the Latin expression "vis major." It is undoubtedly a*

¹⁵Krell v. Henry, 2 KB 740 (1903).

¹⁶Stubbs v. Holywel Railway Co., L.R. 2Exch 311

¹⁷Metropolitan Water Board v. Kerr, AC 119 (1918).

¹⁸Bastralaya v. River Steam Navigation Co. Ltd., AIR 271 (CAL:1987).

¹⁹Gobindram v. Kalidas & Co., 3 SCR 1029(1961).

²⁰Lebeaupin v. Crispin, 2 K.B.714 (1920).

term of broader import". The court further observed that "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," which includes any event over which the performing party has no control".²¹ The same decision also elucidated upon the subjectivity of the clause and the discretion of the court to decide whether a situation will invoke force majeure or not.

- **Satyabrata Ghosh v Mugneeram Bangur & Co.**²²

Another remarkable judgment by the Honorable Supreme court, where the plaintiff, (Satyabrata) was made an assignee for a piece of land. Later, due to the requisitioning of the land by the government because of the prevailing defense rules and war-like conditions at that time, the defendant company repudiated the contract. The plaintiff prosecuted the defendant for unfairly renouncing the contract. The defendant took the defense of frustration of contract on account of the changed conditions pertaining to the development of the land.

The honorable apex Court held that if a force majeure clause has been incorporated in the contract, which on the further established by the Court is relevant to facts of the case, then Section 56 of the Indian Contract Act, 1872, cannot be applied. The court observed that a party to a contract cannot simply claim frustration on account of changed conditions or if the performance becomes onerous due to an unanticipated event. It further elaborated that "*where the Court finds that 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 of the Act. If, however, frustration is to take place de hors the contract, it will be governed by Section 56.*"²³

²¹Ibid 19.

²²Ghosh v. Bangur, SCR 310 (1954)

²³Ibid 21.

- **Himachal Sorang Power Ltd. Vs. Central Electricity Regulatory Commission and Ors.**²⁴

The petitioner (Himachal Sorang Power) submitted that a delay was expected in the commissioning of the Sorang Hydro Electric Power project on account of geological surprises, which were attributed as the force majeure events, as mentioned under the Bulk Power Transmission Agreement (BPTA). Therefore, the petitioner primarily sought a postponement of the date for project completion.

The Appellate Tribunal of Electricity held that as per clause 13 of BPTA that dealt with the application of force majeure clause, in order to claim the benefit of the clause the "aggrieved" party had to assure the other party about the happening of such circumstances and communicate by giving written notice within a reasonable time to the other party. But no attempt was made by the appellant to inform and communicate to the Respondent about the existence of any such geological surprises/force majeure events. Hence, the appellants couldn't claim the defense of the force majeure clause, as mentioned in the agreement.²⁵

- **Energy Watchdog and Ors. vs. Central Electricity Regulatory Commission and Ors.**²⁶

The facts of the case are as follows:

Both Adani and Tata filed an application with the Central Electricity Regulatory Commission (CERC) asking for absolving of the performance under the PPA's signed with the state power procurers, claiming frustration of the contract or to restore them to their earlier economic status before the occurrence of the force majeure event/change in the law. The request was made due to a new rule issued by the Indonesian government, which lead to a surge in coal prices. This raised the prices under the PPA's like the power generating companies had long term fuel supply agreements with coal mines in Indonesia.

The apex Court through Justice P.C Ghose and Justice R.F Nariman, delivered the judgment. They held that "*If a contract has an express or implied force majeure clause, it will override*

²⁴Himachal Sorang Power Ltd. Vs. Central Electricity Regulatory Commission APTEL 148 (Appellate Tribunal for Electricity:2015)

²⁵Himachal Sorang Power Ltd. Vs. Central Electricity Regulatory Commission APTEL 148 (Appellate Tribunal for Electricity:2015)

²⁶Energy Watchdog and Ors. V. Central Electricity Regulatory Commission, MANU 0408 (2017)

the principles propounded in Section 56 of the Indian Contract Act, 1872. The force majeure clause will not apply if alternative modes of performance are available."²⁷The court also said that an unanticipated increase in the cost of coal discharge the power generating companies from performing their contractual obligations since when they gave their bids, they knowingly took this risk. The court also cited '*Treitel on Frustration and Force Majeure*,' 3rd edition, where the author has proposed that " *a force majeure clause will not normally be construed to apply where the contract provides for an alternative mode of performance. It is clear that a more demanding method of performance by itself would not amount to a frustrating event.*"The author also propounds " *that a mere rise in price, rendering the contract more expensive to perform does not constitute frustration.*"²⁸

With an in-depth study of these cases discussed so far, one can get some insight as to how the courts have perceived and interpreted the Force Majeure clause. The germane points that can be extracted from these judgments are, to analyze the implementation of the Force Majeure clause it needs to be seen:

- Whether there exists a force majeure clause in the contract;
- Whether the act in consideration is something that is beyond human control or an 'act of God';
- Whether such an event affects the performance of the contract by the party.

Abiding by this analysis, a party can seek relief under the clause or might seek relief under Section 56 of the Indian Contract Act, 1872, depending on the situation.

²⁷*Ibid* 26.

²⁸*Ibid* 26.

**CAN OUTBREAK OF COVID-19 BE CONSIDERED AS AN ACT OF GOD –
PRESENT SCENARIO**

Is the current pandemic an act of God?

To categorize the current situation as an 'act of God,' it is necessary to understand the root cause of the occurrence – COVID-19.

Coronavirus is not a new species of viruses that came into existence out of nowhere. The first viral species of this category were discovered in the 1930s.²⁹ With the 2003 fatal outbreak of Severe Acute Respiratory Syndrome (SARS), the virus gained notoriety.³⁰ The scientific community has been showing a greater interest in the new member of the infamous family of the virus, which came into the picture in December 2019.³¹

The novel Coronavirus species were named SARS-CoV-2 by the International Committee on Taxonomy of Virus, which is a newly emerged species that attacks the respiratory tract. This was later named as COVID-19 by the World Health Organization (because it was discovered in the year 2019).³²

Before the current viral outbreak, there were six known species of corona virus, which cause infections in humans. The most severe and fatal ones out of these six are SARS-CoV and MERS-CoV, while the other four affect the upper and middle respiratory tract with mild symptoms.³³ SARS-CoV, MERS-CoV, and the recent SARS-CoV-2 are known as a beta coronavirus (the remaining is known as delta coronavirus).³⁴ Bats, in particular, are considered to be a reservoir of beta coronavirus species. These bats have been suspected to be the crossing point of the virus to the humans, as the patients diagnosed initially (in Wuhan,

²⁹C. B. Hudson & F. R. Beaudette, *Infection Of The Cloaca With The Virus Of Infectious Bronchitis*, Science | AAAS (July 1932).

³⁰Susan R. Weiss & Sonia Navas-Martin, *Coronavirus Pathogenesis, and the Emerging Pathogen Severe Acute Respiratory Syndrome Coronavirus*, MMBR 635, (Dec. 2005).

³¹Sandrine Belouzard, Jean K Millet, Beth N Licitra & Gary R Whittaker, *Mechanisms of Coronavirus Cell Entry Mediated by the Viral Spike Protein*, Viruses 1011, (June 20, 2012).

³²David Rutenberg & Yumeng Zhang, *A Mini-review of the 2019 Novel Coronavirus, SARS-CoV-2*, AJBSR 15, (March 10, 2020).

³³Cui, Fang Li & Zhenf-Li Shi, *Origin and evolution of pathogenic coronaviruses*, Nat. Rev. Microbiol 181 (December 10, 2018).

³⁴Dewald Schoeman & Burtram C. Fielding, *Coronavirus envelope protein: current knowledge*, Virol J1, (May 27, 2019).

China) had one common point, that being the similar exposure to the Huanan Seafood Wholesale Market in Wuhan, which sells live animals, including birds and other mammals.³⁵ Viruses, in microbiology, are known for their rapid mutating ability. They can change and adapt according to the environment they are subjected to. Because of this rapid mutating ability, pathogenic viruses are the most difficult targets for vaccine development. This mutating ability of the virus is the precise reason why the current pandemic needs to be categorized as "Force Majeure" or an "Act of God."

Though there already exists a SARS-CoV species in nature, the current viral outbreak is a result of a mutation in the genetic code of this existing species. Mutations in viral species can either be natural or done by the method of genetic recombination in a simulating lab environment. As per the current scientific understanding, the viral outbreak is a result of a crossing between the virus reservoir, bats, and humans, leading to its spread by human to human transmission. Thus, (until further research and investigation relating to the origin of the matter) in our opinion, the outbreak of novel coronavirus or COVID-19, is most certainly, an Act of God and beyond human control.



The current Legal perspective

As mentioned earlier (and explained through the cited case laws), it can be seen that the nature of the Force Majeure clause is pretty restrictive. Just establishing that an event is an “act of God” is not enough. Whether the contractual obligations have been affected by the “act of God” is also to be determined.

This is precisely the understanding that has been adopted by the courts in the matters of breach of contract that have come in the current situation.

³⁵Yushun Wan, Jian Shang, Rachel Graham, Ralph S. Baric & Fang Li, *Receptor Recognition by the Novel Coronavirus from Wuhan: an Analysis Based on Decade-Long Structural Studies of SARS Coronavirus*, JVI 1, (March 2020).

Application of the Force Majeure clause in the COVID-19 crisis.

- **Standard Retail Pvt. Ltd. and Ors. Vs. G.S. Global Corp. and Ors.** ³⁶

In this case, the petitioners filed an appeal praying for interim relief for restraining the Respondent-Bank from encashing the Letters of Credit. The Petitioners argued that due to the COVID-19 pandemic and the lockdown declared by the Central/State Government, its contracts of distribution of steel with Respondent No. 1, which were subject to force majeure clause, stood terminated.

The Bombay High Court ruled that *"the distribution of steel has been declared as an essential service, in any event, the lockdown would be for a limited period and the lockdown cannot come to the rescue of the Petitioners to resile from its contractual obligations of making payments."*³⁷The court also held that the force majeure clause, as mentioned in Article 11 & 12 of the contract applied only to the Respondent No. 1 (seller) so it can't come to the rescue of the Petitioners. Also, the force majeure clause was present in the contract for the sale of steel and not in the letters of credit, which were an independent transaction with the bank. Hence, the prayer for relief was rejected. Another essential point to be inferred from this recent decision is that a force majeure clause, present in the contract, which specifically provides for the termination in the hands of one party (seller), cannot be solicited by the other party (petitioner) and cannot be invoked against any third party (bank) to the said contract.

- **Halliburton Offshore Services Inc. Vs. Vedanta Limited and Ors.** ³⁸

The appellants, Halliburton, as interim protection, prayed for an injunction against Vedanta, restraining it from encashing bank guarantees issued by the bank in favor of the Respondent. The parties had entered into a contract, and the petitioner was supposed to complete the project by January 31, 2020. Still, on its request, the Respondent had extended the deadline till March 31, 2020. A major part of the project was completed prior to the date, but on account of a complete lockdown due to the COVID-19 pandemic, the force majeure clause was invoked by the appellant that it was inevitably affected in performing the contract.

³⁶Standard Retail Pvt. Ltd. v. G.S. Global Corp., MANU 0528 (2020).

³⁷*Ibid* 36 ; *Ibid* 23.

³⁸Halliburton Offshore Services Inc. v. Vedanta Ltd., MANU 0957 (DE:2020).

The Delhi High Court vacated its earlier order of restraining Vedanta from encashing the bank guarantees. The bench of Justice Pratibha M Singh held that non-performance of the contract by the petitioner couldn't be justified because of force majeure due to Covid-19 lockdown as the contractor had breached the contract since September 2019. It had clearly faulted in performance, despite being provided repeated opportunities. The Court observed that the application of the doctrine of force majeure relies upon facts and circumstances of each case. The honorable Court held that it would have to evaluate:

- a. *"The conduct of the parties prior to the outbreak*
- b. *the deadlines that were imposed in the contract*
- c. *the steps that were to be taken,*
- d. *the various compliances that were required to be made and only then assess as to whether, genuinely, a party was prevented or is able to justify its non-performance due to the epidemic/pandemic."*³⁹

The court said that *"it is the settled position in law that a Force Majeure clause is to be interpreted narrowly and not broadly. Parties ought to be compelled to adhere to contractual terms and conditions, and excusing non-performance would be only in exceptional situations."*⁴⁰

Furthermore, The Ministry of Finance vides **Memo No. F. 18/4/2020-PPD** has tried to clarify the considerations pertaining to the Force Majeure clause. It states that;

*"a doubt has arisen if the distribution of the supply chains due to the spread of coronavirus 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 due procedure as above."*⁴¹

The nationwide lockdown came with certain guidelines and restrictions. Though the complete movement of the general public was brought to a halt, there were certain commodities, which

³⁹*Ibid* 38.

⁴⁰*Ibid* 3; Halliburton Offshore Services Inc. v. Vedanta Ltd., MANU 0957 (DE:2020).

⁴¹Force Majeure Clause –FMC, Department of Expenditure (June 5, 2020, 2:42 am), <https://doe.gov.in/divisions/force-majeure-clause-fmc>.

THE CONCEPT OF FORCE MAJEURE IN THE PANDEMIC

were allowed to be transported throughout the country. These commodities were categorized as essential and saw no restriction from the government. For instance, anything categorized as food (wheat, rice, vegetables, fruits, etc.), medicines and healthcare accessories, fuel, etc. were considered as essential, and a lot of other commodities were considered non-essential (e.g., liquor, clothing, barber shops, etc.).

Considering a relief under force majeure will include the court looking into the item that the contract deals with. If the contractual obligations revolve around the essential commodities, non-performance might not be justified by the Force Majeure clause. This point has been taken up in the case of *Standard Retail Pvt. Ltd. and Ors. Vs. G.S. Global Corp. and Ors*,⁴² where, since steel was under essential commodities, non-performance cannot be guarded by the Force Majeure clause.

A SOLUTION FOR THE UNCERTAINTY

Governments across the globe have taken wide-ranging measures to tackle the uncertainty created by the pandemic. Businesses in different sectors, all over the world, are also reeling under the effects of Covid-19, as the economy goes in a downward spiral. Amid the pandemic, the parties are finding it tough to perform their contractual obligations. As mentioned above, the Ministry of Finance has declared that the force majeure clause can be invoked in the current circumstances. But the invocation of this clause does not imply that parties have full freedom to intentionally not perform or delay their contractual duties. It may be noted that in most of the countries, force majeure, is a contractual agreement and not a common-law remedy.⁴³ Some of the remedial measures that can be adopted while entering into a contract in the current scenario are: -

- I. To keep a tab on steps taken by the government- It's essential that the parties are aware and maintain a record about the guidelines issued by the government from time to time. The guidelines may carry details about the nature of activities that are

⁴²Standard Retail Pvt. Ltd. v. G.S. Global Corp., MANU 0528 (2020).

⁴³ Yugandhara Pawar Jha, Kunal Verma and Waheb Hussaini, *COVID-19 Crisis: Practical Steps For Businesses To Preserve Or Resist Force Majeure Claims*, Mondaq (July 04, 2020, 5:15 pm), <https://www.mondaq.com/india/litigation-contracts-and-force-majeure/934394/covid-19-crisis-practical-steps-for-businesses-to-preserve-or-resist-force-majeure-claims>.

allowed; consequently, the defense of force majeure cannot be availed. For example, in the case of Standard Retail Pvt. Ltd.⁴⁴ (as previously stated,) where the distribution of steel was held as an essential service, hence the F.M. clause couldn't be invoked by the petitioner.

- II. Analyzing the contract and F.M. clause – It's crucial for the parties to assess whether the contract carries an F.M. clause and also to determine the scope of the clause. Attention needs to be given to the framework and language of the clause, whether it includes a pandemic and its consequences, act of God, etc.
- III. Renegotiate terms and conditions of the contract⁴⁵- Both the parties with mutual understanding must make conscious attempts to renegotiate their obligations under the contract, like extending the time period or terminating some of the obligations altogether.
- IV. Mitigating the impact of a force majeure event- Parties to a contract must document the measures they undertook to alleviate the impact of such an event. They must communicate with each other the steps they took to mitigate the losses or delays that occurred on account of non-performance of contractual obligations.

CONCLUSION

The repercussions of the current outbreak of COVID-19 have emphasized, significantly, the importance of an elaborate and comprehensively drafted Force Majeure clause.⁴⁶ A Force Majeure clause is imperious to avoid any conflicts or disputes that result because of a non-performance of contractual obligations in such an event.

Despite there being cases of such outbreaks of diseases in the past (e.g., SARS, Ebola, swine flu, etc.), still, such situations have not been taken into consideration under the 'act of God'. Because of no lack of knowledge along with no codification, for such a situation, in the law,

⁴⁴*Ibid* 42.

⁴⁵*Ibid* 42.

⁴⁶Seng Hansen, *Does the COVID-19 Outbreak Constitute a Force Majeure Event? A Pandemic Impact on Construction Contracts*, 201 JCEF, 209 (2020).

THE CONCEPT OF FORCE MAJEURE IN THE PANDEMIC

analysis and interpretation become taxing. With the evolving nature of happenings and situations around, there is a need for evolving the law as well.⁴⁷

Though with the current judgment by Justice Pratibha Singh in *Halliburton Offshore Services Inc. vs. Vedanta Limited and Ors*,⁴⁸ the courts have embarked upon a jurisdiction for such matters. Still, it also needs to be kept in mind that without concrete legislation, the matter will always remain on a cliff hanger. Or else such exceptional circumstances will keep over-burdening the courts with unnecessary litigation pertaining to commercial contracts.



⁴⁷*Ibid* 7.

⁴⁸*Ibid* 37.