



**'FORCE MAJEURE' AND THE
'PANDEMIC': A COMPREHENSIVE
ANALYSIS UNDER THE INDIAN
CONTRACT LAW**

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ABSTRACT:

Coronavirus Disease, commonly known as COVID-19, has vehemently emerged into a global malady. Starting from the streets of Wuhan in China in the late months of 2019, it consistently transformed itself from an ordinary virus to a global pandemic. With a plethora of deaths crossed worldwide within a period of over 7-8 months, the pandemic has created indomitable havoc in the commercial world.

The ubiquitous virus has left a fatal effect on the lives of the people and has shattered the greatest of nations with its draconian traces in terms of death tolls and economic damages. It has affected several purchasing and supply units, manufacturers, distributors, real estate projects and various commercial and financial businesses. But, what is common among them?

Inter alia, every business activity starts from an agreement or covenant between two different parties. These agreements play a major part in harmonious trade and commerce. But, businesses are facing contractual legal problems because of the devastating crisis created by the pandemic. Non-performance of the contractual obligations has led to various kinds of damages to the parties.

The paper aims to delve into the intricacies of the concept of Force Majeure in the Pandemic with pertinent Legislation, Case laws and ad hoc Illustrations. The paper has been divided into *three* different parts-

- **Part-1** introduces the meaning/definition of Force Majeure to understand the difference between a Force Majeure and an Act of God event, and to feasibly analyse the Pandemic as a Force Majeure event. The following part also aims to analyse how the meaning of 'Law' in the contract plays a pivotal role and also renders a brief explanation of a Wagering agreement to avoid any kind of ambiguity in terms of analysing contingency.
- **Part-2** analyses the intricacies under the Doctrine of Frustration and the Doctrine of Impossibility (Initial as well as Subsequent). A clear-cut differentiation is conducted between Force Majeure and the Doctrine of Frustration to viably understand the importance of a Force Majeure clause.
- **Part-3** deals with the types of remedies available to the parties keeping in mind the essence of 'Time' in the contract.

KEYWORDS:

Force Majeure, Act of God, Doctrine of Frustration, Doctrine of Impossibility, Essence of Time.

INTRODUCTION:

The Constitution of India under Article 19(1)(g)¹ provides the right "*to practise any profession, or to carry on any occupation, trade or business*". The article gives the citizens of India the freedom to carry on any business which is legal under the laws of the State. But, the nationwide lockdown has created a contradictory belief. Therefore, to

¹ The Constitution of India.



continue business activities is the right of a citizen and one which isn't barred by law.

But, can these rights be suspended during the Covid-19 Pandemic?

The answer to the very question lies *per se*, under Article 19(6)². The said clause allows the State to impose or even suspend the provisions of sub-clause (g) of clause (1). Article 352(1)³ of the Constitution of India also lays down the suspension of provisions of article 19 during a National Emergency⁴. Such an emergency, however, can only be declared in case of war, external aggression and armed rebellion. Nevertheless, a pandemic constitutes an emergency of national importance but does not identify health emergencies under its ambit. But, entry 29⁵ of the Concurrent list in the Seventh

schedule⁶ allows the centre as well as the states to take necessary steps to curb the transmission of any infectious disease and/or introduce any legislative order or provision(s) to minimize the spread of such infectious disease⁷.

Therefore, a pandemic cannot ostensibly be considered a national emergency but has significant importance to suspend the rights guaranteed under article 19(1)(g) in the context of emergency. Thus, it allows the State to take all or any of those measurable steps in terms of health security.

(PART: I) What is Force Majeure?

The term was first mentioned under the Roman law⁸. Consequently, under the

² Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, [nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise].

³If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or [armed rebellion], he may, by Proclamation, make a declaration to that effect [in respect of the whole of India or of such part of the territory thereof as may be specified in the Proclamation].

[Explanation. A Proclamation of Emergency declaring that the security of India or any part of the territory thereof is threatened by war or by external aggression

or by armed rebellion may be made before the actual occurrence of war or of any such aggression or rebellion, if the President is satisfied that there is imminent danger thereof.]

⁴ Sanjoy Ghose and Rhishabh Jetley, *Does the Constitution Allow Modi to Declare a National Emergency Over COVID-19 ?*, The Wire (Mar. 24, 2020).

<https://www.google.com/amp/s/m.thewire.in/article/1aw/can-an-1897-law-empower-the-modern-indian-state-to-do-whats-needed-to-fight-an-epidemic/amp>

⁵ Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants.

⁶The Constitution of India.

⁷ Bharat Vasani and Samiksha Pednekar, *Is The Central Government Coronavirus Lockdown Order Constitutionally Valid?*, BloombergQuint (Mar 31 2020, 7:50 AM).

<https://www.google.com/amp/s/www.bloombergquint.com/amp/coronavirus-outbreak/is-the-central-government-coronavirus-lockdown-order-constitutionally-valid>

⁸Abhimanyu Bhandari & Laurence Lieberman, *The forgotten Force Majeure clause and its relevance today under Indian and English Law*, Barandbench (March 27, 2020, 6:41 P.M.) <https://www.barandbench.com/columns/the->



Napoleonic code in *Lebeaupin v. Crispin*⁹. And, was subsequently adopted under the provisions of the Indian law. The earliest been adopted by the Madras High Court in 1925¹⁰. However, Force Majeure has been implicitly explained under the provisions of section 32 and section 56 in the Indian Contract Act, 1872.

Section 31¹¹ -“Contingent contract” defined.

It states that- “a ‘contingent contract’ is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen”.

Section 32¹² -Enforcement of contracts contingent on an event happening.

It states- “Contingent contract 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 contract becomes void”.

In the *Cambridge Dictionary*¹³, Force Majeure refers to:

“an unexpected event such as war, fire, or an earthquake which prevents someone from doing something that is written in a legal agreement”.

*Black's Law Dictionary*¹⁴ defines Force Majeure as:

A “superior force- an event or effect that can be neither anticipated nor controlled”.

In simple legal terms, a contingent contract deals with force majeure or in the words of a

layman, any unforeseen circumstance arising in the future. A force majeure event is commonly referred to in the English Law. It states that whenever an event which is external, unforeseen and unavoidable by both the parties to a contract, the same may become *void* or *voidable* at the choice or willingness of the parties to the contract. The parties to the contract are free from any liability arising from the collateral, non-anticipatory event and no suit can be filed for non-performance or non-compliance of their contractual obligations.

A force majeure event can also be examined under the broad category of an *Inevitable Accident*¹⁵ but, it should not be confused with the concept of *‘Act of God’*.

Difference between ‘Force Majeure’ and ‘Act of God’:

An *‘Act of God’* event is only restricted to the occurrence of natural forces which are extraordinary, non-anticipatory and beyond reasonable control¹⁶. An act of god clause only comprises an exhaustive list of events. Whereas, a *‘Force Majeure’* event is one which is external, non-predictable and unavoidable but can also comprise events resulting from human agency.

The force majeure events are all those external forces which are unforeseen, beyond the control of the parties and which cannot be anticipated by the parties to the contract. Act of God (*vis major*), fire, earthquakes,

forgotten-force-majeure-clause-and-its-relevance-today-under-indian-and-english-law

⁹(1920) 2 K.B 714.

¹⁰Edmund Bendit And Anr. vs Edgar Raphael Prudhomme on 2 November, 1924.

<https://indiankanoon.org/doc/1178720/>

¹¹ Indian Contract Act, (1872).

¹² *ibid.*

¹³ Cambridge Dictionary.

¹⁴ Black’s Law Dictionary, 2nd edition.

¹⁵ Dr. R.K. Bangia, LAW OF TORTS 42 (24th ed. Allahabad Law Agency 2017).

¹⁶ Dr. R.K. Bangia, LAW OF TORTS 45 (24th ed. Allahabad Law Agency 2017).



plagues, hurricanes, war, acts of government as well as epidemics are some of the force majeure events¹⁷.

It is not necessary that an exhaustive list of events could only comprise force majeure events in the contract. The parties to the contract are also entitled to have a non-exhaustive list of events to constitute a force majeure clause in the contract on the option of the parties.

Illustration:

'A' the landlord of a house, contracts with 'B' the tenant to pay a sum of ₹10000 if any of his family members die due to 'fire' in the house. Thus, in such a case, if 'fire' could be considered as a force majeure event in the contract, 'B' will be entitled to receive damages for the death of any family member.

Note: Facts and circumstances vary in each case.

For instance, if the same fire is constituted as an act which was under 'B's control' or the facts of the case reveal that 'B' was well aware of the fact that there was likely a chance of fire; thus, in such a case, 'B' will be liable for damages suffered until the provisions of the force majeure clause shall consider 'fire' to be a part of the non-exhaustive list of events.

'Pandemic'- a force majeure event?

The Ministry of Finance in its memorandum¹⁸ dated 19.02.2020 stated that a pandemic such as the novel coronavirus shall also stand as a force majeure event.

Therefore, if 'A' a manufacturer in Kerala under a contract with 'B' a distributor in Chandigarh fails to deliver the products to 'B' due to the lockdown (*act of government*), or, due to any other government order is prohibited to deliver the goods as so demanded by 'B', the parties will not be held liable to any damages so caused to any of the parties.

The Delhi High Court has recently delivered its judgement¹⁹ in this regard.

Change in 'Law':

It must also be noted that the current act of government (*lockdown*) also attracts a 'change in law'. The orders of the government to invoke country wide lockdown falls under the acts that amount to a 'change in law'²⁰. The parties to the contract must be aware of the 'definition of law' and what amounts to change in 'law' while invoking a force majeure clause of the contract²¹.

¹⁷ Poorvi Sanjanwala and Kashmira Bakliwal, *What is force majeure? The legal term everyone should know during Covid-19 crisis*, EconomicTimes (May 21, 2020, 10:42 A.M.)

<https://economictimes.indiatimes.com/small-biz/legal/what-is-force-majeure-the-legal-term-everyone-should-know-during-covid-19-crisis/articleshow/75152196.cms>

¹⁸ No. F 18/4/2020-PPD, Department of Expenditure, Ministry of Finance, Government of India.

¹⁹ Halliburton Offshore Services Inc. v. Vedanta Limited, 2020 SCC OnLine Del 542.

<https://www.sconline.com/DocumentLink.aspx?q=JTXT-9000442692>

²⁰ Preethika Piliinja, Covid-19 Lockdown: Can You Use Change Of Law Clause To Seek Exemption?, LiveLaw (May 20, 2020, 12.07 P.M.)

<https://www.livelaw.in/columns/covid-19-lockdown-can-you-use-change-of-law-clause-to-seek-exemption-157048>

²¹ NAFED v. Alimenta S.A., civil appeal no. 667 of 2012.

<https://main.sci.gov.in/supremecourt/2010/37543/375>



In simple terms, before relying on the force majeure clause, the contract must also be thoroughly examined to understand :

1. The 'laws' governing the contract, and,
2. The 'acts' which fall under the ambit of the acts of the government, to constitute the 'change in law'.

When a party to the contract tries to invoke a force majeure clause, the same party must be aware of the 'definition of law' under the contract to which they are bound to perform their obligations. The clause has to be examined to see if the law which has impacted the contractual obligations is covered under the definition of 'law' in the change of law clause.

For instance, 'A' the exporter of goods from India has a contract with 'B' the importer of the goods in Australia. Under their contract they consider the *definition of law* as the law of both the countries i.e., the law of India as well as the law of Australia, to continue their trade. Later, due to the lockdown both the parties are under a position of *impossibility*. Thus, here the parties can discharge themselves from any liability because the definition of law considers the laws of both the states.

Suppose, the same agreement considers only the laws of Australia under the definition of law governing the contract, the other party

i.e., 'A' cannot discharge himself from the contract²².

It must also be noted that when there is a change in the law as to an instance creating such a change, the same act of the government must be covered under the contract. The contract must consider such an order of the government under the ambit of 'change in law'²³.

Thus, the obligations of a party could only be excused when:

1. The uncertain event is a cause of *superior forces* or a part of the non-exhaustive list of events,
2. The uncertain event is *beyond human control*²⁴
3. The event is *unforeseen*,
4. The event cannot be *avoided*²⁵ or *overcome*, and,
5. The event cannot be *assumed*.

Wagering Agreement:

A wagering agreement is also a kind of contingent contract. Such agreements are also based on the happening or non-happening of a future contingent event.

Section 30²⁶ – Agreements by way of wager, void:

It states- "Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide

43_2010_31_1503_21810_Judgement_22-Apr-2020.pdf

²² Energy Watchdog v. CERC, (2017) 14 SCC 80 : (2018) 1 SCC (Civ) 133, 11-04-2017. <https://www.scconline.com/DocumentLink.aspx?q=JTXT-0002527695>

²³ Oil India Limited v. South East Asia Marine Engineering and Constructions Limited, civil appeal

no. 673 of 2012. <https://indiankanoon.org/doc/108276358/>

²⁴ Dhanrajamal Gobindram v. Shamji Kalidas and Co.,(1961) 3 SCR 1020.

²⁵ Mamidoil Jetoil Greek Petroleum Company SA Moil-Coal Trading Company Ltd v. Okta Crude Oil Refinery, [2003] 2 Lloyd's Rep. 635.

²⁶ Indian Contract Act, (1872).



the result of any game or other uncertain event on which any wager is made”.

A wagering agreement is also considered a contingent contract but stands void *ab initio*. Agreements based on way of wager are often confused and are even sometimes considered to be within the ambit of contingent contracts. The nature of such a contract was differentiated in *Carlill v. Carbolic Smoke Ball Co*²⁷.

For instance, if ‘A’ (a gambler) makes a wagering agreement with ‘B’ (another gambler) that if a pandemic occurs in the future within a reasonable time, ‘A’ will be entitled to a sum of ₹5000. Later, the pandemic occurs, but, ‘A’ will not be awarded any claim by the Court if ‘B’ fails or refuses to pay the sum.

Thus, a wagering agreement is also a contingent contract, but such an agreement has been specifically declared to be void.

(PART:2)

Doctrine of Frustration:

When a party to a contract does not have a force majeure or act of god clause in its contract, they are bound to be liable for compensation towards another party for non-performance or non-compliance of contractual obligations. But, such a party to the contract is also entitled to frustration if such non-compliance is a cause of ‘impossibility’ or ‘unlawfulness’.

Such a frustration to escape from liability could be availed and falls under the ambit of the doctrine of frustration.

Frustration here refers to ‘automatic termination’.

The doctrine of frustration is generally availed in cases which do not have a force majeure clause in the contract.

Section 56²⁸: Agreement to do an impossible act.

It states- “*an agreement to do an act impossible in itself is void*”.

Compensation for loss through non-performance of an act known to be impossible or unlawful.

It states- *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 promisee for any loss which such promisee sustains through the non-performance of the promise”.*

If an act which is impossible or which cannot be performed due to certain uncertain circumstances, such an agreement becomes void *per se* if and only when both the parties are unaware of the contingency.

Illustration:

‘A’ unveils a liquor shop with the prior permission of the government, such an agreement is of legitimate business because of lawful nature. If in proximity the government puts a ban on liquor consumption and sale, ‘A’ will *ipso facto* fall under an unlawful business because liquor falls under an illicit consumption, trade or occupation. Thus, the contract gets frustrated.

²⁷ [1892] 2 QB 484.

²⁸ Indian Contract Act, (1872).



Similarly, if 'A' was well aware of the fact that liquor had become a good of unlawful nature and despite knowing the fact, if 'A' continues to carry on his business activities, 'A' cannot defend himself from the liability under the ambit of the doctrine of frustration. **Note:** In the above-mentioned situation, 'A' cannot defend himself from liability by the pleading of 'mistake as to a matter of fact'. He would still be liable under 'mistake as to a matter of law'²⁹

Apropos current situation, if 'A' (a goods manufacturer) from Delhi contracts with 'B' (a goods dealer) in Kolkata to deliver the goods in the month of April, the same will become an impossible act because both the parties are prohibited from performing their contractual obligation amid lockdown.

Note: The party would not be under impossibility if the same manufacturer deals with essential goods.

The foremost steps of the doctrine of frustration were laid down in Taylor v. Caldwell³⁰. It was held that:

"When the contract is not positive and absolute, but subject to an express or implied condition, e.g., a particular thing shall continue to exist, then in such a case, if the thing ceases to exist, the performance of the contract is deemed to be impossible and the parties are excused from performing the contract"³¹.

²⁹ Indian Contract Act, § 21, (1872).

³⁰ (1863) 3 B. & S. 826.

³¹ Dr. R.K. Bangia, INDIAN CONTRACT ACT 258 (15th ed. Allahabad Law Agency 2016).

³² AIR 1954 SC 44.

³³ C. Scott Pryor, *Clear Rules Still Produce Fuzzy Results: Impossibility In Indian Contract Law*, SSRN 13 (Mar 28, 2011).

Under the Indian Contract law, the doctrine of frustration is elucidated in Satyabrata Ghose v. Mugneeram Bangur & Co. & Anr.³² It should be noted that 'impossibility' does not merely refer to physical or legal impossibility but also comprises impracticability³³. This concept has been ascertained by the Supreme Court of India in the landmark case of Energy Watchdog v. Central Electricity Regulatory Commission³⁴. The court held that-

"if there is an express or an implied clause in the contract which deals with the event leading to frustration of the contract, it should be dealt under Section 32 of the Act whereas if the event that happens is outside the scope of the contract it should be dealt under Section 56 of the Act"³⁵.

Doctrine of Impossibility:

Frustration could be the result of :

1. Initial Impossibility, or,
2. Subsequent Impossibility.

1. Initial Impossibility:

When there is a situation as to a matter of initial impossibility, the case is usually void *ab initio*. The obligations of the parties to the contract are beyond possibility since the beginning. The concept of initial impossibility could be understood in Shyam

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1792964

³⁴ (2017) 14 SCC 80.

³⁵ Maulik Nanavati & Manvi Damle, *Invoking Force Majeure In Times of Covid-19' And Its Impact On Contracts*, LiveLaw (May 06, 2020, 12:18 P.M.).

<https://www.livelaw.in/columns/invoking-force-majeure-in-times-of-covid-19-and-its-impact-on-contracts-156297>



*Biri Works Pvt. Ltd. v. U.P. Forest Corporation*³⁶.

For instance, 'A' enters into a contract with 'B' to discover treasure by magic. Thus, in such a case, the act is void *prima facie*.

Similarly with reference to government restrictions, if a person enters into a contract with another person to perform their obligations during the current lockdown situation, the same will result in initial impossibility.

2. Subsequent Impossibility:

The Covid-19 conundrum attracts the concept of '*subsequent impossibility*'. Under the concept of '*subsequent impossibility*', the impossibility so arisen is not void since the beginning. Such an impossibility is a sole cause of an uncertain act or event during the subsequent performance of the obligations.

Apropos the current situation, for instance, 'A' enters into a contract with 'B' to deliver him 50 bales of cotton. But, unfortunately, because of government orders (lockdown), 'A' is prohibited to perform his obligation. In such a situation, the impossibility is a cause of subsequent impossibility and not one of initial impossibility.

The legal maxim- "*les non cogit ad impossibilia*" states that "*law does not compel a man to do what he cannot possibly perform*".

Thus, with reference to the current scenario, most businesses, not having a force majeure clause, are availing the blanket of section 56 to protect themselves from any liability

Suppose, if 'A' -a manufacturer and distributor of wooden logs- entered into a contract with 'B' the buyer of the wooden

logs in the early months of January and asked 'A' to deliver the product by April. 'B' agreed to 'A's request to deliver the product by April and assuming 'A' to be a good and trusted party, paid a minimal sum to him in advance in the month of January. 'B' assumed no risk in the delivery of the wood, and, therefore did not add a force majeure clause in his contract. Later, due to the vulnerable pandemic, the government restricts the trade and imposes lockdown. Now, 'B' due to some urgent need of the wood, could not terminate the contract and requests 'A' to return the advance payment made by him earlier. But, 'A' refuses saying that he would suffer damages because he had already cut the wood. Thus, in this case, 'B' could render the concept of subsequent impossibility. Thus, the contract stands frustrated.

Note: 'B' could also avail to either suspend or terminate the contract. 'A' has suffered the damage and could be either compensated keeping in mind the nature of the contract and the nature of the event or would not be compensated for any damages stating that consent of 'A' was obtained in good faith or, there was no *mens rea* on the part of 'B'.

Section 65³⁷: Obligation of a person who has received advantage under void agreement, or contract that becomes void.

It states- "*When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make Compensation for it to the person from whom he received it*".

Under the abovementioned provision, the words "*or when a contract becomes void*" are of relevant emphasis. The words state that

³⁶AIR 1990 SC 205.

³⁷ Indian Contract Act, (1872).



when a contract is discovered to have become impossible or unlawful subsequently, the same becomes void. Thus, if any of the party is in the position of an advantage over the other, the same needs to be compensated to the aggrieved party.

It should also be noted that the parties to the contract could frustrate the contract only and only if both the parties are unaware of any possible threat or future contingency³⁸. If a party to the contract is aware of a possible uncertain event, the same could not constitute to be taken due care of. The same has been mentioned in section 56³⁹.

Difference between 'Force Majeure' and 'Doctrine of Frustration':

Often, people consider force majeure to be 'similar' to frustration. This similarity is condonable up to certain features but, it must be noted that 'similarity' does not refer to 'same'. This thin line of differentiation is of the utmost importance when it comes to comparing force majeure with the doctrine of frustration.

Force majeure as we have already discussed is a series of events considered to be uncertain. Whereas, the doctrine of frustration is also concerned with these uncertain events but, it does not completely reflect the events covered under the ambit of force majeure.

1. A force majeure event consists of all those events which are uncertain, beyond human control and unavoidable. Such a clause could comprise a specific list of events (*exhaustive*) or general list of events (*non-exhaustive*) or even both.

³⁸ Soumyadipta Chanda & Rohit Tiwari, *The Concept of No-Fault Liability in Contracts for the Sale of Goods*, SSRN (July 29, 2011).

For instance, 'A' before entering into a contract with 'B', *ad idem*, agrees to add 'gas leakage' as a part of a non-exhaustive list of events in addition to an exhaustive list of events.

Whereas, under the ambit of the doctrine of frustration, only those events which cannot be predicted, controlled and avoided stand under the list of events i.e., specific list of events.

Suppose, 'A' enters into a contract with 'B' to perform their obligations in a water project. Later, due to uncertain water leakage, both 'A' and 'B' are unable to perform their obligations. Thus, here the parties cannot fall under the ambit of the doctrine of frustration unless they have a 'force majeure clause' in the contract covering water leakage as a part of the force majeure event.

2. Under force majeure, the list of events to be covered under the ambit of force majeure are identified prior to the execution of the contract.

For instance, 'A' before entering into a contract with 'B', with mutual consent agrees to add 'gas leakage' as a part of a non-exhaustive list of events. Here, the force majeure event is identified prior to execution.

Whereas, under the doctrine of frustration, the uncertain event arises subsequent to the execution of the contract. Such an event is not identified prior to execution.

For instance, apropos current situation, the parties under a contract, not comprising 'pandemic' as a force majeure event can protect themselves under the blanket of the

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1898289

³⁹ *supra* Note 28.



doctrine of frustration. Such an event has been arising subsequent to execution.

Note: The doctrine of frustration could only be invoked in 'executory' contracts. A contract which has already been 'executed' does not fall under the ambit of the doctrine of frustration⁴⁰. The Delhi High Court has recently delivered a judgement⁴¹ stating that 'frustration' could not be invoked in an executed lease agreement⁴².

3. Under force majeure, the contract does not become void *per se*. Such an event could make the contract either void or voidable only on the choice of the parties. The uncertain event does not adhere to compulsory impossibility. It is only restricted to *pro tempore* impossibility.

For instance, during the current coronavirus situation, those businesses consisting of a force majeure clause in their contract are not necessarily under immediate termination. The contracts could stand suspended for a reasonable time.

Note: The suspension is also objective whether 'time is an element of essence'.

Whereas, under the doctrine of frustration, the parties are intended to termination and the contract becomes void. The impossibility comprises ultimate termination and, thus it is of permanence. When the impossibility is a result of initial impossibility, it is void *ab initio*. On the other hand, if the impossibility

is subsequent, the contract is usually under immediate and compulsory termination.

For instance, with reference to the current conundrum, 'A' had entered into a contract with 'B' in January to fulfil their obligations in May. Thus, here the impossibility is a part of subsequent impossibility. Thus, if the parties to protect themselves from any loss, approach the court to avail remedy, they will be ordered to immediate termination.

Note: It is not always mandatory to terminate the contract under such an event. If the parties do not agree mutually to suspend their obligations, they are bound to termination.

When a force majeure event *cannot* be covered by 'frustration' of the contract could be claimed. Whereas, when a force majeure event *can* be covered, 'frustration' cannot be 'automatically' claimed. Both are simultaneously similar, but contradictory at the same time.

Thus, if a party to a contract has a force majeure clause in the contract, the party cannot claim for the frustration of the contract automatically. On the other hand, if the party does not have a force majeure clause in the contract, the same could claim for the frustration of the contract.

Here, if the party covers a force majeure event, the same cannot be automatically frustrated. The parties need to solemnly formalize the termination of the contract.

⁴⁰ Raja Dhruv Dev Chand v. Raja Harmohinder Singh, (1968) 3 SCR 339.

⁴¹ Ramanand v. Dr. Girish Soni, CM APPL. 10848/2020 (May 21, 2020).
<https://indiankanoon.org/doc/130579261/>

⁴² Livelaw News Network, *Doctrine Of Frustration Under Section 56 Of Contract Act Not Applicable To*

Lease Agreements: Delhi HC [Read Judgement], LiveLaw (May 22, 2020, 02: 32 P.M.)

<https://www.livelaw.in/news-updates/doctrine-of-frustration-under-section-56-of-contract-act-not-applicable-to-lease-agreements-delhi-hc-157162>



Whereas, in a contract, where parties do not have a force majeure clause to cover any such uncertain event, the same could be automatically terminated without prior notice.

(PART:3)

Consequences:

Now that we are well aware of the concepts of force majeure, the doctrine of frustration and the doctrine of impossibility, the important question that still remains is – What are the consequences of such a pandemic on the contracts?

The legal maxim – “*ubi jus ibi remedium*” is of utmost importance. The maxim states- “*where there is a wrong, there is a remedy*”. The current scenario, because of due protection against the draconian virus, has created a lot of confusion when it comes to contractual obligation.

Under such an event, the ‘*wrong*’ affiliated to the deadly coronavirus cannot be adequately ascertained. Such an event, in spite of creating severe health and monetary damages, cannot be considered to be a ‘*wrong*’. But, the result of human activities is always present under the ambit of ‘*wrong*’. The global pandemic was *prima facie* unknown to become a draconian menace. Such an event was *de facto* unfamiliar during the initial days of its outbreak. But, subsequently has led the law perusal in regards to contracts.

Several consequences arise out of such contractual obligations.

The Essence of ‘Time’ in contract:

Before understanding the various consequences of force majeure, it is important to understand the role of ‘*time*’ in a contract.

A contract may be continued for a reasonable time or, for a specific time period. Where contracts do not have a specific period of continuance, the same is considered to have been made for a ‘*reasonable time*⁴³’. The reasonability is based on the nature of the contract, type of contract, etc. Reasonability differs in each case.

There are two situations arising in a contract:

1. When time plays an essence in the contract:

Sometimes, certain contracts are continued for a specific time period. The obligations of the parties are based keeping in view the essence of time in the contract. In such a contract, non-performance of the obligations leads to automatic termination of the contract. It should also be noted that it's not always necessary that such a contract will ultimately lead to termination. Sometimes, the same could lead to being void or voidable by the parties.

Section 55⁴⁴: Effect of failure to perform at a fixed time, in contrast to which time is essential.

It states- “*When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing*

⁴³ Shivani Singh, Adarsh Subramaniam & Varsha Manoj, *Effect of COVID-19 on performance of contracts where time is of the essence and passing of risk in sale of goods contracts*, Barandbench (May 13, 2020, 6:12 P.M.)

<https://www.barandbench.com/columns/effect-of-covid-19-on-performance-of-contracts-where-time-is-of-the-essence-and-passing-of-risk-in-sale-of-goods-contracts>

⁴⁴ Indian Contract Act, (1872).



at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of essence of the contract”.

For instance, ‘A’ had booked a train ticket in Indian railways to travel to Rajasthan in the month of April. Therefore, the same would be automatically terminated due to impossibility. Here, time plays an essence in the contract, but, the same automatically becomes void.

Similarly, if ‘A’ had entered into a contract with ‘B’ for construction of his house by the end of May, the same has time as the essence of the contract. Here, the contract could automatically become void or voidable at the choice of the party.

2. When time does not play an essence in the contract:

When there is a failure to perform the obligations where there is no stipulated period of existence, the same becomes void under the provision of section 51. Here ‘failure’ to perform the obligation is of relevance.

Under the said provision, ‘failure’ refers to non-performance due to human agency and not one that arises from impossibility. When such a failure is due to an uncertain event, the same has been held to be void or voidable at the choice of the parties. The current corona situation has led to an impossibility. But, such an impossibility is not an act of the parties to the contract. Therefore, during the pandemic, if a contract does not consider

time of utmost importance, the same does not lead to being void.

Therefore, the essence of time is of complete relevancy and emphasis to further understand the consequences of non-performance of contractual obligations.

The following are the most common consequences of non-performance amidst the coronavirus conundrum:

1. Termination:

The parties to the contract are entitled to temporary termination (*suspension*) or even permanent termination or discharge of the contract. When parties to the contract have a force majeure clause to deal with any uncertain future circumstance, the same could be terminated on the choice of the parties.

Keeping in view the current situation, suppose, ‘A’ entered into a contract with ‘X’ to deliver him some non-essential product. The same contract was made without a force majeure clause. Here, ‘X’ due to non-performance of his obligation can claim for automatic termination under the doctrine of frustration.

Similarly, if ‘B’ enters into a contract with ‘Y’ to deliver steel amid the lockdown. The same could not be terminated on the grounds of either force majeure or the doctrine of frustration. The same has been explained by the Bombay High Court in this regard⁴⁵ because steel is an essential commodity and is, therefore, allowed for trading amid the lockdown.

2. Suspension:

⁴⁵ Standard Retail Pvt. Ltd. v. M/s. G. S. Global Corp & Ors., Commercial Arbitration Petition (L) No. 404 of 2020. <https://indiankanoon.org/doc/53894809/>



The word '*suspension*' refers to temporary prohibition or prevention for *ad interim* period. When parties to the contract are not at a position to terminate the contract, the parties to the contract can, by mutual acceptance, suspend the contract for a specific time period. Such a suspension is most acceptable where time does not play an essence in the contract.

For instance, if a retailer owns a shop selling non-essential commodities, the retailer could by mutual agreement, suspend the contract with the distributor until the further performance of his contractual responsibility.

Note: Such termination must be duly conveyed by notice to the parties⁴⁶.

3. **Novation:**

Novation⁴⁷ refers to the substitution of an existing contract into a new one. The parties to the contract can, with mutual acceptance and *ad idem*, substitute the original contract into a new contract. Here, the parties to the contract are no further liable for any obligation present under the original contract. Novation of a contract mostly involves the transfer of the obligations of one party to another party with mutual consent of the second party. During the pandemic, many small businesses may agree to novation or substitute for a new and fresh contract.

For instance, 'D' a retailer in Maharashtra, entered into a contract with 'G' a pharmaceuticals manufacturer and distributor in Goa. Later, due to the pandemic, 'G' with mutual consent of 'A', substitutes the supply

to 'K' another pharmaceuticals distributor in Maharashtra. 'A' therefore, substitutes his original contract from 'G' to a new contract with 'K' for expeditious supply. Thus, the contract remains alive.

4. **Alteration:**

Alteration⁴⁸ of a contract refers to the process of reducing or changing the terms of the contract without substituting it into a new contract. Alteration of the contract does not change the parties to the contract but changes the obligations under the contract.

For instance, 'P' enters into a contract with 'Q' for the supply of 100 bags of wheat. Later, due to less income in hand with 'P', both mutually agree to alter the contract and reduce the supply to 50 bags of wheat. Here, the parties to the contract remain the same but the obligation of supplying 100 bags of wheat reduces (alters) to 50 bags of wheat.

5. **Arbitration:**

It is not always mandatory to approach the court for any dispute settlement at the first place, until and unless, the parties to the contract are *ad idem* willing to assign the dispute to an arbitrator. Arbitration has played a massive role in harmonious and satisfactory dispute settlement amidst the coronavirus pandemic. Such a right has been assigned to the parties to the contract under section 28⁴⁹.

Exception 1. - Saving of contract to refer to arbitration dispute that may arise:

⁴⁶ Aditya Mehta, Arjun Sreenivas & Sameer Bindra, *FRUSTRATION (OF CONTRACT) IN THE TIME OF SARS-CoV-2*, Indian Corporate Law (April 29, 2020). <https://corporate.cyrilamarchandblogs.com/2020/04/frustration-of-contract-in-the-time-of-sars-cov-2/>

⁴⁷ Indian Contract Act, § 62, (1872).

⁴⁸ *ibid.*

⁴⁹ Indian Contract Act, (1872).



It states- “This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred”.

Exception 2. - Saving of contract to refer questions that have already arisen:

It states- “Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration”.

Arbitration has stood as a boon to contractual disputes. It is not necessary that parties to the contract need to have an arbitration clause to refer any dispute for arbitration. Section 7 of the Act⁵⁰, *inter alia*, provides the right to have a separate agreement to resolve disputes under arbitration. The parties are also entitled to submit notice to the other party to refer the dispute to an arbitrator with mutual consent and, without an arbitration agreement. Arbitration is considered as an excellent dispute resolution as it prevents the parties from court expenses.

Thus, if any of the parties to the contract are with or without an arbitration clause or agreement, willing to resolve their disputes outside the court, the same could amount satisfactory to both the parties.

⁵⁰ Arbitration and Conciliation Act, (1996).

⁵¹ Sriram Panchu, *Mediation in the age of COVID-19*, TheHindu (June 19, 2020).

If the parties are not satisfied with arbitrary dispute resolution, the parties are not restricted to approach the court. Mediation has also played a significant role in this regard⁵¹.

CONCLUSION:

The Covid-19 pandemic despite creating a deploring situation around the world, has led to severe contractual disputes. The obligations of the parties are on a standstill due to the draconian effects on contracts. Some covenants might have a force majeure clause while some may not.

The pandemic has given us the opportunity to delve into the depth of contingency. Such an uncertain situation mostly evolves once in a century, but, in order to scrupulously tackle these situations, it is important to prepare ourselves. The law has led us to practically understand the concept of force majeure and the importance of the doctrine of frustration in this regard.

The law is very wide, and so are the concepts of force majeure. A force majeure deals with contingency and such a contingency could either make the agreement void or voidable based on the objectivity of the case. Several things need to be kept in mind while drafting a force majeure clause and its enforceability. Similarly, the doctrine of frustration is perusal in this regard.

The parties to the contract are under an event of impossibility amidst the pandemic. Thus, the obligations of the parties to the contract have *ipso facto* become void under the provision of the doctrine of frustration. But,

<https://www.thehindu.com/opinion/lead/mediation-in-the-age-of-covid-19/article31863358.ece>



such a contract could also be voidable at the choice of the parties.

While some contracts are mutually resolved, some still revolve around court procedures. The global malady has solemnly affected the economy at large. But, in order to absolve the disputes so arisen, the courts have enunciated the enforceability and effects of such a pandemic on the covenants.

It is rightly said that the law is very flexible and transforms itself with time. Similarly, the practicability of such force majeure concepts and doctrines are also transformed amidst the pandemic.

