‘Going Viral’ COVID 19 and Laws in the Domain of Contract and Commercial Leases

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Introduction

No one imagined that world is going to be at a stand-still as it is today. The world of automation has come to a halt. The best of economies has suffered terrible losses. The vulnerability of being human was exposed like never before. The novel coronavirus, christened as COVID-19 (Coronavirus disease 2019) is a zoonotic disease caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), previously known as 2019 novel coronavirus (2019-nCoV), a strain of coronavirus. The initial cases were seen in Wuhan, China, in December 2019 before spreading globally. The current outbreak was officially recognized by the WHO as a pandemic on 11th March 2020. While itis spreading like wildfire killing people and wreaking havoc upon the world economy, unprecedented efforts are still on across the world to control this viral strain from further spread. Instances of major cities and towns being blocked, all air travel across the world banned, ships stranded and quarantined, and streets have been de-peopled across the world. As COVID-19 continues to devour upon the health and economy of countries across the globe as the pandemic looms large, the world witnesses the downfall of mankind unprecedented since World War-II. This article provides an overview of its impact on *force majeure* clause and on commercial leases to tickle wits of intellectuals on how easily a microscopic organism can bring down superpowers of the world.

1. *Force Majeure* clause and The Indian Contract Act, 1872 (hereinafter referred to as “the Contract Act”)

The concept of *force majeure* (generally construed as superior force)[i] has its origins in Roman law. Under the name “*vis major*” or “*vis divina*”, Roman law designated unforeseeable and irresistible events that excused a debtor of performance.[ii]The concept was later adopted by civil law countries[iii] and was later incorporated in the French Civil Code 1804 (Napoleonic Code).

India inherited major commercial laws from her colonial rulers. Under Indian law, this clause must be explicitly provided for in the contract and accordingly protection shall be afforded in a given situation. It is a contractual provision that is usually agreed upon at the time of entering into a contract by parties involved. It seeks to cover extraordinary events or circumstances beyond the control of parties to a contract and typically includes events described as act of god or natural disasters, war or

war-like situations, labour unrests, strikes, epidemics or pandemics. In simpler terms, *force majeure* is a jolt that one wouldn't be able to foresee or protect themselves from. The intention of this clause is to save the parties to a contract from facing consequences over which they have no control. It is therefore, an exception to what would ordinarily otherwise amount to a breach of contract.

Given that a *force majeure* event has enough capacity to delay, interrupt, or even lead to cancellation of the performance of many contracts, some reference can be made to Section 32 and Section 56 of the Contract Act in this regard.

The term *force majeure* has been clearly dealt with over a century ago by McCardie J. in *Lebeaupin v. Crispin*[iv], which was later cited by the three-bench judge of Supreme Court of India in *Dhanrajamal Gobindramv. Shamji kalidas and Co*[v]. It elaborated that *force majeure* is an act that a person has no control over, and in law, it is intended to save a performing party to a contract from the repercussions of such act.[vi]

It is worth clarifying that the concept of *force majeure* extends well beyond an "act of god" (natural calamities such as earthquakes, typhoons etc.) and includes man-made circumstances as well, such as change in law, government policy etc. It may include the ancillary acts to the main contract as well. However, that may vary from the facts and circumstances of each case.

Therefore, in light of this inference the lockdown imposed by the governments in the current times is fit to fall under the definition of *force majeure*.

To dive into the details of *force majeure,* it is important to bifurcate it into the following two situations:

1.1. Presence of a *force majeure* clause in a contract

In *Satyabrata Ghose v. Mugneeram Bangur & Co.*[vii], the Supreme Court held that

> *'…When such an event or change of circumstance occurs which is so fundamental as to be regarded by law as striking at the root of the contract as a whole, it is the court which can pronounce the contract to be frustrated and at an end'*

The Supreme Court in *Energy Watchdog v. Central Electricity Regulatory Commission & Ors*[viii], held 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, such as the PPAs before us, it is governed by Chapter III dealing with the contingent contracts, and more particularly, Section 32 thereof. Insofar 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.*'

1.2. In the absence of a *force majeure* clause in the contract

In the absence of any *force majeure* clause in a contract, on the occurrence of an event that results in the impossibility of performance of obligations by any party to the contract, Section 56 of the Contract Act would apply. Here the test is the significant change in the situation originally agreed upon which affects the performance of the obligations of the parties.

Indian courts have held that the term 'impossibility of performance' is not restricted to physical or literal impossibility but also includes circumstances wherein it may be impracticable and useless from the point of view of the object and purpose of the agreement which the parties had in view due to an untoward event or change of circumstances. As per section 56 of the Contract Act, an agreement to do an impossible act is void and therefore the parties are discharged from compliance with their respective obligations.

The impracticability has to be demonstrated by the parties and shall be decided on a case to case basis. Mere difficulty in performing an obligation or increase in price rendering such delivery expensive is not sufficient. The cost of performing the obligation should be highly excessive and unreasonably high rendering it impracticable to perform and thereby impossible.

In the above-mentioned case of *Satyabrata Ghose v. Mugneeram Bangur & Co.*[ix], the Supreme Court also held that,

> *'Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties.'*[x]

It is quite apparent that when a force majeure clause is present in a contract, the intention of the parties to discharge obligations upon the occurrence of certain contingencies is a determining factor. In the absence of the clause, the situation shall be governed by Section 56 of the Contract Act which is also termed as the doctrine of frustration.

As per the doctrine of frustration, the performance of the agreement is excused in the situations wherein:

(a) the circumstances changed fundamentally from the situation contemplated at the time of the entering into the agreement; and

(b) the performance of the agreement becomes entirely impossible without a willful default or negligence of either of the parties to the agreement.

In the present scenario, there is room to argue that the outbreak of the COVID- 19 can be categorized as a supervening impossibility. In the cases where parties to a contract have chosen not to include a force majeure clause, section 56 of the Contract Act can be analyzed on a case-to-case basis, to determine whether the parties' obligations under such agreements can be dispensed with.

While the aforesaid recourse under section 56 of the Contract Act may be available depending on the facts of the case, it is prudent for the parties to

commercially evaluate whether such a recourse resulting in the underlying contract between the parties being rendered void is a desirable step or not.

2. Impact of COVID-19 over Commercial Leases

The outbreak of COVID-19 can prove to be the biggest black swan event for the real estate sector. This situation has found all countries amidst a crisis on all fronts. Beyond the obvious health repercussions, this global pandemic has caused major pandemonium in the global business arena. On one hand, where we can see direct commercial impacts on specific sectors, with interruptions to supply chains, challenges in meeting contractual obligations and implications under funding arrangements, other impacts are universal.

Due to the fluid nature of the outbreak and uncertainty of getting back to the grind, parties to commercial lease agreements are likely to encounter challenges in meeting their contractual obligations. The order of the state governments instructing the shut-down of commercial establishments engaged in non-essential services has encouraged employers and employees to work from home and has rendered leased premises unusable for the time being. Additionally, the loss of business due to the outbreak may consequentially affect lessees' ability to perform their obligation with respect to payment of rent. Under these circumstances, lessees may renegotiate the terms of their leases. However, any such re-negotiation is based on mutual agreement and lessors are not likely to entertain requests for the same without being contractually bound to, due to their personal reasons or any other whatsoever.

In order to ascertain whether the failure to perform contractual obligations under lease agreements due to COVID-19 related causes constitutes a breach of contract or default due regard needs to be given to the provisions of the lease agreement. Although most lease agreements provide for force majeure clauses, the circumstances under which the clause may be invoked and the party that may invoke it may not be straight forward.

Pertaining to the interpretation of force majeure clauses which has been discussed in detail above, in order to understand whether the force majeure clause covers the COVID-19 outbreak, the construction of the force majeure clause will come into play. If the force majeure clause contains terms such as 'epidemic', 'pandemic', 'act of God', 'acts and regulations of government of India', 'natural calamity', 'these situations and events are beyond the reasonable control of affected party, or such situations or events could seldom be prevented through employment of prudent utility practices' etc., the COVID-19 outbreak may fall within the ambit of a force majeure event as stipulated under the lease agreements.

The right to suspend payment of rent or any other financial obligation in the event of a force majeure event, is seldom the intention of the parties while negotiating a lease agreement. Therefore, the unequivocal answer to whether the lessee's

obligation to pay rent will abate on account of the COVID-19 outbreak is not likely to be specifically addressed in lease agreements. That said, lessees could attempt to argue that premises are unusable due to external factors and therefore, rent payments should abate.

In the event the present scenario the parties may seek the relief provided under the clause. However, even in the event of an undisputed force majeure event, lease agreements often also specify potential result of the force majeure event only upon the occurrence of which the clause may be invoked. Specifically, the agreement may state that the parties' obligations will be suspended only in the event that the premises are damaged or destroyed and therefore cannot be used by the lessee. For instance, the language may read, 'In the event Lessee is prevented from using of the premises, or any part thereof, due to destruction or damage thereof, by reason of fire or other casualty or accident, natural catastrophes, governmental action, war or other violence, any change in law or any other act outside the control of the parties, performance of the parties obligation under the Lease Deed will be excused for the period of the delay'. Under this circumstance, it would be difficult to argue that lessees' obligation to pay rent may be suspended during the present the COVID-19 outbreak.

However, if the *force majeure* clause is broad and inclusive, for instance if the clause reads, 'In the event that either party is delayed or hindered in, or prevented from, the performance of any act by reason of fire or other casualty or accident, natural catastrophes, governmental action, war or other violence, any change in law or any other act outside the control of the Party whose performance is affected, performance of such act will be excused for the period of the delay and the period of performance of such act will be extended for a period equivalent to the period of such delay', it may be argued that the obligations of both parties shall be suspended, including the lessee's obligation to pay rent, while the force majeure event subsists.

Further, it is pertinent to note that in order to invoke the *force majeure* clause, the party invoking the clause may be required to undertake certain procedural obligations such as providing notice to the other party.

If the lease agreement does not provide for a force majeure clause, neither party is protected from any claim of breach against it, even if the same was beyond its control. However, in the event that the premises are damaged due to 'fire, tempest or flood, or violence of an army or of a mob, or other irresistible force' rendering it unfit for the purpose for which it is leased, the lease may be void at the option of the lessee, in accordance with Section 108 (e) of the Transfer of Property Act, 1882.

It may be argued that the doctrine of frustration, as discussed earlier, may apply where a *force majeure* event has occurred but there is no damage to the premises leased. However, the Supreme Court, in the case of *Raja Dhruv Dev Chand v. Raja Harmohinder Singh*[xi] held,

"the doctrine of frustration as stipulated in section 56 of the Contract Act does not apply to leases. It held that a lease is a completed conveyance rather than an executory contract, and that 'Where the property leased is not destroyed or substantially and permanently unfit, the lessee cannot void the lease because he does not or is unable to use the land for the purpose for which it is let to him.' "[xii]

Conclusion

This crisis leading to numerous government directives, would play a vital role in the domain of contracts and commercial leases once the pandemic subsides. The parties to various such contracts must know their legal position as well as the legal position of their contracts to avoid unnecessary complications in these testing times. *Inter alia*, a proper understanding of the position coupled with sector specific government directives would definitely help to avoid legal complication and in rebuilding India economy in the years to come.

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[i] While the term "force majeure" is much used in English-speaking countries, its English equivalent, described as "superior force" in the English translation of the Québec Civil Code does not appear to be in common use in the English-speaking world. John O'CONNOR, "Force Majeure, Frustration and Exception Clauses", (visited 10th April. 2020)

[ii] One of the Latin maxims that reflects this concept is the following: "*Fortuitos casus nullum humanum conciliumproviderepotestnec cui prævisopotestresisti*". Robert TASCHEREAU, Théorie de Cas Fortuit et de la Force Majeure dans les Obligations 1-2 (1901) (Ph.D. Thesis, University of Laval – Faculty of Law of Montréal) (on file with the University of Montréal Law Faculty Library)

[iii]Caslav PEJOVIC, Civil Law and Common Law: Two Different Paths Leading to the Same Goal, <http://www.upf.pf/recherche/IRIDIP/RJP/RJP7/16Pejovic.doc> (visited 10th April. 2020)

[iv] [1920] 2 K.B. 714

[v] AIR 1961 SC 1285

[vi]ibid

[vii]1954 SCR 310

[viii](2017) 14 SCC 80

[ix]ibid

[x]ibid

[xi]AIR 1968 SC 1024

[xii]Ibid