

Contracts formed during Frustrations and Force Majeures: An Anti-Crisis Shield for Consumer Protection against Boilerplate and Limited Liability Clauses

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Abstract – All productions and consumptions are outcomes of various contracts between producers, intermediates (whole-sellers, retailers, brokers, dealers, suppliers) and consumers. In a force majeure or frustrating situation bargaining power and freedom of contract drastically get altered and curtailed for consumers comparative to superior position of intermediaries due to rattle in economy. Such impediments provide ideal opportunity for them to include various exemption and limited liability clauses in contracts especially for standard form consumer contracts victimizing inferior consumers leaving no choice other than consenting to such contracts. This paper looks at primarily the legal validity of application of force majeure and frustration principles on contracts formed during such impediments. Secondly, study examine how consumer contractual rights were altered and curtailed by intermediaries through boilerplate and various limited liability clauses during force majeure and frustrations plus their legal implications. Study discussed and reflected the gaps and laps in domestic laws in such frustrated and force majeure situations comparative to Polish and Singaporean laws. Research findings affirmed the legal error in application of force majeure and frustration principles on contracts formed during impediments. Further, it was highlighted that domestic consumers encounter comparatively higher legal risk than the Polish and Singaporean consumers on such scenarios and emphasised the vitality of strengthening domestic consumer protection legal framework to remedy the same.

Keywords - contract, frustration, force-majeure, boilerplate-clauses, limited-liability-clauses

INTRODUCTION

The entire social fabric is a web of various and diverse contracts among different parties. Thus, under impediment like frustration or force majeure situation wide range of contracts get affected comparative to ordinary cause of business. Out of which sales of goods contracts becomes the foremost common, significant and indispensable form of contract that becomes crucial for everyone in everyday life as well as exposed to a greater risk relative to other forms of commercial contracts in such impediments. Besides, their necessity becomes clearly apparent especially in frustrated and force majeure crisis. Thus, real robustness of the contract law is effectively able to test in such force majeure and frustrated situations to determine whether it is necessary to recalibrate the existing doctrines or to develop new laws. Similarly, contract is a law based on the foremost notion of freedom of contract. Thus, governing law of contract is basically depend on the intension of parties and rule of construction or how contract was primarily constructed. Any contract stems and sustain through transactions and relationships between two or more parties. In a frustrated or force majeure situation such transactions and relations encounter drastic alterations comparative to normal sales of goods contract due to rapid reformations made to business models and also due to formation of remote contracts rather than entering contracts through ordinary mode of meeting face-to-face. Hence, most of the time contacts formed during force majeure or

frustrated context, contracting parties becomes strangers instead of known parties. This becomes especially common and evident in

most crucial sales of goods contracts such as food, pharmaceutical and hygiene product related consumer contracts due to their nature of essentiality and scarcity on such conditions. Generally upon such market conditions consumer demand for essential goods will arise while the production and supply of the same will get slowdown and disrupted significantly due to endless predictable and unpredictable causes such as closing of production entities, inaccessibility to raw materials and workers, logistic and delivery issues both domestic and international (imports and exports), problems pertains to harvesting and production, due to perishability of such items, storages and inventory limitations, etc. Simultaneously, the same said reasons confer extraordinary bargaining power on sellers and other intermediaries to dictate both conditions and warranties on such sales of good contract by drastically curtailing buyers' freedom of contract leaving either less or no choice for them.

Correspondingly, the recent COVID-19 impediment upended global consumer landscape and confinement measures forced consumers to shift to online purchases. This move further exacerbated elderly and low-income consumers' behaviour while resulting online scams seek to take advantage of the crisis. E.g. Between the period of January 2020 to mid-April 2020 Federal Trade Commission of United States received more than 22,000 consumer complaints about COVID-19 related frauds which amounts over USD 22 million worth consumer losses (The Organization for Economic Co-operation and Development, 2020).

As a common practise on such impediments, contracts already formed prior to such situation tends to rely on two major principles namely frustration and force majeure. Nonetheless,

contract law has overlooked the application and legal implications of said two principles for

contracts formed during such impediment. Once Lord Justice Denning stated, it is not possible to expect from contractual parties to have 'foresight of a Prophet, or his lawyer with the draftsmanship of a Chalmers' but contrary Justice Viscount held that fate of contractual parties depends 'on the construction of contract' and denied the role of court on imply terms 'what is just and reasonable' into a contract. This controversial approaches in contract law in ordinary sense get further worst for the contracts that are formed during an impediments due to the question of applicability of the said principles of frustration and force majeure.

II. RESEARCH PROBLEM

Contract law based force majeure clauses and common law principle of frustration are the two predominant fundamental principles available for a contract on impediment either to absolve contractual obligation and liabilities of sellers and others intermediaries. Further, such impediments sets the landscape to deploy unfair commercial practise through restriction and curtailing consumer freedom and rights reference to terms of contract.

Although there are heap of literature and case laws pertains to the aforementioned principles with respect to contracts formed either pre or post impediment situations, there is a serious lacuna in both domestic and international laws on their applicability for a contract formed in the cause of an impediment. Thus, this study specifically focused on the research problem of legality in application of common law principle of frustration and contract law principle of force majeure for contracts formed during an impediments and their legal implications especially on consumers at large. Accordingly, four research questions were formulated 1) Does application of contract law principle of force majeure to a contract formed during an impediment is legally valid? 2) Does application of common law principle of frustration to a

contract formed during an impediment is legally valid? 3) How does application of contract law principle of force majeure and common law principle of frustration affect on consumer contracts during an impediments? 4) What is the legal applicability of principles of force majeure and frustrations to contract during impediment in Sri Lanka comparative to Polish and Singaporean laws and what are the recommendations suggested for domestic legal reforms. Thus, objectives of this study is to 1) Examine the legal validity of applying contract law principle of force majeure to a contract formed during an impediment 2) Examine the legal validity of applying common law principle of frustration to a contract formed during an impediment 3) Explore and assess the legal implications of application of contract law principle of force majeure and common law principle of frustration on consumer contracts during an impediments 4) Compare and contrast the legal applicability of principles of force majeure and frustrations to contract during impediment in Sri Lanka comparative to Polish and Singaporean laws to make recommendations for domestic legal reforms.

III. METHODOLOGY

This is a qualitative comparative research based on critical analysis of domestic black letter law comparatively with Polish and Singaporean laws buttressed with empirical methodologies. Data gathered primarily through national and comparative legislations, case laws, directives and regulations made by respective jurisdictional statutory authorities. Those were further strengthen with peer reviewed law journals, books, contributions and reviews made by professional experts of contract and commercial law areas. Research was mainly restricted to contracts formed in the cause of impediment and to the application of frustration and force majeure principles in such contracts. The key limitation of the study is the absence of both domestic and international case law and research literature pertains to the main research problem.

IV. RESULTS AND DISCUSSION

Principle of Force Majeure

In a situation of impediment, party can rely first on the force majeure clause if the formed contract comprised of such a clause. The word force majeure derived from French law which means irresistible super human or superior force and typically these clauses refer as 'acts of god' such as floods, fire, hurricanes, earthquakes, tsunamis, and similar situations like sudden and unforeseen lockdowns, curfews lasted for a certain period of time due to pandemic or epidemic diseases and other acts of man which are disruptive and unforeseen such as industrial actions, strikes, insurrections, riots, explosion and wars¹ which are beyond the control of parties to contract. Therefore, force majeure is an event or situation which is unforeseeable (at the time of formation of contract), unavoidable and impossible to overcome by the parties to a contract². Under English law, there is no blanket definition for force majeure rather it was left for parties to define exactly what they consider to be force majeure in particular under a given contract. Hence, force majeure clauses should set out a list of matters that qualify under force majeure, with an explanation of contractual consequences along with specific conditions and exceptions. As stipulated by such clauses either one or both parties to contract will entitle to excuse or suspense of performance of whole or part of the contract upon the occurrences of certain specific acts, events or circumstances that are reasonably beyond the control of parties to contract. Additionally they will not become liable for failure to perform their obligations as articulated by the contract. Consequently, due to the draconian effect of the doctrine unduly onerousness and expensiveness does not mount to impossibility

¹ Gupta, H. (2020) Force majeure and frustration of contracts in Covid-19 emergency, Oireachtas Library and Research Services,1-8

² McDermott, P. A & McDermott, J.(2017) Contract law, 2nd ed. Bloomsbury Professional, Dublin,21

of performance of contract and does not absolve parties' obligations and liabilities under such force majeure clauses. Thus, under temporary force majeure will suspend the performance of contract while the definitive force majeure will either lead to cancel or terminate the contract. English law requires to satisfy number of conditions like causation between force majeure and performance of contract, mitigation efforts, notice of requirement and consequences of establishing force majeure event etc. Moreover, as a common practise courts interpret such clauses strictly.

Principle of Frustration

On the other hand in absence of such force majeure clause in a contract common law principle of frustration coming to force. English law doctrine of frustration becomes applicable where performance of contract becomes impossible, illegal or fundamentally or radically different than it was intended at the time of formation of contract due to non-faulty of contractual parties. Cases based in frustration broadly falls in to three subcategories; impossibility of agreed performance, impossibility of resulting the mutually agreed purpose of the contract and significant change in to mutually agreed state of affairs. Upon the successful proof of frustration, it will automatically discharge all obligations of the contractual parties by immediately terminating the contract without any further steps. In circumstances where total failure of performance of contract taken place due to frustration, court most likely to order to return money what has already been paid.³ Whereas, in partial frustration, such order only available when court deem where part of the contract mounts to a separate contract.⁴ Due to the assigned high hurdle of establishing "impossibility of performance" to avoid open the flood gates under such claims, court shows

³ Fibrosa vs. Fairbairn [1943]AC 32 HL

⁴ Ringsend Property Ltd vs. Donatex Ltd [2009] IEHC 568

resistance to invoke this doctrine in a normal contractual context.⁵

Similarly, actions and decisions of state and public authorities trigger change of ordinary law in such frustrating and force majeure situations tend to create opportunity for intermediaries including sellers of the supply chain of sale of goods to use the prevailing condition to make use for unjust enrichment specially through inclusion, alteration and exclusion of certain terms to contract which are not possible or prohibited under normal cause of business.

Legality of Application of Principles of Frustration and Force Majeure for Contracts Formed During Impediments

Generally frustration does not require any explicit provision in the contract. However, contract does not mount to frustration if a valid contract term deals with the said or similar situation and parties have foreseen or have applied their mind to the frustrating event at the time of formation of the contract. Similarly, force majeure clause only enforceable where the said event or impediment is external, unpredictable, irresistible and inevitable. Thus, principle of frustration and force majeure clauses becomes inapplicable where contractual parties have experience the frustration or force majeure and if they are reasonably aware of the level of control or outcomes of the said impediment and respective implications on the intended contract at the time of formation of contract.

Thus, application of principles of frustration and force majeure clauses become fundamentally questionable for a contract that formed during a force majeure or a frustration because those principles stipulate as exceptional provisions to normal contractual context which come in to force in an unforeseen extraordinary impediment situation to avoid the breach of contract. Thus, contracts formed

⁵ Taylor vs. Caldwell (1863) 3 B & S 826; Ringsend Property Ltd vs. Donatex Ltd [2009] IEHC 568

during a frustration or force majeure such conditions mounts to the normal contractual context rather than an exception contrary their normal legal application. Therefore, two major remedies that are available for contracts that formed before or after a force majeure or frustration becomes rebuttable and fundamentally non-applicable for contracts formed in the cause of a force majeure or frustration due to four reasons; first, event or impediment exist at the time of formation of contract. Secondly, event or impediment have reasonably foreseen or experienced by the contractual parties at the time of forming the contract. Thirdly, contractual parties able to formulate their contractual terms inter alia reasonably to suit the special contractual condition considering available options and possibilities to cater or mitigate the said impediment and its consequences. Lastly the event or impediment contractual context becomes the normal contractual context for such contracts.

Contracts Formed During Frustration and Force Majeure and Consumer Protection During Impediment in Sri Lanka

There are three major legislations pertains to sales of goods and consumer protection in Sri Lanka; Sale of Goods Ordinance No.11 of 1896 (hereinafter SOGO), Unfair Contracts Terms Act No.26 of 1997 (hereinafter UCTA) and Consumer Affairs Authority Act No.09 of 2003(as Amended) (hereinafter CAAA). SOGO is the bedrock statute for sale of goods but provides little assistant to situations of force majeure or frustrations. Hence, all roads will leads to either force majeure clauses in consumer contracts or common law doctrine of frustration pertains to those contracts that are already formed prior and posy of such impediment. Following the Unfair Contract Terms Act of 1977 U.K., UCTA was formulated based on the notion of test of reasonableness to strike a balance between exemption, limited liability and boilerplate clauses mainly contain in consumer contracts to uphold consumer

rights and consumer protection. But UCTA also neither contain any special provisions pertains to frustration or force majeure nor stipulate application of the said law related to frustration or force majeure conditions. Similar lacuna prevails in the CAAA. Hence, domestic sale of goods and consumer protections laws seriously lacks laws and regulations relates to frustration and force majeure conditions.

In a frustration or force majeure condition sellers may enter exemption, limited liability and indemnity clauses to safeguard self-interest while further including other abusive boilerplate clauses to standard form contracts to exploit consumer rights and freedom by means of ; (1) price gouging (2) pressuring the buyer to “take or pay” for the goods; where “take” specified the amount of goods delivered by the seller which differ to buyer ordered quantity or to “pay” the seller the penalty for full or partial non-acceptance of the delivered goods, (3) where seller failed to deliver the contractual goods and force the buyer to “cover” by the substitution offered upon sellers choice (4) instead of upgrading the quality of damage or defect goods with superior quality goods by replacing them with inferior quality goods through “degradation”, (5) refusal and restriction of buyer examination of goods before acceptance of the goods (6) inclusion of non-refundable payment terms, (7) unreasonable time frames for deliveries, (8) prohibition or restriction on consumer order cancelations, (9) providing incomplete and misleading information and advertising on goods and (10) refusal or restriction certain modes of payment for a buyer such as cash or credit cards etc.

Hence, lacuna in all three major statutes pertains to sale of goods and consumer protection on their applications and implications in the cause of frustration and force majeure, domestic unprotect buyers greatly felt to defend for themselves. Thus, present lacuna in domestic sale of goods and consumer protection laws often fall back in the

absence of an expression of contrary on intention by the parties by exposing consumers for greater domination and exploitation of the sellers and intermediaries especially during impediments.

Consumer Protection During Impediment in Poland

Polish law does not permitted to alter or curtail or to suspend obligations and liabilities enforced on seller or intermediaries in relation to consumers which are applicable under normal condition during frustration or force majeure even though it is difficult to fulfil them as usual. Similarly legislature enforced certain procedural measures such as; (1) to impose monetary fines for infringement of consumers' collective rights and interests or unfair use of contractual advantage⁶ (2) regarding failure to comply with the obligation relates to maxim prices/price margins as stipulate by respective authorities empower to impose a fine and for repeated such failures to imposed a fine of ten percent of trader's preceding year annual turnover⁷ during impediments.

Simultaneously, the Office of Competition and Consumer Protection established a special platform to report unfair commercial practises in terms of withdrawal⁸, return, refund and exchange of goods and services on impediment. Also, due to the crucially of protecting small-scale businesses on such market vulnerability and simultaneously acknowledging their critical role amidst the impediment, those sole-traders whom does not acquire professional character legally declared and treated equivalent to consumers while temporarily reducing their regulatory duties for a tenure of

one year.⁹But quazi-consumer protection measures were enforced through prohibition of abusive clauses, providing additional warranties for defects and granting right for consumers to withdraw distance contract within 14 days.

Consumer Protection During Impediment in Singapore

There are several statutes related to sale of goods in Singapore under normal cause of business; Sale of Goods Act (Cap.393 of Singapore), Supply of Goods Act (Cap.394 of Singapore), Unfair Contract Terms Act (Cap.396 of Singapore), Sale of Goods (United Nations Convention) Act (Cap.283A of Singapore), Misrepresentation Act (Cap.390 of Singapore) and Price Control Act (Cap.244 of Singapore). The Consumer Protection (Fair Trading) Act of 2009 (CPTFA) applies to most of the consumer transaction excluding sale for land and houses and prawn brokering. Section 2(1) of CPTFA defined the term "consumer" and it covers consumers' right to cancel regulated contracts¹⁰, lemon law remedies for the consumer and suing the supplier for unfair practises¹¹. The Consumer Association of Singapore (CASE) is the authorized agency to enforce consumer protection laws and The Competition and Consumer Protection Commission of Singapore (CCCS) administer and enforce CPTFA.

Singapore has no legislation on force majeure and COVID-19 (Temporary Measures) Act No.14 of 2020 (hereinafter CTMA) formulated to provide relief to certain scheduled contracts formed prior to 24th March 2020 to temporary freeze legal rights and obligations of contracting parties until the said the law is in force and

⁶ Article 21 and 29 of Consumer Rights Act of 2014

⁷ Article 106 of Competition and Consumer Protection Act of 2007

⁸ Article 12 and 27 of Consumer Rights Act of 2014

⁹Article 62(1) of Anti-Crisis Shield Act 2020

¹⁰ Regulation 2 of The Consumer Protection (Fair Trading) Act of 2009 - Regulated contracts referred to direct sales contracts, long-term holiday product contracts, time share contracts and time share related contracts

¹¹ Section 4 of The Consumer Protection (Fair Trading) Act of 2009 defines unfair practise.

permitting to proceed under original contractual context when the condition become under control. Thus, CTMA will not applicable to contracts formed or renewed after 25th March 2020. Therefore, in order to ascertain the relief provided under this statute it is vital to establish the the contract was formed prior to the impediment. Also, force majeure clauses and Frustrated Contracts Act (Cap.115 of 1959) revised in 2014 (hereinafter FCA) will prevail over CTMA. Hence, it is important to scrutinize the clauses in contract against the evidence available to determine whether non-performance of contract is occurred due to COVID-19 or otherwise. Hence, Singaporean law indirectly differentiated the contracts formed prior to impediment and contracts formed during the cause of impediment. Further, Singaporean laws laid the statutory remedies precedence order in an impediment.

Moreover, according to Section 5(c) of FCA, it becomes applicable for sale of goods contract other than Section 7 of the Sale of Goods Act (Cap. 393) specific goods that becomes perishable before the risk passed to buyer. The *Alliance Concrete Singapore Pte Ltd vs. Sato Kogyo(S) Pte Ltd*¹² decided that even though force majeure clauses were included in to commercial contracts as boilerplate clauses such clauses should interpreted in the their own wording and based on considering the difficulties encountered by the contract parties under the light to commercial law. Therefore, Singaporean both statutory and common laws were extended to grant better protection for the contractual parties in general and also specially for consumers at large.

Findings and Recommendations

Although modern consumer rights and protection originated in United State of America, Sri Lankan written consumer

¹² *Alliance Concrete Singapore Pte Ltd vs. Sato Kogyo(S) Pte Ltd* [2013] SGHC 127

protection laws able to trace from 10th century onwards through Badulu Dem inscription.

(Amarawansa Thero, 1969). Despite the said history, comparative to the selected two selected jurisdictions prevailing domestic sale of goods and consumer protection laws by and large does not protect consumers/buyers especially under force majeure or frustrated contractual contexts and greatly felt to fend for themselves. Thus, it is necessary for legislature to intervene to control the inclusion of consumer abusive and exploitative various exemption, limited liability, indemnity and boilerplate clauses specially reference to standard form consumer contracts to uphold consumer rights and protection in general and particularly in impediment situations.

Further, it is essential to address the lacuna in present law pertains to frustration and force majeure conditions with appropriate and effective statutory enactments similar to Frustrated Contracts Act in Singaporean law and by assigning a priority order on laws pertains to force majeure and frustration to determine which should take precedence, freezing of existing contracts until impediment is under control, insertion of force majeure clauses retrospectively for pre pandemic contracts¹³ etc. Correspondingly, application of sanctions like penalties for traders who breach consumer protection laws in impediment like Polish law will support to averse consumer victimization on conditions. Similarly, the options available under force majeure and frustration in normal cause of business for intermediaries able to get alter and increase under change of laws with government intervention on such pandemics¹⁴ therefore it is

¹³ Hutchinson, G. B. (2020) Is the Coronavirus outbreak frustration or event? *Commercial Law Practitioner*, 27(3), 42

¹⁴ Stuttaford, S. & Renton, A. (2020) Managing commercial contracts during Covid-19 pandemic, *Castletown law*, 1-3

vital to strike a balance between among producers, intermediaries and consumers in impediments. Furthermore, involving with respective global consumer protecting bodies such as International Consumer Protection Enforcement Network (ICPEN) will help to protect e-consumer both within and beyond national borders while uplifting consumer protection standards to international level during normal and impediment conditions.

V. CONCLUSION

Although literally it apparent that sellers tend to become more victimize in impediments but in reality buyers becomes the actual victims due to necessity and high dependability of essential consumer goods, restriction on accessibility, scarcity of goods and services, limitation of alternatives and substitutes for such essential commodities. The outbreak of COVID- 19 pandemic and its resultant crisis created an ideal force majeure or frustration situation which forced both legislature and law confronting host of hard questions to rethink how they can and should intervene in all dimensions of social life in ways which previously unimagined.

Therefore, crisis provided an impetus to review the ability and effectiveness of present contract law regimes for impediments and it is evident there is a gap and uncertainty in present contract law on how to address rights, remedies and reliefs for contractual parties that are formed amidst an impediments. Simultaneously, it necessary to have a more thorough look at how to legally address domestic commercial contracts formed during an impediment and respective consequences especially on domestic consumer contracts and consumer rights in such impediments.

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