

ARBITRATION PROCEEDINGS: *FORCE MAJEURE* AND FRUSTRATION OF CONTRACTS

I. Invocation of Bank Guarantees: Can invocation be stayed, considering lockdown as an event of *Force Majeure*?

Halliburton Offshore Services Inc. v. Vedanta Limited &Anr., O.M.P. (I) (Comm) 88/2020, Hon'ble High Court of Delhi

An Application under Section 9 of Arbitration Act was filed before the Hon'ble High Court of Delhi, seeking stay on the invocation of bank guarantee during the period of lockdown as though the substantial part of the contract was completed, owing to the complete lockdown, the Petitioner was handicapped in performing the contract in whole on or before 31.03.2020.

The Hon'ble Delhi High Court observed that “*countrywide lockdown, which came into place on 24th March, 2020 was, in my opinion, prima facie in the nature of force majeure. Such a lockdown is unprecedented, and was incapable of having been predicted either by the respondent or by the petitioner*”.

The Hon'ble High Court granted the interim relief of encashing the bank guarantees on the following reasons:

- i. The period of lockdown is actually an unprecedented situation and falls within the nature of force majeure.
- ii. The Petitioner was otherwise in course to complete the project as per the time schedule stipulated in the contract the interest of justice would justify an ad interim relief.

II. Encashment of Letters of Credit: Can it be stayed if supply is already made and purchaser terminates contract based on claim of *Force Majeure*?

Standard Retail Pvt. Ltd. And Ors. V. G.S. Global Corp. and Ors., Comm. Arbitration Petition No. 404-407/2020, Hon'ble High Court of Bombay

A Petition under Section 9 of the Arbitration and Conciliation Act, 1996 was filed before the Hon'ble High Court seeking stay on encashment of Letters of Credit.

The facts of the case are that the Respondent No.1 having its office at South Korea was contracted to supply steel from South Korea to Petitioners in Mumbai. The Petitioners terminated the contract as unenforceable under Section 56 of Indian Contract Act, 1872 in light of COVID-19 and lockdown as the Petitioners were not in position to perform their contractual obligation *qua* its own customers.

However, since Respondent No. 1 has duly performed its contractual obligation of supplying steel, the Hon'ble High Court held as follows, while dismissing the Petition:

- i. The Letters of Credit are an independent transaction with the Bank and the Bank is not concerned with underlying disputes between the parties;
- ii. The Force Majeure clause in the present contracts is applicable only to the Respondent No. 1 and cannot come to the aid of the Petitioners;
- iii. The fact that the Petitioners would not be able to perform its obligations so far as its own purchasers are concerned and/or it would suffer damages, is not a factor which can be considered and held against the Respondent No. 1;
- iv. The lockdown would be for a limited period and the lockdown cannot come to the rescue of the Petitioners so as to resile from its contractual obligations with the Respondent No. 1 of making payments.

III. Doctrine of frustration of contract would not prevail over the provisions of the contract, where the contract itself contains a *force majeure* clause:

NTPC v. Voith Hydro Joint Venture, 2019 SCC Online Del 9014, Hon'ble Delhi High Court

Recently, the Hon'ble Delhi High Court in NTPC case made important observations on the scope and applicability of the doctrine of frustration of contracts (Section 56) *vis-à-vis force majeure* clause.

The brief facts of the case are that NTPC had given a contract to Voith Hydro for a hydro-electric project. The project was however scrapped by the Government and in view of that NTPC without invoking force majeure clause alleged that the contract stood frustrated and called upon Voith to return advances. Voith, on the other hand, disputed the frustration of the contract and urged to be bound by the terms of the contract as the contract itself provided for the course to be followed in case of happening of a *force majeure* event.

The major point of consideration before the Hon'ble High Court was whether Section 56 of the Contract Act would be applicable even in cases where the parties had contemplated the effect of supervening event, which renders it impossible to perform the contract, by a *force majeure* clause in the contract.

The Hon'ble High Court held the following:

- i. Where parties have expressly contemplated the consequence of a supervening event in a contract, the terms of such provision would remain binding and parties would not be absolved from their obligations under the contract.
- ii. In the presence of a *force majeure* clause in the contract, the parties would be bound by such a clause and would be precluded from relying on Section 56 of the Contract Act to escape performance of the contract.

In the facts of this case, since parties had not relied on a *force majeure* clause in the contract, the Court was of the view that they cannot thereafter seek to rely on Section 56 of the Contract Act.

IV. Frustration of contracts *vis-à-vis* right to claim damages:

G+H Schallschutz GMBH v. Bharat Heavy Electricals Ltd., O.M.P. (Comm) No. 158/2019, Hon'ble High Court of Delhi

The question that fell for consideration before the Hon'ble High Court was whether the petitioner company (G+H) is entitled to claim damages on account of the undisputed frustration of contract due to war.

The brief facts of the case are that G+H company had entered into a contract with BHEL contract for construction of power plant in Yemen. BHEL invoked force majeure clause due to outbreak of war in Yemen. Clause 25 of the contract (Clause 25) provided for an alternative mode of performing the contract by stipulating that if it was not possible to make shipment to Maribeven after the 06 months of the scheduled delivery, then to ship/dispatch the material to Mumbai/Haridwar and claim the payment, which however both the parties failed to resort to.

The question which fell for consideration before the Hon'ble High Court was whether parties can claim damages for the losses incurred due to frustration of the contract.

It was held by the Hon'ble High Court that:

- i. It is a settled law that the parties claiming damages has to strictly adhere to the terms of the contract for establishing its claim for damages.

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- ii. Since the parties had stipulated and envisioned the eventualities of cancellation of the order as well as provided for the claim of payment of damages by virtue of Clause 25 that in the event of force majeure condition, if the Petitioner were to keep material in the custody for more than six months of the scheduled delivery, it could then make a claim for the payment of goods after shipping/dispatching the same to Mumbai/Haridwar.
 - iii. In order to press Clause 25 and claim damages, the prerequisite was shipment/dispatch of the material to Mumbai/Haridwar. If the price was not paid on the delivery of the goods or the goods were rejected or returned, the Petitioner would have been entitled to the price of the goods and also claim damages on account of any extra expenditure incurred in the return of shipment for such other claims.
 - iv. Since the Petitioner did not make any effort for the alternative mode of performance of contract, therefore even though the contract was frustrated due to war, the Petitioner was not entitled for any damages.

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