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

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Abstract
The extraordinary lockdowns and shutdowns to contain COVID-19 have significantly impacted businesses across the globe. Consequently, businesses have begun wondering the effect of this pandemic on their contractual rights and obligations. An increasing number of firms and companies have started finding ways to avoid contractual obligations, and some are having difficulty in protecting their rights. The force majeure is one of the contractual rights available to excuse the non-performance impacted by this pandemic. Nonetheless, it is no get-out-of-jail-free card; to dispute the claim of force majeure a party may raise the defence of waiver of rights. In such circumstances, the doctrine of frustration can be used as an alternative remedy to discharge the performance obligations amid COVID-19. Since Pakistani courts strictly construe the doctrine of frustration, it shall be regarded as a remedy of last resort.

Introduction
Given the recent disruption caused by COVID-19 (‘Coronavirus Pandemic’), global markets have felt a significant economic downfall. The global financial crisis of 2008 was considered to 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 economic crisis, and it is worse than the 2008 global financial crisis. Companies across the globe, including in Pakistan, are wondering about the impact of such pandemic and its subsequent aftermath on the business contracts as businesses have no control over such events. Countrywide shutdowns and lockdowns are taking effect across the world, including Pakistan making both large as well as small and medium-sized enterprises particularly vulnerable to liquidity issues. Most corporations have begun to declare their contractual obligations as excused under the force majeure clause. Therefore the performance of those obligations may likely be delayed, interrupted, or even cancelled.

On the contrary, many businesses may not be able to excuse their performance because they have waived their right to excuse their performance or the force majeure clause is excluded

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The views and opinions expressed in this article are those of the author. This article does not constitute a legal advice and is no substitute for professional legal advice.

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from the contract. Such parties may always 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 a lacuna, whereby they would have to suffer the inescapable consequences of the breach of contract due to events which are beyond the reasonable control of parties. It is in this backdrop that courts should step in to interpret the force majeure clauses in favour of the party seeking to rely on it.

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 the businesses can raise a claim to be relieved of their performance obligations under contracts where “pandemics” is not anticipated as a force majeure event. Addressing this issue requires a deeper analysis by construing the meaning of the terms in the standard force majeure clause, such as the act of God, epidemics, and change of law to excuse the performance obligations during the Coronavirus Pandemic. Part III dives into the second issue by examining the obstacles faced by parties where there is a general force majeure clause with no mention of a specific force majeure event. Part IV discusses the issue of frustration to cater to the situation where a party cannot excuse its performance under a force majeure clause. Part V explains the waiver of rights, identifies the contractual rights which may be impacted amid the Coronavirus Pandemic; it also assesses the criteria provided by Pakistani courts to impliedly waive the rights, and provides situations to be taken into account by contractual parties amid the Coronavirus Pandemic where it can be argued to waive the contractual rights of the party to avoid the contractual liability or to dispute the claim of force majeure. Finally, Part V concludes that the force majeure is a contractual right available to excuse the performance during these difficult times, but such right can be waived. In any case, in the end, an impacted party has the option to discharge its contractual obligations under the legal doctrine of frustration.

Force Majeure in Pakistan: A Loose Construction?
The term “force majeure” has not been defined in any statute in Pakistan. The Islamabad High Court has defined “force majeure” as the events which are outside the control of the parties, preventing one or both of the parties from performing their contractual obligations.4 The Court recognized, 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 making the performance of contract impossible or impracticable as a result of an event that the parties could not have anticipated or controlled.5 These three provisions have not limited the scope of “force majeure” because the Islamabad High Court6 reasoned that the term “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. Even though on one hand, the Islamabad High Court was keen to interpret the term “force majeure” broadly, on the other hand, the Court held that if there is a change in economic or market circumstances, which will affect the profitability of a contract, such a change

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4 Atlas Cables (Pvt.) Limited v Islamabad Electric Supply Company Limited 2016 CLD 1833 (ISL), [34].
5 Ibid.
6 Ibid, [36].
shall not be constituted as a force majeure event. Therefore, an “unexpected price hike in the world market of aluminium base metal” \(^7\) 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” is to the extent of protecting the contractual party from the consequences of non-performance of a contract due to which it had no control.\(^8\) Thus, it can be rightly argued that Pakistani courts are keen to interpret “force majeure” holistically; the analysis of cases discussed above suggests that the approach of the courts is to interpret a “force majeure” event in favour of the party, who would subsequently default in performing its contractual obligations due to unforeseeable and uncontrollable events.

**Coronavirus Pandemic: The Specific Force Majeure Events**

A standard force majeure clause which specifies the force majeure events, include provisions for two types of Force Majeure Events (‘FMEs’): (i) Natural Force Majeure Events (‘NFME’) and (ii) Political Force Majeure Events (‘PFME’). The NFME, as the name suggests, includes acts of God. A force majeure clause mentioning an act of God often includes “epidemic” or “plague.” On the other hand, PFME are sub-divided into two types, i.e. (a) PFME which occurs inside or directly involves the host country, 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 includes an act of war, invasions, armed conflict or an act of 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.

The outbreak of Coronavirus Pandemic has raised concerns for many corporations about whether a standard force majeure clause specifying FMEs like an act of God, epidemic, and change of law can be relied upon in excusing performance obligations. In other words, it is prudent to examine whether FMEs including act of God, epidemic, and change of law can be interpreted to include the Coronavirus Pandemic. 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 the Coronavirus Pandemic. However, it is probable that only a few contracts formed outside of the healthcare industry generally have such specific references.\(^9\) 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 a FME.\(^10\) FMEs like acts of God, epidemics, and change in laws 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,” if epidemic is specified as an FME in the force majeure clause; 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, if provided for in the force majeure clause.

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\(^7\) Ibid, [43].

\(^8\) *Sadat Business Group v Federation of Pakistan* 2013 CLD KHC 1451.


The first issue, whether the Coronavirus Pandemic falls within the scope of an “act of God” clause, can be addressed by resorting to the reasoning of Pakistani Courts. 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 “disease” or “epidemic” has not been expressly included in the force majeure clause, the term such as “act of God” or some other “catch-all provision,” will suffice, but that will require careful consideration of the contractual provisions. For example, in the United States, some courts have suggested that that “act of God” may be limited to matters solely caused by forces of nature. However, the majority view in the United States requires the act of God to be unforeseeable. The Supreme Court of Pakistan however, defined the “act of God” as an accident which is caused “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.” In other words, an “act of God” is an accident, which has natural causes and could not be prevented by taking any amount of reasonable care. At present, any natural cause can be foreseen but as the Supreme Court held that “accident … that …could not be prevented by any amount of foresight paid” suggests that it doesn’t matter if the accident was foreseen, what matters most is that such accident could not have been prevented by any amount of reasonable care. Thus, the foreseeability does not seem to be an important ingredient for the Supreme Court of Pakistan in interpreting an “act of God.” The Coronavirus Pandemic is evidenced to be a “product of natural evolution” because it arose through “natural processes.” Therefore, in such a circumstance, it satisfies all ingredients of the “act of God” provided by the Supreme Court of Pakistan, and thus can be held to be an FME.

Next, if the “disease” or “epidemic” has been expressly included in the force majeure clause then the question arises whether the Coronavirus Pandemic would fall within the scope of an “epidemic.” Merriam Webster has defined an epidemic to mean “an outbreak of disease that spreads quickly and affects many individuals at the same time.” Similarly, the World Health Organization (‘WHO’) has defined the “epidemic” to mean “the occurrence in a community or region of cases of an illness, specific health-related behavior, or other health-related events clearly in excess of normal expectancy.” 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.” Similarly, the definition of “Public Health

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11 (n 10).
16 Ibid.
18 (n 15).
Emergency” provided by the WHO means, “an occurrence or imminent threat of an illness or health condition caused by ... epidemic or pandemic”. The use of the word “or” between epidemic and pandemic stipulates that both epidemic or 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 Liability Litigation, 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.”

Therefore, it is arguable that “pandemic” is a type of “epidemic” that relates to geographic spread and describes a disease that affects an entire country or the whole world. In other words, a pandemic is an epidemic on a global level. 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 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, which is infecting a large number of people locally, the disease shall be considered “epidemic” and the impacted parties to such a contract can excuse their performance relying on the term “epidemic”. However, on the other hand, if 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 “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 one of these countries is attacked by the Coronavirus Pandemic, then such disease outbreak shall be considered “pandemic” for the purposes of international parties. Both terms purport the same meaning; thus, it can be concluded that the substance of both these terms is similar in nature. Hence, it will be enough for a party impacted by Coronavirus Pandemic to excuse their performance obligations under contract if the term “epidemic” is listed as an FME.

The third issue pertains to the change of law as an FME which might influence the performance of contract. Amid Coronavirus Pandemic, many governments are taking actions and changing their laws, 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.

22 (n 20).
24 Ibid.
26 Ibid.
Change in laws are 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.”27 Change in law generally encompasses changes in government policies with respect to 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.28 These risks are generally provided as a PFME in the force majeure clause. Government actions can occur at the central, provincial or local levels.29 Thus, the question of utmost importance for the businesses in Pakistan 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.30 In addition, the government also has the power to issue such orders with respect to any “location of person”.31 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,32 For example, these orders might include closing all grocery stores at 5pm,33 and directing markets and shopping malls to remain closed to counter the Coronavirus Pandemic.34 The government is also empowered to regulate “any area,”35 i.e., impose a lockdown in any city.36 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,37 and even dwellings. In addition, the Government of Punjab has been authorised to issue orders relating to such restrictions, prohibitions, and requirements with respect to any persons, goods, vehicle, vessel, or any other means of transportation in any area.38

28 Ibid.
29 Ibid.
30 The Punjab Infectious Diseases (Prevention and Control) Ordinance 2020 (PK), s8 and s9.
31 Ibid.
32 Ibid, s8 (1) and (2).
35 (n 30), s9.
37 (n 33).
38 (n 30), s9.
Due to the lack of any case law on change of law in Pakistan, we can rely on an Indian case,\(^\text{39}\) where the counsel for the appellant provided a three-point test for the change in law, i.e., (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]. Ordinance 2020 satisfies all three limbs of the test. It is an enactment by the Governor of the 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 shuttering 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.\(^\text{40}\) Similarly, according to \textit{Economic Times} “with several states announcing lockdown to curb the spread of COVID-19 pandemic, rating agency ICRA expects around 45 per cent of the rated mall portfolio to be vulnerable.”\(^\text{41}\) In view of this, the lockdowns imposed by the Government of Punjab, whether under section 144 of the Code of Criminal Procedure\(^\text{42}\) or under the Ordinance 2020 can be considered as a change of law. My view is supported by different authors, as one states that “recent government actions, including state-mandated closures of certain businesses, may provide a means for a party to have their performance excused.”\(^\text{43}\) Therefore, it can be expounded that there would not be any obstacle for the Pakistani courts to conclude that the contracts which are signed before the Coronavirus Pandemic, and have been financially affected by the lockdowns issued by the Government of Punjab under Ordinance 2020 or under section 144 of the Code of Criminal Procedure, can excuse their contractual obligations under the “change of 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

\(^{39}\) \textit{Sasun Power Limited, Mumbai and another v Central Electricity Regulatory Commission, New Delhi and another} 2019 Indlaw APTEL 116.


\(^{43}\) (n 10).
interpretation of the “force majeure” by the Pakistani courts demands saving of the impacted party from the consequences of unpredictable events. The Islamabad High Court\(^44\) fittingly held that the “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.”\(^45\) The Coronavirus Pandemic can be construed as an “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 coronavirus outbreak on execution of its contractual duties, thus making it objectively impossible for such parties to comply with their contractual promises. For instance, a corporation that is unable to perform its contract because of the coronavirus outbreak can have no control over the Coronavirus Pandemic. Therefore, it would be fair, just and reasonable to relieve such a corporation from its contractual performance by treating the Coronavirus Pandemic as an FME.

Further, 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 CISG has been ratified by many other states; it is of assistance to see if “pandemic” or “epidemic” has been recognized 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.”\(^46\)

In China, on 5 March 2005 in the China International Economic and Trade Arbitration Commission (‘CIETAC’) Arbitration proceeding (L-Lysine case),\(^47\) 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:

\[\text{SARS happened two months before parties signing the contract, so SARS was not unexpected. Besides, SARS was under control by June 2003. At the time of the conclusion of the contract, the Seller should have had enough opportunities to consider the influence of SARS in China and it shall not become an impediment as stipulated in Article 79 of the CISG.}^48\]

\(^{44}\) (n 4), [35].
\(^{45}\) Ibid.
\(^{48}\) Ibid.
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 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 entered into 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 Swine Flu was declared by the WHO as a “global pandemic”. One author concluded that the “[p]andemic 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 “an 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.” 49 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 the event which could not be avoided or overcome by any party alone. Even governments all over the world combined together have so far not been able to overcome the Coronavirus Pandemic. The degree of spread of Coronavirus Pandemic is “beyond containment.”50 A vaccine is still not approved and is under progress.51 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.52 Therefore, it is 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**

Lastly, the parties whose contractual performance is impacted by this pandemic have also raised the issue of “frustration.” One of the questions, which has 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.

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51 Ibid.
52 Ibid.
acts of God, or the enemy. When a force majeure event is relatable to an express or implied clause in a contract, it is governed by section 32, and if the event occurs outside the scope of contract, it is dealt with by a rule of positive law under section 56 of the Indian Contract Act 1872. In addition, the frustration is a doctrine, it is automatic and thus it cannot be waived. 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 discharge under the doctrine of frustration. 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.” The doctrine was established in an English case Taylor v. Caldwell, where it was held that if an “unforeseen event occurs during the performance of a contract which makes it impossible of performance, in the sense that the fundamental basis of the contract goes, it need not be further performed, as insisting upon such performance would be unjust.” However, the doctrine of frustration can only be invoked if the party alleging frustration shows that it is impossible to perform the contract, and the impossibility occurs without the fault of either party to the contract. The fact that the contract becomes more expensive or onerous is not enough to argue impossibility. 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.” The Court clarified that “commercial impossibility” cannot be regarded as a ground to invoke the doctrine of frustration.

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 is an event that has been caused due to natural causes, 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, and the imposition of travel bans have made it impossible to perform the

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57 Taylor vs. Caldwell (1861-73) All ER Rep 24.
58 Ibid.
59 M/s Haji M. Mohammad Zakaria & Co. v Province of West Pakistan, 1969 SCMR 428 (SC).
60 (n 55).
62 Quinn Corporation v Cotton Export Corporation 2004 CLD KHC 1040, [45].
63 Ibid.
64 (n 17).
contract of freight services. These examples are suitable 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 Coronavirus Pandemic.

Ostensibly, the frustration seems very similar to force majeure. However, the consequences of frustration are 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 come to an end. The Supreme Court of Pakistan held that “it [frustration] guillotines the contract without the action of either party.” The Contract Act, 1872, 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. 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 to frustrate the contract because the frustration makes the contract void. In a Hong Kong Case, when the isolation order was made by the Hong Kong Department of Health amid the 2003 SARS epidemic, the tenant was unable to access its premises for ten days. Hong Kong District Court held that the 10-day period in which a property was uninhabited due to the 2003 SARS epidemic did not frustrate the two-year term residential tenancy agreement.

The Hong Kong case is distinguishable on two grounds. 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.” 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.” In the view of the court, the SARS outbreak and its knock-on effects were capable of triggering the doctrine of frustration. 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

68 M/s Mansukhdas Bodram v. Hussain Brothers Ltd. PLD SC 1980 122, [14].
69 Mustafa Kamal v. Daud Khan 2009 SCMR SC 221, [4].
70 Jatoi Cotton Ginning and Pressing Factory v Zainab Usman 1965 PLD (WP) Karachi 22, [9].
71 Li Ching Wing v. Xuan Yi Xiong [2004] 1 HKLRD 353.
72 Ibid.
73 Ibid, 357.
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 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, the 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 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.”

The application of waiver has been widely acknowledged in insurance law, labour and employment law, property law, civil procedure, tort law, fiduciary relationships, and contract law. 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. Before getting into greater detail, it is important to understand that the waiver of right can only be used as a “shield and not as a sword.”

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

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 opposite 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. If the Coronavirus Pandemic has impacted the performance of the party, one must contemplate if it is appropriate to negotiate a waiver. 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: the minority approach and the majority approach.

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75 Akhtarunnisa Begurn v Surayya Matin 1990 MLD KHC 1821.
79 Major League Baseball v Frank L. Morsani, etc. [2001] 790 So.2d 1071.
80 The Directorate of Industries and Mineral Development v Messrs Masood Auto Stores PLD 1991 LHC 174, [25].
81 Dr. Muhammad Javaid Shafi v Syed Rashid Arshad 2015 PLD SC 212.
84 Ibid.
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. However, the conduct, evidencing such intention, must be clear, unequivocal, and decisive, or it should amount to estoppel, to impliedly waive the right.\textsuperscript{85} A similar approach has been adopted by the Lahore High Court in \textit{Directorate of Industries and Mineral Development v Messrs Masood Auto Stores}.\textsuperscript{86} 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 believe that the performance will not be insisted upon.”\textsuperscript{87} The minority approach has been construed so narrowly that it is certainly difficult for the court to construe 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 majority 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 \textit{Muhammad Saleh v Muhammad Shafi}, the Supreme Court held that “waiver 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.”\textsuperscript{88} The Supreme Court subsequently held that “in order to establish “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. 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”.”\textsuperscript{89} Whereas in \textit{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 “where 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 estoppel may arise from mere silence or inaction or even inconsistent conduct of a person.”\textsuperscript{90} 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 be aggrieved of his right; (iii) he has failed to safeguard his right. Earlier in \textit{Muhammad Saleh v Muhammad Shafi}, the scope of “waiver of rights” was narrowly construed by the Supreme Court.\textsuperscript{91} 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.\textsuperscript{92} The Supreme Court, therefore, required there to be a clear and decisive act or conduct beyond mere silence to waive the right.\textsuperscript{93} The Supreme Court

\textsuperscript{85} (n 75).
\textsuperscript{86} PLD 1991 LHC 174.
\textsuperscript{87} (n 80).
\textsuperscript{88} \textit{Muhammad Saleh v Muhammad Shafi} 1982 SCMR SC 33, [17].
\textsuperscript{89} Ibid.
\textsuperscript{90} \textit{Dr. Muhammad Javaid Shafi v Syed Rashid Arshad} 2015 PLD SC 212.
\textsuperscript{91} (n 88)
\textsuperscript{92} Ibid.
\textsuperscript{93} Ibid.
has broadened the scope of “waiver of right” in Muhammad Javaid Shaft v Syed Rashid Arshad, and the right of a person may be impliedly waived if the person has failed to safeguard his right. Now the “mere silence or inaction or even inconsistent object of a person” may result in a failure to safeguard the right.94 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.”95

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 waiver of right in its defence to escape the liability which may arise out of its non-performance, or in other words, how the non-breaching party may use this principle in its defence to dispute the claim of force majeure.

If an impacted party fails to perform its contractual promise due to the Coronavirus Pandemic and such 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.96 The case of the 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.97 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.98 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.99 Likewise, there may be the same conclusion upon the application of the test provided by the Supreme Court of Pakistan.100 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. 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.101 Resultingly, 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 waiver of rights to dispute the claim to excuse the performance obligations under the force majeure clause. The following three conceivable arguments to dispute the claim of force majeure may be raised by the non-breaching

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94 (n 90).
95 Ibid.
97 (n 80).
98 Ibid.
99 Ibid.
100 (n 90).
101 Ibid.
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;\(^{102}\) (ii) the absence of force majeure clause in the contract indicates that the party has waived its right to excuse the performance; (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.\(^{103}\) The eligibility of these arguments to succeed as a defence against the claim of force majeure is dependent on the application of tests provided by the High Courts or the Supreme Court of Pakistan.

The minority approach is labelled as a test provided by the High Courts which requires the party to evidence an intention through a clear and unmistakable action to waive its right and the other party should reasonably\(^{104}\) believe that the act was intended to waive that right.\(^{105}\) The first two arguments mentioned above may fail as a defence. 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 to argue that there was no clear, unequivocal and decisive action on the part of either party to waive its right. Therefore, a party may excuse its performance in situations like Coronavirus Pandemic. Similarly, the second argument may also fail because an absence of a whole force majeure clause not indicates 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 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.\(^{106}\) Thus, the failure to timely provide notice of such non-performance may result in the reasonable belief that the impacted party can perform the contract amid Coronavirus Pandemic and consequently has waived its right to excuse the non-performance under force majeure.

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. Such failure to safeguard its right can be implied from a mere silence, inaction, or inconsistent act. Upon the application of the test, all

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104 (n 80).
105 (n 75).
the following three arguments satisfy the first limb of the test: whether the failure of a party to incorporate “epidemics” or “diseases” as FMEs post-SARS can be considered as a waiver of a right to excuse performance amid Coronavirus Pandemic; 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; and 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. The contractual parties should have been aware of their right to excuse their performance obligations in the events which are beyond their control, such as the coronavirus pandemic. The question which needs to be considered for the first argument is that whether the parties impacted by the pandemic 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 of “diseases” or “epidemics.” 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 failed to safeguard their right.\(^\text{107}\) It is not enough to show that there was inaction, silence, or even an inconsistent act to safeguard its right. The inclusion of force majeure in the contract should be enough to argue that the party has acted to safeguard its interest. Thus, it is very unlikely for the courts to hold that the party has waived its right to excuse its non-performance amid Coronavirus Pandemic. The second argument 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.\(^\text{108}\) All contractual parties should be mindful to include the clause of force majeure to exercise their right to excuse their 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.\(^\text{109}\) Likewise, the third argument 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.\(^\text{110}\) Thus, a failure to issue a notice may be treated as a waiver of rights because the court may regard it as “inaction.”\(^\text{111}\)

Finally, the impacted parties who have waived their right to excuse the nonperformance 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 doctrine, not a right and the effect of which is to determine the rights and obligations arising under the frustrate contract.\(^\text{112}\) Frustration is automatic and hence cannot be waived\(^\text{113}\) as the waiver of frustration is ineffective.\(^\text{114}\) Therefore, as discussed above, the doctrine of frustration may be invoked as a remedy of last resort.

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\(^{107}\) ibid.
\(^{108}\) ibid.
\(^{109}\) ibid.
\(^{110}\) (n 106).
\(^{111}\) (n 100).
\(^{114}\) *Morgan v Manser* [1947] 1 K.B. 184.
Conclusion
The ongoing 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. Such unprecedented measures mean that the businesses demand some answers regarding the effect of Coronavirus Pandemic on their contractual rights and obligations. A growing number of impacted parties are exploring ways and means to avoid contractual liability for the non-performance. One way to suspend the contractual obligations is under a force majeure clause.

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 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 disputing the claim of force majeure amid the Coronavirus Pandemic. However, such a principle can only be used as a shield. When interacting with the counterparties, a party may waive its contractual rights like the right to terminate, 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 and because of such “inaction,” it may amount to a waiver of its rights.

118 (n 79).