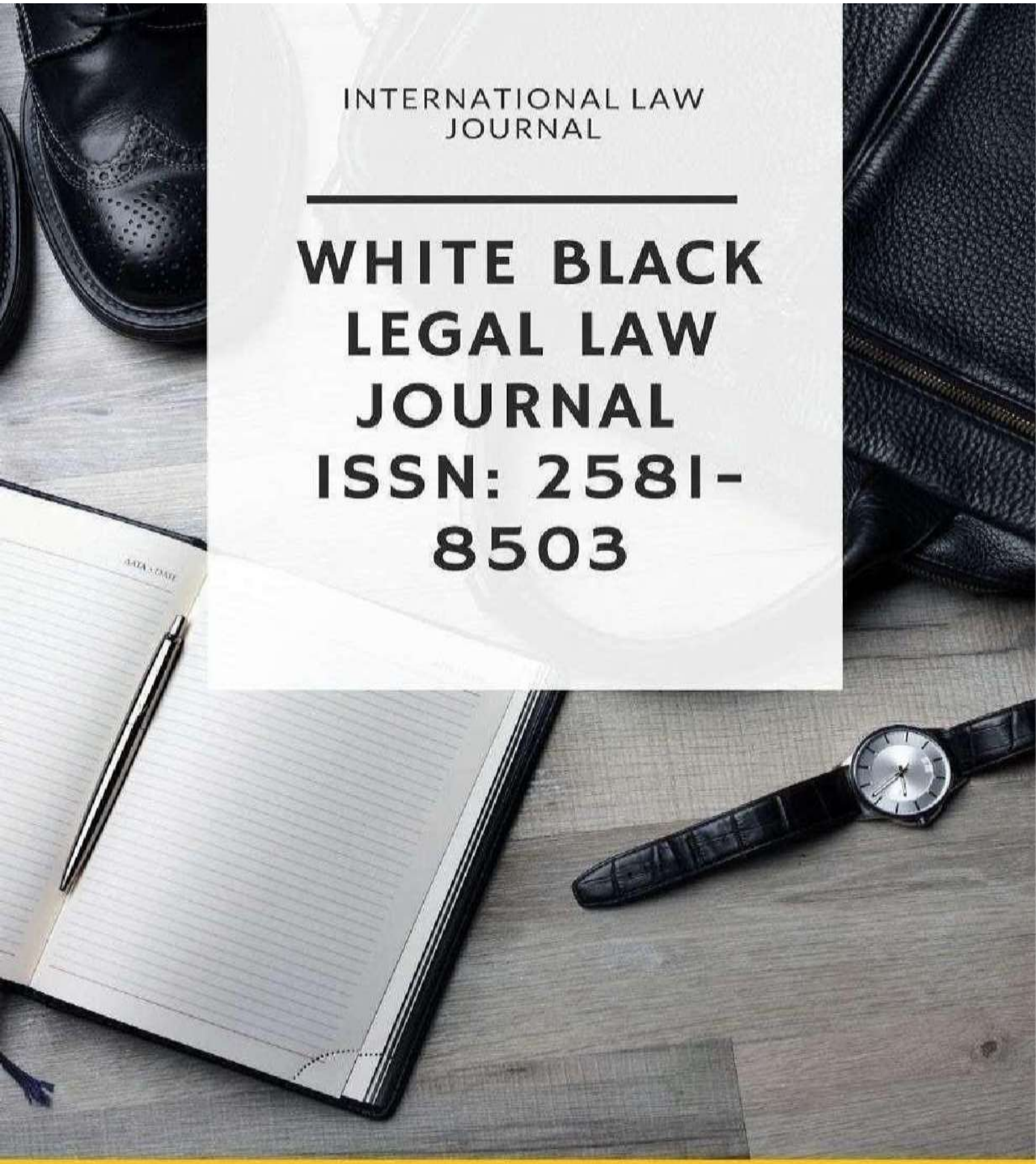

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire 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

FORCE MAJEURE ON CONTRACTS FOR SALE OF GOODS

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2) *Satyabrata Ghosh v. Mugneeram Bangur*
3) *Energy Watchdog v. CERC*
4) National Agricultural Cooperative Marketing Federation of India v. Alimenta S.A
5) Raja Dhruv Dev Chand vs Harmohinder Singh & Anr
6) The Naihati Jute Mills Ltd vs Hyaliram Jagannath
7) Ganga Saran vs Ram Charan Ram Gopal
8) M/s Alopi Parshad & Sons Ltd. v. Union of India

FOREIGN CASE

1) Tsakiroglou & Co. Ltd. v. Noblee Thorl GmbH

INTRODUCTION

The word Force majeure is a French term that means "greater force". The concept is mainly related to the concept of an act of God. It finds its origin in French civil law and is an accepted standard in many jurisdictions that derive their legal systems from the Napoleonic code. In the United States and the United Kingdom where common law systems are used, force majeure clauses are acceptable but they must be more explicit about the events that would trigger the force majeure clause in the contract. In this type of event, no party can be held accountable. 'Force Majeure' means an "event or affect that can be neither anticipated nor controlled…. (and) included both acts of nature (example floods and hurricanes) and acts of people (example riots, strikes and wars)"[1]. If we are talking about the Force majeure from the point of view of contracts signed between two parties then we can say that it is a clause that is included in contracts to remove the liability for either of the parties for an unforeseeable and unavoidable event that can interrupt the regular performance of contractual obligations.

Now another term that is often used instead of Force majeure is 'Vis Major' i.e., 'Act of God'. Vis Major can be defined as an "*overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood or tornado*"[2]. Force majeure is wider than Vis major since the former covers both the natural and artificial unforeseeable events whereas the latter only covers the natural unforeseen events. We can say that Vis major is a subset of Force Majeure. The Supreme Court in *Dhanrajamal Gobindram v. Shamji Kalidas & Co.*[3] has recognized the distinction between both terms. When we talk about force majeure in the context of contracts we can say that it is a clause that is generally enforced in the contracts between the parties. The clause is negotiated between parties and specifies the events that qualify as force majeure events such as the acts of God, wars, terrorism, riots, labor strikes, embargos, acts of government, epidemics, pandemics, plagues, quarantines, boycotts[4]. In case any of the aforesaid events happen during the course of the contract which affected the performance under the contract, then the affected parties

[1] Blacks Law Dictionary (11th Edition, 2019)
[2] ibid
[3] AIR 1961 SC 1285
[4] Force Majeure in the Times of COVID-19 by Adarsh Saxena, Aditya Sikka and Drishti Das

may be relieved from performance. The International Chamber of Commerce has attempted to clarify the meaning of force majeure by applying a standard of "impracticability", meaning that it would be unreasonably burdensome and expensive, if not impossible, to carry out the terms of the contract[5]. It will be pertinent to note that if the contract between the parties does not contain a force majeure clause, none of the parties can be excused for the non-performance of the contract by invoking the clause, as under English law – unlike most civil law jurisdictions – there is no blanket force majeure provision. Hence, we can say that a carefully drafted clause is necessary. This paper tries to dwell in depth on force majeure contracts in general and also on the sale of goods. Through this paper, we can understand the various circumstances in which the force majeure clause can be used.

RESEARCH DESIGN

- Research problem – The researcher tries to understand the force majeure clause in the contracts and its significance in the sale of goods.

- Research methodology - The researcher uses qualitative forms of data. It also uses a secondary form of data which is the data that has already been collected. The researcher studies various articles, journals, websites, and blogs to understand the concept of force majeure. When gathering data, the researcher employs a doctrinal kind of study. The "black letter" methodology used in doctrinal legal study. It concentrates on the letter of the law.

- Research objectives –
    I. To know about the difference of force majeure and doctrine of frustration clause in detail.
    II. To analyze section 32 and section 56 of the Indian Contracts Act, 1872.
    III. To know about the applicability of force majeure in the sale of goods.

- Research questions –
    I. When does the force majeure clause come into the picture?

[5] International Chamber of Commerce. "ICC Force Majeure and Hardship Clauses 2020," Page 1.

II. Under what circumstances does section 32 of the Indian Contracts Act, of 1872 apply?

III. Under what circumstances does section 56 of the Indian Contracts Act, of 1872 apply?

ANALYSIS

Force majeure events can be categorized as follows:

i) Catastrophic events

ii) Unforeseeable or if they are technically foreseeable, inevitable, or unpreventable

iii) Beyond the control of either of the parties

Some examples of force majeure events are

1) Hurricanes, earthquakes, and other natural disasters.
2) Explosions.
3) Public health emergencies, such as epidemics, pandemics, and government-mandated quarantines.
4) War, invasion, hostilities (whether war is declared or not), terrorist threats or acts, riots, or other civil unrest.
5) Government orders, acts, or actions.
6) Blockades and embargos.
7) Labor strikes, lock-outs, stoppages, slowdowns, or other industrial disturbances.
8) Shortage of adequate power or transportation facilities.
9) National or regional emergencies.
10) Acts of God, which is a catch-all language that aims to cover a wide range of natural disasters and events[6].

When we talk about force majeure, one of the key concepts that collide with the former is the concept of "pacta sunt servanda" i.e. "agreements must be kept", which is a key concept in civil and international law. It is not so easy to escape from contractual liability. The world is gradually becoming aware of natural risks that we were previously unaware of, such as pandemics, super volcanoes, asteroids, and solar flares. Additionally, we are creating new human dangers like

[6] https://uk.practicallaw.thomsonreuters.com/w-024-8344?transitionType=Default&contextData=(sc.Default)&firstPage=true visited on 23/07/2023

nuclear, biological, and cyber warfare capabilities. These have prompted discussions regarding what is and is not legally foreseeable. Similarly, we are becoming increasingly aware of human intervention in events that were traditionally considered acts of God, such as climatic and seismic events.

Although it is not covered in the organization's Incoterms, the International Chamber of Commerce has made an effort to define force majeure by using a standard of "impracticability," which states that it would be excessively difficult, expensive, or even impossible to carry out the terms of the contract[7]. Contracts with clear definitions of what constitutes force majeure—ideally, ones that address local threats—hold up better under scrutiny in any country. The concept's use can be carefully limited, even in systems founded on civil law.

FORCE MAJEURE RELATED TO INDIA

The Indian Contracts Act, of 1872 contains two provisions that deal with Force Majeure. Section 32 of the act deals with contingent contracts and can be read as follows:

"Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless that event has happened. If the event becomes impossible, such contracts become void."

Similarly, Section 56 which is also known as the 'Doctrine of Frustration' of the act also deals with the force majeure and can be read as:

"An agreement to do an act impossible in itself is void."

In a line of decisions starting from *Satyabrata Ghosh v. Mugneeram Bangur* to *Energy Watchdog v. CERC*[8], the Supreme Court has held that when a force majeure event is relatable to a clause (express or implied) in a contract, it is governed by Section 32 of the Act whereas if a force majeure event occurs dehors the contract, Section 56 of the Act applies.

There is also scope for situations where there are complex facts that can be interesting issues, for example, where the contract contains a force majeure clause that is particular in how it defines force majeure occurrences (i.e., does not expressly refer to pandemic, epidemic, or Act of God) and does not employ catching terminology. Under such circumstances, it can be argued that Section 56 can be applied to excuse the performance since the epidemic is not relatable to the

[7] International Chamber of Commerce, "ICC Force Majeure and Hardship Clauses 2020, Page 1.
[8] (2017) 14 SCC 80

force majeure clause in the contract[9]. If the party relying on Section 56 of the Act can show that the basic basis upon which the parties relied on their agreement has been completely disturbed and meets the high threshold of Section 56 of the Act[10], the court can, in such circumstances, consider the applicability of such act. Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) that so significantly changes the nature (not merely the expense of onerousness) of the outstanding contractual rights and/or the obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such a case the law declares the parties discharged from further performance. Impossibility and frustration are used as interchangeable expressions. The principle of frustration is an aspect of the discharge of a contract. In India, the only doctrine the courts have to go by is that of intervening impossibility or illegality as laid down in Section 56, and the English decisions in this regard may have persuasive value but are not binding. If the contract contained impliedly or expressly a stipulation, according to which it would stand discharged on happening of particular circumstances. The dissolution of the agreement would take place under the terms of the contract itself. Such cases would be outside the purview of Section 56 of the Contract Act altogether. They would be dealt with under Section 32 of the Contract Act, which deals with contingent contracts[11]. The Indian Supreme Court (principally, in the *Mugneeram Bangur*[12] *case*, and several other judgments, such as *Raja Dhruv Dev Chand*[13], *Naihati Jute Mills*, [14]and *Ganga Saran* [15]has construed this provision to include three critical aspects:

a. Section 56 is a complete or exhaustive code to the extent that the 1872 Act deals with this subject, laying down a positive rule of law; an aspect of what constitutes a permissible discharge of, or an acceptable exception to, the subsequent performance of the contract - as a result, it is not permissible to import the principles of English Law without reference to the statutory provisions in Indian Law, and the Indian courts cannot travel outside the terms of Section 56, including as regards bringing in the concept of whether or not the event under consideration was or was not within the contemplation of the parties at the time of execution of the contract. That said, to the extent of similarities in the treatment

[9] Energy Watchdog v. CERC (2017) 14 SCC 80.
[10] Satyabrata Ghosh v. Mugneeram Bangur
[11] National Agricultural Cooperative Marketing Federation of India v. Alimenta S.A (2020) 19 SCC 260
[12] AIR 1954 SC 44
[13] AIR 1968 SC 1024
[14] AIR 1968 SC 522
[15] AIR 1952 SC 9

of these subject matters between English and Indian Law, the former authorities can indeed be very persuasive and relevant guides.

b. The doctrine of Indian Law is that of "supervening impossibility or illegality", with the word "impossible" to be taken in its practical, and not in its literal, sense and does not leave the matter to be determined by the intention of the parties.
c. The Supreme Court has expounded on a third principle that when an event of a change in circumstances occurs, which is so fundamental as to be regarded by law as striking at the root of the contract, it is the Indian court that can pronounce the contract to be frustrated and at an end. In that regard, the court has to examine the contract; the circumstances under which it was made; and the belief, knowledge, and intention of the parties, being evidence of whether the changed circumstances destroyed altogether the basis of the contract and its underlying object - while reaching its conclusion based on the facts and circumstances of every such contract, whether the contractual bargain was indeed at an end as a result of the significantly altered conditions.

When we talk about whether COVID-19 is such an intervening event beyond parties' control that extends to the "impossibility" of performance in such circumstances is a difficult question. It depends largely on the facts and circumstances of each case where the detrimental effects of COVID-19 are to be considered on the subject matter of the contract, but it also critically depends on the length of time and the extent or range of its detrimental consequences - all to be viewed through the lens of the legal system's undue emphasis.

FORCE MAJEURE IN THE SALE OF GOODS

The majority of purchasers are aware that sellers frequently demand that the force majeure clause not apply to the buyer's payment obligations. This is because, even if a force majeure event may have an impact on the buyer's financial situation, it usually has no mechanical impact on the buyer's capacity to make payments (barring a catastrophic collapse of the banking system). Therefore, the buyer's responsibility to pay for the products is often disregarded if the parties agree to a mutual force majeure provision. As mentioned in the above paragraphs, it is a necessity to include the 'force majeure' clause in the contract beforehand only. 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*[16], despite the closure of the

[16] [1961] 2 WLR 633 : 1961 (2) All ER 179

Suez Canal, and even though 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.

From this we can deduce that the contract only becomes impossible to perform once there is sufficient reason to believe that no matter what, it will be impossible to perform the contract. In instances, where the original course has been changed for the performance of the contract, but the alternative remedy is available for the performance of the contract, then the contract must be performed. After laying out Section 56 of the Contract Act, the apex court held in *M/s Alopi Parshad & Sons Ltd. v. Union of India*[17] held that the Act does not permit a party to a contract to disregard the express covenants thereof and to claim payment of consideration for performance of the contract at rates different from the stipulated rates based on a nebulous equity claim. In the process of carrying out an executable contract, the parties are frequently confronted with a turn of circumstances that they did not at all foresee, such as a fully anomalous rise or fall in prices that present an unanticipated barrier to execution. The deal they struck is still in effect despite this. The contract ceases to be binding only when an analysis of its provisions in the context of the events surrounding their formation reveals that they were never intended to be applied to a fundamentally different situation that had unanticipatedly arisen. It was further ruled that a contract's performance is never terminated simply because it would burden one of the parties.

CONCLUSION

We should keep in mind that each circumstance will be considered individually when determining

[17] 1960 AIR 588

if force majeure will apply for norma as well as sale of goods. However, the Energy Watchdog v. CERC judgment established the law on this topic and required stringent threshold requirements. When interpreting, the courts are supposed to interpret Force Majeure occurrences narrowly; determine if the contract's underlying assumptions were upset; and consider other performance options, if any, before concluding. The supply of goods would be broken if one of the essential parts of the supply chain failed to carry out its obligation. However, if all the requirements are met, the obligation is discharged owing to the contract's inclusion of a force majeure provision. There are contrasts between the philosophies of force majeure and frustration, which many people mistakenly believe to be similar. Both conditions are applied to different situations and both have different remedies and outcomes.