Testing the outbreak of the coronavirus with the touchstone of *force majeure*: An Indian Perspective

Introduction

The macabre of the novel coronavirus (also commonly known as *"COVID-19"*)[1] has engulfed within its fold as many as 112 countries and territories around the world and international conveyance (the *Diamond Princess* cruise ship harbored in Yokohama, Japan)[2]. This virus has found a foothold on every continent except for Antarctica. There are now about 119,223 reported cases and more than 4,299 reported deaths[3] attributed to this new virus and in several countries, the number of cases continues to climb.[4] On Monday, 9 March 2020, the WHO said that the threat of a coronavirus pandemic "has become very real" and that the spread has reached "pandemic proportions"[5]. The WHO defines a pandemic as the "worldwide spread of a new disease," and the determination is made based on the geographical spread of the disease, the severity of the illnesses it causes, and its effects on society.

In fact, on 30 January 2020, the outbreak of COVID-19 was identified as a *"*public health emergency*"* of international concern by the WHO which has resulted in governments across the world taking emergency measures. Depending on the magnitude of impact on the countries, these emergency measures have ranged from imposing travel bans, denial of entry to ships at ports, stringent screening, quarantining suspects and patients and isolating the infected ones in an attempt to stop the virus from spreading any further. These emergency measures have disrupted international trade with a complete slowdown in distribution channels of export and import, hindrance in access to cheap labour and manpower from other countries and shut down of workplaces among other such drastic measures.

The present article seeks to examine whether this global outbreak may be construed as a *force majeure* event or an *"act of God",* and can be taken as a defence to absolve a non-performing party from any liability arising out of failure to perform or delay in performance of it's part of the obligations under an agreement.

Analysis of the legal position

At the outset, one of the fundamental premises of contract law is the principle of *"pacta sunt servanda"*, which means "agreements must be kept". Having said this, accounting for exceptional circumstances that may render a party unable to honour its part of the obligations, a *force majeure* clause forms a boilerplate clause in agreements across the world today and aims at absolving one or both parties from liability to perform contract obligations when the inability to perform is due to some factor/ event/ circumstance beyond the parties' control.

The concept of *force majeure* is essentially a circumstance or event, the occurrence of which is beyond the control of the contracting parties rendering performance of their contractual obligations by the party(ies) impossible, i.e., the occurrence of such an event must be impossible to overcome. The occurrence of a *force majeure* event may suspend the operation of the contract for the duration of

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[1] On 11 February 2020, the World Health Organization (WHO) announced an official name for the disease that is causing the 2019 novel coronavirus outbreak, first identified in Wuhan China. The new name of this disease is coronavirus disease 2019, abbreviated as COVID-19. In COVID-19, 'CO' stands for 'corona,' 'VI' for 'virus,' and 'D' for disease. Formerly, this disease was referred to as "2019 novel coronavirus" or "2019-nCoV". (Source: https://www.cdc.gov/coronavirus/2019-ncov/faq.html)

[2] https://www.worldometers.info/coronavirus/

[3] *Ibid,* at 11.30 am on 11 March 2020.

[4] https://edition.cnn.com/2020/03/09/health/coronavirus-pandemic-gupta/index.html

[5] https://www.businessinsider.in/science/news/the-world-heath-organization-says-the-threat-of-a-coronavirus-pandemic-has-become-very-real-as-global-cases-surpass-110000/articleshow/74557707.cms

the occurrence of the change in circumstance or event, or render the entire contract frustrated. Such events may include calamities such as floods, violent storms, fires or impediments such as governmental action, change in law, riots, shutdowns, etc. depending upon the nature of the contract and understanding between parties.

Practically speaking, given the transnational nature of contracts, globally, courts seek to interpret contracts strictly in terms of stipulated provisions agreed thereunder, with minimal intervention from the governing law. Such intervention also, is restricted primarily to cases of ambiguity, uncertainty or disputes as to the intention of the contracting parties. *Force majeure* clauses may broadly be of two kinds –

i. Most contracts today contain detailed clauses wherein events/ circumstances/ factors that may be considered as a *force majeure* event are expressly set out, or at least thresholds and broad categorisations of an occurrence qualifying as such an event is clearly set out. In such a case, only the occurrence of events falling within the detailed specifics or broad categorisations, may absolve a party of its obligations under the agreement.

ii. Alternatively, contracts today also specifically set out events, the occurrence of which shall *not* be considered a *force majeure* event – but only as an onerous circumstance/ hardship on the party facing such a change in circumstance. In the event of such an occurrence, no party can take the defence of impossibility of performance and will accordingly be held liable for their non-performance in terms of the agreement. In such cases, where parties expressly assume the risk of impossibility, they cannot avoid the performance of obligations on grounds of impossibility. If a contract provides that an obligation is unconditional or unaffected by any impossibility, it is not open for a party to bring a claim under the defence of force majeure. However, in such cases, the occurrence of events other than those specifically excluded from the purview of *force majeure* may be derived from an interpretation of the governing law and shall vary from case to case.

In India, the doctrine of *force majeure* is enshrined in Section 56 of the Indian Contract Act, 1872 (Act), wherein it is stipulated that an agreement to do an impossible act is in itself void. Accordingly, it provides that 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, becomes unlawful - becomes void when the act becomes impossible or unlawful.

Analysis of judicial precedents

It is relevant in the present circumstance to understand the threshold of impossibility – i.e., whether the widespread onset of the virus and its consequences, would qualify as an impossibility or whether the same would be treated merely as a hardship. While examining such threshold, it is imperative that the we do not lose sight of the general rule that courts have no general power to absolve a party from the performance of its part of the contract only because its performance has become onerous on account of an unforeseen change in circumstance. For instance, in the landmark case of Tsakiroglou & Co. Ltd. v Noblee Thorl, GmbH, 1961 (2) All ER 179 it was observed that mere closure of the Suez Canal, given that there existed an alternative route to transport goods (through the Cape of Good Hope), did not qualify as a condition for the frustration of contracts on the sole ground that the alternative route was longer than the original route.

In the landmark decision of Satyabrata v Mugneeram, 1954 SCR 310, the Supreme Court discussed various theories that have been propounded pertaining to the juridical premise of the doctrine of frustration yet the essential idea upon which the doctrine is based is that of the impossibility of performance of the contract. It was observed that Section 56 of the Act lays down a rule of positive

law and does not leave the matter to be determined according to the intention of the parties derogating from the general idea of party autonomy that is central to contracts, globally today. However, in terms of determining the threshold for the applicability of this doctrine, it was observed that Section 56 of the Act allowed for discharge of obligations on grounds of impossibility if "*an untoward event or change of circumstance totally upsets the very foundation upon which the parties entered their agreement.*"

Subsequently, however, the lines between frustration and impossibility seem to have been blurred wherein, in its decision in Energy Watchdog v Central Electricity Regulatory Commission and Anr. (2017) 14 SCC 80, the Supreme Court held that "*in so far as a force majeure event occurs de hors the contract, it is dealt with by a rule of positive law under Section 56 of the Contract. The performance of an act may not be literally impossible, but it may be impracticable and useless from the point of view of the object and purpose of the parties.*" However, it remains undisputed that when a contract contains a *force majeure* clause which on construction by the court is held attracted to the facts of the case, Section 56 of the Act can have no application.

Conclusion

In the aforesaid background, it becomes relevant to examine whether the advent of COVID-19 upsets the very foundation upon which the parties entered their agreement. Moreover, if the coronavirus outbreak becomes protracted, depending on the extent of the impact there is a strong likelihood that it may take somewhere between a few months to a few years to restore normalcy with more and more sectors and projects being impacted and exposed to risks. The restoration to normalcy also may be sector specific and strongly dependent on external factors like import from countries like China (which is the epicentre of the outbreak), where it may take reasonably longer time than expected.

Prima facie, in today's day and age of technological and medical advancement, the answer to whether the advent of COVID-19 upsets the very foundation upon which the parties entered their agreement, appears to be negative. While the classification of the outbreak shall differ depending on the nature, structure and terms of a contract, it appears that in most cases, at first glance, the outbreak may be construed as a hardship – merely creating onerous circumstances for performance of contractual obligations and therefore, failing to qualify the high threshold accorded to a *force majeure* event in law. However, given the nature of contracts where time is of essence of the contract and the blurred lines between impossibility of performance and frustration, as discussed earlier, an argument may be made that the current global scenario constitutes a *force majeure* event on account of an indefinite delays that may be caused in actual performance by the affected party. So even in a scenario where the contractual terms are given supremacy (which may not include the outbreak of a pandemic or an epidemic as a force majeure event or even a broad categorisation thereof), it may effectively be argued that the fundamental purpose of the contract stands frustrated due the party's inability to perform and therefore, that the parties stand discharged from performance of their obligations under the contract.

Having said this, it is also pertinent to refer to the Office Memorandum No. F.18/4/2020-PPD dated 19 February 2020 issued by the Deputy Secretary to the Government of India, Ministry of Finance, Department of Expenditure, Procurement Policy Division to the Secretaries of all Central Government Ministries/ Departments[6] wherein it was *inter alia* clarified as hereunder:

"2. A doubt has arisen if the disruption of the supply chains due to spread of corona virus in China or any other country will be covered in the Force Majeure Clause (FMC). In this regard it is clarified that

[6] https://doe.gov.in/sites/default/files/Force%20Majeure%20Clause%20-FMC.pdf

it should be considered as a case of natural calamity and FMC may be invoked, wherever considered appropriate, following the due procedure as above."

This step taken by the government appears to be an attempt to answer the question that may plague all institutions, whether courts or tribunals, as to whether the outbreak of the current pandemic would adversely affect non-performance by the affected party under the concerned agreement. Needless to mention, the memorandum issued by the Government of India is restricted in its applicability to the contracts referred to therein and may hold high persuasive value when imported to contracts with similar broadly worded clauses.

However, on the other hand, for the school of law that is of the opinion that the terms of the contract are sacrosanct, it may be a harder task to include the spread of the virus within the ambit of clauses that leave no room for interpretation. Such determination shall have to be made keeping in mind factors such as whether the party could have performed its obligations in a timely manner if the outbreak did not occur and whether there are any alternatives to the methodology originally agreed upon for the performance of obligations, the nature of contract, etc. It may also be worth to note if the current scenario has an impact on the drafting of contracts wherein a pandemic may be expressly included in the ambit of a *force majeure* clause hereon.

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