IMPACT: International Journal of Research in Humanities, Arts and Literature (IMPACT: IJRHAL)
ISSN (P): 2347–4564; ISSN (E): 2321–8878
Vol. 9, Issue 7, Jul 2021, 119–126

THE LEGAL IMPLICATIONS OF THE COVID-19 PANDEMIC ON COMMERCIAL, EMPLOYMENT AND INSURANCE CONTRACTS

Dr. Manoj Kumar Sadual

Associate Professor, P.G. Department of Law, Utkal University, Bhubaneswar, Odisha, India

Received: 24 Jul 2021 **Accepted:** 27 Jul 2021 **Published:** 31 Jul 2021

ABSTRACT

Corona viruses are a large family of viruses which may cause illness in animals or humans. The most recently discovered corona virus causes corona virus disease COVID-19. COVID-19 is the infectious disease caused by the most recently discovered corona virus. This new virus and disease were unknown before the outbreak began in Wuhan, China, in December 2019. The Corona virus Pandemic is an unprecedented human tragedy affecting millions of humans around the globe. The pandemic has adversely affected more than 212 countries with 13,17,130 confirmed cases and 74,304 confirmed deaths. Due to the unprecedented ghastly effect of the disease and without any cure in sight, many countries had no choice but to put the nation under lockdown. Even though the world has witnessed Pandemics in the past, But none of those pandemics and perhaps none of the events of any kind in modern history have impacted daily life to the extent that the COVID-19 has, with almost more than half of the population of the world currently living under some form of stay-at-home order. Hence, due to the disruption in the demand and supply chain, lockdowns and economic slowdowns, it is likely that the performances under many contracts will be delayed, interrupted, or even cancelled. Furthermore, the world is heading towards an economic recession that may lead to major cost cutting by the companies, corporations and businesses around the world thereby, leading to major employment layoffs and termination. This paper examines the legal implications of the disruptions caused by the Pandemic on Contracts vis-à-vis the Force Majeure Clause, Employment layoffs and insurance claims.

KEYWORDS: *Covid-19, Force Majeure, Contracts, Employment, Insurance*

INTRODUCTION

Force Majeure and the doctrine of frustration of contract: COVID-19 pandemic. The Doctrine of Force Majeure The term force majeure is of French origin meaning a Superior or Irresistible Power. It refers to an event that is a result of the elements of nature and which can neither be anticipated nor controlled. In terms of law, Force majeure, relates to a provision commonly found in contracts that frees both parties from obligation if an extraordinary event prevents one or both parties from performing the terms of the contract. These events must be unforeseeable and unavoidable and should not be caused by human behaviour or due to one of the party's action; hence, they are usually considered an act of God. It is pertinent to mention that the force majeure clauses do not generally provide for termination of a contract, rather, they suspend a party's obligation to perform under the agreement for the duration of the force majeure event. Due to the sudden outbreak of the disease around the world, the performances of the contracts have either become impossible or difficult. Both Indian and English Laws provide provisions elucidating the situations where the performance of contract has either become impossible or due to subsequent events, the performance of the contract had become so difficult that the contract has been "frustrated".

FORCE MAJEURE UNDER INDIAN CONTRACT ACT, 1872

The main purpose of the Force Majeure clause in the contract is to save the performing/defaulting party from the consequences of the breach of contract. It is an exception to the breach of a contract rule and hence, relives the performing party and in some cases both the parties, from liability in case of non-performance due to unforeseen and uncontrollable events. Typically, force majeure includes events like Act of God or natural disasters, war, riots, terrorist attacks, epidemics etc. The Force Majeure clause as per the Indian Law is defined under section 32 and 56 of the Indian Contract Act, 1872. In the case of Energy Watchdog, the Supreme Court of India had explained the scope of Force Majeure. The Court had stated that "Force majeure" is governed by the Indian Contract Act, 1872. In so far as it is relatable to an express or implied clause in a contract, it is governed by Chapter III dealing with the contingent contracts, and more particularly, Section 32 thereof. 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 Supreme Court had further in Satyabrata Ghose case had held that where the court gathers as a matter of construction that the contract itself contained impliedly or expressly a term, according to which it would stand discharged on the happening of certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be outside the purview of S. 56 altogether Section 32. "Enforcement of contracts contingent on an event happening-Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void." "Section 56: Agreement to do impossible act-An agreement to do an act impossible in itself is void. Contract to do act afterwards becoming impossible or unlawful. A contract to do an act which, after the contract made, becomes impossible or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. Compensation for loss through non-performance of act known to be impossible or unlawful. Where one person has promised to do something which he knew or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promise for any loss which such promisee sustains through the nonperformance of the promise.

AN "IMPOSSIBLE ACT" AS PER SECTION 56

Section 56 of the Indian Contract states that an agreement to do an impossible act in itself is void. The meaning of the word impossible has to be inferred from the surrounding circumstances of the case. It may not be literally impossible to fulfil an act, but it may be unworkable and useless and if an unfavourable occurrence or a change of circumstances totally disrupts the very foundation on which the parties have negotiated, it is quite likely that the promising party finds it impossible to do the act he has promised to do. In Satyabrata Ghose v. Mugneeram Bangur, war condition was known to the parties while entering into the contract, the Court while holding that section 56 would not apply to the case held as follows: "that having regard to the nature and terms of the contracts the actual existence of war condition at the time when it was entered into the extent of the work involved in the scheme fixing no time limit in the agreement for the construction of the roads etc., and the fact that the order of requisition was in its very nature of a temporary character, the requisition did not affect the fundamental basis of the contract; nor did the performance of the contract become illegal by reason of the requisition, and the contract had not therefore become impossible within the meaning of Section-56 of the Indian Contract Act".

DOCTRINE OF FRUSTRATION OF CONTRACT

Force majeure is present in common law as the doctrine of frustration of contract. Force majeure is not a standalone concept of English law. Under English law, contractual performance will be excused due to unexpected circumstances only if they fall within the relatively narrow doctrine of frustration. This doctrine will apply to events that occur after the contract has been agreed. The doctrine has to be construed narrowly and will apply to only such contracts where due to an unforeseen event, contractual obligations have been rendered impossible or the terms of the contract have been radically change. As per the English law, the doctrine will applicable by default unless the parties have expressly stated terms contrary to this effect. In general, it only applies where events occur that make the performance of the contract: (1) impossible, (2) illegal or (3) something radically different from that originally envisioned by the parties. For the liability under the contract to be excused under the doctrine, the party seeking the relief must show something more than that the performance has become expensive or onerous than originally contemplated due to events falling short of this. The party has to show that whole purpose or the basis of the contract has frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was not contemplated by the parties at the date of the contract. In the case of Tsakiroglou & Co. Ltd. v. Noblee Thorl GmbH, the House of Lords had held that despite the route had become much longer than the defined path and that the costs had drastically gone up thereby making the performance onerous, yet the basic object of the contract was unaltered and hence, the contract had not been frustrated. To apply the doctrine of frustration, numerous factors have to be taken into consideration. The test must not be invoked lightly as it may provide an easy escape to the defaulting party in absence of an unforeseeable event. To ensure this, the test of "radically different" has to be applied and it is to be seen if the performance of the contract has been substantially modified as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for. Performance by itself would not amount to a frustrating event. Other factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of the contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances. The contract must also not contain a provision dealing with the supervening event, otherwise there can be no frustration on the basis that the contract has already allocated risk in terms of that occurrence.

LANGUAGE AND TERMS OF THE CONTRACT

In today's time most of the commercial contracts have a force majeure clause even though the language may differ. Mostly the contracts mention specific events or nature of event covered under the realm of Force Majeure, however, generic language of force majeure clauses is also enforceable as per law. The Apex Court in Energy Watchdog's case had stated that in terms of a force majeure clause, the clause could contain words that indicate the extent of impact on performance to invoke the clause, such as 'prevent', 'hinder', 'delay'. However, the words have distinct meanings and interpretations. In addition, Courts have also construed words which precede or follow words such as 'hinder' or 'prevent' in the clause, as well as construed the nature and general terms of the contract to determine if the impact as claimed by a party enables it to invoke the agreed force majeure clause. It is important to bear in mind that a force majeure clause cannot be implied from the terms of the agreement and hence, it is a prerequisite to have an expressed clause in the contract in order to avail the

benefit in case of non-performance of a legal obligation under the Force Majeure rule Legal Implications of Covid 19 Pandemic on Employment Contracts. Air, road and rail transport systems were suspended. With the entire nation's economy going on a standstill, it is expected that many industries will take a massive hit thereby crippling several consumer-based industries especially Tourism, Airline and Hospitality Industries. Hence, due to the sudden massive disruption in the demand and supply chain, the Industries will be forced to downsize and layoff their employees. This section will examine the legislations enacted in India related to retrenchment and laying-off of employees and their legal implications. As per the Indian Constitution, Central and State governments have the power to enact laws to protect, regulate and promote the interest of the employees. The Indian Legislations related to employment and workmen do not necessitate the need of the employment contract to be in writing, leaving apart a few State legislations that mandate the contract to be in writing. Employment contracts are governed by the Contract Act-accordingly, provisions stipulated therein with respect to parties being competent to contract, consideration and validity, would be applicable to employment contracts as well. Thereby meaning that if a contract contains a Force Majeure clause, then the same would be dealt in the manner as explained in section I of this paper. Termination of employment contract, there are various manners of termination of an employment contract in India, some of which are (i) expiry of a fixed term contract/mutual separation; (ii) resignation by an employee; (iii) retirement or superannuation; (iv) layoffs, termination due to transfer of business/closure of an undertaking/ organizational restructuring; (v) termination by an employer for 'cause'. Termination for 'cause' implies the termination of an employment contract by the employer because of an established breach of employment contract and/ or internal policies, employee having committed any criminal offence / authorities having initiated criminal proceedings, employee's inability to fulfill material obligations of his job, Misconduct or Abandonment of employment / continuous absenteeism. As per section 2 of the ID Act, "retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include- (a) voluntary retirement of the workman or (b) retirement of the workmen on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or termination of the service of the workman as a result of the non- renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; (c) termination of the service of a workman on the ground of continued ill-health." It is pertinent to mention that the section states that retrenchment of an employee can be for any reason whatsoever, thereby meaning that the scope of retrenchment is wide enough to include reasons beyond misconduct and constant absenteeism. It may also include economic reasons and disruption of block chains due to an unforeseen event or natural calamity.

LAY-OFF(S) AND MASS DISMISSALS

The term Lay-off has been defined in Section 2 (kkk) of the ID Act, 1947 "lay-off" (with its grammatical variations and cognate expressions) means the failure, refusal or inability of an employer on account of shortage of coal, power or raw materials or the accumulation of stocks or the breakdown of machinery or natural calamity or for any other connected reason] to give employment to a workman whose name is borne on the muster rolls of his industrial establishment and who has not been retrenched. Although, there are no specific rules for collective redundancies or dismissals of the workforce, yet, the same is permissible and can be carried out for reasons such as surplus labour, redundancy, shortage of resources etc. It is always preferable to use the principle of "last-in-first-out" during mass lay-offs to ensure fairness in the process.

The principle states that the last person to be recruited should be the first one to be laid-off because of spending the least amount of time on work as compared to his peers. Other than the above-mentioned provisions, the ID Act also provides procedure for closing of establishments under section 25. The procedure stipulates that prior approval of at least 90 days from the appropriate government has to be sought by the employer and the order for grant or refusal of such permission for reasons to be recorded in writing will be given by the government keeping in mind the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and general public and all other relevant factors. The condition given under section 25F states requires the employer to give notice to appropriate government in addition to the other two conditions. The notice must state the reason for retrenchment of the employee and the notice must be issued as is prescribed in the rules framed under the Act. Moreover, the workman must be paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay. Furthermore, as per section 25N, in the case of the employers of industrial units, who have employed one hundred workmen or more on an average per working day for the preceding twelve months are required to comply with certain different and stricter conditions. It is important to bear in mind that conditions of notice in the present section differ from that in 25F, the employer is required under section 25N to make an application along with the reasons of intended retrenchment to the State Government for seeking its prior permission to retrench the employee. The State Government has the discretion to grant or withhold such permission after making enquiries. Further, the worker should be provided three months-notice or salary in lieu of the notice period. A simple termination as per the contract of employment maybe challenged by an employee on the grounds of non-compliance. The above-mentioned provisions of law are all in the context of workmen and are not applicable for employees performing managerial, administrative or supervisory roles and drawing wages exceeding Rs-10,000 INR. In case of managerial employees, there are no specific requirements under statute, and any dismissal/lay-off or termination of employment would be as per the terms of their contract and governed by the Indian Contract Act. Looking at the present world scenario leading to mass disruptions in the demand and supply chains, it would not be incorrect to say that the massive hit on numerous industries will force establishments to restructure their respective business models. This restructuring might lead to mass dismissals, termination and unemployment. In cases where the termination is done without following the due procedure, employees would definitely have a legal recourse, but other than that, the employers following due course of law in respect of mass lay-offs or termination of contracts, if any, cannot be held liable for the present unforeseen pandemic situation. Despite this, there cannot be a blanket rule and every case would have to be adjudicating as per its own facts & circumstances.

LEGAL IMPLICATIONS OF COVID 19 PANDEMIC ON INSURANCE CONTRACTS

An insurance contract is a legal document representing the agreement between an insurance company or insurer and the policy holder. An insurance contract is the insuring agreement, which specifies the risks that are covered, the limits of the policy, and the term of the policy. The main essentials of an insurance are the conditions, which specify the requirements of the insured, such as paying of premium or incident reporting etc.; compensation, that specify the limits of the policy, such as the maximum amount that the insurance company will pay and exclusions, that state what is not covered under the agreement. All the insurances contracts are indemnity contract except for the life insurance and personal accident insurance. The insurer’s promise to indemnify is an absolute one and in case of failure by the insurer to indemnify the insured, irrespective of the fact whether an actual loss has been incurred or not, the insured will have a legal recourse against the insured. As the insurance agreement is a contract between the insurer and insured, the same is governed by the

provisions of the Indian Contract Act. There may be different types of insurance depending on the object and type of cover provided such as life insurance, motor insurance, house insurance, fire insurance etc. For the purposes of this paper, this paper will focus on Force Majeure Clauses in the insurance contracts and the legal implications of the COVID-19 pandemic on the insurance contracts in India. Force Majeure Clauses in Insurance Contracts Just like the conventional standard contracts, Insurance contracts usually contain a Force Majeure clause that states that in the event where insurer's performance or any other obligations are prevented or hindered as a consequence of any act of God or state, strike, lock out, legislation or restriction by any government or any other statutory authority or any other circumstances that lie beyond insurer's anticipation or control, the performance of the policy shall be wholly or partially suspended during the continuance of such force majeure. The Insurer undertakes to keep the IRDAI informed and seek prior approval before affecting any of these changes. It is critical to mention that in case(s) where the insurer aims to invoke the force majeure clause, it has to seek a prior approval from IRDAI which means the final discretion lies with the Regulatory authority. Usually in cases of Act of God like an earthquake, tsunami etc, the insurer may be excused from performing his liability till the time the operations are suspended due to the unforeseen event.

FORCE MAJEURE CLAUSE WON'T APPLY TO CORONA VIRUS DEATH CLAIMS IN LIFE INSURANCE POLICIES

In the usual course of business, like in any other standard contract, the insurers in case of an unprecedented and unforeseen event could have invoked the force majeure clause thereby exemption themselves from performance of the contracts during the time of global pandemic. However, as desperate times require desperate measures, the Life Insurance Council vide a press statement dated: 07.04.2020 clarified that the insurance companies or insurers cannot take the benefit of the force majeure clause in the case of Life Insurance policies. The legal implication of this press statement is that the Insurer will have to honor the agreement and would have to duly provide the appropriate insurance covers to the insured persons.

CONCLUSIONS

Covid-19 has presented an unprecedented complex problem in front of the world with still no answer in sight, moreover, with countless events still facing potential cancelation, businesses' ability to survive these uncertain times will undoubtedly turn on force majeure and insurance policy provisions. As to ascertain if Covid-19 would qualify as a force majeure event, parties will need to closely look at their contracts. Furthermore, it will be imperative not just to examine the language of the contract, but also to consider the operations and transactions of an establishment depending on the industry, to ascertain the ambit of contractual clauses dealing with impossibility of performance on a case by case basis. Also, judicial interpretation of contracts in disputes involving unforeseen events highly dependents on the nature of the contract and the language of the terms.

REFERENCES

1. *Black's Law Dictionary, https://www.freelawdictionary.org/force-majeure/*
2. *Cornell Law School, Legal Information Institute, 0904-2020 at 16:14,*
3. *Energy Watchdog vs. Central Electricity Regulatory Commission and Others. 2017, Indian Contract Act, 1872.*
4. *Satyabrata Ghose v. Mugneeram Bangur, 1954. AIR 44*

5. *Satyabrata Ghose v. Mugneeram Bangur AIR 44, 1954.*
6. *Taylor v Caldwell B & S 826, 1863.*
7. *Chitty on Contracts', 31st edition. In paragraph 14-151*
8. *Tsakiroglou & Co. Ltd. v. Noblee Thorl GmbH (2) All ER 179, 1961.*
9. *Davis Contractors Ltd v Fareham Urban District Council AC 696, 1956.*
10. *Chitty on Contracts', 31st edition. In paragraph 14-151*
11. *Energy Watchdog vs. Central Electricity Regulatory Commission and Others, (4) SCALE 580, 2017.*
12. *Soutik Biswas. BBC India, 09-04-2020 at 20:12,*
13. *Downsize verb [I or T:] to make a company or organization smaller by reducing the number of people working for it, or to become smaller in this way, Cambridge Dictionary*
14. *Layoff, noun (also lay-off): an occasion when a company stops employing someone, sometimes temporarily, because the company does not have enough money or enough work, Cambridge Dictionary*
15. *Home of the legislations like Industrial Disputes Act, and shops and establishments Act have been enacted depending on the nature of work, location, number of employees etc, 1947.*
16. *Few states such as Delhi and Karnataka require the employment contract to be win writing*
17. *Delhi Cloth and General Mills Ltd. vs Shambhu Nath Mukherjee, AIR SC 141, 1985.*