



Force Majeure -

MEANING, EFFECT ON AGREEMENT, WAY FORWARD

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1. Force Majeure - Meaning

- ▶ The term '*force majeure*' is a French term which means 'superior force.' It refers to an event or effect that can be neither anticipated nor controlled. The term includes both acts of nature and acts of people, including but not limited to natural disasters, riots etc.
- ▶ Roman law recognized that the principle of sanctity of contract can be tempered by a competing principle '***clausula rebus sic stantibus***', which means obligations under a contract are binding only as long as matters remain the same as they were at the time of entering into the contract.

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- ▶ Under both Indian and English law, force majeure does not simply mean anything outside the control of the parties to a contract. Its meaning, and applicability, depends on the particular contract, and the particular wording used. **It is contractual language intended to anticipate unforeseen events and provide for what happens on their occurrence [Chitty on contracts, Volume I, (31st Edition), Sweet & Maxwell].**
 - ▶ Force majeure clauses vary. They can be specific (a list of specific events that are treated as being force majeure, such as fire, flood, war or similar) or general (referring simply to events outside the reasonable control of a party to the contract), or a combination of both.


The test for seeking to rely on a force majeure clause is:


The event that gave rise to a party's non-performance under the contract falls within the definition of force majeure in the contract, that is, the event is covered by the force majeure clause, **and** the non-performance was caused by the relevant event [Edmund Bendit And Anr. vs Edgar Raphael Prudhomme](#).


- ▶ The event and the non-performance were due to circumstances beyond a party's control [see [Dhanrajamal Gobindram v. Shamji Kalidas & Co](#)]. e.g., therefore, force majeure will not include economic problems like insufficient funds.
- ▶ There were no reasonable steps that could have been taken to avoid or mitigate the event or its consequences.

Pre-Requisites to invoke Force Majeure

- ▶ Parties must have a valid Contract / Agreement.
- ▶ The Contract/ Agreement is yet to be concluded.
- ▶ The Force Majeure event should have been an unforeseen event.
- ▶ There is a normal duty of the parties to mitigate the effects of the *force majeure* event and there must be substantial reason to prove that the said event is the cause of non – performance/ impossibility of the Contract.

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- ▶ Impossibility does not mean physical or literal impossibility but that the event may have totally upset the very foundation of the Contract/ Agreement.
 - ▶ The Force Majeure event leading to non-performance need not necessarily conclude in termination of the Contract. It is based on the terms of the contract and the circumstances of the force majeure event.
 - ▶ There is always an alternative to renegotiate or to temporarily suspend the Contract/ Agreement than to blindly terminate it.

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- ▶ The party seeking to rely on the clause may also need to show it was not aware, at the time of entering the contract, that the circumstances giving rise to the event of force majeure was likely to occur.
 - ▶ For example, now that the COVID-19 pandemic has started, if parties enter into a contract after this point and then have problems performing as a result, they may not be able to rely on force majeure unless the contract specifically covers COVID-19 and its consequences, and provides for what happens if it affects performance of the contract.
 - ▶ Similar situation arose in **M/s. Alopri Parshad and Sons Ltd. v. Union of India AIR 1960 SC 588**, in May, 1937 Petitioner entered into an agreement with Government to purchase ghee required for the use of the Army personnel. In September, 1939, the World War II broke out, and there was an enormous increase in demand by Government of Ghee. After almost 3 years of when World War II broke out, the original agreement was, by mutual consent, revised.


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- ▶ The parties sought enhanced rates citing the outbreak of World War II. The contractor claimed that it was entitled to amounts over and above the rates revised as per agreement in 1942.
 - ▶ The Court rejected the claim, noting that the contract was revised three years after the hostilities commenced, and that the party was fully conscious of the circumstances.


“A contract is not frustrated merely because the circumstances in which it was made are altered. The courts have no general power to absolve a party from the performance of his part of the contract merely because its performance has become onerous on account of an unforeseen turn of events, the bench observed”.

2. Force Majeure – Effect on Agreement

Force Majeure Clause:


- ▶ It is a common clause in contracts (if there exists one) that essentially frees both parties from liability or obligation when an extraordinary event or circumstance beyond the control of the parties, prevents one or both parties from fulfilling their obligations under the contract.
- ▶ Force majeure clauses vary. They can be specific (a list of specific events that are treated as being force majeure, such as fire, flood, war or similar) or general (referring simply to events outside the reasonable control of a party to the contract), or a combination of both.

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- ▶ Most contracts today contain detailed clauses wherein events/ circumstances/ factors that may be considered as a force majeure event are expressly set out, or at least thresholds and broad categorizations of an occurrence qualifying as such an event is clearly set out. In such a case, only the occurrence of events falling within the detailed specifics or broad categorizations, may absolve a party of its obligations under the agreement
 - ▶ Alternatively, contracts today also specifically set out events, the occurrence of which shall not be considered a force majeure event - but only as an onerous circumstance/ hardship on the party facing such a change in circumstance. In the event of such an occurrence, no party can take the defence of impossibility of performance and will accordingly be held liable for their non performance in terms of the agreement.

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- ▶ In such cases, where parties expressly assume the risk of impossibility, they cannot avoid the performance of obligations on grounds of impossibility. If a contract provides that an obligation is unconditional or unaffected by any impossibility, it is not open for a party to bring a claim under the defence of force majeure. However, in such cases, the occurrence of events other than those specifically excluded from the purview of force majeure may be derived from an interpretation of the governing law and shall vary from case to case
 - ▶ It is the language of the clause that enumerates the application of the principle and also defines its scope
 - ▶ There is a need for thorough review of the Contract/ Agreement to determine the exact applicability on case to case basis.
 - ▶ The Force Majeure Clause may be implied in the Contract based on the circumstance of the case.

If the contract does not include a force majeure clause

- ▶ If the contract does not include a force majeure clause, the affected party could claim relief under the **doctrine of frustration** under Section 56 of the Indian Contract Act, 1872
- ▶ Note that in these situations, and others where force majeure may or may not apply, the non-performing party might also consider relying on the doctrine of frustration (a creature of English common law and pursuant to Section 56 of the Indian Contract Act).

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- ▶ To take shelter under Section 56 of the Indian Contract Act, it must be ensured that the parties have entered into a Contract/ Agreement wherein the force majeure event has disrupted the performance of its Terms.
 - ▶ Parties to a contract usually have an intention to fulfil their part of the obligations as per the contractual terms and conditions and in case of a breach, the party which commits the breach is liable to compensate for the same. The doctrine of frustration, however is an exception to this rule as it protects the party committing the breach, in case the obligation as per the contract becomes unlawful and/or impossible to perform.
 - ▶ The **language of the force majeure clause will determine** the remedies available to the parties. Some contracts may provide for immediate termination of the contract upon the happening of the force majeure event. Others may provide that the contract will be put on hold until the force majeure event is resolved. Some contracts will only allow for certain obligations to be suspended. It varies on a case-to-case basis also factoring in the circumstance of the force majeure event.

The necessary conditions to invoke protection under the doctrine of frustration:

- ▶ There must exist a valid and subsisting contract between the parties.
- ▶ There must be some part of the contract which is yet to be performed.
- ▶ The contract after it is entered into becomes impossible of performance.
- ▶ Such impossibility to perform can be by way of death, incapacity of a party, change in law, change in circumstances which cannot be anticipated or controlled.
- ▶ Frustration of contract cannot result out of the wilful intention of the parties.

Satyabrata Ghose v. Mugneeram Bangur & Co., 1954 SCR 310

This a landmark Indian decision which explains the ambit of Section 56.

- ▶ Here, the defendant was a company, which was engaged in the construction and development of house plots. There was an agreement for sale of a plot between the plaintiff and the defendant. Meanwhile, during the second world war, the plots were compulsorily acquired by the military.
- ▶ The issue was whether the agreement was frustrated due to requisition by military.
- ▶ On facts, the Court held that the contract cannot be held to be frustrated, as its performance was possible even after the war-time.

"In our opinion, having regard to the nature and terms of the contract, the actual existence of war conditions at the time when it was entered into the extent of the work involved in the development scheme and last though not the least the total absence of any definite period of time agreed to by the parties within which the work was to be completed, it cannot be said that the requisition order vitally affected the contract or made its performance impossible the Court held."

Naihati Jute Mills Ltd. v. Hyaliram Jagannath, 1968 (1) SCR 821

- ▶ In this case, the Court held that even if a contract is held to be void under Section 56, it will not affect the arbitration clause contained in it.

"Even if the appellants had established frustration, it would not be as if, the contract was ab initio void. In cases of frustration it is the performance of the contract which comes to an end but the contract would still be in existence for purposes such as the resolution of disputes arising under or in connection with it and the question whether the contract was discharged under the doctrine of frustration would still have to be decided under the arbitration clause which operates in respect of such purposes.

"The Court also held that to hold a contract as frustrated, the change in events or circumstances must be so fundamental as to be regarded by law as striking at the root of the contract". On facts, the Court held that the change in government policy on jute import did not frustrate the contract in question.

Energy Watchdog v CERC (2017) 14 SCC 80

- ▶ This decision given by a bench comprising Justices PC Ghosh and RF Nariman summarizes the jurisprudence on the doctrine of frustration.

Some key points from this judgment are :

- ▶ If contract has an express or implied 'force majeure' clause, it will apply over the principles under Sec 56.
- ▶ Application of the doctrine of frustration must always be within narrow limits.
- ▶ A rise in cost or expense will not frustrate a contract.
- ▶ Doctrine of frustration will not apply so long as the fundamental basis of the contract remains the same.
- ▶ Force majeure clause will not apply if alternative modes of performances are available.

If there is a force majeure clause in the contract does it automatically entitle a party to the contract to invoke it? (OR) What if the force majeure event does not result in the non-performance or frustration of the contract?


- ▶ No. The force majeure event should affect the performance of an obligation of a party to the contract.
- ▶ The performance is not merely suspended just because a force majeure situation has arisen, ***unless it significantly affects the performance capabilities of a party.***
- ▶ A party invoking a force majeure clause should therefore prove direct nexus between the force majeure event and impossibility to perform contractual obligations.
- ▶ The common legal understanding is that a mere occurrence of a force majeure situation, without a real impact on contractual performance capabilities of such party, would not entitle it to suspend its performance under the contract.

Can a party claiming refuge under the force majeure clause do so at a belated stage?

- ▶ No. It is usually the norm that the party committing a breach as a result of the force majeure event immediately and promptly informs the other party of the impossibility to perform the contractual obligation.
- ▶ The protection under a force majeure clause usually cannot be provided indefinitely and it shall only be applicable for the duration of the force majeure event.

Whether a lessee of a commercial property can take shelter under the laws involving *force majeure* to resist rentals during the Coronavirus pandemic?


- ▶ Therefore, it is quite clear that the order of the government to lockdown the entire country to limit the spread of COVID-19 would certainly qualify as a *force majeure*.
- ▶ The question that therefore specifically arises is whether a *force majeure* clause in a commercial lease would extend to exemption/abatement of the payment of monthly lease *vis-à-vis* a commercial property during this lockdown period.


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- ▶ Whether at all Section 56 would be applicable to a lease. The answer to this appears to be in the negative, as the interpretation of a lease agreement is governed primarily by the *Transfer of Property Act, 1882*, which is a special statute, and it is settled law that a special statute would trump a general statute.
 - ▶ The issue of whether or not rent is payable by the lessee due to a *force majeure* can be found in **Section 108(e)** of the Transfer of Property Act. In considering the scope of the applicability of the Transfer of Property Act, the Supreme Court in [Raja Dhruv Dev Chand v. Raja Harmohinder Singh](#) held that,

“Where the property leased is not destroyed or substantially and permanently unfit, the lessee cannot avoid the lease because he does not or is unable to use the land for purposes for which it is let to him.”

The views of the various High Courts in this regard

- ▶ The Bombay High Court held that the destruction of the tenanted structure does not extinguish the tenancy and the right of occupation of the tenant under the contract of tenancy between the parties. (see [Hind Rubber Industries Pvt. Ltd. v. Tayebhai Mohammedbhai Bagasarwalla and Ors](#)).
- ▶ The Calcutta High Court had also taken a similar view in holding that the lease is not determined automatically even if the property is wholly destroyed (see [Jiwan Lal and Co. v. Manot and Co. Ltd](#)).
- ▶ The Delhi High Court and the Madras High Court have also held that in the case of the tenancy premises being wholly destroyed or rendered substantially and permanently unfit by fire etc., if the lessee does not exercise the option to treat the lease to be void, he will remain liable to pay the rent (see [Chamber of Colours and Chemicals Private Limited v. Trilok Chand Jain](#) and [Sri Amuruvi Preumal Devasthanam v. KR Sabapathi Pillai and Ors](#)).

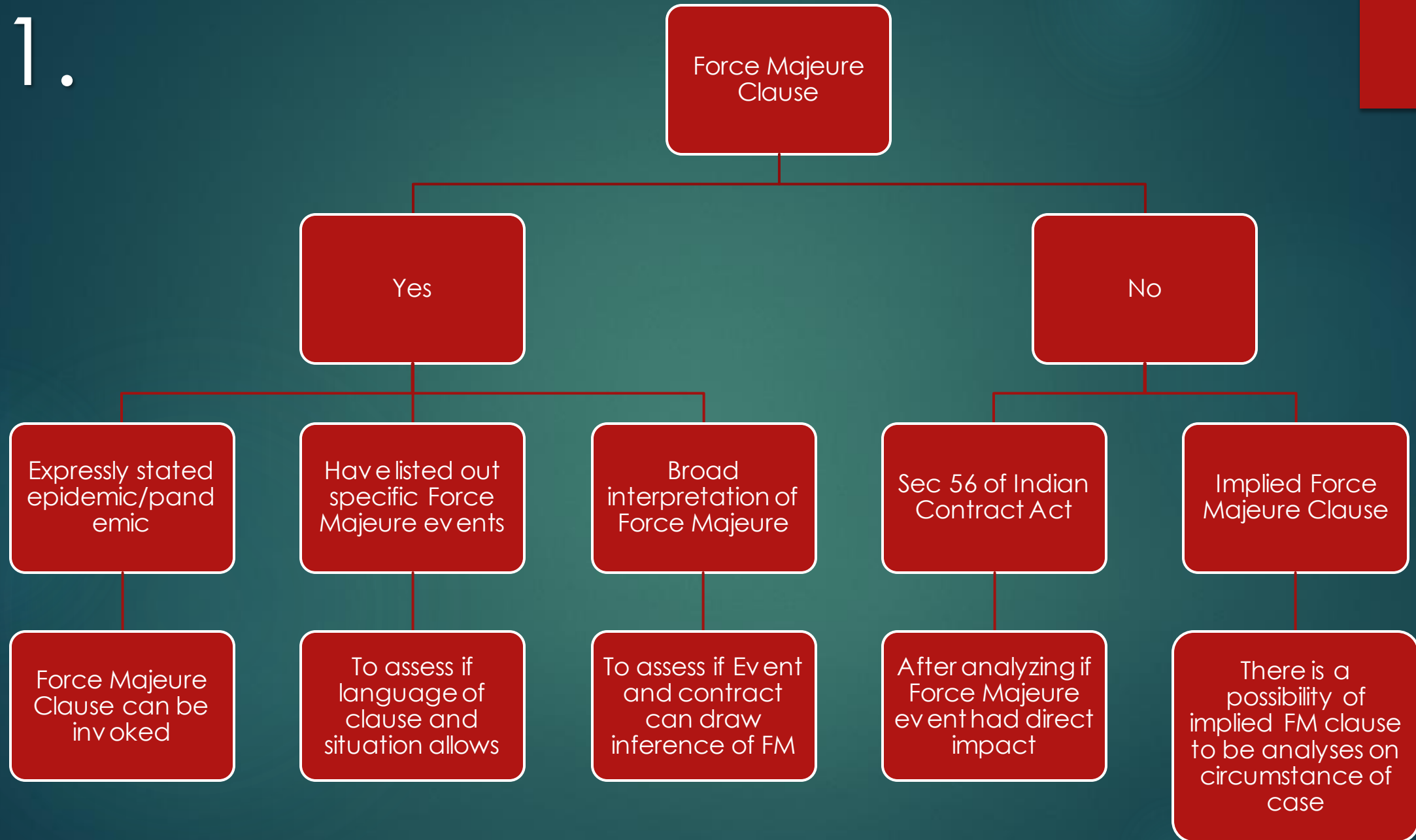
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- ▶ The above precedents of both the Supreme Court and various High Courts allows for an “avoidance” of the lease at the option of the lessee. However, it preconditions the same with the property being rendered “permanently unfit”, which certainly is not the situation today with the COVID-19 lockdown.
 - ▶ The likely stance taken by lessors would be that their obligation under all commercial leases is to provide possession to the lessee. In such a scenario, when the fitness to occupy the premises becomes impossible due to a temporary change in law, due to no fault of the lessor, it would not disentitle the lessor from enjoying the proceeds of the lease.
 - ▶ This view finds significant reinforcement from the fact that the premises continues to be in possession of the lessee along with the lessee's furniture and fittings, and the lessor's rights devolve by law upon the lessee, and there is no suspension of these rights.
 - ▶ There is obviously no change in “place of business” for commercial and legal purposes by the lessee during the present lockdown period.

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- ▶ The Chairperson of the National Executive Committee issued an order dated March 29 that landlords of workers/migrants/students living in their rented premises shall not demand rent from them for a period of one month.
 - ▶ This order also does not come to the aid of lessees of commercial properties. Insofar as the Epidemic Diseases Act is concerned, the immunity provided therein appears to be provided in a narrow sense to state that Section 4 would apply to any authority that has imposed any restrictions under this Act, and does not appear to come to the benefit of commercial lessees in the present situation.

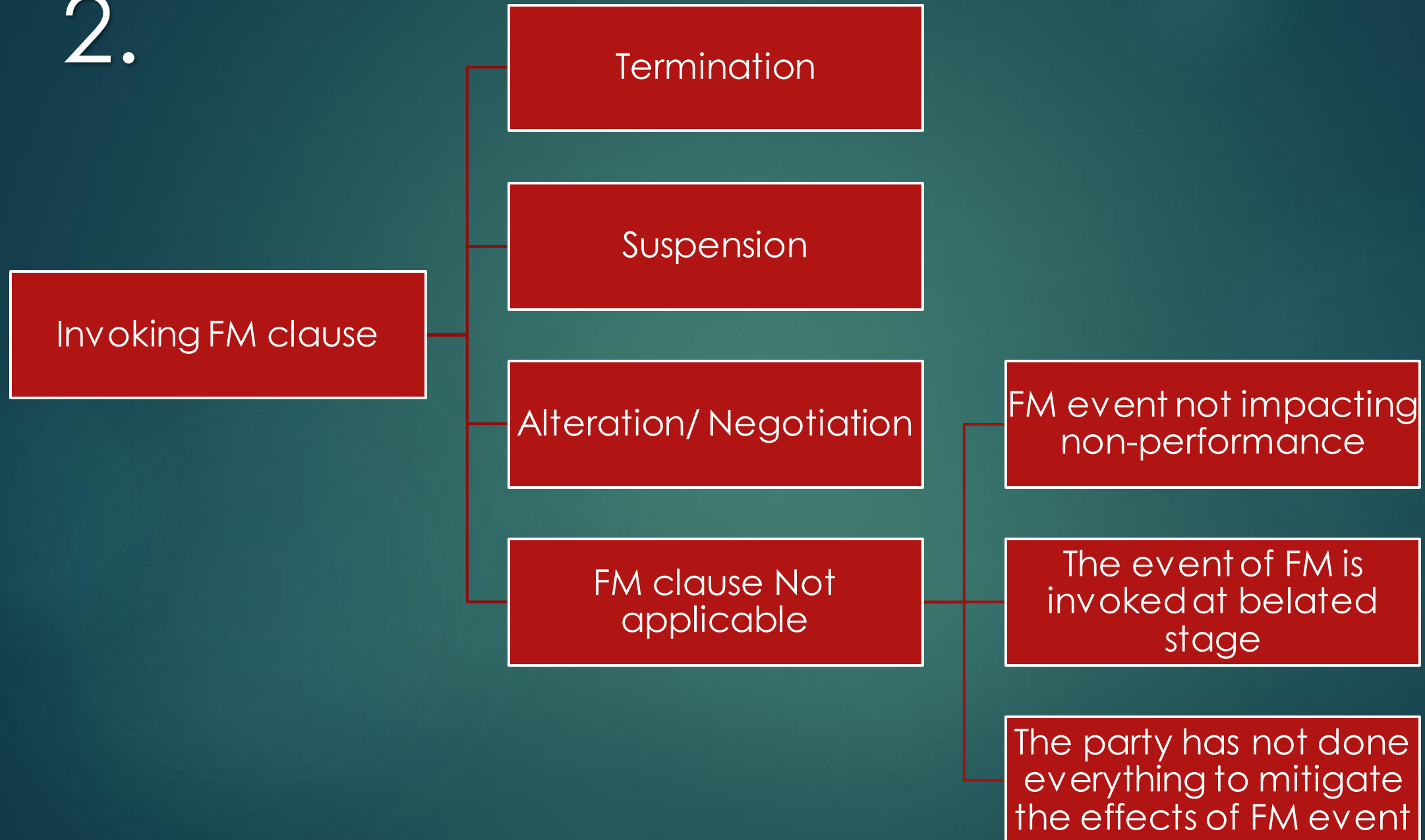
3. Force Majeure – Way Forward

- ▶ The National Disaster Management Authority of India has via its Order dated 24.03.2020 acknowledged that the pandemic Covid-19 is a threatening disaster situation and has taken various measures to handle the same.
- ▶ The Ministry of Finance has via its office memorandum (No. F 18/4/2020-PPD) dated 19.02.2020 has clarified that the pandemic Covid-19 would come under an extraordinary event or circumstance beyond human control as it is a 'natural calamity' and stated that the Force Majeure Clause maybe invoked for Covid-19 wherever considered appropriate.
- ▶ So Yes, it can be inferred that the pandemic Covid-19 is treated akin to a disaster and has been acknowledged as a natural calamity by the Government of India and its agencies.
- ▶ However it has to be kept in mind that the said office memorandum is indicative to being limited to certain Government departments and agencies. We can only be seen on a case to case basis if the same can be applicable to private sector contracts; the parties will certainly make attempts to draw analogies from the same.
- ▶ It is to be seen through the language of the Contract and the clause whether the situation of Covid-19 can be included under the ambit of private contracts and whether it has been expressly been excluded.

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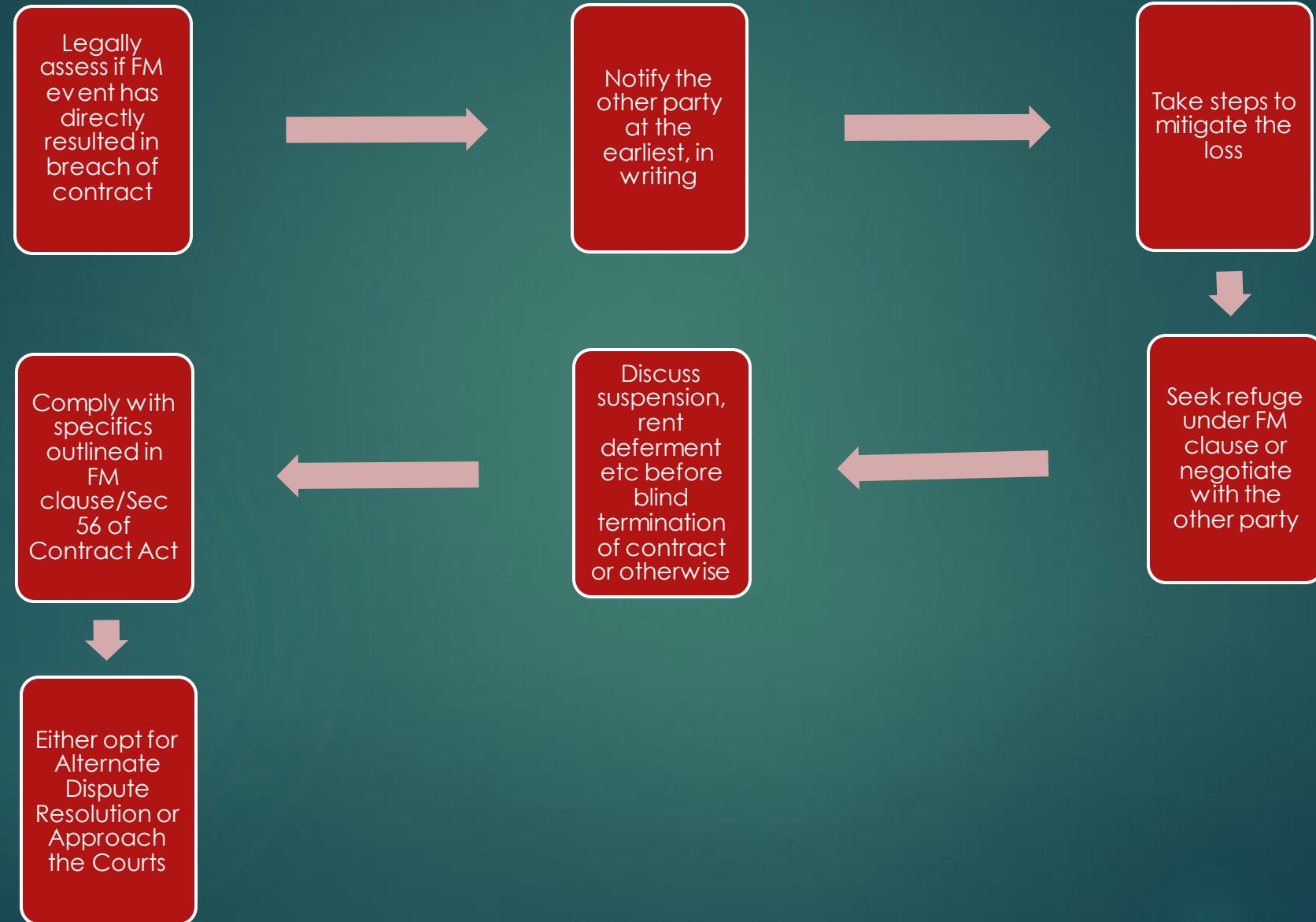


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Process of invoking Force Majeure Clause



Recent order in light of Covid-2019 breakout

- ▶ The Bombay High Court on 08.04.2020 refused to grant 'Force Majeure' exemption to a set of steel importers, who had sought to restrain the encashment of their Letter of Credits by Korea-based exporters.
- ▶ The companies had approached the High Court under Section 9 of the Arbitration and Conciliation Act, stating that the lockdown had rendered the performance of contract impossible. Petitioner invoked the Force Majeure clause in their contract with Hyundai Corp and GS Global seeking directions restraining the respondent bank Wells Fargo from encashing letters of credit.
- ▶ Petitioners contended that contracts with Hyundai Corp and G8 Global stood terminated as unenforceable on account of "frustration, Impossibility and impracticability". They relied upon Section 56 of the Indian Contract Act, 1972 and Supreme Court's judgment in **Energy Watchdog Vs CERC (2017) and Satyabrata Ghose Vs Mugneeram Bangure & Co. (1954)**.
- ▶ Firstly, the Court noted that the Letters of Credit are an independent Transaction with the Bank and the Bank is not concerned with underlying disputes between the buyers and sellers.

- ▶ Notably Justice A A Sayed also observed that the lockdown guidelines indicated that the distribution of steel has been declared as an essential service.

- ▶ Furthermore, court said

“In any event, the lockdown would be for a limited period and the lockdown cannot come to the rescue of the Petitioners so as to resile from its contractual obligations with the Respondent No. 1 of making payments.”

- ▶ Justice AA Sayed observed that the Force Majeure clause in the present contracts is applicable only to exporters and cannot come to the aid of the Petitioners.

- ▶ The bench further said:

“Moreover the contract terms are on Cost and Freight basis (CFR) and the Respondent No. 1 complied with its obligations and performed its part of the contracts and the goods have been already shipped from South Korea. The fact that the Petitioners would not be able to perform its obligations so far as its own purchasers are concerned and/or it would suffer damages is not a factor which can be considered and held against the Respondent No 1”

Thus ad interim reliefs were rejected.



THE END

Thank You

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