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Contracts amid Covid-19 Pandemic: The Need for a Well Defined and Non-Exhaustive Force Majeure Clause in Contracts

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ABSTRACT

The Covid-19 pandemic and the lockdowns have affected the entire World catastrophically and have had a devastating effect on the economy. Fulfilling contractual obligations, in particular, became a challenge as the restrictions imposed made the performance of contracts impossible. Unforeseen and supervening events that can render the performance of contracts impossible and impractical can occur at any point in time. It is this uncertainty that is covered by the defences of Force Majeure and the Doctrine of Frustration. However, an analysis of precedents affirms that due to the high standards of frustration propounded by the Indian Courts and the absence of a provision expressly defining Force Majeure, it is impossible to positively state that a pandemic and a government-imposed lockdown would fall within the ambit of the said defences. Section 32 of the Indian Contract Act, 1872 governs the concept of Force Majeure but does not define it. Hence the scope of invoking the defence is determined by the language of the Force Majeure clause, which, if not drafted accurately, will forbid the parties from claiming its defence. These defences aim at protecting the welfare of contracting parties, but ambiguity concerning its application will only further the hardships endured by the parties. This paper analyses the concepts of Force Majeure and Frustration by conducting doctrinal research using legislation and case laws and suggests that the only way to tackle the issues that arise while invoking the force majeure clause is to ensure that the clause is drafted in a non-exhaustive way. Though this paper's primary focus is the defence of force majeure, the doctrine of frustration is also analysed to emphasise the need to have an all-inclusive force majeure clause in the contract.

Keywords: *Covid-19, contracts, force majeure, frustration, pandemic, lockdown.*

I. INTRODUCTION

The World is under the siege of the Covid-19 pandemic. The novel Coronavirus spread with such potency that Nations around the World imposed countrywide lockdowns and banned

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travel. India was no exception. The Indian Government, following the guidelines issued by the Ministry of Home Affairs, imposed a lockdown across the country, suspending travel and supply of non-essential commodities. The lockdown disrupted the supply chains and impeded commercial and industrial transactions, thereby hindering the performance of various contractual obligations. Covid-19 pandemic and the lockdown have severely affected the performance of contracts leading to its eventual breach. However, considering that such a breach was due to an unforeseen and a supervening event and not because of the parties' fault, there is a need to protect the parties from the dire consequences of non-compliance. Force Majeure and the doctrine of frustration are two concepts that hold immense importance in such crucial times for the very discernible reason that these concepts can help the contracting parties avoid the consequences of non-performance of a contract; in essence, act as a defence.

According to *Black's Law Dictionary*, a force majeure clause is a 'contractual provision allocating the risk of loss if the performance becomes impossible or impractical, especially as a result of an event or effect that the parties could not have anticipated or controlled',[2] and this clause has to be incorporated into the contract either before the execution of the contract or during its subsequent amendments. It is expedient for the parties to use their foresight and allocate for contingent events which can potentially render the performance impossible. So that on the happening of such an event, the force majeure clause can be successfully invoked, to exempt them from performing the said contract and hence avoid the liability. The said event or effect could be anything, from a natural calamity like a flood, famine, drought or war or even an epidemic, and it can also include government-imposed restrictions, regulations or orders. Under the Indian legal system, for the parties to claim the defence of force majeure, the contract must contain a force majeure clause.

Black's Law Dictionary defines frustration as 'the prevention or hindering of the attainment of a goal, such as contractual performance'.[3] Commercial frustration is the non-performance due to 'some unforeseeable and uncontrollable circumstance'[4], and hence different from self-induced frustration which is nothing but breach of contract. In the Indian legal system, the contract is frustrated only when an unforeseen event has occurred rendering the performance impossible and impractical, and this impossibility or impracticability should be the result of a radical change in the foundation of the contract and not mere hardships.

The restrictions imposed by the authorities as part of the lockdown owing to the spread of

[2] Black's Law Dictionary 718 (Thomson Reuters 9th ed. 2009)
[3] Black's Law Dictionary 740 (Thomson Reuters 9th ed. 2009)
[4] Id

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Covid-19 affected travel, production and sale, which were essential for fulfilling contracts. The concepts of force majeure and frustration undeniably perform a crucial role in protecting the contracting parties from the repercussions of non-performance of contractual obligations. Non-performance of contracts affects not only the financial stability of the parties but also their credibility, which if affected, can be detrimental for their business.

The invocation of the force majeure clause and the successful suspension of the contract depends on the occurrence of an event or effect which renders the performance of the contract impossible and impractical- provided the contract had a force majeure clause specifying such events or effects at the time of the execution or subsequent amendments of the contract. Similarly, the contract can be deemed to be frustrated and hence terminated if the parties can prove that an event or effect had fundamentally changed the contact, rendering its compliance impractical in the eyes of the law. However, whether a pandemic and a government-imposed lockdown will fall within the ambit of events or effects which can potentially give rise to the invocation of a force majeure clause in the contract and whether the same events or effects can frustrate a contract is a question that needs to be answered.

There is also no provision which expressly provides for force majeure unlike how section 56 of the Indian Contract Act, 1872 provides for the concept of frustration. Hence the focus comes down onto the force majeure clause. If the clause is not precisely drafted, by providing for all contingencies, the parties would not be able to prove that the events or effects so occurred are force majeure according to the clause and thereby claim its defence. The requirement to prove that the contract has fundamentally changed makes the process of discharging the contract under the concept of frustration even more strenuous.

(A) Objective of Research

The research objective is to critically analyse case laws on the invocation of force majeure clause and the application of the doctrine of frustration. The researcher intends to analyse the evolution and the current position of the concepts of force majeure and frustration in the Indian legal system to ascertain whether Covid-19 pandemic and the lockdown can constitute a force majeure or a frustrating event.

Though the paper is regarding the defence of force majeure, its invocation, and the need for an all-inclusive force majeure clause in the contract, the paper also analyses the doctrine of frustration in detail, and highlights the issues that are involved in the application of the doctrine of frustration. By highlighting the issues that arise from the invocation of the force majeure clause and the application of the doctrine of frustration, the researcher intended to

draw more emphasis on the need to have a carefully drafted force majeure clause in the contract.

(B) Research Questions

The researcher intends to answer the following questions,

1. Can the force majeure clause be invoked or the concept of frustration be applied under the Indian legal system to avoid the consequences of non-performance of contracts if Covid-19 pandemic and the government-imposed lockdown had effectuated such non-performance.

2. What are the benefits of having a well defined, carefully drafted, and non-exhaustive force majeure clause in the contract?

(C) Methodology Of Research

The methodology used in this paper is Doctrinal research. Primary sources of data such as existing legislation and case laws have been used to collect the information.

A critical analysis of the legislation and case laws relating to the concepts of force majeure and frustration is also undertaken.

II. FORCE MAJEURE AND THE DOCTRINE OF FRUSTRATION UNDER THE INDIAN CONTRACT ACT, 1872

The concept of force majeure is not enunciated in any Indian legislation. However, the concept draws its legal bindingness from section 32 of the *Indian Contract Act, 1872,* which deals with contingent contracts. It states that 'contract to do or not to something, the enforcement of such contracts which are contingent on happening of a future event, cannot be enforced unless and until that event has happened'.[5] The section also states that impossibility can render a contract void. Section 56 of the *Indian Contract Act, 1872* states that 'an agreement to perform impossible acts or agreements becoming subsequently impossible or unlawful to perform is void'[6], and it is those agreements that subsequently become impossible or unlawful to perform which are said to be frustrated. This concept is known as the doctrine of frustration and it 'absolves the parties from further performance'.[7] However, there is a need to evince a fundamental change in the contract in order to take the defence of frustration.

Though both the concepts of force majeure and frustration, relieves a party from performing

[5] The Indian Contract Act,1872, No.9, Acts of Parliament, 1872 (India)
[6] Id
[7] 1 SIR FREDERICK POLLOCK & SIR DINSHAW FARDUNJI MULLA, THE INDIAN CONTRACT AND SPECIFIC RELIEF ACTS 871-872 (LexisNexis, 14th ed. 2014)

an impractical and unlawful act in furtherance of a contract, 'the doctrine of frustration cannot be applied where the contract makes full and complete provision for a given contingency'[8], that is if the contract contains a force majeure clause. The main difference between the concepts is that force majeure clause can only be invoked if the force that makes the contract impossible is from within, in essential an event, which has been provided for under the clause. When it comes to frustration, it can be applied when a contract becomes impossible due to an outside force.[9]

III. A COMPREHENSIVE STUDY OF THE INVOCATION OF FORCE MAJEURE CLAUSE AND THE APPLICATION OF DOCTRINE OF FRUSTRATION USING CASE LAWS

It is a known fact that the concept of force majeure is not expressly stated in the *Indian Contract Act, 1872*. Hence, its applicability strictly depends on (1) whether or not the contract in question contains a force majeure clause, (2) whether the event which has occurred is included in the force majeure clause, and (3) whether the force majeure clause is drafted in such a manner that, even if the event is not explicitly mentioned in the clause, the event which has occurred can be interpreted to fall within the ambit of the clause, to claim the defence of force majeure. In addition to this, it is also necessary for the parties claiming the application of force majeure clause, to prove that the event which occurred could not have been mitigated, that it was beyond their control and that the contract could not have performed due the impossibility which the event had caused and that it was not mere inconvenience caused by price escalations or other difficulties.

Since the emphasis lies on the drafting of the force majeure clause and because the language of the clause can differ from one contract to the another, and also taking into consideration that 'force majeure clauses' have often been scrutinised by the Courts, it is necessary to have a clear understanding of the decisions taken by the Courts pertaining to the invocation of the force majeure clause. Similarly, it is also essential to have clarity regarding the application of the doctrine of frustration and the standards set by the Courts, which have to be fulfilled to ensure the successful application of the doctrine of frustration.

The Court's reasoning in these cases have to be examined carefully as this would answer what events would successfully invoke a force majeure clause or result in the application of the doctrine of frustration. The reasoning would also answer 'why' certain events do not qualify as a force majeure event or a frustrating event. It is important to know how exactly a

[8] Satyabrata Ghose v. Mugneeram Bangur & Co., A.I.R. 1954 S.C. 44 (India)
[9] Id

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force majeure clause has to be drafted or what criteria have to be fulfilled for a contract to be frustrated so that in future there would not be any hindrance when parties seek to suspend or terminate their contracts.

Edmund Bendit v. Edgar Raphael Prudhomme[10]is one of the prominent Indian cases, where the concept of force majeure was examined, and its application was scrutinised. The case made references to various decisions of English Courts, such as *Matsoukis v. Priestman and Co.*, in which the decision was made after considering the definition of force majeure as 'causes you cannot prevent and for which you are not responsible'[11], establishing that war conditions and the inability caused by it would amount to force majeure, and *Lebeaupin v. Crispin* in which it was observed that 'force majeure clause should be construed in each case with close attention to the words which precede or follow it and with due regard to the nature and general terms of the contract'[12], thereby affirming that the applicability of a force majeure clause will vary under each case depending on the language of the clause. In this case, the question before the Madras High Court was 'whether the inability of the defendant to obtain tonnage due to war was force majeure within the meaning of that expression as construed in English Courts'[13]; the Court held that the event that occurred came within the scope of the force majeure clause, which included the term 'war' and hence discharged the defendant from the performance.

In *Coastal Andhra Power Limited v. Andhra Pradesh Central Power Distribution Co. Ltd*, the appellant had entered into a contract with the respondent to generate electricity with coal which was to be imported from Indonesia. However, due to certain amendments in Indonesian laws, the coal price escalated. The appellant contended that the contract had become onerous due to the price increase and that it amounted to force majeure according to the contract and hence wanted to rescind the contract and restrain the respondents from invoking the bank guarantees. The question before the Court was whether an increase in the price of coal would amount to force majeure and hence fall within the force majeure clause of the contract.[14]To answer this, the High Court of Delhi considered the *Energy Watchdog*[15] case, in which it was observed that it was not specified in the power purchase agreement that the coal had to be only obtained from Indonesia, meaning that the appellant had alternate

[10] Edmund Bendit and Anr. v. Edgar Raphael Prudhomme, A.I.R. 1925 Mad 629 (India)
[11] Matsoukis v. Priestman and Co. (1915) 1 K.B. 681
[12] Lebeaupin v. Crispin (1920) 2 K.B. 714
[13] Edmund Bendit and Anr. v. Edgar Raphael Prudhomme, A.I.R. 1925 Mad 629 (India)
[14] Coastal Andhra Power Limited v. Andhra Pradesh Central Power Distribution Co. Ltd. & Ors., A.I.R. 2019 (NOC 350) 120 (India)
[15] Energy Watchdog v. Central Electricity Regulatory Commission, (2017) 14 S.C.C. 80 (India)

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modes of performing the contract. Therefore it was held that 'that price escalation and change in law abroad will not amount to force majeure and will not entitle a party to omit to perform its obligations under a contract'.[16] The Court also considered the case of *M/s Alopi Parshad*[17] in which it was stated 'that the Courts have no general power to absolve a party from the performance of his part of the contract merely because its performance has become onerous on account of an unforeseen turn of events'[18]. Finally, after considering the precedents, the High Court of Delhi held that the appellant could not be granted relief as the change in Indonesian law and therein the increase of coal price in Indonesia would not amount to force majeure. This decision of the Delhi High Court emphasised that the parties must prove that event which occurred was indeed beyond their reasonable control, that it was impractical and impossible to perform the contract while that event subsisted, that the event had indeed prevented, delayed or even hindered the performance and not that the contract had merely turned difficult, expensive or even onerous.

In a recent suit, the petitioners invoked the force majeure clause present in their contract. They contended that their contracts with the respective respondents were unenforceable and hence had to be terminated, as it was impossible and impractical to perform the contract due to Covid-19 pandemic and its consequential lockdown. The Bombay High Court decreed that the petitioners could not be exempted from their performance and that the respondents could not be restrained from encashing the letters of credit, as 'the distribution of steel had already been declared as an essential service'[19], hence the lockdown would not have hindered the steel distribution process and that the petitioners had defaulted in performing its duty. Moreover, according to the general terms and conditions of the contract, the force majeure clause was only applicable to the sellers, that is, the respondents. This decision reiterated that the applicability and non-applicability of a force majeure clause are dependent on the wording and the language of the clause.

Furthermore, in a similar case, the petitioners invoked the force majeure clause to restrain the respondents from enchasing bank guarantees, contending that they could not fulfil the performance due to the Government imposed lockdown owing to the spread of Covid-19. Though the respondents countered by contending that petroleum was treated as an essential commodity during the lockdown and that there was no scope for invoking the force majeure clause, the Court clarified that the petitioner was engaged in the drilling of petroleum wells

[16] Id
[17] Alopi Parshad and Sons, Limited v. Union of India, A.I.R. 1950 S.C. 588 (India)
[18] Id
[19] Standard Retail Pvt. Ltd. & Ors. v. M/s. G.S. Global Corp. & Ors., (2020) S.C.C. Bom 704 (India)

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and not the production of petroleum. The Delhi High Court held that 'the Court was satisfied that the lockdown was prima facie in the nature of force majeure'.[20] The above High Court judgements act as an evidence to prove that the wording of the force majeure clause and the fulfilment of requirements mentioned therein are crucial and the mere existence of a clause is a contract does not necessarily guarantee relief.

As far as the application of the doctrine of frustration is concerned, in order to treat a contract as frustrated it essential to prove that the performance of the said contract was impossible, but the Hon'ble Supreme Court clarified that 'the word impossible in section 56 of the *Indian Contract Act* does not mean physical or literal impossibility; it can be impractical and still constitute frustration'.[21] In *Satyabrata Ghose v. Mugneeram Bangur & Co.*, the plaintiff claimed the occurrence of an unforeseen event and contended that 'the contract for selling plots had frustrated because the military had compulsorily acquired the plots owing to the Second World War'.[22]The Court referred to the case of *Taylor v. Caldwell*, in which a music hall was destroyed by fire on the very day of the concert and neither of the parties was at default; it was held that since the music hall was fundamental for the performance of that contract, its destruction had resulted in frustration of that contract.[23] However, in this case, the Hon'ble Supreme Court observed that the contract could be performed even after the war, thereby holding that there was no frustration of contract.

In the case of *Energy Watchdog v. Central Electricity Regulatory Commission*, the Court in addition to the observations made concerning force majeure, also held that 'a rise in cost and expenses would not render a contract frustrated and the doctrine of frustration cannot be applied as long as the fundamental basis of the contract remains the same'.[24] This principle was emphasised in various other cases including one where a change in governmental policy on jute import had resulted in the escalation of price of jute[25] and another case where the increase in the price of ghee had made the performance of the contract difficult.[26]In both these cases, it was held that the price increase would not lead to the frustration of the contract.

In essence, the defence of force majeure is not a statutory remedy. By that, it means that section 32 of the *Indian Contract Act, 1872* cannot be merely invoked for claiming force

[20] M/s. Halliburton Offshore Services Inc. v. Vedanta Limited & Anr., (2020) S.C.C. Del 542 (India)
[21]Satyabrata Ghose v. Mugneeram Bangur & Co., A.I.R. 1954 S.C. 44 (India)
[22] Id
[23] Taylor v. Caldwell (1863) 3 B&S 826
[24] Energy Watchdog v. Central Electricity Regulatory Commission, (2017) 14 S.C.C. 80 (India)
[25] Naihati Jute Mills Ltd. v. Hyaliram Jagannath, A.I.R. 1968 522
[26]Alopi Parshad and Sons, Limited v. Union of India, A.I.R. 1950 S.C. 588 (India)

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majeure. The cases discussed have also shown that the concept of force majeure will not come into the picture unless and until a force majeure clause is included in the contract. Even if the contract contains a force majeure clause, the language and words used, in essence, the drafting will determine its applicability. It should be wide enough to include any unforeseen event. Eventually, it all comes down to the drafting of the clause, and it necessitates the parties to use their foresight and provide for events that can potentially make the performance impossible. If the parties can successfully invoke the clause, then the contract will be suspended for some time. This period of suspension is required to be decided by the parties and included into the contract. If the parties are still not able to perform the contract after the decided time period due to the event, then the contract will be terminated.

On the other hand, frustration is a statutory remedy as it is explicitly provided for under section 56 of the *Indian Contract Act, 1872*and there is no necessity to depend on a separate clause as it is 'impliedly provided'.[27] However, availing the defence of the doctrine of frustration is rather difficult, and this is due to the high standards that the Indian Courts have set. The doctrine does not apply to contracts merely because it has become onerous or if the party has faced hardships or a bad bargain or if the frustration was self-induced. The Courts also look into whether either of the parties had foreseen the event but had failed to provide for it. There can be a multitude of reasons why a contract has turned to be impossible to perform, impractical and unlawful in the eyes of the law. However, a contract will be frustrated only if it can be proved that an event has fundamentally changed the contract.

In a scenario, when an unforeseen event occurs, rendering the performance impossible or impractical or unlawful, and the contract does not contain a force majeure clause, then the parties can seek remedy under Section 56 of the *Indian Contract Act, 1872,* but the Courts in India have time and again proved that the application of the doctrine is not easy. It is upon the party contending frustration to prove that the event that occurred was indeed unforeseen and made the performance impossible, impractical or unlawful; an excuse that the performance has become difficult will not be sufficient. If successful in applying the doctrine, then the contract will be discharged, that is, terminated.

IV. THE ISSUES IN THE EXISTING PROVISIONS WHICH GOVERN THE CONCEPTS OF FORCE MAJEURE AND DOCTRINE OF FRUSTRATION IN RELATION TO COVID-19

In this part, the researcher intends to highlight the issues regarding the invocation of the force majeure clause and the application of the doctrine of frustration in the Indian legal system

[27] Taylor v. Caldwell (1863) 3 B&S 826

that can arise when parties seek to suspend or terminate their contracts in the present situation, that is, when the World is gravely affected by Covid-19. The researcher intends to do this by answering a few questions, which are as follows,

Q. Is Covid-19 a force majeure event?

As decided by precedents, the language of the force majeure clause will ultimately determine whether it can be applied or not and for an event like the Covid-19 the World Health Organization has classified as a pandemic, it is necessary for the 'clause' to specifically include a term, in essence, 'pandemic', because such an event cannot be brought under the term of 'Act of God' albeit one would like to believe otherwise.

Act of God is 'an overwhelming, unpreventable event caused *exclusively by forces of nature*, such as an earthquake, flood, or tornado';[28] thereby meaning that the events should be effectuated by *forces of nature* and not 'connected with any agency of man or any other cause directly or indirectly'.[29] As far as force majeure is concerned, it is a broader term which covers 'Act of God' in its entirety and 'other causes connected to the human agency directly or indirectly'[30]such as war, strikes and even a lockdown. The Hon'ble Supreme Court has also recognised the said difference.[31]In the case of *Divisional Controller, KSRTC v. Mahadeva Shetty*, it was observed that 'Act of God signifies the operation of natural forces free from human intervention'[32] and this corresponded to the decision that was taken in the case of *Ramalinga Nadar v. Narayana Reddiar*.[33]

According to the World Health Organization, 'the Coronavirus disease can spread from an infected person's mouth or nose in small liquid particles when they cough, sneeze, speak, sing or breathe heavily',[34] thereby confirming that there is an involvement of human agency in the spread of the virus causing the Covid-19 pandemic, hence substantiating that, the term 'Act of God' cannot include Covid-19 pandemic and emphasising the requirement or need for a force majeure clause to provide for 'pandemic' specifically. In short, if the clause has the term 'Act of God' but not the term 'pandemic' or if the clause is not wide enough to bring Covid-19 within its purview, the party would not be able to bring Covid-19 under the ambit of 'Act of God'.

[28]*Black's Law Dictionary* 39 ((Thomson Reuters 9th ed. 2009)
[29] RATANLAL & DHIRAJLAL, THE LAW OF TORTS 92 (25th ed. 2009)
[30]Id
[31] Dhanrajamal Gobindram v. Shamji Kalidas & Co., A.I.R. 1961 S.C. 1285 (India)
[32] The Divisional Controller, KSRTC v. Mahadeva Shetty, (2003) 7 S.C.C. 197 (India)
[33] R.R.N. Ramalinga Nadar v. v. Narayana Reddiar, A.I.R. 1971 Kerala 197 (India)
[34] World Health Organization, *Coronavirus disease (COVID-19): How is it transmitted?*, WHO (Jul., 09, 2020), https://www.who.int/news-room/q-a-detail/q-a-how-is-covid-19-transmitted

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Q. Can the parties successfully invoke the force majeure clause if the clause explicitly or impliedly provides for an event like Covid-19?

Provided that a contract does contain a force majeure clause, and the unforeseen event which has occurred is covered within the clause, even then, one can only take the defence of the clause only if the event so occurred was the proximate or direct reason/cause for the non-performance of the contract. Hence, the 'immediate and direct cause should be taken to determine whether it is an Act of God or Human cause'.[35] Even in a recent case, one of the reasons why the injunction was not granted is due to the fact that 'there was no direct link between Covid-19 pandemic and the non-performance of the contract'.[36] It is also essential 'to prove that the inability to perform the contract was 'only' because of the force majeure event'.[37]

Prima facie the Covid-19 pandemic has hindered the performance of many contracts. However, Covid-19 pandemic was not the proximate or the direct cause for such non-performance as the proximate cause for the hindrance was the suspension of travel services and manufacturing and sale of non-essential commodities for the period of lockdown which was imposed by the Government.

That said, lockdown can be brought under the ambit of 'government rules/regulations/orders' of the force majeure clause, provided the clause expressly or impliedly provides for the same.

Q. Was Covid-19 unforeseen or unexpected?

The force majeure clause is included in a contract to provide for unforeseen events which could not have been controlled or predicted by the parties to a contract. However, if the event was predictable and the parties did not take efforts to mitigate it, then, they would not be entitled to claim the defence of force majeure.

Since the force majeure clause is subjected to the interpretation and analysis on a case to case basis, a valid defence argument which can be expected is that 'whether a pandemic like situation was indeed unforeseen or unexpected'. *SARS* (Severe Acute Respiratory Syndrome), *MERS-CoV* (Middle East Respiratory Syndrome Coronavirus) and *Influenza* are some of the pandemics, and *Zika* and *Nipah* are some of the epidemics, which the World has seen in the years before Covid-19 and which also affected contracts terribly. Even before the World Health Organization had declared Covid-19 to be a pandemic, the organization had declared it a Public Health Emergency of International Concern. The determination of whether or not

[35]Sri Ananda Chandra Behera v. Chairman, Orissa State Electricity Board, 1998 85 C.L.T. 79 (India)
[36] Standard Retail Pvt. Ltd. & Ors. v. M/s. G.S. Global Corp. & Ors., (2020) S.C.C. Bom 704 (India)
[37]Seadrill Ghana Offshore v. Tullow, (2018) E.W.H.C. 1640 (Comm)

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Covid-19 was unforeseen or not will again come down to how the clause is drafted.

On the other hand, lockdown can be argued to be an unforeseen event as there are many countries that did not implement a lockdown despite the pandemic, hence foreseeing a lockdown as a consequence to the pandemic was not entirely possible.

Q. Why is there a need for a non-exhaustive force majeure clause, when the parties can always resort to the relief granted by the doctrine of frustration?

Though both the concepts of force majeure and frustration can protect the contracting parties from the liability of non-performance, the contracting parties cannot resort to the defence of the doctrine of frustration under Section 56 of the *Indian Contract Act, 1872,* if the contract contains a force majeure clause which provides for contingencies. This is because, the presence of a clause deems the contract to be governed by the principles of section 32 of the *Indian Contract Act, 1872* which provides for parties to decide what events can suspend or terminate the contract and this clause will determine the extend up till which the parties can claim the defence of force majeure. Hence if the force majeure clause present in the contract is not wide enough to cover the contingency, the invocation of the clause would be unsuccessful, and they also would not be able to resort to the doctrine of frustration.

Also, unlike the concept of force majeure, the *Indian Contract Act, 1872* expressly provides for the doctrine of frustration. However, it is challenging to prove that the contract has been frustrated as the Courts have set high standards. There is a requirement to prove that an essential factor of the contact had been changed due to the unforeseen event such as 'not being able to finish the contract on *time*; when *time* was an essential factor'.[38] Nevertheless, parties prefer the concept of force majeure over the doctrine of frustration. This is because, when parties find it difficult to perform a contract due to an unforeseen event, they would prefer for the contract to be suspended for a while so that after that period they can resume the performance. However, this is not possible with the latter, because if frustration is successfully applied then the contract will be terminated perpetually. Though such termination might not affect them financially, their credibility may be affected.

Q. What will happen if the force majeure clause is exhaustive, that is, limited in its application?

The primary purpose of the defence of force majeure is to protect the interest of contracting parties and ensure that they do not incur loss/damage by breaching a contract when the reason for such non-performance was beyond their control.

[38]Codelfa Construction Pty Limited v. SRA of New South Wales, (1982) 149 C.L.R. 337

Nevertheless, since the application of force majeure is dependent on the interpretation of the clause, a lot of time and efforts are invested in Court proceedings to prove whether a particular event falls within the force majeure clause or not. Moreover, there is also a requirement for the party invoking the force majeure clause to send notice to the other party; if such notice is not served, then again, the invocation of the clause will be deemed invalid. However, despite all these efforts, there are chances of unsuccessful application of the defence of force majeure. Hence, no benefit would arise from the time, money and the efforts invested in invoking the force majeure clause.

V. RECOMMENDATIONS FOR OVERCOMING THE HINDRANCE POSED BY THE ISSUES

On reading the provisions governing the concept of force majeure and the doctrine of frustration, and then analysing the cases which dealt with the invocation of the clause and the application of the doctrine, and after enumerating the issues, the researcher strongly believes that the most feasible solution, as far as the future contracts are concerned, is for the parties to the contract to ensure that their contracts have a well defined and detailed force majeure clause.

Whether or not a pandemic and a government-imposed lockdown will come under a force majeure clause so as to escape the performance of an impossible and impractical contract itself depends entirely on the drafting of the clause. As pointed out before the language and the wordings of the clause have a crucial role to play as it will essentially determine whether or not a particular event can qualify to fall within the ambit of the clause. A lockdown such as the one which the Government of India imposed on 24th April 2020 vide the order of Ministry of Home Affairs, can be argued to come under the term 'government rules, regulations or orders', that is, if such term is provided under the force majeure clause. If that is not the case, then there would be no remedy for obstacles that such a lockdown would have caused. After assessing the outbreak of Coronavirus, the World Health Organization on the 11th of March 2020, characterised Covid-19 as a 'pandemic'.[39] Hence, if the force majeure clause exclusively provides for the term 'pandemic', then the Covid-19 pandemic will fall within the ambit of the term.

If a contract has a force majeure clause, it becomes easier for the parties to convince the Courts that a particular event will fall within the purview of the force majeure clause present

[39]World Health Organization, *WHO Director-General's opening remarks at the media briefing on COVID-19*, WHO (Mar., 11, 2020), https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020

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in their contacts. Though the ultimate decision will depend on the language of the clause and the interpretation undertaken by Court, the analysis of precedents clearly show that having a force majeure clause in the contract is always beneficial to the parties rather than not having a clause and having to depend on the doctrine of frustration. The researcher is not saying that one should not seek relief under the doctrine of frustration, but the researcher is of the opinion that it is difficult to prove that the contract has been frustrated, especially in the Indian legal system, considering that the Courts have set high standards for its application.

The precedents analysed in the previous parts of this paper clearly show that merely having a force majeure clause in the contract does not mean that the parties would be able to invoke it successfully. The language of the clause determines whether the clause is limited in its scope or not, and that is the reason why the clause has to be carefully drafted. It should never be exhaustive, and it should have the capacity to bring any unforeseen event within its ambit. By this, the researcher does not mean that every event has to be enumerated in the clause; rather specific terms have to be used so that at least through their interpretation, the parties will be successful in their endeavour to bring an event under the purview of the clause. The clause must contain catch-all phrases such as 'et cetera' and 'including this but not limited to', which in the past have been relied upon by the Courts to declare an event force majeure, even though such event was not expressly provided in the clause.[40]

The Indian precedents have also shown that the interpretation of each word in the force majeure clause can determine whether or not an event in question will fall within the ambit of the force majeure clause. Even in China where the defence of force majeure is a statutory provision embodied under Article 117 of the *Contract Law of the People's Republic of China, 1999*,[41] Courts still have to interpret the provision on a case to case basis in order to determine whether a particular event is force majeure or not. Whether force majeure is a statutory provision or a clause in a contract, determining whether an event will fall within the ambit of the provision or the clause will always involve a detailed interpretation. Interpretation is the key, and hence the focus has to be on the language.

The researcher feels that professional help has to be taken up while drafting the clause as people who actively engaged in the legal World tend to have better knowledge regarding Court's recent decisions and with their help, it can be easily incorporated into the contract. The drafters also have to use their foresight and consider all the events that can potentially affect the contract in the future, and efforts should be taken to provide for these events in the

[40]Md. Serajuddin v. State of Orissa, A.I.R. 1969 O.R.I. 152 (India)
[41]Contract Law of the People's Republic of China, 1999, No.15 (1999)

force majeure clause.

The researcher is also of the opinion that the force majeure clause should also include words such as unforeseeable, unavoidable and insurmountable. This is because the use of such words will give the clause a wider scope of interpretation. Therefore even if the clause does not explicitly provide for a pandemic, if the parties can prove that the pandemic was unforeseeable or unavoidable or insurmountable, the Courts can consider it and grant the defence.

VI. CONCLUSION

The Covid-19 pandemic and lockdowns have unquestionably affected contracts, and its performance; the rationale behind the concepts of force majeure and frustration is to protect the contracting parties from unwarranted liabilities which can arise from such non-performance. Though these concepts are intended for furthering the welfare of contracting parties by safeguarding them from liabilities, the standards set by precedents concerning these concepts, make the invocation or application process complex. In essence, the issues caused by the complexity tend to outweigh its benefits. Hence it is necessary to draft a force majeure clause that is not exhaustive, and this will ensure that the parties would be able to successfully invoke the clause and bring any unexpected event under its ambit. Having an accurately drafted clause would immensely ease the burden of the parties.

Recently, the Madras High Court directed the 'Municipal Corporation to waive off the license fee for running a shop in a bus stand for the entire period of the lockdown'.[42] The Court directed for the fee to be waived by holding that Covid-19 pandemic was a force majeure event. But the point which has to be noted is that the contract did not contain a force majeure clause, yet the pandemic was held to be force majeure in nature. The Court observed that the concerned shop was closed due to the local body's direction. Since the local body had ordered the shop to be shut, the Court felt that they did not have the right to demand the license fee from the shop owners. This case is an exception. It is unlikely that all the Indian Courts will grant the defence of force majeure if the contract does not have the clause. Hence to be on the safer side, it is necessary to have a carefully drafted and non-exhaustive force majeure clause in the contract.

Covid-19 is not the first pandemic that this World witnessed, and it would not be the last. The rampant climate change, environmental degradation and pollution will trigger more devastating events and effects in the future, and it is necessary that the force majeure clauses

[42] R Narayanan v. The Government of Tamil Nadu WP (MD) 19596 of 2020

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included in the contracts are drafted in such a manner that it is wide enough to include all these events within it.

Contracts facilitate the exchange process, and this cycle of exchange is essential for maintaining a balance in the economy. The Covid-19 pandemic and the government-imposed lockdown have already created an instability in the economy, and it is imperative to ensure that the future contractual obligations and through that the business relations are not affected in similar ways.

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