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CONTRACTUAL NON-PERFORMANCE FORCE MAJEURE AND ALTERNATIVES TO COVID-19



The COVID-19 has caused numerous troubles for organizations and entrepreneurs in doing their business exercises around the world. The economic impact of the Pandemic all over the world has disturbed the political, social, economic, and financial structures. Thus, here we have undertaken an analysis portraying what India (I) and France (II) have to offer as approaches to the effect of the pandemic.

I. India

Is there any specific legislation on commercial contracts to regulate the problems arising from the health emergency we are facing?

As of this date, there is no specific legislation on commercial contracts in India that regulates the problems arising due to Covid 19. It is important to state here that on February 19, 2020, the Indian Government issued an Office Memorandum, stating that covid-19 pandemic shall be considered as natural calamity and force majeure clause may be invoked wherever necessary. It should be noted however that the memorandum was related to Government contracts.

However, the mentioned office memorandum was applicable in event of failure to perform an obligation is primarily due to the lockdown implemented by the Government, therefore, the force majeure clause under a contract should also entails terms such as lockdown, pandemic or epidemic in order to be invoked.

Does this jurisdiction imply a concept of Force Majeure into commercial contracts, and what are the other remedies when this concept cannot be applied?

Under the Indian Contract Act, Force Majeure has not been defined. However, the provisions related section 32 may be considered, which renders a contract void when an event upon which performance of contract is depended, becomes impossible (contingent contracts).

In absence of any clause governing force majeure event, then the circumstances that have affected the performance of contract will have to be examined to establish whether it renders the contract impossible, unlawful or impractical to perform and due to which the contract is rendered void automatically. If it is established that the circumstances have materially affected the parties and obligations and there is no way to continue the contract while such circumstances exists, the contract is voided and both contracting parties are discharged of their subsequent obligations and neither party has the right to sue the other party for breach of such contract.

Secondly, in India, in the absence of a force majeure clause, the contract will have to be examined in the context of the doctrine of frustration under Section 56 of the Indian Contract Act, 1872 ("Contract Act"). The concept of restitution as set out in Section 65 of the Contract Act also assumes significance in the context of the frustration of contract. Section 65 states that when an agreement is discovered to be void, such as in case of a contract getting frustrated, the person who has received any advantage under such agreement is 'bound' to restore it or to make compensation for it, from whom he received it.

For a contract without a Force Majeure provision, what options does a party have where its ability to perform its obligations has been affected by COVID-19?

If a contracts "do not include" a force majeure clause and "Section 56 of the Contract Act, as is not applicable" or the affected party prefers "not to" invoke Section 56 (to prevent the contract from becoming void in its entirety); and mutual negotiations amongst parties have failed- the parties may approach the dispute resolution mechanism agreed in contract or otherwise the court of the relevant jurisdiction to has to decide upon the question of law.

How are the courts likely to assess whether COVID-19 qualifies as a Force Majeure event?

The courts and arbitrators will have to evaluate and decide each dispute on individual merits, which would be based on the terms of the contract, the intent of the parties, steps taken to mitigate.

The court may dismiss any applications related to frustration of contract if there is the trivial chance partial obligation of obligation or if it seems that the circumstances would change in the very near future or if sub-contracting is possible, if there is only a delay but eventual delivery is possible.

In cases where the courts dismiss such claims of force majeure or doctrine of frustration, the courts may order specific performance of the contract or award damages if losses have incurred due to non-performance of delay of the contractual obligations.

II. France

1. Is there any specific legislation on commercial contracts to regulate the problems arising from the health emergency we are facing?

Currently in this health crisis, under French law, two legal provisions are invoked, *force majeure* (A) and *Imprévision* (B).

A. Force majeure is defined in Article 1218 of the French Civil Code as an event beyond the control of the affected party that could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures.

Unless the parties have agreed otherwise, for an event to qualify as force majeure under French law three requirements must be met:

- Exteriority (*extériorité*), *i.e.*, the event is beyond the affected party's control.
- Unforeseeability (*imprévisibilité*), *i.e.*, the event could not reasonably have been foreseen at the time of the conclusion of the contract.
- Irresistibility (*irrésistibilité*), *i.e.*, the effects of the event could not be avoided by appropriate measures. Irresistibility is the core requirement of force majeure.

B. *Imprévision* is governed by Article 1195 of the French Civil Code:

- If a change of circumstances that were unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party that had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract.
- If the renegotiation is refused or fails, the parties may agree to terminate the contract or to turn to a court or arbitral tribunal to adapt the contract. In the absence of such an agreement in a reasonable time, upon the request of any party, a court or tribunal may amend or terminate the contract.

2. Does this jurisdiction imply a concept of Force Majeure into commercial contracts, or do the parties need to negotiate the provision?

As long as a contract has been concluded before Covid-19 was not rampant, the first two criteria of exteriority and unforeseeability can be assumed to have been met. The force majeure clauses are a prime area for interpretation because the parties rarely pay attention to them except in the case of specific contracts such as the transport of precious goods such as jewellery.

The French Court (Cour de Cassation) in the matter of insurance contract had ruled that nothing prohibits an insurer from insuring a risk relating to an event of force majeure (Civ. 1, 23 May 2000, No. 97-18.129). It accepted that a risk relating to force majeure was insurable where an insurance policy specifically covered armed robbery without referring, for that particular insurance cover, to force majeure. Also, in practice, as reminded by the French Insurance Federation, almost all contracts covering businesses (operating losses, disruption of the supply chain, cancellation of events, non-delivery, etc.) exclude the event of an epidemic (FFA, fact sheet updated on 19th March 2020). Hence, in the event of dispute between the Parties, interpretation of clauses under contract by court will decide whether the non-performing could take plea of force majeure event for non-performance of contract.

3. For a contract without a Force Majeure provision, what options does a party have where its ability to perform its obligations has been affected by COVID-19?

Imprévision applies in cases where "a change in circumstances unforeseeable at the time of the conclusion of the contract makes its performance excessively onerous for a party who had not agreed to assume the risk". The concept is attractive but is not necessarily easy to implement in the present case. When a party experiences the situation described above, Article 1195 of the French civil code provides that it may "request a renegotiation of the contract". If this fails, the matter is referred to the judge. Moreover, Article 1195 also provides that the party who invokes *Imprévision* must continue to perform its obligations during the renegotiation.

On another note, in the real estate/construction sector, the French Court (Cour de Cassation) has approved, a clause increasing the time limit for carrying out the construction work "for days of bad weather, within the meaning of the regulation of work on building sites, (...), as well as for delays resulting from the strike and the filing for bankruptcy of a company, and generally speaking, in case of force majeure" (Civ. 3, 24 October 2012 - n° 11-17.800).

Also, the Vienna Convention on the Sale of Goods ("CISG", 11 Apr. 1980) provides in article 79 (1): "A party is not liable for non-performance of any of its obligations if it proves that such non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have prevented or overcome it or its consequences



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4. How are the courts likely to assess whether COVID-19 qualifies as a Force Majeure event?

If a party is unable to fulfil its obligations and considers itself confronted with a case of force majeure, it is advised that it should notify the other party. On the one hand, this will allow the latter to adapt and limit his damage. On the other hand, in the event of a dispute, a judge may be thought to be less inclined to acknowledge force majeure if it is invoked later on. Finally, the contract may contain a clause providing for a specific procedure imposing a notification requirement within a certain period of time. If a party is considering force majeure, it should review the impacted contract without delay (including the general terms and conditions applicable where applicable).

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