

## **The Doctrine of *Force Majeure* under the Law of Contract in Pakistan: A Critical Exposition**

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### **Abstract**

*This paper discusses what is the meaning of force majeure; what is its extent and scope; what is its effect; the onus to prove force majeure is on who; can a contract hit by force majeure become void; is it incorporated within our law; what can be included in force majeure and what cannot be included in it; The methodology used in this paper is doctrinal. The main findings of this paper are that force majeure means any superior or irresistible force that causes an event to occur due to an Act of God. Examples can be of tsunamis, floods, earthquakes etc. Hence any natural disaster that strikes is an Act of God. It is incorporated within the doctrine of frustration which in turn is incorporated within Section 56 of the Act and as well Section 32 of the Act. the act becoming physically impossible to perform has two things in mind, one is it becoming physically impossible to perform due to unforeseen circumstances caused by human intervention, such as mobs, strikes, protests and more, while the second thing is the act becoming physically impossible to perform due to unforeseen circumstances caused by an Act of God, such as snowstorms, thunderstorms and it also includes natural disasters such as earthquakes, floods, tsunamis etc. An act of God that is a natural disaster or is at such an extent that it causes a lot of damage, the same only needs to be proved by providing evidence that the subject-matter was damaged by the act of God and it caused this amount of damage. And of course, anyone who claims that an act of God occurred must also prove the same by providing sufficient and substantial evidence that it had occurred. A force majeure event absolves a party from liability for the non-performance of a contract due to a supervening impossibility, when a dispute arises. contract hit by force majeure becomes null and void. Although, stipulations could be added in such a case where the parties would stipulate that the contract would be put on hold till the resolution of the force majeure event. Some parties could also stipulate that certain obligations can be suspended where force majeure occurs.*

**Keywords:** Contract, Agreement, Frustration, Force Majeure, Act of God

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### **1. Introduction**

Force majeure is French for “a superior or irresistible power.” (West, 2005, p. 445). It refers to “an event that is a result of the elements of nature, as opposed to one caused by human behavior.” (West, 2005, p. 445.). It has also been referred to quite simply as a “superior or irresistible force.” (Black, 1910, p. 509.). Hence, force majeure quite simply means any superior or irresistible force that causes an event to occur due to an Act of God. Examples can be of tsunamis, floods, earthquakes etc. Hence any natural disaster that strikes is an Act of God. It is incorporated within the doctrine of frustration which in turn is incorporated within Section 56 of the Contract Act 1872 (hereinafter referred to as the “Act”) which provides that

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

*A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful*

*Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the nonperformance of the promise.”*

Frustration simply refers to when the promiser (the one who makes a promise) is unable to fulfill their promises to the promisee (the one to whom the promise was made to) in a contract due to unforeseen circumstances beyond their control. It includes even when the prospective act that the promisor promised to perform is unable to be performed due to the fact that the act itself becomes impossible to perform or becomes unlawful after the initial contract was made between both parties, provided that such impossibility or unlawfulness was not within the knowledge of the promisor. Hence, the act becoming physically impossible to perform has two things in mind, one is it becoming physically impossible to perform due to unforeseen circumstances caused by human intervention, such as mobs, strikes, protests and more, while the second thing is the act becoming physically impossible to perform due to unforeseen circumstances caused by an Act of God, such as snowstorms, thunderstorms and it also includes natural disasters such as earthquakes, floods, tsunamis etc. It is this second which we will focus on today as anything more would be beyond the scope of this paper (Ibn Munir, 2023). It should also be noted that this paper uses both force majeure and act of God interchangeably.

## **2. Scope and Extent**

As discussed hereinabove, force majeure refers to an act of God which does not include any events caused by human factors. The position was different over a century ago however. “The expression ‘force majeure’ is not a mere French version of the Latin expression ‘vis major’. It is undoubtedly a term of wider import. Difficulties have arisen in the past as to what could legitimately be included in ‘force majeure’. Judges have agreed that strikes, breakdown of machinery, which, though normally not included in ‘vis major’ are included in ‘force majeure’. An analysis of rulings on the subject into which it is not necessary in this case to go, shows that where reference is made to ‘force majeure’, the intention is to save the performing party from the consequences of anything over which he has no control” (*Lebeaupin v. Richard Crispin & Co.*, [1920] 2 K.B. 714)

This observation is correct to a certain extent. Force majeure refers to an event that is beyond the control of the parties but is an Act of God, thus it does not include acts that are caused due to human factors.

An act of God can be a valid reason for a person to not appear in their first hearing after receiving a summons and in such a case, Article 164 of the Limitation Act 1908 would apply and limitation would commence from the date of the knowledge of the decree, when the ‘summons’ was not duly served (*Messrs Rehman Weaving Factory (Regd.), Bahawalnagar v. Industrial Development Bank of Pakistan*, PLD 1981 SC 21, p. 38.). In a case where the appellant’s house was damaged due to a heavy rain, the court held that the appellant is not guilty of absence of duty as alleged by the department where he worked (*Ch. Tawangar Hussain v. Director, Manpower and Training, Punjab*, 1983 PLC (C. S.) 1011 [Service Tribunal Punjab], para 33). In a case where a shipment of goods had been damaged and there was an allegation of negligence from the appellant to the respondent, the court held that there was no evidence brought forth to show the same by the appellant and the respondents had shown that there was proof of the goods being damaged by an act of God (*International General Insurance Company of Pakistan Limited v. British India Steam Navigation Co. Ltd.*, 1987 CLC 152 [Karachi], p. 160). Sickness is also an act of God and nobody can be held responsible for any

misconduct on the ground of sickness only (*Jamil Akhtar v. Secretary, Ministry of Food and Agriculture, Islamabad*, 1999 PLC (C.S.) 719 [Federal Service Tribunal], para 4).

In a case where there was an agreement for a sale of land, the respondent had the land physically verified and found it contradicting to the reports provided by the appellant. It had been found out that some area of the land had been covered by the riverbed. This land was to be excluded as per the sale agreement. The court after relying on various caselaw held that “even in Sind the law is that the owner of the lost land to the river remains the owner upon the reformation of such land if it can be identified. (Rana, 2020) We may observe that in the absence of any statutory provision or the custom having the force of law divesting the ownership of land from the owner on account of its having been lost temporarily because of the act of God or other acts upon which the owner had no control.... whoever has land, wherever it is, whatever may be the accident to which it has been exposed, whether it be a vineyard which is covered by Lava or ashes from volcano or a field covered by the sea or by a river, the ground, the site, the property remains in the original owner, still hold good” (*Miss Rifat Hamid Ghani v. Muhammad Shamsul Jalil*, 1987 CLC 1902 [Karachi], para 9).

In another case, the court observed that “the words “Act of God” embody a very wide range in different senses such as literal sense, judicial sense and religious sense.” (*Messrs Jehangir Services (Private)Limited v. Mst. Bibi Rukhsana Begum*, PLD 1995 Karachi 329, para 6).

This observation is laudable as it has widened the scope of an “Act of God”.

In another case where the respondent who was assigned to work on a canal but was unable to continue such work due to flooding in the canal. The Engineer Incharge recorded the quantum of work as done by the respondent whereof the latter gave him quite a hefty bill which the former declined, citing that the floods came up within the natural calamity as incorporated within the force majeure clause in the contract. The clause provided that the government who was the appellant in the case would not be responsible for any act of God or force majeure that causes the work to be partly completed. The trial court held that the payment of dues should be made by the government as the clause was not applicable to the respondent’s claim. On appeal to the district court, the court dismissed the case and held that the clause was not applicable as the same was also recorded in the measurement book. This was also upheld by the High Court. The Supreme Court held that this interpretation was not violative of any known principle of interpretation (*Government of N.W.F.P v. Daud Shah, Contractor, Peshawar*, 1996 SCMR 1713, para 7). The court observed that “force majeure clause couched in the words in the instant case is to be construed strictly in contradistinction to the one employed in other contracts particularly those in carriage of good by sea in compensation claims.” (*Government of N.W.F.P v. Daud Shah, Contractor, Peshawar*, 1996 SCMR 1713, para 7). The court further observed that “the litmus test as to the invocation of the ‘act of God’ clause in a contract agreement, notwithstanding the use of very broad phraseology therein, would be whether the damage to the work done by the Contractor and taken down in the official record could not have been averted by any amount of foresight paid and care reasonably to be expected from him. If it is proved as has been conceded in the case before us, then ‘force majeure’ clause would give way to other clauses (namely clause herein)” (*Government of N.W.F.P v. Daud Shah, Contractor, Peshawar*, 1996 SCMR 1713, para 7).

Both observations of the court are laudable. The force majeure clause should indeed be construed like any other clause in a contract but should the damage that was actually and the amount that was actually recorded could have been averted by reasonable foresight and reasonable care, then the force majeure clause would be construed to allow any contradicting clause to be applied instead of it.

A force majeure clause does not deal with a situation where a party has no intention of performing the contract, it merely deals with a situation where a contract while being performed is interrupted by eventualities described in the clause. (*Conticottons S.A. Co. v. Farooq Corporation*, 1999 CLC 1018

[Karachi], p. 1022) In a case where the federal government withdrew the concessions for excise duty it gave to certain goods, the court held that while the concession itself is discretionary, its unilateral withdrawal is not discretionary unless of course the withdrawal occurred due to unforeseen circumstances such as national interest or a drastic change in the national economy or a force majeure. (*Messrs Indus Plastic Industry, Rawalpindi v. Collector of Customs and Central Excise, Rawalpindi*, 2003 PTD 2105 [Lahore High Court], paras 7-8.) Sickness is also an act of God and nobody can be held responsible for any misconduct on the ground of sickness only. In a case where a bank had loaned a finance facility to the appellant, while the other respondents stood as guarantors for the same and had mortgaged their shops as well. An insurance company insured the goods as well. In the event of any loss or damage to the goods, the bank was to recover their debt from the insurance company. The insurance company however refused to give an insurance for the loss caused to the appellant's goods which were damaged by fire. The appellant argued that because of the fire, which is an Act of God, the principal borrower stands exonerated from the liability and thus the other defendants/appellants also are discharged as surety /mortgagors. The court however rejected this argument and dismissed the petition. (*Muhammad Naeem Bhatti v. United Bank Limited*, 2005 CLD 643 [Lahore], paras 6-8).

Economic circumstances cannot generally form a claim for force majeure (*Thames Valley Power Ltd. v. Total Gas and Power Ltd.* [2006] 1 Lloyd's Rep. 441.) In a case where the petitioners and two other respondents who were reluctant to cross an unsafe area were assured safety and security by the Magistrate who was on special duty and was accompanied by a police squad. While they were on the way, they were ambushed by a group of armed people which resulted in a few sustaining injuries and one person died. The Magistrate along with the police squad who had assured them safety and security stood there without doing anything. They did not stop the offenders from shooting or tried to protect the life of the victims. They were tried for *diyat* by the legal heirs by virtue of being responsible as a machinery or agent of the State who are charged with protecting the life, liberty and property of the people. The court held that "Firstly, if loss is caused to the life or property of a person as a result of an act of State or an act of Government or an act of an agent of Government, either such an act was due to the willful negligence of a state authority or otherwise. Secondly the damage and loss are caused to a person due to the failure of State machinery to control law and order situation to maintain peace and administer Criminal Justice in the society and thirdly, the loss caused in unforeseen circumstances to the life or property of a person as a result of a natural disaster or act of God." (*The State v. Muhammad Azam*, 2012-14 GBLR 10 [Supreme Appellate Court], para 25.)

This observation does seem laudable in terms of incorporating an act of God in situations where state liability is also incurred.

In a case where an agricultural land of an unregistered society was damaged due to floods and the provincial government were blamed for failing to control the river action and thus, they were sued for the damages caused to the land. The court held that the provincial government could not be sued for damages on the basis of force majeure as the floods were extremely devastating and could not be prevented. (*Anjuman-i-Mutasareen Khshatkaran River Ravi v. Province of Punjab*, 2012 CLC 1145 [Lahore], para 10.)

Even in cases that go to arbitration, the arbitrators have the jurisdiction to decide whether a party has properly and successfully invoked a force majeure clause in the contract in relation to or out of which the dispute arises. (*K-Electric v. Federation of Pakistan*, PLD 2014 Sindh 504, para 9.)

In a case where the students were penalized due to not being able to submit their examination forms and thus not being able to receive their annual examination cards, the court after appraising the record found out that the examination fees were misappropriated and thus according to the court, the students should be allowed to sit the examination as they had already submitted the examination fee and the

misappropriation of the examination was a circumstance which was beyond their control and thus came within the ambit of the rule providing for unforeseen circumstances and force majeure the Examination Rule and Procedures of the Calendar of Board Secondary Education, Karachi, Chapter-XI. (*Muhammad Hussain v. Province of Sindh*, 2014 MLD 174 [Sindh], para 9.) The court's observation is correct as misappropriation of the examination fees falls into a circumstance which is caused by human conduct. It does not fall into force majeure however as force majeure is for circumstances caused by an act of God.

Force majeure means any act of God which thus includes events like explosions, fire, flood, drought or peril of sea or air, sabotage, embargo, commotion or war hostilities, terrorist attacks, thus it is an event or effect that cannot be reasonably anticipated or controlled. (*Messrs Venus Pakistan (Pvt.) Ltd v. Additional Collector Customs Preventive, MCC Customs House*, 2014 PTD (Trib.) 108 [Customs Appellate Tribunal, Karachi], para 12).

In a case where there was a contract for an international supply of cables and there was a default on the delivery of goods within the stipulated period caused by 'unavoidable circumstances' which was the unprecedented increase in the cost of input materials in the local and international market as claimed by the supplier who in turn relied on the force majeure clause of the contract. The court after contemplating on the scope of force majeure by relying on Anglo jurisprudence and Indian jurisprudence, the court held that the international increase in prices of a particular material which is metal in this case is not sufficient to constitute a force majeure. (*Atlas Cables (Pvt.) Limited v. Islamabad Electric Supply Company Limited*, 2016 CLC 1677 [Islamabad], 2016 CLD 1833 [Islamabad], paras 35-41).

In another case, the court while relying on different sources contemplated on the meaning and scope of an "Act of God". The court first relied on the definition as provided by the Black's Law Dictionary observing that it is "*an overwhelming, unpreventable event caused exclusively by forces of nature, such as earthquake, flood, or tornado*" (Garner and Black, p. 37). The court further relied upon Pakistani jurisprudence and Anglo jurisprudence to further observe on the scope of "act of God" and proceeded to observe that there are four elements needed in order to constitute an act of God. The court observed that an "*Act of God is an unavoidable and unpredictable event that results from the occurrence of natural causes or forces which is entirely irresistible, uncontrollable and could not have been prevented by the exercise of foresight or carefulness.*" This observation is laudable. However, the court further observed that that the term act of God should be used in legal and judicial sense rather than literal and religious sense. (*Tabish Gauhar v. The State*, 2016 PCr.LJ 1398 [Sindh], paras 9-11 and 15). Thus, the court went against the briefly established jurisprudence as discussed hereinabove.

In a case where there was a contract was made with the running a hostelry in a hospital. The hospitals all over the province were closed due to the Covid-19 pandemic that took the world at large and while the petitioner wished to close the hospital's hostel, but there was no response, as a result, due to very few customers coming, the petitioner incurred heavy losses. The court while relying on Anglo-Jurisprudence and contemplating on the meaning and scope of force majeure observed that "Force majeure is a French term that literally means 'greater force' or 'a superior force'. It has been taken from the Code of Napoleon. In contract law it can be defined as 'an event or effect that can be neither anticipated nor controlled; especially, an unprecedented event that prevents someone from doing or completing something that he or she had agreed or officially planned to do. The term includes both, acts of nature (e.g. floods and hurricanes) and acts of people (e.g. riots, strikes and wars)" (*Abdul Waheed v. Additional District Judge*, PLD 2021 Lahore 453, paras 9-10, 12 and 17).

The court observed that it refers to events beyond the control of the parties which prevent one or both of them from performing their contractual obligations. The court further observed that the doctrine of

force majeure was incorporated within Sections 32 and 56 of the Act. The court observed on the former that it applies where the contract itself contains an express or implied force majeure clause which provides for contingencies on who's happening the contract cannot be carried out and prescribes its consequences. On the latter, the court observed that if there is no such provision or it does not apply, the party may have recourse to section 56. This is interesting as Section 56 also incorporates the doctrine of frustration which is also what the court observes. All these observations of the court are laudable. *Abdul Waheed v. Additional District Judge*, PLD 2021 Lahore 453, paras 9-10, 12 and 17).

### 3. Burden of Proof

In "*Messrs Jehangir Services (Private)Limited v. Mst. Bibi Rukhsana Begum*", the court observed that "The words "Act of God" embody a very wide range in different senses such as literal sense, judicial sense and religious sense. In case of Fatal Accidents, the courts have to deal with such contention in its judicial sense. Any party who claims that any act was the Act of God, then onus is on the same party to prove that they were innocent and the incident was the Act of God. Mere claim that an act is Act of God would have no force in it." (*Messrs Jehangir Services (Private)Limited v. Mst. Bibi Rukhsana Begum*, PLD 1995 Karachi 329, para 6). This observation is laudable. Any act of God that is a natural disaster or is at such an extent that it causes a lot of damage, the same only needs to be proved by providing evidence that the subject-matter was damaged by the act of God and it caused this amount of damage. And of course, anyone who claims that an act of God occurred must also prove the same by providing sufficient and substantial evidence that it had occurred. (*Liaquat Hayat Khan Wahla v. Mian Muhammad Trust Hospital, Faisalabad*, 2008 MLD 883 [Lahore], para 7.) Thus, a force majeure event absolves a party from liability for the non-performance of a contract due to a supervening impossibility, when a dispute arises, regarding such a force majeure event, the same should be proved in the appropriate forum by a party who wants to be absolved from its contractual obligations. (*Atlas Cables (Pvt.) Limited v. Islamabad Electric Supply Company Limited*, 2016 CLC 1677 [Islamabad], 2016 CLD 1833 [Islamabad], para 32.)

### 4. Effect of Force Majeure/Act of God

A force majeure clause is to be narrowly construed, it is an event that absolves a party from liability for the non-performance of a contract due to a supervening impossibility when a dispute arises. *Energy Watchdog v. Central Electricity Regulatory Commission*, (2017) 14 SCC 80, para 43). The object to insert force majeure clause in an agreement is to save the performing party from the consequence of anything over which the said party has no control. (*Pakistan State Oil Company Ltd v. Pakistan National Shipping Corporation*, 2021 CLC 761 [Sindh], para 8.)

The courts have also ruled that "the parties may include a force majeure clause in their contract specifying the consequences of certain supervening events. There is no "standard" force majeure clause. Generally, they focus on impossibility, impracticability and illegality but the parties may negotiate it like any other term of the contract. The interpretation, scope and application of a force majeure provision would depend on its precise language and the party seeking to avoid the contract has to show that the event falls within its ambit. The covenants of the force majeure clause would also determine the remedies available to the parties. Some contracts may provide for immediate termination of contract on the happening of a force majeure event while others may stipulate that the contract would be put on hold till the resolution of the force majeure event. Some contracts may make provision for suspension of certain obligations." (*Abdul Waheed v. Additional District Judge*, PLD 2021 Lahore 453, para 11).

This observation is laudable as the court has accurately gauged the effect of a force majeure clause in

a contract. Thus, a contract hit by force majeure becomes null and void. Although, stipulations could be added in such a case where the parties would stipulate that the contract would be put on hold till the resolution of the force majeure event. Some parties could also stipulate that certain obligations can be suspended where force majeure occurs.

### 5. Conclusion

From the discussion hereinabove, we can conclude that force majeure means any superior or irresistible force that causes an event to occur due to an Act of God. Examples can be of tsunamis, floods, earthquakes etc. Hence any natural disaster that strikes is an Act of God. It is incorporated within the doctrine of frustration which in turn is incorporated within Section 56 of the Act and as well Section 32 of the Act. In the doctrine of frustration, the act becoming physically impossible to perform has two things in mind, one is it becoming physically impossible to perform due to unforeseen circumstances caused by human intervention, such as mobs, strikes, protests and more, while the second thing is the act becoming physically impossible to perform due to unforeseen circumstances caused by an Act of God, such as snowstorms, thunderstorms and it also includes natural disasters such as earthquakes, floods, tsunamis etc. The scope and extent of a force majeure or an act of God is wide and can include many things such as natural disasters and also other events not caused by human beings but by God such as snowstorms, thunderstorms, explosions, fire, flood, drought or peril of sea or air, sabotage, embargo, commotion or war hostilities, terrorist attacks. Thus, it is an event or effect that cannot be reasonably anticipated or controlled. Economic circumstances do not come within the ambit of force majeure. Force majeure was to originally embody a wide range in different senses such as literal sense, judicial sense and religious sense. In case of fatal accidents, it must be seen in a judicial sense. However, now it is to be seen only in a legal and judicial sense rather than a literal and religious sense. A force majeure clause in a contract is to be construed narrowly and like any other clause in a contract. Even arbitrators have the jurisdiction to decide whether a party has properly and successfully invoked a force majeure clause in the contract in relation to or out of which the dispute arises. An act of God that is a natural disaster or is at such an extent that it causes a lot of damage, the same only needs to be proved by providing evidence that the subject-matter was damaged by the act of God and it caused this amount of damage. And of course, anyone who claims that an act of God occurred must also prove the same by providing sufficient and substantial evidence that it had occurred. A force majeure event absolves a party from liability for the non-performance of a contract due to a supervening impossibility, when a dispute arises, regarding such a force majeure event, the same should be proved in the appropriate forum by a party who wants to be absolved from its contractual obligations. The object to insert force majeure clause in an agreement is to save the performing party from the consequence of anything over which the said party has no control. A contract hit by force majeure becomes null and void. Although, stipulations could be added in such a case where the parties would stipulate that the contract would be put on hold till the resolution of the force majeure event. Some parties could also stipulate that certain obligations can be suspended where force majeure occurs.

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