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Force Majeure in Commercial Contracts

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The devastating effect of Coronavirus (COVID- 19) not only affected the health and life of human beings, but also the economic health of the Corporate world as well. When the lockdown was announced in March 2020 in almost all parts of the country arising out of Covid- 19, the commercial entities started assessing their abilities to perform their obligations under the Contracts entered into by them with various stakeholders. As a result, most of the operators in the market started dusting up their contracts to look out for an exit route from their contractual obligations. Generally, contracts mention various circumstances under which the contractual obligations are legally terminable, and they all flow from their estimated assessment of business risks of the contracting entities. *Force Majeure* is the clause designed in a contract to protect an entity from an event which it could not have reasonably foreseen and such event may be outside the ken of its normal business risk assessment. This expression has no clear meaning in English Law. English Law has adopted this expression from French Civil Law[1]. This expression came from a detailed examination in *Lebeaupin v. Richard Crispin and Co*.[2] based on a definition taken from a French legal textbook:

"This term is used with reference to all circumstances independent of the will of man, and which it is not in his power to control, and such force majeure is sufficient to justify the non-execution

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[1]Luxembourg Civil Code, Art. 1148; No damages shall be due when, as the result of superior force [force majeure] or accident, the debtor has been prevented from delivering or doing what he has bound himself to deliver or to do or has done what was prohibited.

[2] [1920] 2 K.B. 714

of a contract. Thus, war, inundations, and epidemics are cases of *force majeure*; it has even been decided that a strike of workmen constitutes a case of force majeure."[3]

Currently, it is a part of the civil and contractual framework in almost all jurisdictions. It means superior power. It is similar to the Latin expression *Vis Major,* meaning 'act of god or irresistible force'. Any loss directly resulting from a natural cause without any human intervention, having an overwhelming impact and could not have been prevented through foresight or assessment of human agency would fall under this category. The expression *Force Majeure* is wider in scope than the Latin *Vis Major*. While the latter includes only the act of god, the former expression includes within its scope, act of god and also events such as wars, strikes, terror attacks etc., over which a party under a contract has no control. Hence, the party to the contract is required to be protected from those very events which would otherwise constitute grounds for breach of contract if the party was not to perform the same under normal circumstances.

Normally, each contract consists of a specific *Force Majeure* clause stating that the performance of obligations by the parties to the contract may be postponed, delayed or totally excused on the occurrence of events, such as acts of god, strike, epidemics, war or acts which are beyond the reasonable control of the contracting parties and clearly specified in the terms of the contract either expressly or impliedly. Though a right under this category may give them a right to postpone or relieve them of their obligations, such a right is not necessarily an absolute one. A contracting party desirous of absolving himself of his contractual obligations under this head needs to prove the following: that the specified event of *Force Majeure* has occurred which was the causal reason for his non-performance, and it was not actuated by any economic or other motives, the said event was not triggered due to his own default or negligence, he had taken all steps to mitigate the loss arising out of such an event, he had no alternative method of performing his obligations

[3]SIR KIM LEWISON, THE INTERPRETATION OF CONTRACTS (5th Ed. 2016, Sweet & Maxwell, Thomson Reuters)

and the event has made the performance of his obligations impossible or beyond his control.

It is extremely important that a person who is pleading a non-performance under this category needs to adduce strong evidence to prove a *Force Majeure* event, as the Courts are likely to interpret invocation of such an event very strictly. It must also be noted that interpretation of any *Force Majeure* clause is fact-specific to each contract and there exists no standard formula for application of such clauses.

In the absence of a *Force Majeure* provision in a contract, the generally accepted practice is to invoke the doctrine of Frustration of Contract or Supervening Impossibility to plead non-performance. In the Common Law regime, if an event could not have been reasonably contemplated by the parties at the time of the contract, but occurs subsequent to the entering of the contract, such an event is said to frustrate the contract or destroy the contract itself.

The Origin of *Force Majeure*

The concept of *Force Majeure* was brought into the English Common Law System only by the parties to the contract. This expression along with *cause estrangere* and *cas fortuity* concepts are part of French jurisprudence in the contractual and delictual liabilities. *Force Majeure* in French law derives from the expression *Vis Major* of Roman Law. This expression had been extensively commented upon by the glossators over the centuries. *Vis Major* operates as a limiting factor to the rule of strict liability imposed on the contracts (bailees) in the ancient Roman texts. French Law adopted the Roman law principle that all contractual liabilities are to be construed as strict if they are violated. Such of those exceptions are to be covered under the category of *Force Majeure*[4]. However, all that has changed over a period of time and the modern law has a range of situations in which strict liability is subject to the limit of *Force Majeure*. French Law of contract recognizes two types of

[4] BARRY NICHOLAS, Force Majeure in French Law, in FORCE MAJEURE AND FRUSTRATION OF CONTRACT 21(2nd Ed. 1995)

contractual obligations. One is *obligation de moyens* under which the promisor is obliged only to take reasonable care, and another is *obligation de resultant* under which the promisor in addition to taking due care is also responsible for fulfilling the promised act[5]. While in the former the promisee needs to prove the promisor's default, in the latter he needs to prove that the promised act has not been done or executed. It may be observed from the viewpoint of frustration that the above differentiation is one of obligations and not of contracts. As in most of the commercial contracts, both the above obligations may be present in a mixed manner, it depends upon what role the *Force Majeure* plays. For instance, if it is a failure to perform some obligations in a contract, force majeure may operate to give relief from liability arising from such non-performance whereas if the performance of the obligations is the very basis for performance of the contract, the force majeure clause may frustrate the contract itself[6].

Common Law and *Force Majeure*

Historically, the Common Law's treatment of breach of any contractual obligations had been very strict giving rise to damages for breach of any obligation promised by the promisor under the Contract. This principle was enunciated way back in 1647 in *Paradine v. Jane*[7]. It was held in that case that when a promisor by his own act commits to do an act under a contract, is bound to do as he had an option to limit his liability if he had any difficulty in doing it.

The plea that the defendant had done his best to fulfill the contractual obligations is no defence for any non-performance. By contrast, in an action for tortious liability, the plaintiff has to show that the defendant was responsible for causing the harm to him in order to

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[5] *Id.*

[6]See generally BARRY NICHOLAS, FRENCH LAW OF CONTRACT (Oxford University Press, USA, 2nd Ed. 1992); , WILLIAM SWADLING, The Judicial Construction of Force Majeure Clauses,in FORCE MAJEURE AND FRUSTRATION OF CONTRACT, 5 (Lloyd's of London Press LTD. 2nd Ed. 1995)

[7] [1647] EWHC KB J5

succeed. In cases of torts, the requirement is that the plaintiff should show that the defendant has failed to take such reasonable steps as are required not to inflict on him the harm complained of. However, in a contract, where free will of the parties plays a role, contractual liabilities are assumed to be absolute as set out in the contract unless the promisor decides to limit his liabilities under the contract. This proposition leads to a conclusion that a promisor may be penalized even for performing an impossible act under the contract, if such contractual promises are seen as promise to bear the risk of a promised event not happening and not seen as 'promise to perform'[8].

Oliver Wendell Holmes, Jr., in his work Common Law demonstrates this point by stating when a party to a contract promises that a third person would paint a picture or do a performance or it would rain next day is as much a promise as a promise to deliver one hundred bales of cotton. The law is not concerned with to what extent the promised event is within the control of a promisor; the assumption under a legally binding contract is that the promisor takes the risk of that event being promised and it is as good as promising 100 bales of cotton to be delivered.

The principle involved in shaping a contract is the ability to allocate risks amongst the parties and that freedom enables parties to plan their future course of actions secured with the comfort that the promised deeds would be performed as per the terms of the contract. It is generally expected that the promisor will do only those acts which are under his control and not those on which he would have no control. In respect of those acts beyond his control, he would try to qualify them by way of a clause of "force majeure". In a force majeure event, a promisor would provide in the contract that he shall not be responsible for any losses arising on account of any Act of God, such as flood, earthquake, landslides etc., or even man made events such as lock-out, strikes, riot, civil war, Governmental actions etc. This clause shall be read only in the

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[8] Bunge y Born Limitada Sociedad Anonima Commercial Financier y Industrial of Buenos Aires v. H. A Brightman & Co. [1925] A.C.799, 816

context of the contract along with other terms as each contract may have a separate provision for Force Majeure.

Since the time of *Paradine v. Jane*, the Common law has relieved the promisor from non-performance of promises under a contract under the category of Doctrine of Frustration of Contracts. This operates on the principle that "a contractual obligation has become impossible of performance on account of the fact that the changed circumstances at the time of non-performance have become so materially different from what was promised at the time of entering into a contract[9]. However, this principle posed the problem of placing the risk of non-performance on the promisee and operated against the principle of risk allocation of a contractual framework and future looking nature of the contracts. Hence, Courts were extremely reluctant to hold that the contracts were frustrated[10].

Doctrine of Frustration under the Common Law

Under the early English Common Law, the doctrine of absolute contracts did not apply where there was personal promise by a promisor under a contract or incapacity or supervening illegality[11]. This case was the basis of the Doctrine of Frustration which laid down the principle of discharge of contracts. Subsequently, in *Krell v. Henry*[12],the defendant took on rent a flat in Pall Mall to see the procession of King Edward II. However, the contract was frustrated on account of cancellation of the procession due to the illness of the King. Though the contractual performance could have still been done on the postponed dates, the frustration was held not limited to only physical impossibility. It was held to be extending to those cases where the said event leading to non-

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[9] Davis Contractors Ltd. v. Fareham U.D.C.(1956), A.C.696, 729.

[10] British Movietonesnews Ltd.v. London and District Cinemas(1952), A.C.166; *see also* The Super Servant Two, (1990), 1 Lylod's Rep.1; EDWIN PEEL, TREITAL ON LAW OF CONTRACT (Sweet & Maxwell 2015).

[11] Taylor v. Caldwell, 18633 B.& S.826 at 836.

[12] 1903, 2 K.B. 740.

performance was either due to cessation or absence of an express condition in the contract itself affecting the substratum of the contract without which it cannot exist[13]. In a subsequent case, *British Movietonews Ltd., v. London and District Cinemas*[14], the argument that mere uncontemplated events was a ground for cession of a contract did not find favour with the House Lords. The Courts considered the factors such as sanctity of absolute nature of the contractual obligation under the contract, that promises were not put to any hardship and the and the Doctrine was not used by the parties to avoid the contract on account of improperly concluded contracts with bad bargains while applying the doctrine of Frustration. The Courts also held that the Frustration should not be lightly treated by the parties[15]. Unexpected rise or fall of prices or depreciation of the currency or unexpected obstacles to the contract were held to be no grounds for frustration of Contracts.

In another case, *National Carriers Ltd. v. Panalpina (Northern) Ltd.*[16], it was held that a party prevented from performing his obligations on account of a temporary event could not cite it as a ground for frustration.

Subsequent to the Movietonews case, the doctrine of frustration was narrowed down by the courts in its overall scope[17]. Accordingly, Courts were very cautious in applying this principle in cases where the parties tried to use it as an excuse to avoid the contracts. This was on account of a variety of reasons such as using it as an escape route from the contractual obligations to get out of a bad bargain, problems in identifying the fine line between where the liabilities of contracts were absolute in case of non-performance, where smart parties stipulated their "own way out of contractual obligations" as part of contracts. For

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[13] EDWIN PEEL, TREITAL ON LAW OF CONTRACT (Sweet & Maxwell 2015).

[14] (1952) A.C.166.

[15]The Nema (1982), A.C. 724 at 75; *see also,* Tsakiroglour7 co Ltd., Noblee Thorl GmbH (1962) A.C.93 at 115; The super Servant Two(1990)1 Lloyd's rep.1 at 8; The Sea Angel(2007)EWCA civ547.

[16][1981] A.C.675 at 689

[17]*Supra* at 14.

instance, there were two cases arising out of Suez crisis in 1956 both of which pressed for frustration which were overruled[18].

The English Courts, however, used this doctrine where the parties were really prevented from performance. In the aftermath of clashes between Iran and Iraq in 1980s, a number of charter party cases involving stranding of their ships for longer duration due to the clashes between the two Arab countries, rendered the performance of contracts impossible leading to cessation of contracts[19]. The Frustration principle was not invoked where the contractual obligations became more onerous to the party who alleged frustration. The Doctrine of Frustration had practical difficulties in Common Law. For instance, it was burdensome to hold a contract to have been ended instead of enforcing; some compromises were required to be made as in some Coronation seat cases where it was provided if the event was cancelled, the promisee was entitled to use the same ticket on those days when the event took place[20].

Post 1956 Suez canal cases, the parties started specifically laying down in the contract itself as to which party should be liable in the event of closure of Suez Canal[21]. Earlier, absence of specific provisions in the contracts prevented the Common Law Courts from giving relief of discharge of contracts.

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[18]Carapanayoti & Co.Ltd. v. ET Green Ltd(1959)1. Q.B.131.overruled in Tsakiroglou & co v. Noblee Thorl GmbH (1962) A.C. 93; and the The Massalia(1961) 2 Q.B. 278, overruled in the The Eugenia {1964} Q.B.226.)

[19]The Evia (No.2) [1983] 1. A.C.736; The Agathon [1982] 2Llyod's Rep.211; The Wenjiang (No.2) [1983], 1Llyod's Rep.400

[20] Clark v.Lindsay (1903) 19 T.L.R.202; Victoria Seats Agency v.Paget (1902), 19 T.L.R. 16.

[21] Achille Lauro v. Total Societa Italiana per azioni (1969) 2 Lylod's Rep. 65; D I Henry Ltd.v Wilhelm G.Clasen [1973] 1Llyod's Rep.159.

Juristic Basis of the Doctrine in Common Law[22]

The relief through Doctrine of Frustration as applied by Common Law was not always effective in allocation of risks amongst the contracting parties. In Common Law, the parties to the contracts were expected to specifically provide as part of the contracts the allocation of risks as the Courts were not expected to be reading into the contracts such terms. The evolution of this principle in English Common Law appears to have alternated between the need to justify the sanctity of it and at times to evolve some general rules for its operation. This gave rise to some judicial theories on the Doctrine of Frustration:

1. *Theory of Implied term:* The contract is said to be terminated as it was implied that on the onset of events which had happened it should come to an end. Lord Loreburn propounded this theory in the Tamplin case, where he stated that if the parties to the contract did not intend a particular obligation as absolute, the Court will not regard it as absolute[23]. This theory was seen to be more subjective as it presumes that the parties could predict the supervening events. However, in reality upon the happening of the supervening events, each party might view the events from a different perspective, one considering the contract as discharged and the other continuing. Lord Reid in *Davis Contractors Ltd. v. Fareham urban DC*[24] observed that "the parties could not, as reasonable persons, intended to continue with the contract under the altered conditions". As this theory did not give effect to the subjective intent of the parties, it did not find favor with the Courts.

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[22] EDWIN PEEL, TREITEL ON THE LAW OF CONTRACT, 19,114- 119 (15th Ed.Sweet & Maxwell, 2020)

[23] In Tamplin SS Co. Ltd v. Anglo-Mexican Petroleum Co, (1916)2 A.C.397 at 404.

[24] [1956] A.C.696 at 728.

2. *Just solution:* This theory postulated that the frustration doctrine was a judicial device by which the terms of absolute contract were to be reconciled with ends of justice. In another case *Joseph Constatntine SS Line Ltd. v. Imperial Smelting Corp. Ltd.*[25] Lord Wright observed that in order to achieve a just and reasonable end result, the Court exercises its power to terminate a contract under this Doctrine. However, that was not to suggest the Court had unbridled power; it was to be guided by the principles of the strict rules of the Doctrine of Frustration with the ultimate objective of ends of justice being met. Under this theory, though the contract was discharged at Common Law relieving both the parties of their obligations, the apportionment of the loss might be the just solution.
3. *Foundation of the Contract theory:* This theory was propounded by Lord Haldane in the Tamplin case.[26] When parties enter into a contract to perform their obligations based on the availability of a specific thing, the contract automatically ends when that specific thing is not available anymore on account of circumstances beyond their control. Apparently simplistic, this theory posed the problem of finding out the real foundation of the contract which could be done only on construing the entire contractual terms. In that case, it resembled the Implied Theory which stated that the subjective intent of the parties were to be found out in an objective sense.
4. *Construction of the Contract theory:* All the above theories are subsumed into this theory as ultimately whether a contract should be frustrated or not depended on the construction of the entire contract. As Lord Wright observed in the case of *Denny, Mott & Dickson v. James B Fraser& Co Ltd.*[27], “What happens is that the contract is held on its true construction not to apply at all from the time when the frustrating circumstances supervene.”

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[25] [1942] A.C.154 at 186.

[26] *Supra* note 24.

[27] [1944] A.C.265 at 274.

All the above theories were propounded as part of the efforts to assess the application of doctrine of Frustration in English Common Law. Depending upon the facts of each case, the above theories were conceived and applied in order to assess whether a contract could be said to be frustrated or not.

The Doctrine of Frustration as developed by English Common Law applied very stringent rules when it came to the question of canceling absolute Contracts, bringing about a great degree of hardship to the party who was adversely affected by the cancellation of the contract. He was compelled to suffer more due to the unforeseen supervening impossibility of events or it was less favorable than he expected. It also brought about a great deal of uncertainty of the contract itself as the parties were not able to determine whether the nature of the supervening event was so serious in its effect as to induce a frustration. This problem was solved later when the parties introduced the concept of *'force majeure'* as part of the contract which provided the circumstances or events occurring beyond the control of the parties giving rise to discharge of the contracts. This type of specific event which discharges the parties from performance of the contractual obligations can take place irrespective of whether the same supervening events qualify a contract to be frustrated under the general law. This type of termination was termed as "Contractual frustration clause"[28]. If the specified clause in the contract was invoked, the contract would be discharged based on the construction of the contract as a whole and not on the basis rules developed to determine the Doctrine of Frustration under the Common Law.

While the principle of frustration will be applied not very liberally, parties to the contract were incorporating "Force Majeure" clauses in the commercial contracts. Over a period of time, the clause *Force Majeure*, has come to the rescue of the contracting parties in

[28] Bremer Handelsgesellschaft GmbH v. Vanden Avenne-Izegem PVBA [1978] 2 Llyod's Rep.109 at 112.

anticipating the future events and to suitably provide the allocation of risks between them in the contract itself.

As mentioned earlier, the concept of Force Majeure has been adopted by the Common Law from the French Law. Under the English Law, the promisor must prove that the promised act has become impossible to perform and not onerous. The English frustration corresponds to the French Law[29]. However, where it differs is that in French Law technical performance will not afford any defence of *Force Majeure*. Whereas the English law recognizes the concept of existence of economic basis of the contract and if it disappears, then that may be a ground for cancelling a contract. Generally, under both English and French Law, the events which impeded the performance of the contract must be unforeseeable and irresistible. If the parties have foreseen the risk of an event, they must have provided for it; otherwise, the plea of non-performance on account of force majeure is of no avail. If the parties had an alternate way of performing or the obstacle to the performance is removed, then the force majeure will not apply.

Force Majeure and Exemption Clauses in a Contract

Justice Donaldson, in *Kenyson, Son & Craven Ltd. v. Baxter Hoare & Co. Ltd.*[30] brought out a distinction amongst various types of exemption clauses on the following lines:

1. Those clauses which seek to limit the obligation of promisor(defendant's) under a contract which but for such limitation, those very obligations, indeed, are binding on him to perform.
2. Those clauses which exempt the promisor from any damages in the event of any breach of those obligations which he is bound to perform under the contract.

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[29] Davies Contractors Ltd. v. Fareham U.D.C.(1956) A.C. 696.

[30] [1971] 1 WLR 519 .

3. Those clauses which limit the extent of indemnification by the promiser for a breach of duty owed by him under the contract.

While there is no breach in case of the first category of clauses, there exists breach in the second category. However, there is no liability on account of exclusion. The second category leads to an interpretation as postulated by Denning, L. J. in *Karsales (Harrow) Ltd. v. Wallis*[31], that the contractual terms should be read independent of the exemption clauses set out in the contract and see what obligations are cast on the party and only then should the Court decide whether such exemption clause provides a defence to the breach of contractual obligations[32].

However, a force majeure clause comes under the first category of clauses mentioned by Donaldson J. above. In *Fairclough Dodd & Jones Ltd. v. J H Vantol Ltd.*[33]Lord Tucker observed: In the case of an exemption clause, it will come into operation on the event happening, the same otherwise would be a breach. However, the parties are free to either opt for a substituted mode of performance or extension of time on the happening of an event of force majeure irrespective of whether that event would have prevented the performance of that act.

Lord Dillon L. J. observed in *J. Lauritzen A S v. Wijsmuller B V*[34], that a clause in a contract of carriage to cancel the performance of the contract on the event of Force majeure operated as a cancellation clause and not as an exemption clause. The logic for this is that a force majeure limits what would otherwise be a positive and absolute obligation rather than stipulating what should be done for a breach of the very obligation[35]. The line of distinction between an exception clause and force majeure is very tenuous. In *SHV Gas Supply and Trading SAS v. Naftomar Shipping*

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[31] 1956, 1 W.L.R 936.

[32] *Supra* note 7

[33] (1957) 1 W.L.R.136.

[34][1990] 1 Lloyd's L. Rep. 1

[35]*Supra* note 4 at 635

& Trading Co Inc.[36], it was held that a force majeure clause should be interpreted as an exception clause. This clause, if operative, will hold the seller liable for not delivering within the stipulated time frame but will only give him relief from any damages that are payable for the breach of that obligation[37].

Application of the principle of Force Majeure: The Courts over a period of time have laid down various rules for the application of this principle.

1. It is a general rule that a force majeure itself will be applicable only when the event that gives rise to it is beyond the control of the parties and could not be avoided or mitigated through reasonable steps. In *Bulman & Dickson v. Fenwick & Co.*[38], one of the exceptions in the Charterparty delay was caused due to strike in loading and unloading. The Court observed that the strike could not be taken as one of the grounds for taking delivery of goods upon arrival of the vessel. However, since, on facts it was found that even with reasonable steps they could not have taken delivery. The delay on account of the strike was held to be within the exception clause. In a number of subsequent cases, the test of reasonable efforts taken by the party invoking force majeure was followed.
2. Where a clause on Force majeure contains the expression 'prevention of contractual obligation' as an event triggering force majeure, the Court would only rely on it when it is legal or physical prevention and not arising out of economic reasons such as loss of profit, or commercial impossibility or change in market conditions affecting the viability of the contract etc.[39]

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[36][2006] 1 Llyod's Rep.163.

[37] *Id.*

[38][1894] 1 Q.B. 179.

[39]Lancashire Ltd., v. C S Wilson & Co, Tandrin Aviation Holding Ltd., Aero Toy Store LLC [2010] 2 Llyod's Rep.668

3. Where an event contained in the force majeure causes non-performance of the contractual obligations, only then can the doctrine be invoked. A contract of sale of nuts stipulated that the seller had the right to terminate the contract in the event of non-delivery due to failure of crops. However, due to poor output of crops, the seller tried to avoid the contract. The Court did not agree as there was no failure of crops and secondly, the party was not prepared to pay a higher market price to get the delivery[40].
4. If the Force majeure clause provided for an alternate mode of performance of the contract, then the relief of Force majeure would not be available. A seller cannot take the plea that he intended to perform in a particular way or time but was prevented by the supervening event but also needs to show that he could not have performed through alternate time or ways[41].
5. Where an event which could not have reasonably been foreseen, even if mentioned as part of Force Majeure clause, such an event would not trigger a Force Majeure but frustrate the contract itself. In case of a building contract, where a reservoir was to be built in 6 years time, the contract provided for extension of time on account of difficulties or impediments; however, due to Governmental directive the work was stopped. When the provision Force Majeure was invoked and argued that it was covered under the extension of time due to delay. But House of Lords held that the contract was frustrated. They held that though the general language was wide enough to include any contingency, the words were used *alio intuitu* and could not have covered an indefinite legislative delay[42].
6. The relief of Force majeure may not be available if the event causing force majeure was caused by the negligence of the party who seeks such relief.

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[40] Buntern & Lancaster Ltd., v. Wilts Quality Products (London) Ltd. [1951] 2 Lloyd' Rep.30.

[41] Warinco AG. Fritz Mathner, [1978] 1 Llyod's Rep.151

[42] Metropolitan Water Board v. Dick, Kerr & Co. Ltd.,[1918], A.C.119.

7. If the Force Majeure clause demands serving of notice as a condition precedent by a party relying on it, the said party may not get the relief if he had not given the notice.

The English Common law has also held that it would be difficult to assess the relationship between these two doctrines, Force Majeure and Frustration. For instance, if for some reason the force majeure covers an event fully which otherwise would qualify for frustration, the latter would be excluded[43].

Doctrine of Frustration and Force Majeure in India

In India, the concepts of 'Force Majeure' and 'Frustrations of Contract' are very clearly articulated in the Indian Contract Act, 1872. While Section 32 deals with Force Majeure events as may be mentioned in a Contract, Frustration of a Contract which leads to total cancellation or annulment of the contract is dealt by Section 56, through a positive law, viz., "an agreement to do an act impossible in itself is void".

In *Satyabrata Ghosh v. Mugneeram Bangur & Co.*[44] the Hon'ble Supreme Court laid down that the Indian Law of Frustration is laid down in Sec. 56 of the Indian Contract Act, 1872 which leaves the matter to be decided by the Court on the Frustration of Contract and the matter is not for the parties to decide. It also stated that Sec.56 of Act is a positive law and not driven by the intention of the parties and the Court has to decide the matter on the basis of construction of the Contract. Where the very purpose of the contract is defeated on account of unexpected change of circumstances beyond the contemplation of the parties, the Court needs to step in to give relief to the parties and when there is frustration of the Contract, it automatically comes to end and not on the choice of parties by way of rescission or repudiation or breach of the party. But in *Alopi Parshad & Sons v. Union of India*[45], the Supreme Court refused the

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[43] *Supra* note 4 at 651

[44] AIR 1954 SC 44

[45] AIR 1960 SC 588

frustration stating that mere alliteration of the circumstances cannot lead to frustration. The Courts will not interfere with the contracts where they have become more onerous or difficult to perform the obligations as commercial difficulties cannot induce frustration. In *Naihati Jute Mills Ltd. v. Hyaliram Jaganath*[46], the Supreme Court held that the change in circumstances did not give rise to any frustration of the contract. The question of the contract becoming impossible to perform did not arise on account of change in Government's policy. In that case the buyer was not given import license on account of personal disqualification and due to change in Government policy. The buyer was aware of the Government stance and could not take the plea of change in Government policy of import. It also stated that no implied terms need to be read in the contract in such cases. Another interesting point that came for consideration in that case was even if there was frustration, it would only bring to an end the performance of the contractual obligations, but the contract may still continue for the purpose of resolution disputes. The issues such as whether the contract was impossible to perform and should be discharged under the Frustration doctrine etc., would need to be examined under the arbitration clause. Recently, the Supreme Court in the case of *Energy Watchdog v. CERC*[47] had reiterated the law laid down in the earlier case decided by it in the matter of *Satyabrata Ghose v. Mugneeram Bangur & Co*[48]. It stated that the word "Impossible" has not been used in Section 56, in the sense of physical or literal impossibility but the performance may also be impracticable and useless from the viewpoint of the object and purpose of the parties. When the frustration is pressed as a ground for release from performance of a contract, the rigour of proof will be even more stiffer than in the case of Force Majeure, as it may lead to total annulment or cancellation, resulting in economic loss to the counter parties.

While Section 32 of the Indian Contract Act, does not specifically call it as a force majeure clause, it has all similarities to the force majeure

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[46] AIR 1968 SC 522.

[47] 2017 (4) SCALE 580

[48] *Supra* note 44.

clause of a contract. It states that if the parties to the contract agree to perform or not perform any act on the happening of an uncertain future event, such contract cannot be legally given effect until and unless that event has happened. Two points emerge from this provision. The first one being that there should be an agreement to do or not something must be present and it should be linked to the causative factor of "uncertain future event". That means to say to do or not to do that contracted act will be valid and enforceable only on the happening of that "uncertain event". The second limb of Section 32 stipulates that if that event becomes impossible, then the contract becomes void."

Except for the above cases dealt with by the Supreme Court, the jurisprudence in this space has not developed much as it has happened in the English and European jurisdictions. However, with the announcement of the nationwide lockdown in the country, there is an increasing interest and focus on the concepts of force majeure and doctrine of frustration. A Government of India memorandum No.F/18/4/2020 PPD dated 19.02.2020 issued by Finance Ministry stated that a doubt had arisen whether supply chain disruption could be treated as Force Majeure on account of the spread of CoronaVirus in China and other countries and it was further stated that the corona virus may be treated as natural calamity and the force majeure may be invoked wherever required upon following necessary procedures. However, this memo, as observed by the Delhi High Court in the matter of *M/s Polytech Trade Foundation v. Union of India & Ors.*[49] is more advisory in nature and not directory. Such advisories cannot interfere with the private contracts.

In *M/s. Halliburton Offshore Services Inc. v. Vedanta Ltd.*[50] and another 20 April 2020, while granting relief from invocation of bank guarantees, the Delhi High Court stated that the country wide lockdown was in the nature Force Majeure. However, in *Indrajith Power private Ltd., v. UOI & Ors*.[51], the same Court did not give relief from invocation of bank guarantee as sought by the Petitioner citing lockdown as force

[49] 10546/2020 W.P.(C) 3029/2020.

[50] 2020 SCC OnLine Del 542.

[51] W.P.(C) 2957/2020 & CM Nos.10268-70/2020.

majeure, as it could not fulfil its contractual obligations in spite of repeated extensions of time being given. The default was found to have happened independent of the lockdown. Similarly, the Bombay High Court in *Standard Retail Pvt. Ltd. v. G S Global Corp. and Ors.*[52], refused interim relief to the Petitioner stating that the subject commodity was "Essential" in nature and lock down was only for a limited period. Whereas in another matter, *Rural Fairprice Wholesale Ltd & Anr. v. IDBI Trusteeship Services Ltd. & Ors.*[53], the Court held, the crash of the stock market in the wake of Covid- 19 was a justification to restrain the bank from proceeding on the sale orders for the pledged shares.

Conclusion

The sudden event of Corona vires or supervening events such as these could not be reasonably foreseen by any contracting party. As a result, whether it should be treated as a "Force Majeure" or not is dependent upon the language of the clause of Force Majeure set out in a contract. As the Contract Law is private law in nature, construction of the terms of the Contract will play a main role in determining whether a Force Majeure will apply or not. In French jurisdiction, which was the origin of this concept, Article 1218 French Civil Code, 2016 provides that Force Majeure in a contract exists if an event has the effect of preventing a debtor from fulfilling his contractual obligations, and such an event was beyond the control of the debtor and could not have been reasonably foreseen at the time of entering into contract and its effects cannot be avoided by reasonable measures. If the impediment is of temporary in nature, the operations of the obligations are suspended for that period. However, if the delay is prolonged, it has the effect of releasing the parties from their obligations in terms of Article 1351 of the French Code.

In American jurisdiction, the Uniform Commercial Code (UCC) vide Article2-615(a) also provides for "Force Majeure" as a ground for a

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[52] Commercial Arbitration Petition (L) No. 404 OF 2020.

[53] Commercial Suit (O) 307 of 2020.

seller to excuse performance of the contract, if it is commercially impractical either due to occurrence of a contingency as its non-occurrence was the basis of the contract or compliance in good faith any domestic or foreign regulation or order whether or not it later proves to be invalid. Similarly, in India either the contracts themselves may provide force majeure clauses in which case Section 32 of the Indian Contract Act, 1872 will apply. If there is no provision for force majeure in contracts, Section 56 of the Indian Contract Act, 1872 providing for frustration may apply. In all these jurisdictions where specific provisions exist for Force Majeure either in statutory law or in Common Law or in contractual framework, the Pandemic, Covid-19 was seen affecting the performance of the contracts. Extensive material have come out, post Covid-19, on the applicability of the concept of *Force Majeure* using various legal interpretations. It was interpreted that Covid-19, would be covered if it was covered under the expression “Pandemic or epidemic” provided in the Force Majeure clause of the contract. If not, it may be covered under the expression “Governmental Acts”, normally used in the Force Majeure clauses, wherever the Governments have come out with specific rule or order to treat the pandemic as a Force Majeure. However, the same may not be of any help if they happen to be directory and advisory in nature. For instance, the Indian courts have followed different approaches in construing the Covid -19 as Force Majeure as “Government Acts”, depending upon the fact specific contracts. If not, it could still be covered under the catch all expression, “beyond the reasonable control of the parties or any other causes beyond the control of the parties”. While these are only suggestive interpretations to indicate whether Covid-19 as a Pandemic is included in the Force Majeure, it remains to be examined from the overall construction of the contract as to whether Covid-19 provides a ground of discharge from the contract, whether temporary or permanent. Another important point is that the Pandemic should provide a causative factor/reason for non performance of the obligations. The subjective intention of the parties of the contract will also be considered whether they intended to cover an event like Pandemic, even if it is not specifically covered under the Contract.

While the Indian Courts have been applying the principles of force majeure and frustration to various commercial contracts against the background of corona vires, the coming days will further determine the development of judicial precedents to the doctrine of force majeure and Frustration as these are fact specific to each contract and will have to be examined from the viewpoint of construction of each contract and the subjective intention of the parties of the contract. That will create a robust body of judicial precedents for the doctrines of force majeure and frustration of contracts for future cases of commercial contracts.