

The Impact of Covid-19 on Contractual Rights and Obligations in Pakistan

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Abstract

The extraordinary lockdown to contain COVID-19 has significantly impacted business and commerce across the globe. As a result, businesses have begun to wonder what effect this pandemic will have on contractual rights and obligations. Increasingly, firms and companies have started finding ways to avoid contractual obligations, and some are having difficulty in protecting their rights. Force majeure is one of the defences available to excuse the non-performance of contractual obligations impacted by this pandemic, and the associated lockdown. However, this defence does not apply automatically in all situations. More often than not, it is upon the party claiming this defence to positively raise it in order to seek a waiver of the obligations under a contract to which they are party. Alternatively, the doctrine of frustration can also be used as a defence seeking to discharge contractually mandated performance obligations amid COVID-19. That being said, Pakistani courts have historically construed the doctrine of frustration strictly – meaning this doctrine is to be applied only in the absence of other existing and available defences.

Keywords: COVID-19 Pandemic, Contracts, Force Majeure, Act of God, Frustration, Waiver of Rights

Introduction

As a consequence of the recent disruption caused by COVID-19 (Coronavirus Pandemic), global markets have felt a significant reduction in economic activity. Until recently, the global financial crisis of 2008 was considered to

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be the worst economic disaster since the 1929 Great Depression. According to the chief of the International Monetary Fund (IMF), the Coronavirus Pandemic has created an unprecedented global economic crisis; and it may impact the global economy worse than the 2008 global financial crisis.¹ Companies and business enterprises across the globe, including those in Pakistan, are wondering about the impact this pandemic will continue to have over business concerns. Companies are also trying to ascertain the effect these set of circumstances have on contracts as commerce is impacted with no fault attributable to parties to the contract. Nationwide shutdowns are taking effect across the world, making business enterprises of all sizes particularly vulnerable to liquidity issues.² Most corporations have begun to declare their contractual obligations excused under force majeure clauses found in a majority of standard contractual terms.³ This means that the performance of those contractual obligations may likely be delayed, interrupted, or even cancelled.

However, a significant number of businesses may not be able to excuse their performance by pointing to a boiler-plate clause found in their contracts – some may have waived their right to excuse their performance without understanding the implications of this pandemic, or because of the possibility that a standard force majeure clause is excluded from their contractual dealings. It is arguable that parties who are not secured to discharge their contractual obligations under the force majeure clause in their contract may opt to discharge the performance obligations under the doctrine of frustration. The purpose of the law is to provide relief to the disadvantaged party. The devastating impact of the Coronavirus Pandemic has left a multitude of contracting parties in limbo. Parties lacking a defence to discharge performance based on a force majeure argument face an uncertain future where they may possibly rely on the doctrine of frustration for relief or

¹ Dan Mangan, Berkeley Lovelace Jr., and William Feuer, ‘Coronavirus pandemic economic fallout ‘way worse than the global financial crisis,’ IMF chief says’ CNBC (United States, 3 April 2020) <<https://www.cnbc.com/2020/04/03/coronavirus-way-worse-than-the-global-financial-crisis-imf-says.html>> accessed 05 April 2020.

² Sarjeel Mowahid, Bakhtawar Bilal Soofi, and Muhammad Yar Lak, ‘SBP’s measures for COVID-19’ (ABS & CO. 27 March 2020) 1 <<http://absco.pk/wp-content/uploads/2020/03/CEOAlerts-SBP-Measures-ABSCO.pdf>> accessed 27 March 2020.

³ Recorder Report, ‘Energy contracts: Government seeks to declare force majeure clause’ (Business Recorder, 31 March 2020) <<https://www.brecorder.com/2020/03/31/585165/energy-contracts-government-seeks-to-declare-force-majeure-clause/>> accessed 06 April 2020.

suffer the inescapable consequences of being in breach of contract due to unforeseen events, which are beyond their reasonable control. It is in this backdrop that courts would be required to step in to interpret the force majeure clauses in the context of global pandemic.

This article consists of six parts. Part I provides a quick road map of how the Pakistani courts have interpreted the term ‘force majeure’. Part II deals with the first issue whereby ‘pandemics’ are not anticipated or stated as a force majeure event in the contracts of certain businesses. Addressing this issue requires a deeper analysis by construing the meaning of standard force majeure terms to assess whether a justifiable excuse exists for non-performance of contractual obligations under the terms of a contract during this pandemic. Part III expands upon the analysis provided in Part II by examining the obstacles faced by parties where a force majeure clause has not been specifically mentioned what exactly constitutes a force majeure event. Part IV discusses the doctrine of frustration of purpose as an alternative defence for parties who cannot otherwise excuse their performance under a force majeure clause. Part V explains what constitutes a waiver of rights with particular attention paid to the criteria provided by courts to waive the rights through implication and conduct. This Part also provides situations to be taken into account by parties amid the pandemic where an impacted party may successfully argue the waiver of contractual performance to avoid liability, or on the other hand, where a non-breaching party may force compliance of the contract by disputing the claim of force majeure. Part V concludes that the force majeure is a contractual right available to excuse the performance during these difficult times, but such right is subject to implicit waiver.

Force Majeure in Pakistan: A Loose Construction?

Generally, standard forms of business contracts have a force majeure clause as part of their terms. Under the terms of such a clause, performance obligations of a party may be excused upon the occurrence of a force majeure event, whereby parties may have the right to terminate a contract pursuant to the very terms of the contract itself. The force majeure events generally fall in one of two categories. Force majeure events may either be (i) Natural Force Majeure Events (NFME) or (ii) Political Force Majeure Events (PFME). The

NFME, as the name suggests, broadly encompasses ‘Acts of God’.⁴ A force majeure clause mentioning an ‘Act of God’ often includes terms like epidemic, plague, diseases, earthquake,⁵ hurricane,⁶ tornado,⁷ or flood.⁸ On the other hand, PFME are sub-divided into two types, i.e. (a) PFME which occurs inside or directly involves the host country (assuming the contract in question involves a transaction across borders), and (b) PFME which occurs outside the host country and does not directly involve the host country; it is usually known as a ‘foreign political event’. Generally, PFME clauses found in contracts include terms like acts of war, invasions, armed conflict or an act of a foreign enemy, blockade, embargo, evolution, riot, insurrection, civil commotion, act of terrorism, or sabotage, nationwide strikes, works to rule or go-slows, and the making of or any change in the laws, which materially and adversely prevent the performance of the contract.⁹

A ‘force majeure’ event has not been defined in any Pakistani statute; however, the Islamabad High Court has defined ‘force majeure’ as the events that are outside the control of the parties, preventing one or both of the parties from performing their contractual obligations.¹⁰ The Court recognised, but did not limit, the scope of force majeure to three forms of provisions, including: (i) a provision stipulating unforeseen events like wars, acts of God or certain strikes; in such cases, the party will be excused from performing its contractual duties; (ii) a provision providing for events like earthquakes, floods, or acts of war, which are beyond the control of the party; the affected party will be absolved from the non-fulfilment of its contractual obligations caused by such events, and (iii) a contractual provision allocating the risk and

⁴ Ivan E Mattei and Armando Rivera Jacobo, ‘Public-Private Partnerships’ (Law Business Research, 2015) 67 <<http://www.cga.co.mz/wp-content/uploads/2015/11/PPP2016-Mozambique.pdf>> accessed 13 April 2020.

⁵ ‘Act of God Law and Legal Definition’, (USLegal), <<https://definitions.uslegal.com/a/act-of-god/>> accessed 13 April 2020.

⁶ Ibid.

⁷ Ibid.

⁸ Legal Information Institute, “Act of God,” (Cornell Law School) <https://www.law.cornell.edu/wex/act_of_god> 13 April 2020.

⁹ ‘Force Majeure Clauses - Checklist and Sample Wording’ (World Bank Group) 6 <https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/ppp_testdumb/documents/force_majeure_clauses_checklist_sample_wording_en.pdf> accessed 13 April 2020.

¹⁰ *Atlas Cables (Pvt.) Limited v Islamabad Electric Supply Company Limited* 2016 CLD 1833 (ISL), [34].

making the performance of the contract impossible or impracticable as a result of an event that the parties could not have anticipated or controlled.¹¹ These provisions have not limited the scope of force majeure because the Islamabad High Court reasoned that the clause of force majeure is a term of ‘wider import’ as the intention is to save the performing party from the consequences of anything over which it has no control.¹² On the one hand, the Islamabad High Court interpreted the force majeure events quite broadly; however, the Court held that a change in economic or market circumstances, which will affect the profitability of a contract, should generally not constitute a force majeure event. Therefore, an ‘unexpected price hike in the world market of aluminium base metal’¹³ was held not to be a force majeure event. Similarly, the Sindh High Court held that the widest meaning that can be given to force majeure event is to the extent of protecting the contractual party from the consequences of non-performance of a contract due to supervening events upon which neither party had any control.¹⁴ It can be rightly argued that Pakistani courts are keen to interpret force majeure events holistically, but courts have still circumscribed its meaning to not include economic hardship or commercial impracticability as potential force majeure events. An analysis of case law suggests that the approach of courts is to interpret force majeure events as those supervening events which are either unforeseeable or uncontrollable by the contractual parties.

Coronavirus Pandemic: The Specific Force Majeure Events

The outbreak of the Coronavirus Pandemic has raised concerns for many corporations about whether a standard force majeure clause specifying terms as force majeure events (FME) can be relied upon in excusing performance obligations. In other words, it is prudent to examine whether language found in standard force majeure contractual clauses may be interpreted broadly to include a global pandemic as a force majeure event. A specific force majeure clause that refers to epidemics or pandemics will be helpful to a party wanting to excuse its contractual performance as a result of this on-going global crisis. Probably only a few contracts formed outside of the healthcare industry

¹¹ Ibid.

¹² Ibid, 36.

¹³ Ibid, 43.

¹⁴ *Sadat Business Group v Federation of Pakistan* 2013 CLD KHC 1451.

generally have such specific references.¹⁵ Therefore, a way to address this issue is by understanding the nature of a force majeure clause to determine whether the words embodying such a clause can be interpreted to include the Coronavirus Pandemic as an FME.¹⁶ Events which have historically constituted FMEs are highly fact and jurisdiction-specific. This subsequently raises three essential questions: (a) whether the Coronavirus Pandemic falls within the scope of an ‘Act of God’; (b) whether the Coronavirus Pandemic may fall within the meaning of ‘epidemic’, assuming an ‘epidemic’ is specified as an FME in the boilerplate clause of force majeure; and (c) whether the recent enactment of Punjab Infectious Diseases (Prevention and Control) Ordinance, 2020 (Ordinance 2020) to counter the Coronavirus Pandemic would constitute a change of law amounting to a force majeure event contemplated in a contractual term.

(a) Whether the Coronavirus Pandemic falls within the scope of a term ‘Act of God’?

Pursuant to case law, it is likely that Coronavirus can be argued to be an Act of God, but such an argument is subject to the interpretation of Pakistani courts regarding the breadth of the term ‘Act of God’. If the terms ‘disease’ or ‘epidemic’ have not been expressly included in the boiler-plate language in force majeure clause, the term ‘Act of God’ or some other ‘catch-all provision,’ may suffice to excuse non-performance under the term ‘Act of God.’ For example, in the United States, some courts have suggested that ‘Act of God’ may be limited to matters solely caused by forces of nature.¹⁷ However, the majority view in the United States requires the Act of God to be unforeseeable.¹⁸ The Supreme Court of Pakistan, however, defined the Act of God as an accident which is ‘due to natural causes directly or exclusively without human intervention and that it could not be prevented by any amount of foresight paid and care reasonably to be expected from him.’¹⁹ In other

¹⁵ Adam T. Schramek, ‘US: Force Majeure in the age of coronavirus’ (Norton Rose Fulbright, March 2020) <<https://www.nortonrosefulbright.com/en/knowledge/publications/dcc14f95/force-majeure-in-the-age-of-coronavirus>> accessed 01 April 2020.

¹⁶ Gordon Prince, ‘Coronavirus and business contracts: What’s the law?’ (Daily Local, 17 March 2020) <https://www.dailylocal.com/opinion/coronavirus-and-business-contracts-what-s-the-law/article_40e8882c-687d-11ea-8db5-73ea8a8392e5.html> accessed 01 April 2020.

¹⁷ *McWilliams v Masterson* [2003] 112 S.W.3d 314, 320.

¹⁸ *United States v Winstar Corp.*, [1996] 518 US 839, 905–907.

¹⁹ *Government of N.W.F.P. v Daud Shah Contractor* 1996 SCMR 1713.

words, the following two limbs of the test must be met for Coronavirus Pandemic to fall within the scope of the term, Act of God: (i) the act to be exclusively a natural cause; (ii) the act could not be prevented by taking any amount of foresight paid and care reasonably expected from the impacted person.

The first requirement of the test requires the act to be exclusively a natural cause. The ‘natural cause’ can be construed to mean ‘exclusively without human intervention.’²⁰ In *Nugent v Smith*, ‘natural cause’ amounting to Act of God was construed by the Court of Appeal as ‘elementary forces of nature unconnected with the agency of man or other cause.’²¹ Thus, the first limb of the test requires the act to be exclusively caused by elementary forces of nature and without human intervention. An act, which is caused by elementary forces of nature without human intervention, is interpreted to include storms,²² floods, lightning,²³ and heavy snowfall.²⁴ The question is whether the Coronavirus Pandemic satisfies this limb. The English Courts, however, found an ‘illness’ to an Act of God but in the context of a personal service contract.²⁵ The Court in *Boast v Firth* highlighted that, ‘only illnesses that are not the fault of the person in question can be considered an Act of God.’²⁶

It is not questionable that Coronavirus is an ‘illness,’ it is evidenced to be a ‘product of natural evolution’ because it arose through ‘natural processes.’²⁷ The question of utmost importance is how the Pakistani courts may construe the ‘Coronavirus Pandemic’ upon determining its eligibility to be an ‘Act of God.’ In other words, whether the Courts may take into account the origin of the Coronavirus Pandemic or the cause of its spread.

²⁰ Ibid.

²¹ *Nugent v Smith* [1876] 1 CPD 423.

²² *Cushing v Peter Walker & Son (Warrington & Burton) Ltd* [1941] 2 All ER 693.

²³ *Forward v Pittard* [1785] 99 E.R. 953.

²⁴ *Briddon v Great Northern Rly Co* (1858) 28 LJ Ex 51.

²⁵ Ashurst, ‘COVID-19; Does it fall within your force majeure clause?’ (Ashurst, 25 March 2020) <<https://www.ashurst.com/en/news-and-insights/legal-updates/covid-19-act-of-god/>> accessed 24 June 2020.

²⁶ *Boast v Firth* [1868-69] L.R. 4 C.P. 1.

²⁷ Scripps Research Institute, ‘COVID-19 coronavirus epidemic has a natural origin’ (Science Daily, 17 March 2020) <www.sciencedaily.com/releases/2020/03/200317175442.htm> accessed 03 April 2020.

If the Court takes into account the ‘origin’ of the Coronavirus Pandemic, the virus cannot be held to be the result of human intervention. Resultantly, the first limb of the test may be satisfied. Nonetheless, if the Court takes into account the cause of the spread of Coronavirus Pandemic, i.e., the human intervention and negligence in spreading the virus, arguably the first limb of the test may not be satisfied.

The second limb of the test is similar to what the Court of appeal in *Nugent v Smith* provided while construing the Act of God that such an act cannot be ‘prevented by any amount of foresight ... and care reasonably to be expected.’²⁸ English case law indicates that to constitute an Act of God, the party is not reasonably expected to prevent or foresee against any act which arose exclusively as a natural cause.²⁹ Accordingly, a party impacted by Coronavirus Pandemic is not reasonably expected to prevent or foresee the Coronavirus Pandemic. Likewise, the Australian High Court held in *Commissioner of Railways (WA) v Stewart* states that a severe rainstorm cannot be considered as an Act of God because it was not such that it exceeded in an amount that for which a reasonable man could have been expected to provide.³⁰ It is true, there have been epidemics before, but a reasonable person with sufficient knowledge could not ever expect a pandemic with such degree of impact over the globe. It is even impossible for a contractual party to reasonably prevent such a pandemic. Therefore, the second limb shall be satisfied.

Therefore, upon the application of the two limb test by the Supreme Court of Pakistan³¹ to the Coronavirus Pandemic situation, both limbs of the test may be satisfied if the Court takes into account the ‘origin’ of the Coronavirus Pandemic. Therefore, in such circumstances, the parties impacted by Coronavirus Pandemic may successfully be able to excuse non-performance under the term, Act of God.

²⁸ (n 21).

²⁹ *Nicholas v Marsland* [1876] 2 Ex.D.1.

³⁰ *Commissioner of Railways (WA) v Stewart* (1936) 56 CLR 520.

³¹ (n 19).

(b) Whether the Coronavirus Pandemic may fall within the meaning of ‘epidemic,’ assuming an epidemic is specified as an FME in the boilerplate clause of force majeure?

It is critical to understand that the interpretation of a clause is vital in seeing whether or not a court would accept a defence of a force majeure event by the contracting parties. If the term epidemic has been expressly included in the boilerplate clause of force majeure, then the question arises whether such term is wide enough to include a ‘pandemic’ within its scope.

It is instructive to examine the scope and extent of a force majeure event in other jurisdictional laws. The notion of force majeure has been embodied in Article 79 of the United Nations Convention on International Sales of Goods (CISG) as a ‘failure to perform ... due to an impediment beyond his control’. Pakistan has not ratified the CISG; however, since many other states have ratified CISG; it is of assistance to see if pandemic or epidemic has been recognised as an FME under Article 79 of the CISG. Lawyers at Linklaters argue, “it is in principle accepted that Article 79 CISG may apply in case of epidemic diseases.”³²

When the dispute arises as to the interpretation of the term of the contract, the Court decides the true construction of the contract³³ because the construction of a written contract involves the questions of law.³⁴ The Lahore High Court expounded the rules of construction of the contract in the following words:

[F]irstly, that each contract is to be interpreted according to intention of the parties; that the construction of the contract must be reasonable, liberal and with a spirit to save rather than destroying it; that the ordinary sense of the word is to be followed; that the whole of the contract is to be looked at in

³² Kirstin Schwedt and Hannes Ingwersen, ‘Covid-19: Impact on commercial contracts – CISG’ (Linklaters, 12 March 2020) <<https://www.linklaters.com/en/insights/publications/2020/march/novel-coronavirus-commercial-contracts/novel-coronavirus-impact-on-commercial-contracts/un-convention-on-the-international-sale-of-goods-cisg>> accessed 06 April 2020.

³³ *Province of Punjab v Malik Muhammad Ilyas* 1994 MLD LHC 476.

³⁴ *Ibid.*

order to gather the intention of the parties (See Chitty on Contracts, 17th Edn., Chap. V).³⁵

The first rule of the construction of a contract or document is to ascertain the intention of the parties.³⁶ It is an objective test;³⁷ it requires the Court to identify the intention of the parties to contract by taking into account the following non-exhaustive list of rules of the construction of the contract: (i) whether ‘a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean;’³⁸ (ii) the provisions made in the contract ought to be read in such a manner that they remain in consonance with each other and do not destroy the intent thereof;³⁹ (iii) whether the words should be given their natural and ordinary meaning;⁴⁰ (iv) what is the overall purpose of the clause and the contract.⁴¹

Therefore, upon taking into account the above rules of the construction of the contract in determining the intention of the parties, the term ‘epidemic’ was integrated into the boilerplate clause of force majeure. The question is whether the contractual parties intended to excuse non-performance during pandemics when the term ‘epidemics’ was included in the boilerplate clause of force majeure.

First, we will take into account whether a reasonable person having all the background knowledge, which would have been available to the parties, would have understood to include the term ‘epidemics’ to cover ‘pandemics.’ The question we must raise is why a reasonable person would use the term epidemics in the force majeure clause. The term ‘epidemics’ is used in the force majeure clause as a defence to excuse non-performance where there is an outbreak of disease. Most standard contracts include only ‘epidemics’ to cover the outbreak of disease.⁴² A pandemic is also an outbreak of a disease

³⁵ (n 33).

³⁶ (n 10), [60].

³⁷ *Lord Hoffman in Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [14].

³⁸ *Ibid.*

³⁹ *Nadeem Ahmed Mirza v Mrs. Shah Sultana Begum* 1991 PLD KHC 177.

⁴⁰ (n 33).

⁴¹ *Ibid.*

⁴² ‘STANDARDIZED POWER PURCHASE AGREEMENT’ (Private Power & Infrastructure Board), <<http://www.ppib.gov.pk/Standard%20PPA%20-%20May%202006.pdf>> accessed 29 March 2020.

but at a global level.⁴³ Therefore a reasonable party who has included the term epidemics understand such a term to cover all sorts of ‘outbreaks of disease’ including pandemics. It is very challenging for the Court to conclude that a reasonable contractual party with all the background knowledge included the term epidemics to only cover outbreak of diseases at the local level.

Secondly, the construction of the contract requires the Court to take into account the natural and ordinary meaning of the disputed terms, i.e., ‘epidemics’ and ‘pandemics.’⁴⁴ Merriam Webster has defined an epidemic to mean “an outbreak of disease that spreads quickly and affects many individuals at the same time.”⁴⁵ Similarly, the World Health Organization (WHO) has defined an epidemic to mean “the occurrence in a community or region of cases of an illness, specific health-related behaviour, or other health-related events clearly in excess of normal expectancy.”⁴⁶ A pandemic on the other hand, has also been defined as “an epidemic occurring worldwide, or over a very wide area, crossing international boundaries and usually affecting a large number of people.”⁴⁷ Similarly, the definition of ‘Public Health Emergency’ provided by the WHO means, “an occurrence or imminent threat of an illness or health condition caused by ... epidemic or pandemic.”⁴⁸ The use of the word ‘or’ between epidemic and pandemic stipulates that both epidemic and pandemic are of the same nature and can be used interchangeably. The ordinary distinction between an epidemic and a pandemic is that epidemic is a primary term which has been used to define the severity of the disease at a regional level, whereas pandemic is the type of epidemic used to describe the severity of disease at a global level. This can be illustrated through the case, namely *Re Swine Flu Immunization Products*

⁴³ Rochester Regional Health, ‘Pandemic vs. Epidemic: What's the Difference?’ (Rochester Regional Health, 27 March 2020) <<https://www.rochesterregional.org/news/2020/03/pandemic-vs-epidemic>> accessed 02 April 2020.

⁴⁴ (n 33).

⁴⁵ ‘Definition of epidemic’ (Merriam Webster) <<https://www.merriam-webster.com/dictionary/epidemic>> accessed 02 April 2020.

⁴⁶ World Health Organization, ‘Definitions: emergencies’ (Humanitarian Health Action) <<https://www.who.int/hac/about/definitions/en/>> accessed 02 April 2020.

⁴⁷ Peter Doshi, ‘The elusive definition of pandemic influenza’ (2011) 89 *Bulletin of the World Health Org* 532-538 <<https://www.who.int/bulletin/volumes/89/7/11-086173/en/>> accessed 02 April 2020.

⁴⁸ (n 46).

Liability Litigation,⁴⁹ in which the Court used the definitions of epidemic and pandemic provided by Dorland's Illustrated Medical Dictionary, 24th ed. 1965 to decide the tort claim. The Dorland's Illustrated Medical Dictionary, 24th ed. 1965 defined the terms, epidemic and pandemic as following:

'EPIDEMIC — A situation where a disease attacks many people in the same region.

PANDEMIC — A widespread epidemic.'⁵⁰

Therefore, arguably that pandemic is a type of epidemic and the difference in the terms exist merely to stress upon the geographic spread of disease and not its nature. Meaning, the term pandemic merely conveys the widespread nature of an on-going epidemic, and therefore both terms would cover the Coronavirus Pandemic within its meaning.⁵¹ In other words, a pandemic is an epidemic on a global level.⁵²

Thirdly, the overall purpose of the term epidemics in the clause of force majeure is also critical to determine whether 'epidemics' cover pandemics. As discussed above, the purpose of the epidemics in the contract is to excuse performance obligations in an event like 'outbreak of disease' that is beyond the control of either party. The pandemic is an outbreak of a disease but at the global level.⁵³ In other words, it is a type of epidemic. The difference between "epidemic" and "pandemic," for the purposes of a force majeure, would be only to the extent that the Coronavirus Pandemic will be an epidemic for parties at the local level and the same will be pandemic for parties forming international contracts. If there is a local contract, whose performance is being affected by the Coronavirus Pandemic and which is infecting a large number of people locally, the disease shall be considered an epidemic and the impacted parties to such a contract can excuse their performance relying on the term 'epidemic'. However, on the other hand, if

⁴⁹ *Jennie Alvarez v United States of America* [1980] 495 F. Supp. 1188.

⁵⁰ *Ibid.*

⁵¹ Rochester Regional Health, 'Pandemic vs. Epidemic: What's the Difference?' (Rochester Regional Health, 27 March 2020) <<https://www.rochesterregional.org/news/2020/03/pandemic-vs-epidemic>> accessed 02 April 2020.

⁵² *Ibid.*

⁵³ *Ibid.*

there is an international contract, which can only be performed through the acts that are performed in different nations of the world, the disease will be considered as a ‘pandemic’. For example, A manufactures a product for B in Pakistan; the manufacturing of a product requires A to import different supplies from different countries, i.e., United States and China. Subsequently, if the Coronavirus Pandemic attacks one of these countries, then such a disease outbreak shall be considered a pandemic for the purposes of international parties.

Both terms, epidemics and pandemics, purport the same meaning; they serve the same purpose; the reasonable person who would include epidemics or pandemics in its contract intends to excuse performance in case of outbreak of disease. Thus, the substance of both these terms is similar in nature. Hence, it will be enough for a party impacted by the Coronavirus Pandemic to excuse their performance obligations if the term epidemics is listed as a force majeure event in the boilerplate clause force majeure.

(c) Whether the recent enactment of Ordinance 2020 to counter the Coronavirus Pandemic would constitute a change of law amounting to a force majeure event contemplated in a contractual term?

The third issue pertains to the change of law as an FME, which might influence the performance of the contract. Amid the Coronavirus Pandemic, many governments are taking actions and changing their laws for the protection of their citizenry. Therefore, the question arises that where the contract fails to provide for pandemics, whether the ‘recent government actions, including state-mandated closures of certain businesses’ could provide a means for an impacted party to excuse its performance obligations.

Here, we shall consider concession agreements as an example. A change in law is generally defined to be the risks of government actions that may endanger the party to perform their contractual obligations and includes:

[(1)] the adoption, promulgation, modification, or reinterpretation after the signature date of the concession agreement (CA) by any governmental authority of any laws of the host country; and (2) the imposition by a governmental authority of any material condition in connection with the

issuance, renewal, or modification of any approval after the date of signature of the CA.⁵⁴

Change in law generally encompasses changes in government policies for laws and regulations, methods to address inflation, currency conversion, rates and methods of taxation, and the method by which even the electricity tariffs are set and approved.⁵⁵ These risks are generally provided as a PFME in the force majeure clause. Government actions can occur at the central, provincial, or local levels.⁵⁶

The question of utmost importance for the businesses in Pakistan, especially in the province of Punjab, is whether the recent enactment of the Punjab Infectious Diseases (Prevention and Control) Ordinance 2020 (Ordinance 2020) to counter the Coronavirus Pandemic would constitute a change of law, which has been enacted to repeal the Punjab Epidemic Diseases Act, 1958. It empowers the Government of Punjab to issue orders to prohibit or impose any requirements or restrictions on any person's right to the 'entry into or exit from' any premises.⁵⁷ In addition, the government also has the power to issue such orders for any 'location of person'.⁵⁸ However, such orders can be issued for a specific time period and may be issued with respect to any specific area of one specific premises,⁵⁹ for example, these orders might include closing all grocery stores at 5 pm,⁶⁰ and directing markets and shopping malls to remain closed to counter the Coronavirus Pandemic.⁶¹ The government is also empowered to regulate 'any area',⁶² i.e.,

⁵⁴ Shou Qing Wang, Robert L. K. Tiong, S.K. Ting, and D. Ashley, 'Evaluation and Management of Political Risks in China's BOT Projects' (2000) 126 (3) *Journal of Construction Engineering and Management* 244.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ The Punjab Infectious Diseases (Prevention and Control) Ordinance 2020 (PK), sections 8 and 9.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*, sections 8(1) and 8(2).

⁶⁰ Ali Raza, 'Lockdown tightened in Lahore: Order for closing shops at 5pm leads to rush of buyers at stores' *The News* (Pakistan, 2 April 2020) <<https://www.thenews.com.pk/print/638178-lockdown-tightened-in-lahore-order-for-closing-shops-at-5pm-leads-to-rush-of-buyers-at-stores>> accessed 05 April 2020.

⁶¹ Sher Ali Khalti, 'Shopping malls, markets closure for two days notified' *The News* (Pakistan, 22 March 2020) <<https://www.thenews.com.pk/print/632705-shopping-malls-markets-closure-for-two-days-notified>> accessed 05 April 2020.

⁶² (n 57), section 9.

impose a lockdown in any city.⁶³ In other words, the Government of Punjab has the power to not only impose lockdowns in any city in the province of Punjab, but can also impose restrictions on the premises of any person. Such premises could include offices, shopping malls,⁶⁴ and even private dwellings. In addition, the Government of Punjab has been authorised to issue orders relating to such restrictions, prohibitions, and requirements for any persons, goods, vehicle, vessel, or any other means of transportation in any area.⁶⁵

Due to the lack of any case law on change of law in Pakistan, we can rely on an Indian case, where the counsel for the appellant provided a three-point test for a change in the law to amount to a force majeure event:

[i] Whether there is a change in law, i.e. enactment, amendment, modification of a Statute, Rule or Regulation etc.; (ii) whether the said change in law was brought about by an Indian Governmental Instrumentality; and (iii) whether such change in law impacts the cost/revenue and fulfils the threshold provided under the PPA [Power Project Agreement].⁶⁶

Ordinance 2020 satisfies all three limbs of the test. It is an enactment by the Governor of Punjab under which the lockdown of the city or any premises has been issued, which is ultimately affecting the costs or revenues of the parties impacted by these lockdowns. For example, in one news item, it was stated that with two-fifths of the world's population is under some form of lockdown that has caused the shutting of businesses and a slowdown in transportation to try to contain the virus, the country where the outbreak originated may escape a recession but will nonetheless suffer a sharp slowdown.⁶⁷ Similarly, according to *Economic Times*, “with several states announcing lockdown to curb the spread of the COVID-19 pandemic, rating agency ICRA expects around 45 per cent of the rated mall portfolio to be

⁶³ Noor ul Ain Ali, ‘Punjab to enforce lockdown for 14 days’ Daily Times (Pakistan, 23 March 2020). <<https://dailytimes.com.pk/581400/punjab-to-enforce-lockdown-for-14-days/>> accessed 05 April 2020.

⁶⁴ (n 60).

⁶⁵ (n 57), section 9.

⁶⁶ *Sasan Power Limited, Mumbai and another v Central Electricity Regulatory Commission, New Delhi and another* 2019 Indlaw APTEL 116.

⁶⁷ News Wires, ‘Coronavirus outbreak taking huge toll on China’s economy, World Bank warns’ (France 24, 31 March 2020) <<https://www.france24.com/en/20200331-world-bank-sees-coronavirus-outbreak-taking-huge-toll-on-china-s-economy>> accessed 05 April 2020.

vulnerable.”⁶⁸ In view of this, the lockdowns imposed by the Government of Punjab under the Ordinance 2020⁶⁹ can be considered as a change in law. Different authors support this view; one states, “recent government actions, including state-mandated closures of certain businesses, may provide a means for a party to have their performance excused.”⁷⁰ Therefore, it can be expounded that there would not be any problem for Courts in Pakistan to conclude that the contracts, which were signed before the Coronavirus Pandemic and have been financially affected by the lockdowns issued by the Government of Punjab under Ordinance 2020, can excuse their contractual obligations under the ‘change in law’ clause in their force majeure provision.

Coronavirus Pandemic: General Force Majeure Clause

The interpretation of contracts encompassing a force majeure clause with no specific FME during the escalating situation of Coronavirus Pandemic is crucial for parties who have entered into such contracts. Therefore, the question such parties have raised is whether such a clause, where no specific FME is provided, is broad enough to excuse their performance obligations during Coronavirus Pandemic outbreak.

One possible way to address this issue is by construing the scope of a force majeure clause within the contract by relying on the interpretation provided by the Pakistani courts. The understanding of the term ‘force majeure’ has already been discussed above. The basic interpretation of the ‘force majeure’ by the Pakistani courts demands to save the impacted party from the consequences of unpredictable and unforeseen events. The Islamabad High Court fittingly held that, “force majeure presupposes an external cause which has consequences which are inexorable and inevitable to the point of making it objectively impossible for the person concerned to comply with his legal obligations.”⁷¹ The Coronavirus Pandemic can be construed as an

⁶⁸ PTI, ‘Coronavirus lockdowns to impact 45% of rated mall portfolio: ICRA’ (*The Economic Times*, 24 March 2020) <<https://economictimes.indiatimes.com/industry/services/retail/coronavirus-lockdowns-to-impact-45-of-rated-mall-portfolio-icra/articleshow/74794886.cms?from=mdr>> accessed 05 April 2020.

⁶⁹ Government of Punjab, ‘Order of partial lockdown, by Govt. of Punjab, under “The Punjab Infectious Diseases (Control and Prevention) Ordinance 2020”’ <<https://twitter.com/GOPunjabPK/status/1250284935815913472>> accessed 24 June 2020.

⁷⁰ (n 16).

⁷¹ (n 10) 35.

‘external cause’ and now is the most suitable time and circumstance for the courts to shield the impacted parties from such an external cause, which has unavoidable consequences. The impacted party cannot escape the influence of the Coronavirus outbreak on the execution of its contractual duties, thus making it objectively impossible for such parties to comply with their contractual promises. Therefore, it would be fair, just, and reasonable to relieve such a corporation from its contractual performance by treating the Coronavirus Pandemic as a force majeure event.

In China, on March 5, 2005 in the China International Economic and Trade Arbitration Commission (CIETAC) Arbitration proceeding (L-Lysine case),⁷² the claimant (buyer) and the respondent (seller) disputed a sale contract. The seller only delivered about 2/3 of the goods, and the parties then changed the delivery schedule. Upon non-delivery of goods by the seller, the buyer cancelled the rest of the goods and brought a suit against the seller in arbitration proceedings. The seller’s failure to deliver was allegedly connected to the 2002/2003 Severe Acute Respiratory Syndrome (SARS) epidemic. The arbitral tribunal constituted under the rules of the CIETAC rejected the plea of force majeure under Article 79 of the CISG, opining that:

SARS happened two months before parties signing the contract, so SARS was not unexpected. Besides, SARS was under control by June 2003. At the time of the conclusion of the contract, the seller should have had enough opportunities to consider the influence of SARS in China and it shall not become an impediment as stipulated in Article 79 of the CISG.⁷³

According to the tribunal, SARS constituted as a force majeure event but for the fact that parties signed the contract after the epidemic; the signing of the contract in the aftermath of the epidemic made the event foreseeable and under the control of parties. As the seller was aware of the challenges that the epidemic could have posed on the performance of the contract, the tribunal did not let the seller take advantage of its non-performance under the disguise of the force majeure event. Therefore, it can be concluded that had the parties

⁷² CISG, ‘China 5 March 2005 CIETAC Arbitration proceeding (L-Lysine case)’ (CISG Database, 5 March 2005) <<http://cisgw3.law.pace.edu/cases/050305c1.html>> accessed 06 April 2020.

⁷³ Ibid.

entered into a contract before the upsurge of the epidemic, the seller could have successfully raised the defence of SARS as an FME. The logical conclusion, which can be inferred from this case pertaining to the issue of Coronavirus Pandemic, can be very similar. It can be extrapolated that the contracting parties can excuse the performance of their contracts where the contract was entered into before the eruption of Coronavirus, making it absolutely unmanageable for the parties to ascertain the outcome of such pandemic on their contractual duties.

A similar analogy can be drawn from the events that erupted in 2009 when the WHO declared Swine Flu as a ‘global pandemic.’ One author concluded that the pandemic flu would seem to fall within the definition of force majeure provided in the FIDIC Contracts. In the FIDIC Contract, force majeure was defined as:

[A]n exceptional event or circumstance: [i] which is beyond a party’s control; [ii] which such party could not reasonably have provided against before entering into the contract; [iii] which, having arisen, such party could not reasonably have avoided or overcome; and [iv] which is not substantially attributable to other party.⁷⁴

Likewise, the Coronavirus Pandemic is an exceptional event, which is not only beyond anyone’s control, but an impacted party could not reasonably have foreseen such an event before entering into the contract. It was an event that a party could not avoid or overcome alone. Even governments all over the world combined together have so far not been able to overcome the Coronavirus Pandemic. The degree of the spread of Coronavirus Pandemic is ‘beyond containment.’⁷⁵ A vaccine is still not approved and is under progress.⁷⁶ The uncertainty caused by the Coronavirus Pandemic that ‘if their children’s school will close, if their jobs will disappear, if a planned trip will be scrubbed, even if their city will be put on lockdown’ is enough evidence to establish the element of “beyond control” in force majeure.⁷⁷ Therefore, it is

⁷⁴ Peter Dzakula, ‘Pandemic flu risk for major projects’ (2010) *Const. L.J.* 160, 166.

⁷⁵ James Hamblin. ‘You’re Likely to Get the Coronavirus’ (The Atlantic, 24 February 2020) <<https://www.theatlantic.com/health/archive/2020/02/covid-vaccine/607000/>> accessed 05 April 2020.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

adequate to conclude that the impacted parties can excuse their performance obligations amid Coronavirus Pandemic where the contract contains a general force majeure clause with no specific FME.

Frustration

The parties whose contractual performance is impacted by this pandemic have also raised the issue of ‘frustration’. One of the questions, which have concerned the business world, is, whether parties to a contract with no force majeure clause are qualified to discharge their performance obligations amid the Coronavirus Pandemic. The impacted parties who are unable to rely on contractual provisions are limited to the common law defence for non-performance, such as frustration provided under section 56 of the Contract Act 1872. The Supreme Court of India clarified that many contracts expressly provide for the performance to be excused if the performance is rendered impossible by an unavoidable cause such as force majeure or vis major, acts of God, or the enemy.⁷⁸ When a force majeure event is relatable to an express or implied clause in a contract, it is governed by section 32 of the Act. Moreover, if the event occurs outside the scope of the contract (that is to say, not within the contemplation of the contracting parties), it is dealt with by a rule of positive law under section 56 of the Indian Contract Act 1872.⁷⁹ In addition, the frustration is a doctrine, it is automatic, and thus it cannot be waived.⁸⁰ Therefore, the doctrine of frustration is always available as a remedy of last resort.

As a general principle, the performance of an impossible or unlawful contract can be discharged under the doctrine of frustration.⁸¹ The Halsbury’s law provides that “the doctrine of frustration is in all cases subject to the important limitation that the frustration circumstances must arise without fault of either party.”⁸² The doctrine was established in an English case *Taylor v Caldwell*,⁸³ where it was held that if an “unforeseen event occurs during the performance of a contract which makes it impossible of performance, in the

⁷⁸ *Energy Watchdog v Central Energy Regulatory Commission* (2017) 14 SCC 80.

⁷⁹ *Ibid.*

⁸⁰ *The Siboen and the Sibotre* [1976] 1 Lloyd’s Rep. 293.

⁸¹ David Golten, ‘LOCKDOWN! – HOW FRUSTRATING’, (Wedlake Bell, 27 March 2020) <<https://wedlakebell.com/lockdown-how-frustrating/>> accessed 07 April 2020.

⁸² Halsbury’s Laws of England (Third Edition), Volume 8, 187.

⁸³ *Taylor v Caldwell* (1861-73) All ER Rep 24.

sense that the fundamental basis of the contract goes, it need not be further performed, as insisting upon such performance would be unjust.”⁸⁴ However, the doctrine of frustration can only be invoked if the party alleging frustration shows that it is impossible to perform the contract,⁸⁵ and the impossibility occurs without the fault of either party to the contract.⁸⁶ The fact that the contract becomes more expensive or onerous is not enough to argue impossibility.⁸⁷ The Sindh High Court further studied the requirement of impossibility by holding that “the party is required to establish physical impossibility ... over which the vendor has no control and which it could not avoid with all due diligence.”⁸⁸ The Court clarified that ‘commercial impossibility’ cannot be regarded as a ground to invoke the doctrine of frustration.⁸⁹

Subsequently, the question arises whether the parties impacted by the Coronavirus Pandemic are qualified to frustrate the contract under Pakistani law. This question necessitates the application of the above case law to current facts. The Coronavirus Pandemic, an event that has been caused due to natural causes,⁹⁰ implies that the fault cannot be on the part of either party to the contract in giving rise to such an event. There is no question that the impossibility has been created by extensive government lockdowns and shutdowns for several industrial sectors to perform their contractual duties. For example, it is impossible to perform construction contracts amid shutdowns,⁹¹ and the imposition of travel bans have made it impossible to perform the contract of freight services.⁹² These examples are suitable

⁸⁴ Ibid.

⁸⁵ *M/s Haji M. Mohammad Zakaria & Co. v Province of West Pakistan* 1969 SCMR 428 (SC).

⁸⁶ (n 81).

⁸⁷ Mazhar Bangash, Asma Hamid and Mayhar Kazi, ‘Covid-19’s impact on businesses in Pakistan: key legal considerations’, (RIAA Barker Gillette, 5 April 2020), <<https://www.riabarkergillette.com/pk/wp-content/uploads/2020/04/RIAA-Barker-Gillette-Pakistan-COVID-Bulletin-05042020.pdf>> accessed 07 April 2020.

⁸⁸ *Quinn Corporation v Cotton Export Corporation* 2004 CLD KHC 1040, 45.

⁸⁹ Ibid.

⁹⁰ (n 27).

⁹¹ Sean M. McChristian, ‘COVID-19 Made Performance Impossible – Now What?’ (Porter Hedges, 16 March 2020), <<https://www.porterhedges.com/texas-construction-law/covid-19-made-performance-impossible-now-what>> accessed 07 April 2020.

⁹² Andrew Fox, Alastair Hopwood and Matthew Shankland, ‘COVID-19 and the Impact on English Law Governed Contracts – Force Majeure and Frustration’ (Sidley, 16 March 2020),

instances to illustrate the physical impossibility in performing contracts amid the Coronavirus Pandemic. Thus, arguably, given the above analysis, the court may favourably hold for frustrating such contracts amid the Coronavirus Pandemic.

Similarly, the performance of some contracts may cause a breach of law and therefore if performed, can be held to be illegal. In *Messrs Dada Ltd. V Abdul Sattar & Co*,⁹³ the defendant contracted to transport the oilseeds to the plaintiff but for an order under section 144 of the Code of the Criminal Procedure (Cr.P.C) was passed by District Magistrate, the defendant was not able to perform his contract. The order under section 144 of the Cr.P.C prohibited to transport out of the district, certain varieties of seeds, including, oilseeds, for one month, either by rail or road. The Supreme Court held, “The contract ... was held to have become unlawful and impossible to be performed and thus frustrated under section 56 of the Contract Act.”⁹⁴

Comparing it to the current lockdown either under section 144 of the Cr.P.C,⁹⁵ or under laws like Ordinance 2020,⁹⁶ some businesses are prohibited from conducting business,⁹⁷ and some are restricted to conduct business during the specific hours of the day,⁹⁸ therefore performing contractual obligations in such a situation may not only cause a breach of law and thus illegal, but it is impossible to perform such contracts. Therefore, such contracts can be frustrated under section 56 of the Contract Act 1872.

Ostensibly, the frustration of object, or purpose, of a contract seems very similar to force majeure. However, the consequences of frustration are

<<https://www.sidley.com/en/insights/newsupdates/2020/03/covid-19-and-the-impact-on-english-law-governed-contracts--force-majeure-and-frustration>> accessed 07 April 2020.

⁹³ *Messrs Dada Ltd. v Abdul Sattar & Co* 1984 SCMR 77, [6].

⁹⁴ *Ibid.*

⁹⁵ INP, ‘Punjab government extends COVID-19 lockdown until April 14’ (*Daily Times*, 7 April 2020) <<https://dailytimes.com.pk/590558/punjab-government-extends-covid-19-lockdown-until-april-14/>> accessed 08 April 2020.

⁹⁶ (n 69).

⁹⁷ ‘Coronavirus lockdown: What’s open and what’s closed in Punjab?’ (Geo News, 15 April 2020), <<https://www.geo.tv/latest/282928-coronavirus-lockdown-whats-open-and-whats-closed-in-punjab>>

⁹⁸ *Ibid.*

different from those of force majeure. For example, if the contract is frustrated, the parties are completely discharged from their contractual obligations. In other words, the contract will not be excused but will come to an end.⁹⁹ The Supreme Court of Pakistan held that “it [frustration] guillotines the contract without the action of either party.”¹⁰⁰ The Contract Act, however, does not permit any party to receive an advantage under the void contract. Thus, when the contract is held to be void, the benefit received under such a contract must be restored to the other party under section 65 of the Contract Act, 1872.¹⁰¹ In other words, the contract excluding a force majeure clause may be frustrated, but no party will be allowed to gain any advantage from the other party. Therefore, it is advisable that the impacted parties shall only opt to frustrate the contract as a remedy of last resort. There is always a possibility that courts may not be interested in frustrating the contract because the frustration makes the contract void.¹⁰² In a Hong Kong case, when the Hong Kong Department of Health made the isolation order amid the 2003 SARS epidemic, the tenant was unable to access its premises for ten days. The Hong Kong District Court held that the ten-day period in which a property was uninhabited due to the SARS epidemic did not frustrate the two-year term residential tenancy agreement.¹⁰³

The Hong Kong case is distinguishable on two grounds. Firstly, the tenant alleged frustration on the ground that he was unable to use the premises for ten days because of the isolation order to contain the 2003 SARS epidemic. The court rejected the claim of tenant because the term was ‘quite insignificant in term of the overall use of the premises.’¹⁰⁴ Judge Lok then held that “an event which causes an interruption in the expected use of the premises by the lessee will not frustrate the lease, unless the interruption is expected to last for the unexpired term of the lease, or, at least, for a long period of that unexpired term.”¹⁰⁵ In the view of the court, the SARS outbreak

⁹⁹ Ben Longworth and Paul Jones, ‘Contracts in the time of COVID-19: Force majeure and frustration’ (Farrer & Co, 1 April 2020), <<https://www.farrer.co.uk/news-and-insights/contracts-in-the-time-of-covid-19-force-majeure-and-frustration/>> accessed 07 April 2020.

¹⁰⁰ *M/s Mansukhdas Bodram v Hussain Brothers Ltd.* PLD SC 1980 122, [14].

¹⁰¹ *Mustafa Kamal v Daud Khan* 2009 SCMR SC 221, [4].

¹⁰² *Jatoi Cotton Ginning and Pressing Factory v Zainab Usman* 1965 PLD (WP) Karachi 22, [9].

¹⁰³ *Li Ching Wing v Xuan Yi Xiong* [2004] 1 HKLRD 353.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*, 357.

and its knock-on effects were capable of triggering the doctrine of frustration.¹⁰⁶ Therefore, the first counter-argument to this case can be that the requirement of impossibility was not satisfied because it was a two-year term tenancy agreement, and mere ten days of non-occupancy cannot be held sufficient to satisfy the requirement of frustration. The tenant was able to perform the contract after ten days. Secondly, the court was inclined to protect the impacted party. The tenant, in this case, was not the impacted party, and he was trying to benefit from the frustration of agreement. In this case, it was the landowner who would have been impacted by the frustration of the agreement. The tenancy agreement was of a two-year term, and it would not have been reasonable to conclude in favour of tenant on the ground that the tenant was unable to use his dwellings for ten days.

Waiver of Rights

According to Black's Law Dictionary, a waiver is defined as abandoning, renouncing or surrendering a claim, privilege, or right. In other words, it means the intentional giving up of a right or claim voluntarily. The Sindh High Court has defined the waiver of right as a right which "may either be made expressly, or it may be inferred from the conduct of the party and all other attending circumstances of the case."¹⁰⁷ The application of waiver has been widely acknowledged in insurance law, labour and employment law,¹⁰⁸ property law, civil procedure, tort law, fiduciary relationships,¹⁰⁹ and contract law.¹¹⁰ Therefore, the discussion on the role of the waiver of right in shaping the contractual rights and obligations of the parties amid the Coronavirus Pandemic is critical. The waiver of right can only be used as a 'shield and not as a sword, meaning that, subject to exceptions, the argument of waiver may only be brought as a defence to a cause of action not as its basis'.¹¹¹ The

¹⁰⁶ Will Irving & Gordon Lamb, 'Coronavirus – contractual performance amidst a global outbreak' (Russell Mcveagh, 20 February 2020) <<https://www.russellmcveagh.com/insights/february-2020/coronavirus-contractual-performance-amidst-a-glo>> accessed 07 April 2020.

¹⁰⁷ *Akhtarunnisa Begum v Surayya Matin* 1990 MLD KHC 1821.

¹⁰⁸ William M. Howard, 'Arbitrating Employment Discrimination Claims: Do You Really Have to? Do You Really Want to?' (1994) *Drake L. Rev.* 269-73.

¹⁰⁹ Tamar Frankel, 'Fiduciary law' (1983) 71 *Cal. L. Rev.* 821-22.

¹¹⁰ David V. Snyder, 'The Law of Contract and the Concept of Change: Public and Private Attempts to Regulate Modification, Waiver, and Estoppel' (1999) *Wis. L. Rev.* 607, 609, 624-26.

¹¹¹ *Major League Baseball v Frank L. Morsani, etc.* [2001] 790 So.2d 1071.

Pakistani courts have recognised waiver as a ‘kind of estoppel’¹¹² and have construed it under Article 114 of the Qanun-e-Shahadat Order 1984, which provides for the doctrine of estoppel.¹¹³

The rights of a contractual party are rights guaranteed through a legally valid contract. These rights may include the right to terminate, right to payment, right to timely performance, right to notify timely, and right to excuse performance under the force majeure clause. These rights can be waived either expressly or impliedly. Therefore, one must take caution, when interacting with the opposing parties that are reporting difficulties performing their contractual obligations, to ensure that the party does not make any promises or provide assurances that could later be argued to amount to a waiver of their rights.¹¹⁴ If the Coronavirus Pandemic has impacted the performance of either party, one must contemplate if it is appropriate to negotiate a waiver.¹¹⁵ The analysis of the judgements discussed in the following paragraphs of this article by the Pakistani Courts on implied waiver indicates that the Courts have adopted two different approaches to determine the criteria of implied waiver: minority approach and majority approach.

The minority approach provided by the Sindh High Court requires that the conduct of the person must evidence an intention to waive his rights and the other person concerned has been induced by such conduct to believe that there has been a waiver.¹¹⁶ However, the conduct, evidencing such intention, must be clear, unequivocal and decisive, or it should amount to estoppel, to impliedly waive the right.¹¹⁷ The Lahore High Court adopted a similar approach in *Directorate of Industries and Mineral Development v Messrs Masood Auto Stores*.¹¹⁸ In this case, the Lahore High Court supplemented the test with an additional requirement of ‘reasonableness’ by requiring the waiver to be ‘so unmistakable and clear that the other party should reasonably

¹¹² *The Directorate of Industries and Mineral Development v Messrs Masood Auto Stores* PLD 1991 LHC 174, [25].

¹¹³ *Dr. Muhammad Javaid Shafi v Syed Rashid Arshad* 2015 PLD SC 212.

¹¹⁴ Prelisha Singh and Glenn Penfold, ‘COVID-19: Flagging Significant Commercial & Legal Issues’ (Webber Wentzel) <<https://www.webberwentzel.com/News/Documents/2020/webberwentzel-coronavirus-booklet.pdf>> accessed 13 April 2020.

¹¹⁵ *Ibid.*

¹¹⁶ (n 107).

¹¹⁷ *Ibid.*

¹¹⁸ PLD 1991 LHC 174.

believe that the performance will not be insisted upon.¹¹⁹ The minority approach has been construed so narrowly that it is certainly difficult for the courts to construe an implied waiver of rights of a party unless the conduct of the party evidencing an intention to waive its rights is so clear, unequivocal and decisive that the other party reasonably believes the conduct was intended to waive such right.

The view, as provided by the Supreme Court of Pakistan to determine whether the party has waived its rights by conduct has transformed over the years. For example, in *Muhammad Saleh v Muhammad Shafi*, the Supreme Court held that:

[W]aiver is generally created upon knowledge of all the facts by both the parties ... In cases of waiver, there should be some clear and decisive act or conduct beyond mere silence, as pure silence by a party in regard to a right perfectly known to the other can rarely mislead a man of average intelligence.¹²⁰

The Supreme Court subsequently held that “in order to establish a ‘waiver by conduct,’ it must be shown that the person entitled to the right had knowledge of the breach thereof, and secondly, that he had acquiesced or failed to act, notwithstanding that knowledge.¹²¹ Therefore, mere failure to object or to take action due to ignorance of the breach of his right cannot be said to give rise to any ‘waiver by conduct.’”¹²²

Whereas in *Dr. Muhammad Javaid Shafi v Syed Rashid Arshad*, the Supreme Court of Pakistan, while interpreting Article 114 of the Qanun-e-Shahadat Order of 1984, held that:

[W]here a person who is aggrieved of a fact, he has a right, rather a duty to object thereto for the safeguard of his right, and if such a person does not object, he shall be held to have waived his right to object and subsequently shall be estopped from raising such objection at a later stage. Such waiver or

¹¹⁹ Ibid.

¹²⁰ *Muhammad Saleh v Muhammad Shafi* 1982 SCMR SC 33, [17].

¹²¹ Ibid.

¹²² Ibid.

estoppel may arise from mere silence or inaction or even inconsistent conduct of a person.¹²³

Taking into account the above judgments of the Supreme Court, it is settled law that to impliedly waive the right of a person, the satisfaction of following three elements is required: (i) the person must have a legal right; (ii) he must have knowledge of the fact that he is going to be aggrieved of his right; and (iii) he has failed to safeguard his right.¹²⁴

Earlier, the Supreme Court, in *Muhammad Saleh v Muhammad Shafi*, observed that the scope of ‘waiver of rights’ was narrowly construed.¹²⁵ Thus, a ‘mere failure to object or to take action due to ignorance of the fact’ was not enough to conclude that the person has waived its right.¹²⁶ The Supreme Court, therefore, required there to be a clear and decisive act or conduct beyond mere silence to waive the right.¹²⁷

The Supreme Court has now broadened the scope of waiver of right in *Dr. Muhammad Javaid Shafi v Syed Rashid Arshad*, and the right of a person may be impliedly waived if the person has failed to safeguard his right.¹²⁸ The ‘mere silence or inaction or even inconsistent object of a person’ may result in a failure to safeguard the right.¹²⁹ Thus, the courts may most likely hold that the person who has failed to safeguard his right even by lack of action, has ‘waived his right to object and subsequently shall be estopped from raising such objection at a later stage’.¹³⁰

Following the criteria established by the Supreme Court of Pakistan and High Courts to determine the implied waiver, the next question is how the impacted party may use the waiver of right in its defence to escape the liability which may arise out of its non-performance, or on the other hand, how the non-breaching party may use the principle of waiver of rights to force compliance of the contractual obligations.

¹²³ (n 113).

¹²⁴ Ibid.

¹²⁵ (n 120).

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ (n 123).

¹²⁹ Ibid.

¹³⁰ Ibid.

If an impacted party fails to perform its contractual promise due to the Coronavirus Pandemic and the party has timely notified the non-breaching party of the non-performance, then in such a situation, the non-breaching party may be required to respond to such notice. Failure to respond gives rise to a question whether such inaction of the non-breaching party to respond would amount to a waiver of its right including the right to terminate the contract, the right to demand performance on time, or the right to claim liquidated damages. It is undeniable that the right to termination and demanding performance on time are legally enforceable contractual rights.¹³¹ The case of *Directorate of Industries and Mineral Development v Messrs Masood Auto Stores* supports the above proposition, in which time and venue of the delivery was the essence of the contract.¹³² Subsequently, in the said case, the plaintiff requested the defendant to change the date and venue of delivery, which was not declined by the defendant.¹³³ The court opined that the doctrine of waiver applies to the case, and the defendant waived the performance pertaining to time and venue of delivery incorporated in the clause.¹³⁴ Likewise, there may be the same conclusion upon the application of the test provided by the Supreme Court of Pakistan.¹³⁵ The non-breaching party was entitled to the right to terminate the contract or demand performance on time or to claim liquidated damages, upon the knowledge of the breach.¹³⁶ However, the fact that the non-breaching party failed to respond to the notice is enough to conclude that such ‘inaction’ was intended to waive its rights regarding the performance.¹³⁷ Resultantly, the impacted party may avoid its contractual obligations, and the non-breaching party may end up waiving its contractual rights.

On the contrary, a non-breaching party may use the waiver of rights to force strict compliance with the contractual obligations of the contract. When the impacted party may raise the defence of force majeure to excuse non-performance, the non-breaching party may use the waiver of rights to dispute

¹³¹ Satnam Chayra and Gary Pitt, ‘Contracts and Coronavirus - What Are Your Rights?’ (Howes Percival, 19 March 2020) <<https://www.howespercival.com/articles/contracts-and-coronavirus-what-are-your-rights/>> accessed 11 April 2020.

¹³² (n 112)

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ (n 123).

¹³⁶ Ibid.

¹³⁷ Ibid.

the claim of force majeure. If the impacted party's right to excuse performance under force majeure is waived, the non-breaching party may demand strict compliance of the contractual obligations. Given the global nature of Coronavirus Pandemic, it is not in the best interest of any business to force strict compliance with the contract. For example, if the contract is strictly enforced, that may have side effects on the party who insisted on strict enforcement of the contract. As the lawyers from Nixon Wenger states that, "COVID-19 related contract breaches will cut in all directions. If you insist on strict compliance with others, they may insist on strict compliance with you."¹³⁸ Nonetheless, the following three conceivable arguments to enforce the strict compliance of the contract may be raised by the non-breaching party: (i) post-SARS epidemic in 2002/2003, the epidemics or diseases were now foreseeable and should have been contemplated in the contract; failure to incorporate it can be considered as a waiver of right by parties to use epidemics or pandemics as a defence to excuse delay in contractual performance,¹³⁹ therefore, the contract should be performed under the terms and conditions agreed under the contract; (ii) the absence of force majeure clause in the contract indicates that the party has waived its right to excuse the performance and therefore, the impacted party shall perform its agreed contractual obligations; and (iii) the impacted parties' failure to give timely notice of force majeure means that the impacted party has waived its right to obtain relief for non-performance or delayed performance, thus the contract should be performed in strict compliance with the terms and conditions of the contract.¹⁴⁰ The eligibility of these arguments to succeed as a defence against the claim of force majeure to force compliance of the contract is dependent on the application of tests provided by the High Courts or the Supreme Court of Pakistan.

¹³⁸ 'Force majeure: Can Covid 19 release you from your contract obligations?' (Nixon Wenger LLP), <<https://www.nixonwenger.com/news/detail/force-majeure-can-covid-19-release-you-from-your-contract-obligations.html>> accessed 16 April 2020.

¹³⁹ David J. Ball, W. Stephen Benesh, Philip J. Bezanson, Rachel B. Goldman, Matthew G. Nielsen, & David A. Shargel 'Contractual Performance in The Age Of Coronavirus: Force Majeure, Impossibility and other Considerations' (The National Law Review, 18 March 2020) <<https://www.natlawreview.com/article/contractual-performance-age-coronavirus-force-majeure-impossibility-and-other>> accessed 10 April 2020.

¹⁴⁰ P. Danielle Cortez & Jason B. Sims, 'Boilerplate Contract Language Coming to the Forefront: Force Majeure Clauses and COVID-19' (The National Law Review, 19 March 2020) <<https://www.natlawreview.com/article/boilerplate-contract-language-coming-to-forefront-force-majeure-clauses-and-covid-19>> accessed 10 April 2020.

The minority approach is labelled as a test provided by the High Courts that require the party to evidence an intention through a clear and unmistakable action to waive its right and the other party should reasonably¹⁴¹ believe that the act was intended to waive that right.¹⁴²

The first two arguments mentioned above may fail as a defence to dispute the claim of force majeure and the non-breaching party may fail to force compliance of the contract. Disregarding terms like ‘epidemics’ and ‘diseases’ post-SARS does not evidence a clear and decisive action by the party waiving its right to excuse performance in such circumstances. The inclusion of the force majeure clause in the contract is enough for the impacted party to argue that there was no clear, unequivocal and decisive action on the part of either party to waive its right. Therefore, the first argument may fail as a defence to the claim of the force majeure, and the impacted party may excuse its performance in the current situation of the Coronavirus Pandemic. Similarly, the second argument may also fail because an absence of a whole force majeure clause does not indicate that the party decisively wanted to waive the right to excuse its performance in events which are beyond its control. A mere failure to take action on the part of the party cannot be held to be a clear, decisive or unmistakable action to waive the right.

Whereas the third argument, the impacted parties’ failure to give timely notice of force majeure means that the impacted party has waived its right to obtain relief for non-performance or delayed performance may succeed on the ground that the impacted party has been provided with a timeline under the contract to provide timely notice of its non-performance to the non-breaching party. Contracts generally stipulate that contractors should issue notices within a certain period of time after they have been made aware of the force majeure event.¹⁴³ Thus, the failure to timely provide notice of such non-performance may result in a reasonable belief that the impacted party can perform the contract amid the Coronavirus Pandemic and consequently has waived its right to excuse the non-performance under force majeure. Consequently, the non-breaching party may succeed to force the

¹⁴¹ (n 112).

¹⁴² (n 107).

¹⁴³ Hogan Lovells, ‘The impact of the Novel Coronavirus on the Construction Sector’ (Hogan Lovells, 19 February 2020) <https://www.hoganlovells.com/~/_media/hogan-lovells/pdf/2020_pdfs/2020_02_19_the_impact_of_the_novel_coronavirus_on_the_construction_sector_19_feb.pdf?la=en> accessed 13 April 2020.

compliance of the contract, and the party impacted by the Coronavirus Pandemic may be required to perform the contract in compliance with its contractual obligations. The failure of the impacted party to perform the contract in compliance with the contract may result in the breach of contract.

The Supreme Court of Pakistan requires the satisfaction of the following test to impliedly waive the right: the person who knows that he has a right must be aware of the fact that he will be aggrieved of his right if he has failed to safeguard his right.¹⁴⁴ Such failure to safeguard its right can be implied from mere silence, inaction, or inconsistent act.¹⁴⁵

Upon the application of the test provided by Supreme Court to the first argument, the failure of a party to include the terms ‘epidemics’ or ‘diseases’ to the boilerplate clause of force majeure post-SARS cannot be considered as a waiver of a right to excuse performance amid the Coronavirus Pandemic. It is not questionable that the contractual parties should have been aware of their right to excuse their performance obligations in the events which are beyond their control. The question, which needs to be considered for the first argument, is that whether the impacted parties had knowledge that they will be aggrieved of this right, and they still failed to safeguard their right to force majeure. It is debatable that post-2002/2003 SARS epidemic, parties should have been aware to excuse performance during epidemics or pandemics. Thus, the second limb of the test may be satisfied, but the fact that the parties included a force majeure clause in the contract is enough to show that parties did not fail to safeguard their right.¹⁴⁶ Thus, it is very unlikely for the courts to hold that the party has waived its right to excuse its non-performance amid the Coronavirus Pandemic. Resultantly, the non-breaching party may fail to enforce compliance of the contract.

The second argument, whether disregarding a force majeure clause in the contract indicates that the party has waived its right in any event which is beyond its control, may successfully be claimed as a defence against the claim of force majeure since it may satisfy all the limbs of the test provided by the Supreme Court of Pakistan.¹⁴⁷ All contractual parties should be mindful to include the clause of force majeure to exercise their right to excuse their

¹⁴⁴ (n 113).

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

performance under force majeure. Therefore, if an impacted party has failed to include the clause of force majeure, the party has simply failed to safeguard its right by ‘inaction’ and hence has waived its right to excuse performance under force majeure amid the Coronavirus Pandemic.¹⁴⁸ Hence, the non-breaching party may successfully enforce strict compliance of the contractual obligations by arguing that the impacted party has waived its right to excuse performance under force majeure. Therefore, the contract should be performed according to the agreed terms and conditions of the contract.

Likewise, the third argument, whether the impacted party’s failure to provide timely notice of force majeure to the non-breaching will amount to a waiver of its right to obtain relief for non-performance, may also be successfully upheld. The impacted party under the contract may have the duty to timely provide the notice of non-performance to the non-breaching party. For example, the FIDIC Conditions of Contract for EPC/Turnkey Projects (Silver Book) requires that notice of force majeure be sent to employers within 14 days, notices of triggering events of claims should be made within 28 days, and detailed claim reports should be submitted to employers within 42 days from the occurrence of the triggering event.¹⁴⁹ Even the failure to give proper notice is fatal to a defence of force majeure when the notice of force majeure is stipulated in the contract.¹⁵⁰ Thus, a failure to issue a notice may be treated as a waiver of rights because an ‘inaction’ to safeguard a right can result in waiver of rights.¹⁵¹ Consequently, the non-breaching party may also triumph in enforcing compliance of the contract by arguing that the impacted party has failed to provide timely notice of force majeure and hence waived its right to obtain the relief for non-performance.

Therefore, the contract should be performed in compliance with the conditions stipulated in the contract and failure to perform in accordance with those conditions may result in the breach of the contract.

Finally, the impacted parties who have waived their right to excuse the non-performance either by disregarding the force majeure clause or by failure to notify the other party of excusing its performance may still opt to discharge the contract under the doctrine of frustration. The frustration is a legal

¹⁴⁸ Ibid.

¹⁴⁹ (n 143).

¹⁵⁰ *Sabine Corp. v ONG Western, Inc.*, (1989) 725 F. Supp. 1157, 1168.

¹⁵¹ (n 144).

doctrine – not a right – and the effect of which is to determine the rights and obligations arising under the frustrated contract.¹⁵² Frustration is automatic¹⁵³ and hence, cannot be waived¹⁵⁴ as the waiver of frustration is ineffective.¹⁵⁵ Therefore, as discussed above, the doctrine of frustration may be invoked as a remedy of last resort.

Conclusion

The Coronavirus Pandemic is causing significant disruptions across the globe, including Pakistan. The implementation of a variety of measures by the governments – including travel bans, nationwide lockdowns, and the cancellation of large-scale events – is an attempt to contain the spread of the virus.¹⁵⁶ Such unprecedented measures mean that the businesses demand some answers regarding the effect of the Coronavirus Pandemic on their contractual rights and obligations. A growing number of impacted parties are exploring ways and means to avoid contractual liability for their non-performance.¹⁵⁷ One way to suspend the contractual obligations is under a force majeure clause.¹⁵⁸

Nevertheless, the availability of the relief of force majeure is contingent on the availability of the clause, understanding of the clause, and interpretation of terms therein, as provided by the local courts in Pakistan. The

¹⁵² Ewan McKendrick, *Force Majeure and Frustration of Contract* (2nd edition, Routledge, 2014).

¹⁵³ *Messrs Dada Ltd. v Abdul Sattar & Co* 1984 SCMR 77, [6].

¹⁵⁴ *The Siboen and the Sibotre* [1976] 1 Lloyd's Rep. 293.

¹⁵⁵ *Morgan v Manser* [1947] 1 K.B. 184.

¹⁵⁶ Tim Maloney, Matthew Blower, Joseph Lewin, Bertie Rooke and Alyce Kelly, 'Contractual Implications of the COVID-19 Pandemic – Can it Excuse a Business from Performance of Contractual Obligations Under Contracts Governed by English Law?' (Dorsey & Whitney LLP, 27 March 2020) <<https://www.dorsey.com/newsresources/publications/client-alerts/2020/03/contractual-implications-of-the-covid>> accessed 12 April 2020.

¹⁵⁷ Christian Leathley, Amal Bouchenaki and Ben Rubinstein, 'COVID-19: Pressure Points: Contractual Implications and Considerations Under New York Law (United States)' (Herbert Smith Freehills, 2 April 2020) <<https://www.herbertsmithfreehills.com/latest-thinking/covid-19-pressure-points-contractual-implications-and-considerations-under-new-york>> accessed 12 April 2020.

¹⁵⁸ Karl Oscar Dalin, 'Brief information on Force Majeure and Covid-19' (DLA PIPER, 20 March 2020). <<https://sweden.dlapiper.com/en/news/brief-information-force-majeure-and-covid-19>> accessed 05 April 2020.

second way to discharge the contractual obligations is for the parties who are not eligible to excuse the performance via force majeure either because they have waived their right to excuse performance or they have not provided a force majeure clause in the contract. Such parties may rely on the doctrine of frustration to discharge their non-performance.

Lastly, the concept of waiver of rights can play an essential role in excusing the non-performance or even forcing the compliance of the contract amid the Coronavirus Pandemic. However, such a principle can only be used as a shield.¹⁵⁹ When interacting with the counterparties, a party may waive its contractual rights like the right to terminate, the right to demand performance, or right to claim liquidated damages, only because the party provided assurance, or failed to respond to the breach, or failed to provide notice of non-performance. This ‘inaction’ may amount to a waiver of its rights.

¹⁵⁹ (n 111).