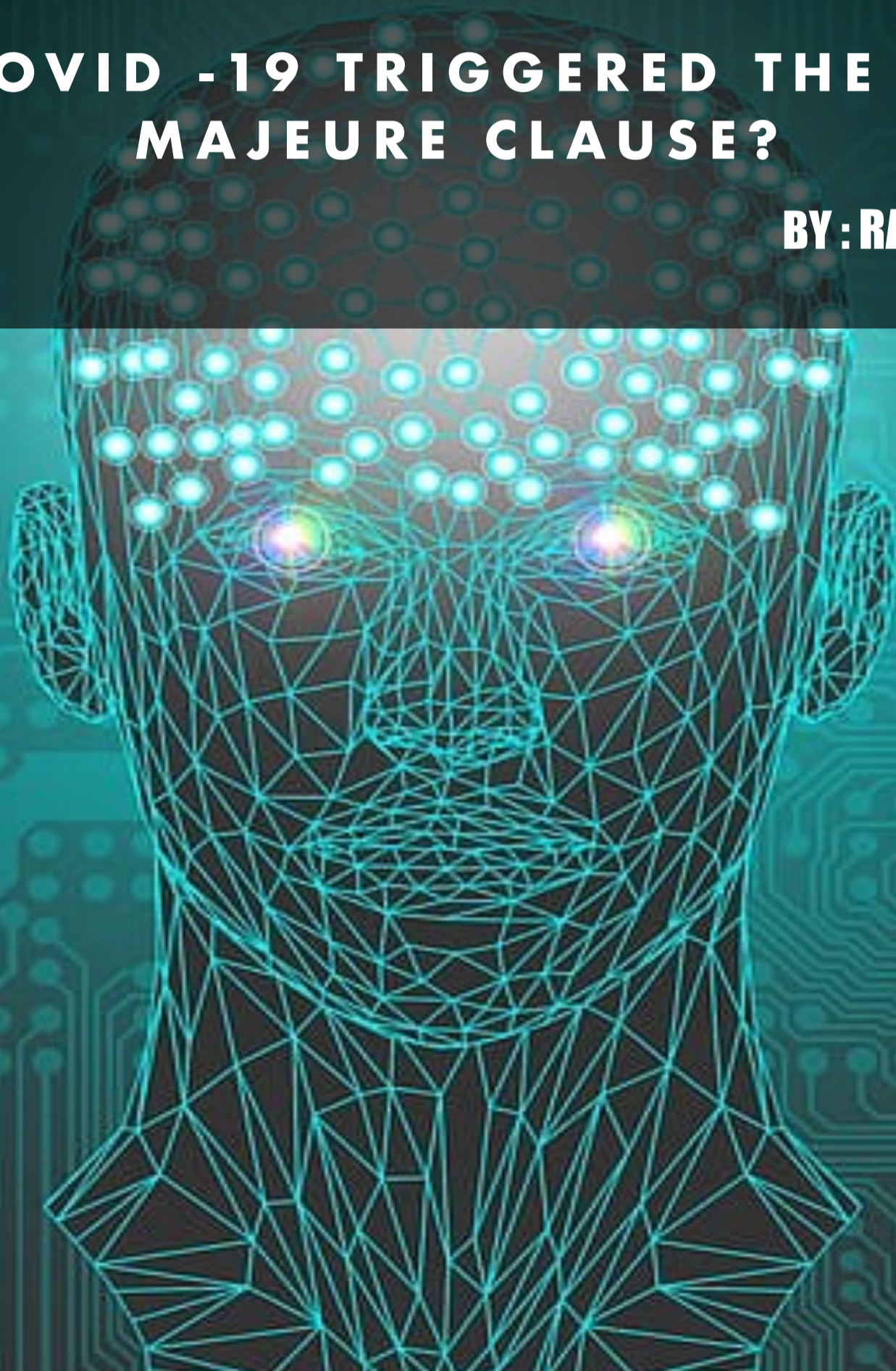


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**DID COVID -19 TRIGGERED THE FORCE
MAJEURE CLAUSE?**

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Abstract:

COVID 19 The global concern does it actually triggered the FORCE MAJEURE?. The researcher has dealt with this specific question by connecting to some other research questions. Starting with the introductory part of force majeure and doctrine of frustration , the research includes , applicability of force majeure , how it is important by the perspective of covid 19 etc. The researcher has used doctrinal method of research by going through some articles, blogs , etc. The goal of the researcher is to make one understand that in this harsh times every business needs the force majeure clause. The design of the research covers the major research questions and answered them properly with an understandable explanation

Keywords : COVID-19, Force Majeure, Clauses, Doctrine of frustration.

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Introduction

As we all know the **CORONA VIRUS** (covid 19) is having devastating impact on the human beings of whole world. Apart from the lives of human beings its outreach has also reached on commerce and business worldwide. COVID 19 has confined people in homes with the lockdowns and restricted movements worldwide. So, consequently businesses have been affected, operations in major as well as minor industries and when these gets affected the contractual obligations also needs to get revisited to asses these impacts which have been done between the parties pre pandemic, as this was unprecedented. The article focuses on the term "force majeure" that has assumed relevance in businesses today during the pandemic.

In the background of covid 19 the article have some questions and answers endeavoured to explicate the concept of "force majeure" and "frustration of contract", difference between both of them and reverberation of COVID 19 on contracts in India in light of Force majeure and frustration of contract.

"FORCE MAJEURE"

Firstly we have to understand that what actually term force majeure impiles : The term 'force majeure' has been defined in Black's Law Dictionary, as 'an event or effect that can be neither anticipated nor controlled. It is a contractual provision allocating the risk of loss if performance becomes impossible or impracticable, especially as a result of an event that the parties could not have anticipated or controlled.' While force majeure has neither been defined nor specifically dealt with, in Indian statutes, some reference can be found in Section 32 of the Indian Contract Act, 1872 (the "Contract Act") envisages that if a contract is contingent on the happening of an event which event becomes impossible.

What comes under the force majeure clause and what are the consequences if this clause is not in the contract?

Force Majeure clause typically includes an exhaustive list such as Floods, Earthquakes, Tsunamis, and other natural calamities it also includes Government order, Epidemics, and other events which one cannot anticipate or it can be non exhaustive list where one party simply narrates the other party that why it is impossible to fulfill the obligations of contractual liabilities with reasonable reason of any beyond the control situation. If a contract does not include this clause then parties would have to ascertain the light factors such as nature of contract, nature of event and so forth.

Does the COVID 19 is really a Force majeure event?

A force majeure contract depends basically upon the provisions of the contract. In many cases events such as lockdowns, pandemics etc may be listed in the triggered events for force majeure clause so we can say that yes covid 19 can be listed under the force majeure event.

Whether COVID-19 Jeopardize contractual obligations?

The drastic domino effect of lockdown nation wide has been felt by every sector. The exact impact of covid 19 is on the liabilities under the contractual obligations it do jeopardize the contracts because it is an unforeseen situation and it is possible that contractual parties are unable or unwilling to continue with their contractual obligations.

Whether the concept of Force Majeure has subsidized the risk of violation of contract?

We can say that somehow, this concept is subsidized the risk of violation of contract, because when we talk about the contracts of major and reputed industries violation of any kind of commercial contract damages the business as well as creates chaos and disputes between the industries which sometimes results in damage to their reputation in the market as well. Force majeure clause is added in the contractual agreements so that if there is any kind of unforeseen situation one of the parties can violate the contract and get free from every liabilities but, due to this the other party can suffer the major loss which is sometimes impossible to recover when more money is invested, So, in this was force majeure somehow subdize the risk of violation of contractual obligations.

Can force majeure called as statute?

Before considering the realm of operation of force majeure, it is important to highlight two fundamental principles which should be kept in mind while dealing with principles of contract. First is the Latin maxim *Pacta Sunt Servanda*. This speaks of purpose of the contract in accordance with the terms of the contract. The other principle is *Rebus Sic Stantibus*. This speaks of discharge of contractual obligations owing to events which had occurred, destroying the basic assumption which the parties had made at the time of entering into the contract.

The above principles significantly aid in understanding the applicability of force majeure. The Supreme Court has interpreted Section 56 of the Act and observed that the word "impossible" has not been used in Section 56 in the sense of physical or literal impossibility. 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. Thus, if an untoward event or change of circumstance totally upsets the very foundation upon which the parties rested their bargain, it can be argued that the promisor finds it impossible to do the act which he promised to do. There may however be an inverse situation. This is so, where parties do contemplate the possibility of an intervening circumstance which might affect the performance of the contract but expressly stipulate that the contract would stand despite such circumstance. In such a scenario, there can be no case of frustration because the basis of the contract being to demand performance despite the happening of a particular event, it cannot disappear when that event happens.

Application to Coronavirus

When it comes to the Coronavirus no matter if an agreement includes a force majeure clause, or not, the prudent course of action frequently is for a business to reach out directly to clients, staff and suppliers to explain and cover any delays, cancellations or other problems in a transparent and orderly manner. This behavior can make certain everyone is very much on the same page, and the businesses and customers involved might appreciate proactive outreach during a time of uncertainty. Based on the verbiage of the agreement a business might also be mandated to give notice to the other party or perhaps take mitigating steps based on the situation at hand.

Additional company Coronavirus considerations will vary based on the type of company and its actual locations. Businesses with clients, operations or suppliers in Asia, North America and many areas of Europe should get ready for, and many have already experienced significant delays to manufacturing and distribution, along with staff absences. Since it is not easy to predict the length of these delays, some businesses will need to locate secondary channels for distribution and supplies. As well, businesses that have insurance for business interruption should verify with their insurer to assess whether a viral pandemic, which many times is not included from the scope of such insurance policies, would in fact be covered as well.

"DOCTRINE OF FRUSTRATION"

As general rule parties to contract are having an intention towards the fulfillment of their part and in case of breach, party breaching is liable to compensate for the same. But an exception to this rule is laid down in Section 56 of the Indian contract act 1872. Section 56 deals with the doctrine of frustration as being acts which cannot be performed. Under this doctrine a promisor is relieved of any liability under a contract in the event of the breach of contract and contract will be deemed to be void.

56 is based on the maxim “les non cogit ad impossibilia” which means that the law will not compel a man to do what he cannot possibly perform.

Applicability of frustration of contract:

1. **Death or incapacity of a party:-** Where a party to the contract has died after entering into contract or the party is incapable of performing the contract, in such a situation the contract will be void (Robinson v Davison).
2. **Frustration by virtue of legislation:-** Where, a law promulgated after the contract is made, makes the performance of the agreement impossible and thereby the agreement becomes void (Rozaan Mian v Tahera Begum).
3. **Frustration due to change of circumstances:-** This particular situation deals with those cases where there was no physical impossibility of performance of the contract, but because of the change in circumstances, the main purpose for which the contract was entered has been defeated²

Can COVID 19 called as frustration self induced?

While examining the doctrine of frustration the Supreme court had observed wholly and laid down that section 56 of Indian Contract Act is a rule of positive law and cannot be leaved according to determinants of intentions of the parties. When the event which is alleged to have frustrated the contract arises from the act or election of a party, there would be no protection under the doctrine of frustration. When we talk about the present scenario of COVID 19 the situation can be arise in the contracts of sales of goods, , where the parties agree to sell and purchase a commodity (steel, which is an exempted commodity) on the specific terms and conditions therein. Subsequently, owing to the Government imposed lockdown induced by COVID-19, the buyer seeks to wriggle out of the contract inter alia citing commercial reasons. However, the contract envisaged transfer of title and risk of the commodity upon shipment. In this circumstance, the buyer’s plea for discharge of the contract may not sustain since the act of election by the buyer may not meet the tests highlighted above in addition to amounting to self-induced frustration.

Are there any differences between FORCE MAJEURE and DOCTRINE OF FRUSTRATION?

In common law, a contract may be discharged or set aside on the ground of frustration where an unforeseen event renders the contract physically or commercially impossible to fulfill. Unlike force majeure, which must be included in a contract to be invoked, frustration needs not be referred to or included in a contract and can potentially be invoked by any party.

Note, however, that a force majeure clause, if it exists, would displace the doctrine of frustration for any event that falls within the scope of the force majeure clause. Nonetheless, one may still argue frustration for any event that falls outside of the scope of the force majeure clause. Thus, even if a contract includes a force majeure clause, a court may still find frustration to be applicable, though never simultaneously applicable to the same event.

Threshold for Invoking Frustration

Since frustration may potentially be invoked by any party, the threshold that a party has to meet is high. In fact, the practice of including force majeure clauses is directly related to the high threshold for invoking frustration, because contractual clauses let parties customize the threshold and other elements.

As noted above, a contract may be frustrated where, due to a supervening event, its performance becomes substantially different from the original obligations assumed by the parties.³

Difference in the context of COVID 19

With respect to COVID-19, for individuals and businesses that wish to rely on frustration, the main hurdle to overcome would be the ability to demonstrate that the changes to the nature of contractual obligations are permanent, and not just temporary or transient. Most effects of the COVID-19 such as illness, quarantine, travel restrictions, shuttering of businesses and schools, or working from home, seem temporary. However, if time is of the essence for the performance of a fundamental term in a contract, and such performance is utterly prevented by the pandemic, the parties may have a case.

It is also no mean feat to demonstrate that the impact of COVID-19 on the contract rises above inconvenience, expenses and onerousness. The performance of the contract has to become impossible or radically different. The most obvious example might be when a party has died from COVID-19, and the main purpose of the contract relates to personal rights and obligations of the deceased party.

Does the party invoking force majeure has duty to mitigate?

Yes, the party who is claiming force majeure is usually under a duty to show that it has taken all the reasonable endeavours to avoid or mitigate the event and its effects. This is a subjective standard and will be interpreted on a case-to-case basis. The force majeure event or circumstance must be causative to the contractual breach and a party claiming force majeure is typically required to establish that it was the force majeure event (and not some other factor) that caused the party to be unable to fulfil its contractual obligations

Impact on businesses of both the concepts in wake of corona virus

COVID 19 has affected cross border trade , real estates, business, major and minor industries as well as all the important business globally. The home business, engineers and all the joint ventures also got affected in India. It has also impacted the parties ability to meet their pre pandemic contractual obligations due to restrictions in movement, stoppage of production, no import export, lack of laboures , lack of raw materials, lack of supply etc, Government has to declare the lockdown which made very harsh damage to the economy. Presently various companies of India of different sectors already declared "FORCE MAJURE" or some of them are likely to declare some of the examples are:-

Gateway Terminals India Private Limited, Adani Ports in Gujarat, Indian Oil and Mangalore Refineries, based on a recent newspaper article, private highway developers such as Ashoka Buildcon and IRB Infrastructure and the latest addition to this list being Hero MotoCorp.

Whether litigation ,or arbitrators are significant for the relief of force majeure and frustration disputes ?

Ofcourse, the courts and arbitrators have to evaluate and decide each and every case on individual merits , which would have to be based on intent of the parties, steps taken to mitigate . Although , in contracts where explicit clause of force majeure has not been added then the parties may seek the shelter under the section 56 of Indian contract act and doctrine of frustration. In this situations the power is in court's hand to decide that whether the doctrine of frustration is applicable .

How the courts will interpret COVID -19 in relation to force majeure provisions ?

Presently, the Ministry of Finance has by way of an office memorandum (O.M. No. 18/4/2020-PPD) issued on February 20, 2020 clarified that the disruption of the supply chains due to spread of coronavirus in China or any other country should be considered as a case of natural calamity and “force majeure clause” may be invoked, wherever considered as a case appropriate, following the due procedure. However, such clarification has been provided only with respect to the disruption of the supply chains and as indicated above, invocation of force majeure provisions in light of COVID-19 will have to be assessed on a case-to-case basis depending on the terms of the contract entered into between the parties. It will also be interesting to see the stand which the insurance companies will take vis-a-vis insurance policies taken by companies to cover loss arising due to certain unforeseen circumstances in their businesses, and whether COVID-19 will be covered under these policies.

COVID 19 through Judicial lens

Bombay High Court’s Order passed in Rural Fairprice Wholesale Ltd. & Anr. vs IDBI Trusteeship Services Ltd. & Ors. on 3 April 2020

In this case the Bombay High Court recognized the market situation pursuant to the COVID-19 and observed that the share market had collapsed due to COVID-19, therefore, it was a fit case to restrain the bank from acting upon the sale notices and a direction to withdraw any pending sale orders for the pledged shares.

Bombay High Court's Order passed in Standard Retail Pvt. Ltd vs Gs Global Corp And Ors on 8 April, 2020

In a departure from its 3 April 2020 Order, the Bombay High Court refused to grant interim measures to the Petitioner observing that the commodity in question was an essential item and lockdown is only for a limited period. Consequently, Petitioner cannot resile from its contractual obligation of making payments to the Respondents.

Delhi High Court's Order passed in M/s. Halliburton Offshore Services Inc. vs Vedanta Limited & Anr. 20 April 2020

The case pertained to restrain on invocation of bank guarantees. While granting interim relief on the invocation of bank guarantees, the Delhi High Court observed that the country wide lockdown was prima facie, in the nature of force majeure. Therefore, it could be said that special equities do exist, as would justify grant of the prayer, to injunct invocation of the bank guarantees.

Delhi High Court's Order passed in Indirajth Power Private Limited v. UOI & Ors on 28 April 2020

The Petitioner sought interdiction of the Bank Guarantee inter-alia on account of the lockdown in the country due to spread of COVID-19 pandemic, which could drive the Petitioner towards being declared an NPA. The Court while observing the Petitioner's conduct i.e. despite the extension of 12 months, could not fulfil its obligation under the Contract, refused to grant relief to the Petitioner. The Court observed that Petitioner's position under the contract was unaffected by the imposition of the lockdown.

CONCLUSION

By concluding the reseach paper, what i have observed is force majeure is no doubt one of the important concept under the Indian contract act 1872, because when we talk about the events that one cannot anticipate and neither they can be forseen then in this sort of situations the parties of contractual agreement should have some kind of legitimate reasons to give when the contratual liablities gets violated. When i researched about the doctrine of frustration i analyzed that it is somehow different concept then force majeure but somehow connected there are interrelations but differences in both of them. Now , coming to the covid 19 scenario yes we can say that it is compeletely an force majeure event , as covid devastated the economy on a global level parties can seek shelter under the force majeure or doctrine of frustration . **"COVID 19 HAS DEFINETLY TRIGGERD FORCE MAJURE"**