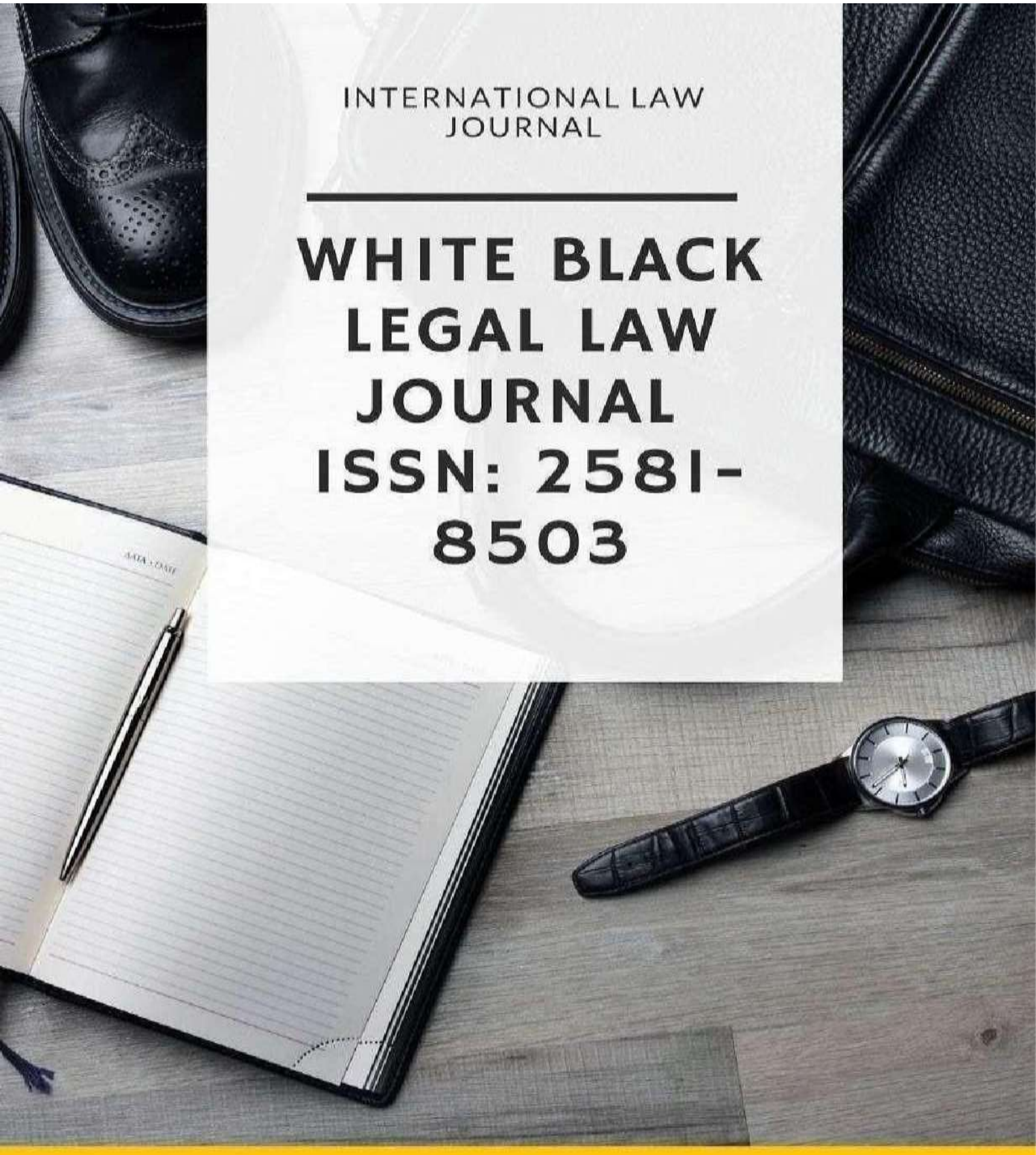

INTERNATIONAL LAW JOURNAL

WHITE BLACK LEGAL LAW JOURNAL

ISSN: 2581-8503

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

DISCLAIMER

EDITORIAL TEAM

Raju Narayana Swamy (IAS) Indian Administrative Service officer

Dr. Raju Narayana Swamy popularly known as Kerala's Anti Corruption Crusader is the All India Topper of the 1991 batch of the IAS and is currently posted as Principal Secretary to the Government of Kerala . He has earned many accolades as he hit against the political-bureaucrat corruption nexus in India. Dr Swamy holds a B.Tech in Computer Science and Engineering from the IIT Madras and a Ph. D. in Cyber Law from Gujarat National Law University . He also has an LLM (Pro) (with specialization in IPR) as well as three PG Diplomas from the National Law University, Delhi- one in Urban Environmental Management and Law, another in Environmental Law and Policy and a third one in Tourism and Environmental Law. He also holds a post-graduate diploma in IPR from the National Law School, Bengaluru and a professional diploma in Public Procurement from the World Bank.

Dr. R. K. Upadhyay

Dr. R. K. Upadhyay is Registrar, University of Kota (Raj.), Dr Upadhyay obtained LLB , LLM degrees from Banaras Hindu University & Phd from university of Kota.He has succesfully completed UGC sponsored M.R.P for the work in the ares of the various prisoners reforms in the state of the Rajasthan.

Senior Editor

Dr. Neha Mishra

Dr. Neha Mishra is Associate Professor & Associate Dean (Scholarships) in Jindal Global Law School, OP Jindal Global University. She was awarded both her PhD degree and Associate Professor & Associate Dean M.A.; LL.B. (University of Delhi); LL.M.; Ph.D. (NLSIU, Bangalore) LLM from National Law School of India University, Bengaluru; she did her LL.B. from Faculty of Law, Delhi University as well as M.A. and B.A. from Hindu College and DCAC from DU respectively. Neha has been a Visiting Fellow, School of Social Work, Michigan State University, 2016 and invited speaker Panelist at Global Conference, Whitney R. Harris World Law Institute, Washington University in St.Louis, 2015.

Ms. Sumiti Ahuja

Ms. Sumiti Ahuja, Assistant Professor, Faculty of Law, University of Delhi, Ms. Sumiti Ahuja completed her LL.M. from the Indian Law Institute with specialization in Criminal Law and Corporate Law, and has over nine years of teaching experience. She has done her LL.B. from the Faculty of Law, University of Delhi. She is currently pursuing Ph.D. in the area of Forensics and Law. Prior to joining the teaching profession, she has worked as Research Assistant for projects funded by different agencies of Govt. of India. She has developed various audio-video teaching modules under UGC e-PG Pathshala programme in the area of Criminology, under the aegis of an MHRD Project. Her areas of interest are Criminal Law, Law of Evidence, Interpretation of Statutes, and Clinical Legal Education.

Dr. Navtika Singh Nautiyal

Dr. Navtika Singh Nautiyal presently working as an Assistant Professor in School of law, Forensic Justice and Policy studies at National Forensic Sciences University, Gandhinagar, Gujarat. She has 9 years of Teaching and Research Experience. She has completed her Philosophy of Doctorate in 'Intercountry adoption laws from Uttranchal University, Dehradun' and LLM from Indian Law Institute, New Delhi.

Dr. Rinu Saraswat

Associate Professor at School of Law, Apex University, Jaipur,
M.A, LL.M, Ph.D,

Dr. Rinu have 5 yrs of teaching experience in renowned institutions like Jagannath University and Apex University. Participated in more than 20 national and international seminars and conferences and 5 workshops and training programmes.

Dr. Nitesh Saraswat

E.MBA, LL.M, Ph.D, PGDSAPM
Currently working as Assistant Professor at Law Centre II, Faculty of Law, University of Delhi. Dr. Nitesh have 14 years of Teaching, Administrative and research experience in Renowned Institutions like Amity University, Tata Institute of Social Sciences, Jai Narain Vyas University Jodhpur, Jagannath University and Nirma University.
More than 25 Publications in renowned National and International Journals and has authored a Text book on Cr.P.C and Juvenile Delinquency law.

Subhrajit Chanda

BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

"AN ANECDOTE OF TWO THINGS: FRUSTRATION & FORCE MAJEURE CLAUSES IN THE TIME OF THE COVID-19 PANDEMIC SITUATION."

AUTHORED BY – DEBARJUN DEY

Introduction:

The spread of Coronavirus had an enigmatic repercussion on almost every sector. Every contractual obligation including sponsorship contracts is being affected by COVID-19. It has not only affected India's economy, but also affected other countries' economies too like the United Kingdom. One sector most affected by this pandemic is the sports industry. Many championships and games scheduled this year including the UEFA European Championship and the Tokyo Olympic Games have been postponed from 2020 to 2021. The Indian Premier League (IPL) too has been postponed. As we should know, every tournament and championship contains so many contracts and there is also an agreement between every sport tournament comptroller and television broadcasters. So, due to the prevalence of this pandemic, will there be any lawful action against party who is unable to perform contractual obligations by an aggrieved party? If the answer to this question is no then what is safeguarding them? The answer to this question will be no because of some exceptions given under English as well as Indian law, popularly known as the doctrine of frustration and the doctrine of force majeure.

If any person is unable to perform any contractual duty, they will not be liable for not fulfilling those duties if they have a valid defense under the concept of force majeure or the common law doctrine of frustration.Covid-19 or the Corona Virus was declared as a pandemic on March 11, 2020. This has led to lockdowns and financial slowdown across the country in all sectors. The impact on the businesses has been severe, and the force majeure clauses will play a crucial role if the businesses are not able to perform their contractual obligations amidst this crisis.

In the aftermath of the closedown, many suppliers would not be able to perform their contractual obligations and, to say the least, they would be delayed. The suppliers are seeking to delay and/ or avoid contractual obligations/ performance. They wish not to be held liable for their contractual non-

performance. The companies might not be able to honor their customer agreements. The same is true for the consideration, which either of the party to a contract might not be able to fulfill under the terms of the contract. Under such scenarios, the force majeure clause would be a determining factor to understand the implications of these events.

"On Feb.17, 2020, the China Council for the Promotion of International Trade (CCPIT), revealed that it had already issued over 1,600 'Force Majeure certificates' to firms in 30 sectors, covering contracts worth over $15 billion."[1]

On February 19, 2020, the Department of Expenditure, Procurement Policy Division, Ministry of Finance issued an Office Memorandum with respect to the 'Manual for Procurement of Goods, 2017', which serves as the dictum for procurement by the Government of India.

This memorandum, in essence, states that the Covid- 19 could effectively be covered under force majeure clause because it is a *'natural calamity'* and all the departments who should invoke it by following the *'due process.'*

But this implication of Covid- 19 cannot be upheld for every contract, and the clause needs to be interpreted based on different circumstances.

English Law Perspective:

Force Majeure and the doctrine of frustration: *"Frustration is an English contract law doctrine that acts as a device to set aside contracts where an unforeseen event either renders contractual obligations impossible, or radically changes the party's principal purpose for entering into the contract."*[2]

Force Majeure (S.56 of the Indian Contract Act, 1872.): A force majeure clause relieves one or both parties from liability to perform contract obligations when performance is prevented by an event or circumstance beyond the parties' control. Typical force majeure events may include fire, flood, civil unrest, or terrorist attack. Force majeure is a term used to describe a "superior force" event. The purpose of a force majeure clause is two-fold: it allocates risk and puts the parties on notice of events that may suspend or excuse service.

---

[1] https://www.bloombergquint.com/opinion/coronavirus-key-legal-issues-for-india-inc-with-covid-19LAST VISITED ON 10TH JULY 2020 AT 2.30 PM

[2] Taylor v Caldwell (1863) 3 B & S 826;

The doctrine of frustration (S.56 of the Indian Contract Act, 1872.): The essential idea upon which the doctrine of frustration of contract is based is that of the impossibility of performance of the contract; in fact, 'impossibility' and 'frustration' are often used as interchangeable expressions. The changed circumstances, it is said, make the performance of the contract impossible, and the parties are absolved from the further performance of it as they did not promise to perform an impossibility.

The parties shall be excused if substantially the whole contract becomes impossible of performance or, in other words, impracticable by some cause for which neither was responsible. The spirit of force majeure and the doctrine of frustration have been embodied in sections 32 and 56 of the Indian Contract Act.

While the doctrine of frustration is a common law principle, the force majeure clause is a creature of contract. It is a civil law concept that has no settled meaning in the common law. It must be expressly referred to and defined in a contract.

The entire jurisprudence on the subject has been stated by Justice RF Nariman of the Supreme Court in the case of *Energy Watchdog vs. CERC (2017).*[3]

INDIAN LAW PERSPECTIVE-Force Majeure or Act of God

Force majeure literally translates from the French as "superior force". Immediately apparent is its continental roots within the civil law systems of the world – the foundational basis of the principle is one crystallised in the Napoleonic Code in the 1800s, although its origins can be traced to Roman Law[4]

"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. Sections 32 and 56 are set out herein:

---

[3] Supreme Court of India: Civil Appeal Nos.5399-5400 of 2016

[4] *See* Laurence Lieberman & Abhimanyu Bhandari, "The forgotten Force Majeure clause and its relevance today under Indian and English Law", Bar & Bench, dated 27-3-2020.

"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."
Illustration: 1) A, a person, contracts with another person, B, that A will pay B if B marries C. If C then dies without marrying B. Now this contract becomes void.

Illustration: 2) A, a person, makes a contract with another person, B, for buying B's horse if A survives C. This contract of obligation cannot be enforced unless and until C dies in A's lifetime.

"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 non-performance of the promise."[5]
Prior to the decision in Taylor vs. Caldwell, (1861-73) All ER Rep 24, the law in England was extremely rigid. A contract had to be performed, notwithstanding the fact that it had become impossible of performance, owing to some unforeseen event, after it was made, which was not the fault of either of the parties to the contract. This rigidity of the common law in which the absolute sanctity of contract was upheld was loosened somewhat by the decision in Taylor vs. Caldwell in which it was held that if some unforeseen event occurs during the performance of a contract which makes it impossible of performance, in the sense that the fundamental basis of the contract goes, it need not be further performed, as insisting upon such performance would be unjust.

[5] The Indian Contract Act, 1872

'Impossibility' under S.56 doesn't mean literal impossibility to perform (owing to strikes, commercial hardships, etc.) but refers to those cases where a supervening event beyond the contemplation and control of the parties (like the change of circumstances) destroys the very foundation upon which the contract rests, thereby rendering the contract 'impracticable' to perform, and substantially 'useless' in view of the object and purpose which the parties intended to achieve through the contract. In *Satyabrata Ghose v. Mugneeram Bangur*[6], war condition was known to the parties while entering into the contract such that they were aware of the possible difficulty in the performance of the contract, in such circumstances, the requisition of property did not affect the root of the contract. Secondly, no stipulation as to time was provided in the agreement such that the work was to be completed within a reasonable time. Still, having regard to the nature of the development contract and the knowledge of the war conditions prevailing during the contract, such a reasonable time was to be relaxed. Therefore, the contract had not become impossible of performance under S.56.

Illustration: 1) A, a person, contracted to sell the horse to B on 1st January 2020. But the horse died on 31st Dec. Therefore, the previously made contract between A and B becomes void because the object of the contract is not in existence.

Illustration 2 is more relevant to the present context:
Illustration: 2) A, a resident of India, entered into a contract with B, a resident of another country i.e. China. Some portion of the contract was performed but a major portion was still to be performed and the Government of India declares war on China and suspends all transaction with China. After this the contractual obligation becomes void and party who is unable to perform his obligation can claim the defense of impossibility of contract.

There are some specific situations in which the doctrine of frustration applies:

- Change of circumstances: A contract will frustrate where circumstances arise which make the performance or fulfillment of contact impossible in the manner and the time contemplated.
- Death or incapacity of Party: A party to a contract is excused from performance of the contract if it depends upon the existence of the given person and that person dies or becomes too ill to perform.

[6] Satyabrata Ghose v. Mugneeram Bangur 1954 AIR 44

- Government, Administrative or Legislative Intervention: A contract will perish when legislative or administrative intervention has so directly operated upon the specific performance of the contract as to change the contemplated conditions of fulfillment.

The ongoing Covid-19 pandemic meets the first situation, making doctrine of frustration a defense against the obligations to fulfill a contract. Hence**, the World Health Organization declared Coronavirus an Act of God and parties to a contract can use Coronavirus as a defense or protection from legal consequences.**

"A contract is not frustrated merely because the circumstances in which it was made are altered. The Courts have no general power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events."[7]
It has also been held that applying the doctrine of frustration must always be within narrow limits. In an instructive English judgment namely, *Tsakiroglou & Co. Ltd. v. Noblee Thorl GmbH*[8], despite the closure of the Suez canal, and despite the fact that the customary route for shipping the goods was only through the Suez canal, it was held that the contract of sale of groundnuts, in that case, was not frustrated, even though it would have to be performed by an alternative mode of performance which was much more expensive, namely, that the ship would now have to go around the Cape of Good Hope, which is three times the distance from Hamburg to Port Sudan. The freight for such a journey was also double. Despite this, the House of Lords held that even though the contract had become more onerous to perform, it was not fundamentally altered. Where performance is otherwise possible, it is clear that a mere rise in freight price would not allow one of the parties to say that the contract was discharged by the impossibility of performance.

This view of the law has been echoed in 'Chitty on Contracts', 31st edition. In paragraph 14-151, a rise in cost or expense has been stated not to frustrate a contract. Similarly, in 'Treitel on Frustration and Force Majeure,' 3rd edition, the learned author has opined, at paragraph 12-034, that the cases provide many illustrations of the principle that a force majeure clause will not normally be construed to apply where the contract provides for an alternative mode of performance. It is clear that a more onerous method of performance is not sufficient to invoke the doctrine of frustration.

---

[7] Naihati Jute Mills Ltd. v. Hyaliram Jagannath, 1968 (1) SCR 821
[8] 1961 (2) All ER 179

"The application of the doctrine of frustration requires a multi-factorial approach. Among the 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. Since the subject matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as "the contemplation of the parties", the application of the doctrine can often be a difficult one. In such circumstances, the test of "radically different" is important: it tells us that the doctrine is not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances."performance by itself would not amount to an frustrating event. The same learned author also states that a mere rise in price rendering the contract more expensive to perform does not constitute frustration."[9]

The most generic clause under most force majeure clauses is the 'Act of God', and the Covid- 19 can be brought under the ambit of the same. But the effect of this clause can be mitigated through the 'duty to mitigate' and 'exercise due diligence clause.' The subjective standards on the case to case basis have to be applied in order to determine their effect on the overall contract. The 'best endeavor' clauses might also play a crucial role in order to define the ambit and implications of the force majeure clause, as the presence of the same might end up mitigating the effects of force majeure clauses. The foreseeability of the event has to be gauged too, especially for the contracts entered after the month of December 2019 as for the force majeure clauses to become effective, the event must not be foreseeable in essence, and the Covid-19 outbreak had effectively begun from December 2019 onwards.

The wordings of the clause(s) also becomes very important. Some contracts provide that it can be put on hold until the force majeure event is resolved. Some contracts provide for limitations in time, after which either party may cancel the agreement with written notice to the other. Others require the

[9] *Supra, note 3*

contract to remain in effect until the force majeure event is resolved. The burden of proof lies with the party who wants to invoke the force majeure clauses, and the Courts have traditionally interpreted these clauses in a very strict manner. And if the party wishes to invoke the force majeure clause, the dispute resolution clause of the contract shall be checked and the appropriate adjudicatory mechanism shall be adopted by the procedure mentioned under the terms of the clause, or the law of the land, whichever is applicable.

In the absence of a force majeure clause, any party could also invoke the doctrine of frustration under Section 56 of the Indian Contract Act, 1872. In order to invoke the same, parties must show that the performance of a contract has become impossible, and the arrangements and conditions have become fundamentally different from those envisaged in the contract. The parties also have the option to invoke several clauses such as price adjustment clauses, limitation or exclusion clauses, material adverse change clauses, and many others such clauses in order to limit the liabilities arising from non-performance or the partial performance of the contractual obligations. The ability to invoke such grounds would depend on the wording of the Contracts, the application of case-laws on these clauses, and how these clauses would be interpreted by the tribunals, courts, and other adjudicatory bodies.

Does Spread of COVID-19 in the Aggregate Qualify as an Act of God?

For any act to be considered an Act of God, it must be unusual, extraordinary, grave and sudden such that it is very hard to foresee such a turn of events. Conclusively, COVID-19 cannot be considered an Act of God by the court. This is a decision the court will soon have to face.

Conclusion

COVID-19 is a game changer in many respects – whether it will upend the prevailing principles of *force majeure* and frustration of contracts due to "impossibility" remains to be seen. The existing legal provisions and the Indian legal jurisprudence surrounding the same appear robust enough to address the large and wide-ranging legal consequences of the viral pandemic. Whether in particular cases, such consequences will actually lead to parties being able to successfully avoid their obligations, still continues to depend on the time-tested benchmarks of each case – namely, whether the changed circumstances destroyed altogether the basis of the contract and its underlying object, and whether the contractual bargain was indeed at an end as a result of the significantly altered conditions.

That is until the fullness of the COVID-19 disaster unfolds.

Lastly, I would like to end with a legal maxim which is based on the doctrine of frustration: “les non cogit ad impossibilia” which means “a man cannot be compelled by law to do what he cannot possibly perform.”