Force Majeure And Covid-19: An Analysis Under Indian Law

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# Introduction

On the eve of new year in December 2020, hospitals in Wuhan, China discovered repetitive symptoms of a chronic pneumonia-like disease which several patients had contracted. It arose from a virus known as SARS-CoV-2, and the disease it diagnosed people with is referred to the Coronavirus Disease 2019 **(“Covid-19”)**.[[1]](#footnote-2)

Little did the world know that within less than three months of the viruses’ discovery, the entire world would be dragged into a Pandemic. Nationwide lockdowns have been imposed throughout the world and human activity has come to a halt. This, quite evidently, affects businesses and the economy alike. The World Bank has predicted that the world economy will face a recession of the magnitude which has not been seen for over 100 years.[[2]](#footnote-3) In times like these, one of the most relevant questions,which is asked by person who have contractual obligations to perform in the midst of this crises, is will the omission of parties to perform their contract be an ‘act of god’? Or, does the Covid-19 crisis constitute as a situation stemming the impossibility to perform a contract?

These questions are the subject matters forming the basis of this paper, which shall be discussing the concept of Force Majeure **(“FM”)** clauses in contracts under Indian Law.

# Understanding ‘Force Majeure’ Under Contracts

## ORIGINS

The term ‘force majeure’ is French. It translates, literally, as ‘superior or greater force’.[[3]](#footnote-4) Under contractual law, it is considered as “an event or effect that cannot be reasonably anticipated or controlled”, almost similar to the idea of an ‘Act of God’.[[4]](#footnote-5) The *Black’s Law Dictionary* defines FM as “an event or effect that can be neither anticipated nor controlled.”[[5]](#footnote-6)

Now, the FM clause, if mentioned in an agreement or a contract between two parties, acts as an exception to the general obligation between the parties to perform their part of the obligation. Thus, a FM clause, in a contract, may be defined as a “contractual provision allocating the risk of loss if performance becomes impossible or impracticable” especially as a result of an event which the parties could not have anticipated or controlled.[[6]](#footnote-7) The general rule of the contract law is that parties are supposed to perform their part of the contract in the most substantial manner.

## Position UNDER INDIAN AND ENGLISH LAW

At the outset, an agreement is a relationship between two persons for the performance of their respective obligations which they have mutually decided.[[7]](#footnote-8) When such an agreement makes the rights and liabilities of the parties enforceable under law, it may be called a Contract. Under Section 37 of the ICA, parties are mandated to perform their part of the Contract, unless “such performance is dispensed with or excused under the provisions of” of the ICA.[[8]](#footnote-9)Therefore, the performance of the obligations by the parties to a contract is subject to them being capable of performing them; and in case of an incapability alleged by them, the same must fall within the framework of the ICA.

Let us look back at the FM clauses’ understanding. If in case circumstances render it impossible or impractical for a party, or parties, to a contract to perform their part(s) of the obligation(s), then they may be saved from performing their parts of the obligation due to the unforeseeable circumstances facing them. Such situations are also referred to as the frustration of a contract. Therefore, it is important for us to look at the doctrine of frustration under contract law.

The doctrine of frustration brought to limelight in the case of ***Taylor* v*. Caldwell***.[[9]](#footnote-10) In this case, an artist had promised to perform a concert at a music hall, but was unable to do so when the hall was burnt down by fire. The musicians demanded performance by the hall owner, and accordingly alleged in the lawsuit that the music hall owners ought to have arranged a hall for them to perform in. Court disagreed and observed that the parties must be excused if the performance becomes impossible before the default on behalf of the contractor. This very same principle is recognised Section 56 of the ICA.

Section 56 states that an agreement “to do an act impossible in itself is void”.[[10]](#footnote-11) It goes further to edict that when the performance of a contract becomes void after the contract has been entered into, then the contract shall be deemed as void after such impossibility arises.[[11]](#footnote-12) Thus, when you read Section 56 of the ICA alongside the doctrine of frustration propounded under English law, the doctrine of frustration refers to a case wherein a contract is discharged owing to the impossibility of performance arising after the contract was made.[[12]](#footnote-13)

The Supreme Court of India **(“SC”)** in ***Satyabrata Ghose* v*. Mugneeram& Co***.[[13]](#footnote-14) for the first time, endorsed the doctrine of frustration – as prevalent in England – under Indian law. They further observed that for a contract to fall within the purview of Section 56 of the ICA, the performance of the contractual must become impossible owing to a circumstance which either of the parties could not foresee.[[14]](#footnote-15) Further, if we stem the doctrine of frustration from English law and extrapolate it into India law, the frustration will be applicable to both legal and physical impossibility to perform the contract. Herein, impossibility and frustration, as was conceded by the court, are interchangeable terms; and impossibility has to be seen from a practical sense and not a literal one.

## CLASSIFYING IMPOSSIBILITIES

Impossibilities may be classified into two heads: *legal* impossibility and *physical* impossibility. Various case-law examples may be taken in this regard to understand them individually.

For instance, in the case of ***State of Rajasthan* v*. Madanswarup***,[[15]](#footnote-16) a legal practitioner contracted with the erstwhile Government of Bikaner before the Constitution of India **(“Constitution”)**came into effect, wherein he was obligated to perform his functions as the Government advocate for a fixed salary. The contract was entered to on 1st November 1947. However, on 7thNovember 1950, through a Letter from the Law Secretary and Legal Remembrancer of the State of Rajasthan, he was terminated from his services from 11thNovember 1950 onwards. The plaintiff claimed that his termination was a breach of Contract that he had with the Government of Bikaner. The Rajasthan High Court held that the princely states, including Bikaner, acceded to the Constitution and merged together to form the State of Rajasthan. Owing to this accession, the plaintiff was no longer capable to perform his duties as the Advocate to the Government of Bikaner, which no longer existed. Because of a new law coming into force, thereby making it impossible for him to perform his contract, the HC held that the Contract stood frustrated under Section 56 of the ICA due to a *legal* impossibility. However, a mere difficulty in performing a contract because of a change in the laws does not *ipso facto* amount to legal frustration.[[16]](#footnote-17)

In regard to physical frustration or impossibility, the case of ***Robinson* v*. Davidson***[[17]](#footnote-18)is relevant. In this case there was a contract between the plaintiff and the defendant's wife, who was the agent of her husband. The contract obligated her to play the piano at a concert organised by the plaintiff on specific day. On the day of the concert, she was unable to perform owing to her falling ill. The plaintiff sued, but the court held that the contract’s performance became impossible because of the wife’s sickness, thereby frustrating the contract *physically*.

## Impossibility And Contingency

Section 56, in its very essence, has been divided into three separate paragraphs. The second paragraph, as discussed, talks about the vitiation of contractual obligations upon the happening of an event which renders its performance impossible. The first paragraph, on the other hand, talks of the contract being void for the very reason that it obligates the party to perform an impossible task.[[18]](#footnote-19)The ICA, however, comprises of another overlapping provision under Section 32. Section 32 states that contracts contingent “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.”[[19]](#footnote-20) Further, in the second sentence, it states that the if the event becomes impossible, the contract is itself void in that case.[[20]](#footnote-21)

Contingency implies a future event which is possible but cannot happen with *certainty*.[[21]](#footnote-22) An example in this regard may be a person winning a gold medal at the Tokyo Olympics, 2020. *Let us say* that the athlete participating at the said Olympics contracts with a sports complex in her hometown and the terms of the contract state that if she wins a gold medal at the Tokyo Olympics, 2020 then she will be getting free access to the complex for a continuous period of five years. As we all know, the Tokyo Olympics got postponed due to the Coronavirus outbreak.[[22]](#footnote-23) Therefore, the happening of the event itself has become impossible owing to the postponement. Thus, the contingency on which the contract depended, becomes precarious.

Therefore, it is *likely* that such a contract will come under the ambit of Section 32 of the ICA. But such a situation also attaches an interplay with Sections 32 and 52 of the ICA. Does the contract come under the ambit of ‘impossibility’ under Section 32, or will the doctrine of frustration under Section 56 apply? This question may be answered through the terms of the contract between the parties. The SC in ***Naihati Jute Mills Ltd.*v*. Khyaliram Jagannath***[[23]](#footnote-24) derived a distinction between the two.[[24]](#footnote-25) The source of distinction between applying one and not the other is the implied or express intention prescribed within the contract that on the happening or not happening of an event, the contract will stand as discharged. Naturally, if the contract’s execution is contingent of the happening of an uncertain event, it is obvious that the contract will stand as discharged if the contingency does not occur. In situations, thus, where the contract itself provides for a mechanism of discharging the contract on the non-happening of a contingent event, then Section 32 will apply and not Section 56 – in situations of impossibility.[[25]](#footnote-26)

An example may be the recent case decided by the SC on 22ndApril, 2020 -***National Agricultural Cooperative Marketing Federation of India* v*. Alimenta S.A.***[[26]](#footnote-27) In this case, the appellant had contracted with the respondent for the supply of ground nuts. However, this supply was contingent on government approval (*clause 14 of the contract*). The government of India had prohibited the export of ground nuts at the point of time when this contract was entered into, owing to which the appellant was unable to perform its part of the obligation. This respondent applied Section 56 to contend that the contract had frustrated owing to the impossibility to form the contract. The court observed the distinction, as discussed above, between frustration under Section 56 and impossibility under Section 32 and noted that the contract was itself contingent on the approval being granted by the government, which is why Section 32 will apply and not Section 56.[[27]](#footnote-28)

Similarly, the Calcutta HC in ***Ram Kumar*v*. P.C. Roy & Co. (India) Ltd****.*[[28]](#footnote-29) was faced with a similar situation wherein the parties had contracted to supply wagons. However, the government had imposed restrictions on the supply of wagons. The parties contracted with the view that the restrictions will be lifted by the time they will go ahead with their respective obligations’ performance. This did not happen and the supply could not take place. Herein, as opposed to the previous case discussed, the performance was not made contingent on the lifting of the restrictions, rather the parties mutually *believed* that the restrictions will be lifted. Therefore, there was no express or implied intention between the parties for the supply to be *contingent* to government approval or anything of such nature. Therefore, the doctrine of frustration under Section 56 of the ICA, as opposed to Section 32, applied in this case.[[29]](#footnote-30) It is pertinent to note that the doctrine of frustration is recognised under Section 56 and not Section 32. Frustration is a natural phenomenon – something beyond the beliefs and intent of the parties. Impossibility and contingency are determined from the perspective of the parties’ mutual intention.

## FORCE MAJEURE TERMS WITHIN THE CONTRACT

Let us go back to FM clauses in India. If we closely look at the jurisprudence of developed by the courts in India, we see that FM is another constituting element for frustrating a Contract. A FM clause may be explicitly provided in a contract, in which case impossibility has to be determined on the pedestal of the contractual clauses.[[30]](#footnote-31) But, for the contract to come under the purview of Section 56 of the ICA, under which a contract is declared void due to impossibility, the entire object and purpose of the contract has to be fissured because of the change in circumstances leading to the frustration of the contract. **Lord Atkinson**has chimed the same tunes, when he noted that when a person who contracts to do something absolutely but is unable to do so because of the might of circumstances beyond his control leads to the impossibility to perform a contract.[[31]](#footnote-32) Even the SC in *Satyabrata Ghose* has observed that Section 56 of the ICA is a positive law and the intention of the parties in respect of the performance of contract will play no part if the entire purpose of the contract is frustrated owing to the change in circumstances beyond the control of the parties.[[32]](#footnote-33) However, in the very same case the SC held that if the parties, upon a contingency, agree for the performance of the contract to be excused (*vide*, let us say, a clause under the contract), then the dispute has to be determine in furtherance of such a clause and not under Section 56 of the ICA.[[33]](#footnote-34)

Quite often, the parties themselves decide upon whether they stand discharged in case of an ‘impossibility’, or if an ‘act of god’ renders them, or one of them, incapable of performing their obligations under the contract. Herein, *Section 32 will be applicable*. The reasons behind the same are co-relatable to the distinction drawn between cases where Section 56 will be applicable and not Section 32. However, in the absence of a FM clause in a contract, either expressly or impliedly, Section 56 will apply in case a party pleads impossibility to perform the contract.

The same tunes were chimed by the SC in ***Energy Watchdogs* v*. Central Electricity Regulatory Commission***.[[34]](#footnote-35)In this case, the Central Commission of Electricity Regulation, under the Electricity Act, 2003, entered into a contract with Adani Enterprises to constitute a scheme of electricity generation and sale. However, there were certain changes in the law of Indonesia “which aligned the export price of coal from Indonesia to international market prices instead of the price that was prevalent for the last 40 years.”[[35]](#footnote-36) This left Adani incapable to perform its obligations under the Contract and it attempted to invoke the FM clause so as to discharge themselves from their obligations. It is in this backdrop that the SC distinguished FM clauses in contracts and the Doctrine of Frustration under Section 56. **Justice Nariman**, speaking on behalf of the majority, lucidly reasoned as follows:[[36]](#footnote-37)

“***32****. ‘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. 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*.” ***(emphasis supplied)***

Therefore, the Doctrine of Frustration and FM clauses are two sides of the same coin. The former comes within the ambit of Section 56, and the latter within the ambit of Section 32. On the basis of this premises set-out above, we shall now move on to the interplay between Covid-19 and FM under *Indian* contract law.

# APPLICATION OF FORCE MAJEURE DURING COVID-19

Operations of businesses worldwide have come to a halt and entire nations have been on lockdowns for months on end. It is predicted that a third of the world’s population is under lockdown.[[37]](#footnote-38) Naturally, the world economy is going to be affected as production of goods and services, demand and supply, and all commercial activities come to a halt. The International Monetary Fund has predicted the global GDP to rise at 3.1%, which is the lowest the world has been since the Great Depression in the 20th Century.[[38]](#footnote-39) Owing to such a situation, many businesses will be in financial distress, will be left incapable trade in goods and services and may not even have enough consumers. Many sectors, such as the e-commerce sector have been big leaps in revenue and usage, since consumers are left with limited options of approaching markets and trading in services. Many streaming websites like Amazon Prime and Netflix have gained supernatural profits as people in quarantines have large amount of time on their hands.[[39]](#footnote-40) Economic activities which predominantly require physical labour or physical human presence are going to face repercussions of lockdowns.

Naturally, in the midst of such a troublesome state economic actor, or market entities, will be left incapable of performing various of their contractual obligations. Governments have imposed measures which make it impossible for businesses and economic actors to work. This is where FM (clauses) and the doctrine of frustration come in. Before arriving to the conclusion as to how they are relevant here, it is imperative to acknowledge various legal measure imposed by India in the midst of the Covid-19 outbreak and the lockdown imposed thereof.

## Trade Measures

### Inter-State Trade

The most noticeable step by governmental across the world was to withhold medical equipment manufactured in the domestic markets, and subsequently import medical equipment from countries who are still allowing exports. India too amended its Indian Trade Classification (Harmonised System) of Export Items, 2018 and prohibited the export of personal protection equipment like masks used to protect air borne particles from entering inside one’s respiratory system and other masks utilisable for a like purpose.[[40]](#footnote-41)

India further adopted eight measures in relation to export prohibitions of medical equipment such as ventilators, incubators etc. Top medical equipment and other related product manufacturers would find it difficult to perform their part of the contract, as the government now imposed orders prohibiting their exports.[[41]](#footnote-42)

The Ministry of Shipping circulated a number of orders and guidelines, which included matters relating to FM. *For example*, under Order of the Ministry of Shipping dated 7th April, 2020, it has been directed that all the Major Ports can permit “waiver of all penal consequences on a case-to-case basis along with deferment of certain performance obligations under the relevant provisions of concession agreements”.[[42]](#footnote-43) It is, thus, quite evident that corporations will be unable to perform their pre-existing obligations which they may have wanted to perform during this period of the year in relation to good and services which have been prohibited. However, at the time of this article being written, the government of India has relaxed the lockdown for industrial outlets in selective parts of the country, such as Special Economic Zones in urban areas.[[43]](#footnote-44) This relaxation comes after a continuous halt of activities for of over six weeks.

### Intra-State Trade

Identical to the inter-state trade prohibitions, intra-state trade prohibitions were introduced. As per the guidelines issue by the Government of India on 1st May, 2020, in respect to the third lockdown imposed in succession, permissions are required for the transportation of non-essential commodities from one location to another. These non-essential commodities may be categorised as those which are not required for a person's animal survival in his or her isolated silos during the period of a lockdown;*for example*, posters, magazines etc. On the other hand, essential commodities are permitted to be transported. For example, the transportation of vegetables and other groceries.[[44]](#footnote-45)

## AIRLINES

Airlines were stopped on the day of the imposition of the first nationwide lockdown on 25th March 2020. This meant that all flights which were booked prior to the imposition of the lockdown and were scheduled to take place during the said period, were not permitted to do so. Our flight bookings too are in the form of a service-centric contracts which the airlines, being one of parties to the contract, will be unable to perform. A natural consequence of the same would be people losing the money which they have spent on the bookings.

In the midst of such a situation, the Civil Aviation Minister, through the Directorate General of Civil Aviation, “released new refund rules regarding the cancellation of flights in view of the lockdown.”[[45]](#footnote-46) Under these rules, airlines were direct to refund the amount paid by the passengers for availing their services, if requested. The Ministry further clarified that no refund charges shall be made against passengers by airlines. A catch here is that only passengers who have paid full amount for their travel will be eligible for the refund. Thus, the rules circulated omit those who have paid partial fees of travel to airlines. This leaves room open for court litigation on behalf of those who have not received refunds for their cancelled flights.

## OTHER MARKET SECTORS

Infrastructure Projects and other projects undertaken by the Government through contractual relationships they had with private entities will take a hit as well due to the lockdown. Projects and plans have been stopped for the time being. However, the Government relaxed its guidelines and allowed certain industries, like industrial establishments with access control in Special Economic Zones and Export Oriented Units, the IT Manufacturing Sector, Coal and Gas sector etc, were allowed to open conditional to them securing safety for the workers by providing them with transportation facilities or ensuring accommodation for them.[[46]](#footnote-47) On the other hand, the Hospitality and Foods and Beverages Sectors, which somewhere encompass and deal in non-essential commodities, are shut indefinitely for the time being.[[47]](#footnote-48) Therefore, it is but obvious that persons in these sectors will be facing financial burns and are – at the time of this paper being written – incapable of performing their obligations which they may be having.

## THE FDI AMENDMENT

On 17th April, 2020, India amended[[48]](#footnote-49) paragraph 3.1.1 of their Foreign Direct Investment Policy, 2017 **(“FDI Policy”)**, formulated under the Foreign Exchange Management Act, 1999, by the way of which India has mandated countries – which share land borders with it – to adopt the government route for advancing Foreign Direct Investments **(“FDI”)** in India. This amendment was implemented to curb “opportunistic takeovers/acquisitions of Indian companies due to the current Covid-19 pandemic”. The said paragraph now encompasses both FDIs and Beneficial Ownerships from land border sharing nations in India. Naturally, although not on all occasions, investments being made from land-border sharing countries may be rejected by the Government if they are disguisedly attempting to devour large chunks of market share by the way of FDIs into the domestic market. As a matter of fact, the amendment has been so flummoxing for potential investors to Indian market players, that big Chinese firms such as Great Wall Motors, MG Motors, SIAC etc. have withheld investments tallying to billions of dollars.[[49]](#footnote-50)

Indian start-ups are most likely to be hard-hit because of this measure. Chinese investments are a stable source of capital investment for them. The amendment does not only concern prior approval for direct investments by Chinese firms but also restricts any future FDI resulting in beneficial ownership being acquired by Chinese entities. Performing obligations under contracts concerning, or relating to, FDIs will face difficulties due to an investment barrier which, if not a complete opaque cross-border boundary, creates a virtually translucent and prospectively finicky passage for investors. The amendment also looks down on the genuine investors, who seek to gain from the Indian market. Government approvals through the governmental route of FDIs– even if they are not extremely inconsiderate – will take more time for investments to reach businesses in the Indian economy.[[50]](#footnote-51) This will severely prejudice the pre-existing relationship that Indian firms and their Chinese investors, or their beneficial owners, have as over $12 billion[[51]](#footnote-52) worth of investments are at stake here.

# Legal Recourse Available

Trade and commerce have been affected the most due to lockdowns imposed during the Covid-19 outbreak worldwide. In such a situation, there are various remedies which may be availed by the entities upon financial, operational or performance-based default. There may be three outcomes which may arise such a situation: *firstly*, the parties may mutually agree that the performance may be delayed, as contract law is bound with the intent of the parties and the terms of the contract they are signatories to; *secondly*, the state and central authorities may implement measures, or promulgates law or ordinances which will save persons from incurring liability for the time being; and thirdly, in a situation where a contract has something in the nature of a FM clause, or a FM clause in itself, then the parties may invoke the same so as to save themselves from their obligations under contracts. One such example is that of Mexico’s oil company Pemex, which declared force majeure “to avoid penalties related to the suspension of supply contracts or scheduled spot purchases.”.[[52]](#footnote-53)

One of the most likely recourse which may be undertaken by corporations is through the Insolvency and Bankruptcy Code, 2016

Under the Code, financial creditors, operations creditors and corporations themselves may initiate the Corporate Insolvency Resolution Process **(CIRP)**. Once the application to initiate a CIRP is accepted by the adjudicating authority, which is the National Company Law Tribunal **(NCLT)** the company - against who the CIRP has been initiated - loses control over its functioning and a separate resolution professional is appointed to overlook the company's functioning.[[53]](#footnote-54) The intention behind this process is to enable a firm, which has defaulted, to bleed to the extent becoming capable enough to pay back its debts, either financial or operational. Sections 7, 8 and 9 of IBC pertain to the initiation of the CIRP by financial creditors, operational creditors and by the defaulting company itself.

In the aftermath of the lockdown implemented by the government of India, many entities will suffer from critical financial arrears. Owing to such a woeful economic condition, it is but obvious that the NCLT will see high number applications being advanced to initiate the CIRP against the defaulters. In pursuance of facing such a situation, the Union Government of India has proposed that they pass an ordinance which will suspend the reliefs available under Sections 7, 8 and 9 of the Code.[[54]](#footnote-55) The Union Government has been thinking of promulgating an ordinance which will suspend the initiation of this process a period of six months, at least.[[55]](#footnote-56) Similarly, even the Reserve Bank of India **(RBI)** has declared a three-month moratorium on repayment of term loans by borrowers, which means that borrowers, or RBIs debtors, would not have to pay the EMIs on their loans with the RBI.[[56]](#footnote-57) Even the government has encouraged the enforcement of FM clauses for government commercial agreements.[[57]](#footnote-58)

It is quite obvious that disputes pertaining to special laws will be dealt with under special statutes; for example, as was the case in *NACMFT* judgment – a dispute under the Electricity Act, 2003.[[58]](#footnote-59) However, under general statutes, such as the ICA, disputes will either go for arbitration or to civil courts under the Code of Civil Procedure, 1908. At this juncture, it is pertinent to note that the SC recently in *In Re: Cognizance For Extension of Limitation*[[59]](#footnote-60) using their powers under Articles 141 and 142 of the Constitution to extend the limitation period under the Negotiable Instruments Act, 1881 – which deals with cheque bounces – and the Arbitration and Conciliation Act, 1996 – which deals with arbitration and conciliation proceedings. This order came into effect from 15.03.2020 “till further orders”, thereby meaning indefinitely until ordered otherwise.[[60]](#footnote-61) This way, the SC has somewhat acted on discouraging litigants to approach courts with commercial and civil disputes. Accordingly, people will be able to approach courts on a later date and will avoid risking their health.

# SECTION 56 AND 32 – SHIELDS OR SWORDS?

In 2019, the SC in *Ravinder Kaur* v*. Manjeet Kaur*[[61]](#footnote-62) formulated a very interesting interpretation of Article 65, Schedule I of the Limitation Act, 1963.[[62]](#footnote-63) The said article refers to ownership by adverse possession. For context, adverse possession is the enjoyment of real property with a claim of right when that enjoyment is opposed to another person's claiming to be the real owner of the concerned property.[[63]](#footnote-64) Adverse possession is a tool utilisable by persons when they have occupied a property for a period of over 12 years.[[64]](#footnote-65) Now the question which pops up is whether this provision may be used as a defence, or could an adverse possessor approach a civil court for declaring that he or she has acquired adverse possession on the property. The SC in the aforementioned case held that adverse possession cannot be merely used as a defence, but a person may also approach the court for declaring adverse possession. In the words of the SC, the right of adverse possession may be used as a sword by the plaintiff, or a shield by the defendant within the ken of Article 65.[[65]](#footnote-66)

Our discussion does not pertain to adverse possession, but to the *idea* behind formulating the interpretation in regard to the adverse possession being both the sword and the shield. When we extrapolate this interpretation’s idea into the present context, a question arises: is it the party in a contract defaulting who may approach a civil court to declare the contract as frustrated, or can this plea be only used as defence? This question also extends to the invocation of the FM clause.

This paper has delved into several cases which pertain to the frustration of contracts under Section 56 and FM clauses under Section 32 of the ICA. On a closer perusal of the facts of all individual cases, we see that Sections 56 and 32 have been used as a defence by the defendants in a contractual dispute, or in other words: as a shield. For instance, in *Taylor* v*. Caldwell*[[66]](#footnote-67) it was the performer who sued the person who was supposed to organise a stage for the former to perform on. The latter merely defended himself by stating that he was unable to perform his part of the obligations because of the impossibility which arose because of the hall burning down to the ground. Similarly, in *Jayaprakas*h defendant in the original suit took the plea of impossibility, and in *NACMFT* too, the appellant (which originally defaulted) invoked the impossibility clause in its contract owing to legal impossibility.

All these instances are proof of the general notion that FM clauses and plea of impossibilities are taken by the defendants in a suit. However, in the opinion of the author, a person must have the liberty to first approach a court and demand that the contract be frustrated or invoke the FM clause. This would be using these exceptions as a *sword* and not a defence (or a *shield*).

One such a rare incident under Indian law is traceable to the bygone decision of the Patna HC in *A.F. Ferguson & Co.* v*. Lalit Mohan Ghosh*.[[67]](#footnote-68) In this case, the plaintiff was in a contract with an insurance company during British India. When Britain went to war with Germany in 1939, the insurance company could no longer function in India, since it was administered and controlled by persons from German origin. The plaintiff was still paying his dues as a part of the insurance premium. When the administration of the company was conferred on another party, the plaintiff requested them to declare the contract as void and return the premium which he had given them after the declaration of war. When the insurance firm did not agree to do so, he approached the civil court and contended, *inter alia*, that the contract had frustrated.[[68]](#footnote-69) The court held in his favour, and the same was appealed before the Patna HC. The Patna HC too held that the contract did frustration upon Britain going to war with Germany.

This case is a classic example of how a provision is used as a sword. The plaintiff in this case was the first to contend that the contract had frustrated. Unlike other cases, the court endorsed the reverse-engineering of Section 56 of the ICA. Further, even within the language or the grammar of Sections 56 and 32 of the ICA, there is no express or implied limitation which edicts that impossibility may only be used as a shield and not a sword. The reason why this nuance is being discussed is because by using frustration and contingency as a shield, it will become convenient for those who genuinely were unable perform their contracts due to the lockdowns. Coming to the moot topic of discussion, FM clauses can be invoked by the parties themselves upon them being unable perform their parts of the obligation due to an impossibility which arose owing to the lockdown imposed. This is using the FM clause as a sword and not merely a shield. However, the same may be challenged before a court of law, and the court must see the facts and circumstances of a case and determine whether the FM clause could, in-fact, be invoked. *For instance*, the Bombay HC in *Standard Retail Pvt. Ltd.*v*. M/s. G. S. Global Corp*[[69]](#footnote-70) (2020) was tasked to determine whether a dispute pertaining to trade in steel, wherein one of the parties invoked the FM clause and contended that they could not perform their obligations. The Bombay HC rejected this argument, as the Government of India had declared Steel to be an essential service as per its lockdown policy, thereby giving them a window to perform their obligations. On the other hand, the Delhi HC in*M/s Halliburton Offshore Services* v*. Vedanta Ltd*,[[70]](#footnote-71)a dispute concerning trade in petroleum drilling contract wherein the party responsible for drilling invoked the FM clause. The Delhi HC accepted this argument and held that drilling petroleum and petroleum per se are two separate things, although the latter was declared as an essential commodity.

Wherefore for the following reasons, is humbly submitted, that in light of this discussion, frustration of contracts under Section 56 of the ICA and FM clauses read with Section 32 of the ICA are capable of being used as both shields and swords.

# CONCLUSION

This paper began with the discussion of the prevailing situation in legal situation of FM clauses and impossibility to perform a contract in general, their recognition under British and Indian law and which provisions of the ICA govern the two. The paper thereafter moved to analyse the position of trade and commerce in India after the lockdowns were imposed, and how there are certain sectors which are left incapable – but later regained competence owing to relaxation – to function amidst the lockdown. Thereafter, the paper discussed how the laws in India have been changed, or are to be changed, owing to the lockdown and the drastic change in the economic conditions. Finally, the paper determined whether frustration or FM may be pled only as a defence – or a shield – or even as an assertion – or a shield. In light of the logic behind deeming it to encompass both, it was submitted that FM clauses and frustration of contract under Section 56 of the ICA may be used not merely as a shield but also as a sword.

Given the extensive discussion that the author has had in this paper, he believes that the jurisprudence of FM clauses and frustration of contract will undergo drastic review and change. As of 15th May, 2020, the Government has decided to extend the lockdown in India but will be doing so by extensively revising their policy.[[71]](#footnote-72) This will further refresh the position of contractual relationships and may open windows for force majeure litigations in India. It is hoped that the courts use their sagacious and judicious wisdom in furtherance of doing justice to those who were economically and financially affected and not to those who are eager to misuse force majeure and the doctrine of frustration.

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