IMPACT OF A PANDEMIC ON THE SPORTING WORLD: ANALYZING POTENTIAL CONTRACTUAL DISPUTES IN SPORTS DUE TO THE SPREAD OF COVID-19

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ABSTRACT

Beyond its extremely concerning health-related implications, COVID-19 has also massively impacted trade and business across all sectors. The realm of sports specifically has faced major setbacks, as most sporting leagues and events have been postponed, cancelled, or left in abeyance. Given the huge sums of money involved in these leagues/events, there are bound to be more than a few stakeholders hoping to cut their losses. This could potentially open the floodgates to litigation and a host of contractual disputes. This paper shall delve into potential defences that a party may rely upon in its attempts to defeat such litigious action. Specifically, this paper focuses on the English common law doctrine of frustration, the foundational theories behind it as well as the Indian iteration of this doctrine. The author also scrutinizes the concept of 'force majeure' and the potential of modern-day 'force majeure' clauses to combat the issue at hand, and in doing so, illustrates how contractual disputes along these lines could influence the legal framework of sports contracts in the future.

KEYWORDS

COVID-19, Frustration, Force Majeure, Contractual.

1. INTRODUCTION: COVID-19 AND SPORTS

The alarmingly rapid rate at which COVID-19, or the Coronavirus, has spread globally and the resultant colossal economic impact cannot be overstated. As early as March 2020, officials had estimated a multi-trillion-dollar loss to the global economy, and the International Monetary

Fund, expecting the situation to only worsen, similarly predicted that the adverse economic impact of this virus could culminate in another 'Great Recession' soon.[1] This came as no shock, however, considering that most countries had implemented lockdowns and/or curfews and urged citizens to socially isolate to stymie the transmission of this novel viral disease. Businesses, trades, and professions across the globe were left scrambling in an attempt to adjust to these restrictions, justified and necessary as they may have been.

The sporting world, of course, was no exception. Some of the most riveting and eye-catching sporting events of this year – be it ongoing or scheduled to start from June/July onwards – had been either cancelled, postponed, or left in an unnerving state of limbo. The 2020 Olympic Games which were to be held in Tokyo from July 24 - postponed to 2021. The 2019-20 NBA season was initially suspended indefinitely but did make a solid return (likewise for the National Hockey League in the US). Football leagues across the world too were suspended, with rumours of eventual cancellation or voiding the entire season, but with time, circumstances improved, and these leagues are now running relatively smooth. The English Premier League, the German Bundesliga, the Italian Serie A, and the Spanish La Liga are a few such prominent leagues whose top officials were tasked with making a plethora of hard decisions (with possibly dire economic ramifications).[2] The grave impact of COVID-19 on Indian sports could be best observed through the quagmire that the Board of Control for Cricket in India (BCCI) found itself in vis-à-vis the Indian Premier League (IPL). An initial postponement of the tournament's starting date to April 15 by the organizers was premised on the hope that the situation around the pandemic would perhaps gradually improve in India. However, with India imposing a 21-day lockdown period from March 25 onwards, cancellation of IPL 2020 seemed not only probable but arguably inevitable at that point of time.[3] Eventually, the IPL did come to fruition on 19 September and got concluded on 10 November 2020, with the Mumbai Indians winning their fifth championship title.[4]

[1] Eric Martin, *Coronavirus economic impact 'will be severe', at least as bad as Great Recession, says IMF,* FORTUNE (Mar. 24, 2020), https://fortune.com/2020/03/23/coronavirus-economic-impact-predictions-great-recession-2020-markets-imf/.
[2] Reuters, *Sports Events around the World hit by Coronavirus Pandemic*, THE NEW YORK TIMES (Mar. 23, 2020), https://www.nytimes.com/reuters/2020/03/23/sports/skiing/23reuters-health-coronavirus-sport.html.
[3] Press Trust of India, *IPL 2020 cancellation on cards after 21-day lockdown due to COVID-19,* INDIA TODAY (Mar. 24, 2020), https://www.indiatoday.in/sports/cricket/story/coronavirus-lockdown-covid-19-21-day-lockdown-bcci-ipl-2020-sourav-ganguly-ipl-2020-1659299-2020-03-24.
[4] Ashwin A., *IPL 2020 final: Mumbai Indians beats Delhi Capitals to win fifth title*, SPORTSTAR (Nov. 10, 2020), https://sportstar.thehindu.com/cricket/ipl/ipl-news/ipl-2020-final-mi-vs-dc-mumbai-indians-beat-delhi-capitals-defending-champion-winners-result-score/article33069354.ece.

For all aforementioned sporting leagues and events, whatever the final course of action was or maybe, going forward, it is abundantly clear that there will be an adverse economic impact of unparalleled proportions. To wit, it had been estimated that the cancellation of IPL 2020 could reduce the value of the entire IPL ecosystem by $700 million to $1 billion![5] If the IPL had been cancelled, the economic loss would have been felt by all stakeholders involved (some more so than others) – be it the organizers, broadcasters, team/franchise owners, players, coaching staff, or non-playing staff. Such a scenario would have paved the way for a host of contractual issues and disputes between these stakeholders, as each would have indubitably attempted to mitigate their losses to the greatest extent possible. Similarly, it had been suggested that organizers of the English Premier League could have been liable to pay Sky Sports a whopping $3.5 billion (£3 billion) fine if they failed to finish the 2019-20 season by the end of July, in light of the broadcasting agreement between the two parties.[6] Crucially, the outcome of such contractual claims hinged on the potential of COVID-19 to qualify as an extenuating circumstance that would have released parties from their contractual obligations during this moratorium. This paper will delve into the intricacies behind this possible defence, primarily through the lens of Indian contracts jurisprudence and the English common law.

2. AN UNAVOIDABLE BREACH OF CONTRACT?

A pandemic of this ilk, with restrictions on social mobility and interaction, is likely to render the performance of any contractual obligations impracticable or extremely difficult, if not impossible altogether. An act or omission that may usually be considered a blatant breach of contract could be possibly justified as an unavoidable consequence of the unforeseen situation that we find ourselves in now. Parties could resort to two possible defences, as per prevailing contract jurisprudence, in this regard. The first is a fundamental tenet of contract law that has found universal acceptance in one form or another, i.e., the English common law doctrine of frustration (certain jurisdictions, such as the United States, have a similar iteration – termed the doctrine of impossibility). The second is the inclusion of '*force majeure*' clauses by parties

[5] Gaurav Laghate, *Nixing IPL over Coronavirus may erode $1b value: Duff & Phelps*, THE ECONOMIC TIMES: SPORTS (Mar. 21, 2020), https://economictimes.indiatimes.com/news/sports/nixing-ipl-over-coronavirus-may-erode-1b-value-duff-phelps/articleshow/74741483.cms.

[6] Joe Brophy, *Premier League risk breaching £3bn TV contract with Sky Sports and BT Sport if they don't finish season by end of July*, THE SUN FOOTBALL (Mar. 17, 2020), https://www.thesun.co.uk/sport/football/11190607/premier-league-risk-breaching-tv-contract-sky-sports-bt-sport/.

in their contract, through which parties explicitly provide for a release from their contractual obligations in case a certain event or situation arises outside their control.

2.1. DOCTRINE OF FRUSTRATION

The doctrine of frustration is enshrined in Section 56 of the Indian Contract Act, 1872 ('the Act'); specifically, through the following statement:

> "*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.*"[7]

Essentially, this doctrine comes into play when, subsequent to the execution of a contract, circumstances beyond the control of the parties arise which render further performance of the contract "*impossible or radically different from what had been contemplated in the contract*."[8] As per Section 56, the contract would thereby be terminated and the parties will be discharged from the requirement of further performance. As this doctrine releases a party from all the promises it has made in a contract by voiding the contract altogether, courts have to be wary in its application and not invoke it lightly. Accordingly, conditions that warrant the application of the doctrine of frustration has long been a bone of contention before Indian and English courts. The two following tests/theories have been propounded in this respect.

2.2. 'IMPLIED TERM'

In *Taylor v. Caldwell*,[9] one of the seminal cases on the doctrine, the plaintiff rented out Surrey Music Hall to put on four extravagant concerts featuring a preeminent English singer as well as a variety of games and a fireworks display. Unfortunately, the music hall burned down before the concerts could take place. Despite the absence of any provision in the contract dealing with such a contingency, Blackburn J. observed that there must be an implied term in the contract that a 'particular specified thing' (herein, Surrey Music Hall) would continue to exist during the contract. Hence, the perishing of that specified thing and the resultant

[7] Indian Contract Act, Section 56 (1872).
[8] Rajdeep Choudhury, *Coronavirus: The Fallacy of Forcing Force Majeure,* BAR AND BENCH (Mar. 17, 2020), https://www.barandbench.com/columns/coronavirus-the-fallacy-of-forcing-force-majeure.
[9] [1863] EWHC QB J1.

impossibility of performance was deemed a valid reason to excuse the performance of the contract. In reaching this decision, the court gave rise to the 'implied term' theory.

The application of this theory under Indian contract law (specifically, Section 56) was refuted by the Supreme Court in *Satyabrata Ghose v. Mugneeram Bangur*[10] however, as it stated that "*Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties*." The court deemed the 'implied term' theory to fall outside the purview of Section 56 and called for its application in cases relating Section 32 of the Act (pertaining to 'contingent contracts'). Instead, the court held that relief under Section 56 is given by the court where it finds that the whole purpose or basis of a contract was frustrated by a change of circumstances which was beyond what was contemplated by the parties at the time of entering into the contract. Despite these observations, the Madras HC in *Bansilal Fomra v. Thadava Cooperative Agricultural and Industrial Society Ltd.*[11] used the 'implied term' theory as a basis for frustration, while the Supreme Court in *Union of India v. C. Damani and Co*.[12] also went on to observe that there is an implied condition in ordinary contracts that parties shall be exonerated in case performance became impossible. Thus, a claim for relief under Section 56 premised on the 'implied term' theory could still be accepted by Indian courts, though the Supreme Court's precedent in *Satyabrata* explicitly precludes the application of this theory.

2.3. THE DISAPPEARANCE OF THE BASIS OF THE CONTRACT

The theory of disappearance of the foundation of the contract can be traced back to the landmark case of *Krell v. Henry*.[13] In this case, Mr Henry had rented rooms from Mr Krell to watch processions during the coronation of King Edward VII. However, the coronation was postponed and the processions called off, as the King had appendicitis. Mr Henry consequentially refused to pay Mr Krell the balance for renting his rooms (as the purpose for which he rented the room had been defeated) and this formed the crux of the dispute between the two parties. Though there was no physical impossibility herein (in *Taylor*'s case, the music hall ceased to physically exist), it was held that there was the frustration of the 'commercial

[10] [1954] SCR 310, 322.
[11] (1976) 1 Mad LJ 39, 48.
[12] AIR 1980 SC 1149, 1154.
[13] [1903] 2 KB 740.

object' due to "*cessation or non-existence of an express condition or the state of things going to the root of the contract and essential to its performance*."

Indian courts have predominantly utilized this theory as the basis for granting relief under Section 56, ever since the Apex Court's espousal of it in *Satyabrata* and its application in subsequent notable decisions in *Naihati Jute Mills v. Khyaliram Jagannath*[14] and *Sushila Devi v. Hari Singh*.[15] In *Sushila Devi'*s case, the parties entered into an agreement to lease, for land located in a village in Pakistan (before partition). The lease deed could never be executed nor could the lessee-respondents make any use of the land as a partition between India and Pakistan quickly followed, making it virtually impossible for the respondents to even get into Pakistan. The court intriguingly observed that the impossibility contemplated by Section 56 is not confined only to something which is not humanly possible, and rather, impossibility occurs when the performance of a contract becomes "*impracticable or useless having regard to the object and purpose the parties had in view*." This pragmatic approach towards the interpretation of impossibility vis-à-vis Section 56 has continually developed, and it is now accepted that 'impossible' concerning a contract between commercial people must be understood in a commercial sense,[16] and; the test of impossibility is whether it is practically impossible for a party to perform the contract within the specified time.[17]

The aforementioned observations are particularly pertinent to numerous stakeholders in sports today. Hypothetically speaking, if the IPL had been cancelled, IPL organizers could have feasibly relied upon the 'implied term' theory to argue that the contracts they entered into in preparation for IPL 2020 were implicitly contingent on the availability of players and their ability to travel to/within India for matches. This was rendered impossible by India's ban on international travel (affecting non-Indian players in the IPL) and the lockdown on domestic travel as well (affecting even the remaining Indian players). Now, even if this argument had been rejected on the grounds that it is (a) not a case of 'physical impossibility' (insofar as the stadiums are still intact, the players are still healthy, etc.) or (b) a case to be dealt with under Section 32 of the Act, IPL organizers could still have easily availed Section 56 relief through the theory of disappearance of the foundation of the contract. With India in lockdown for the

[14] AIR 1968 SC 522, 527.
[15] AIR 1971 SC 1756.
[16] POLLOCK & MULLA, THE INDIAN CONTRACT AND SPECIFIC RELIEF ACTS 892 (14th ed. Nilima Bhadbhade, 2012).
[17] *Id*. at 892; accord *D.L. Sooryaprakasalingam Guru v. Shaw Trikamlal,* AIR 1917 Mad 509.

foreseeable future, all aspects of the tournament stood to be drastically affected – from players' match participation and training to fan viewership at stadiums, etc. Hence, in the prevailing global scenario, it would have been irrefutable that the performance of IPL-related contracts had become impracticable due to cessation of the circumstances that went to the very root of those contracts.

Additionally, the application of Section 56 in the scenario discussed above, and its correlated impact, would not have been restricted only to contracts executed by IPL organizers; rather, it would have created a ripple effect which would have been felt by every stakeholder involved in the sporting event. To elaborate, if IPL organizers had cancelled the 2020 IPL edition, this would have prompted owners/governors of each IPL team into taking action vis-a-vis their contracts with the team's coaching staff, players, stadium staff, etc. After all, why continue to incur expenses in relation to contracts that were essentially rendered incapable of performance? Especially when, in certain players' cases, these contracts involve monetary outlays to the tune of an annual Rs. 17 crores (under Virat Kohli's contract) or Rs. 15 crores (under Rohit Sharma and Rishabh Pant's contracts).[18] As explained above, these owners too could have feasibly relied upon the theory of disappearance of the foundation of the contract and rescind contracts whose 'commercial object' has been clearly frustrated. Of course, short-sighted action of this ilk, aimed at 'recouping current lost profits and expenses', may not be the ideal solution (since it could damage inter-personal relationships between players/staff and team owners), and one could argue that risk-allocation between the contracting parties with a focus on dispute avoidance and mutually agreed-upon contractual abeyance would be a more pragmatic approach.[19] However, even this approach may not be possible or desirable in all situations (for example, where a player's age or health is a concerning factor)[20] and availing contractual relief under the doctrine of frustration of contract cannot thus be disregarded as a probable outcome of the situations forced by COVID-19.

[18] Kunal Dhyani, *IPL 2020: Players to lose over Rs. 600 crore if COVID-19 forces cancellation,* INSIDE SPORT (Mar. 20, 2020), https://www.insidesport.co/ipl-2020-players-to-lose-over-rs-600-crore-covid-19-forces-cancellation/.
[19] Lakshmikumaran & Sridharan, *COVID 19 & Sporting Events: Impact Analysis*, L&S UPDATE (Apr. 8, 2020), https://www.lakshmisri.com/Media/Uploads/Documents/COVID-19-Sporting-Events.pdf.
[20] *Id.*

2.4. FORCE MAJEURE CLAUSES

Cognizant of possible supervening hindrances to their contractual performance (and to a certain extent, reluctant to subject their contract to discretionary interpretation by courts), parties have increasingly started including *force majeure* clauses in their agreements. The concept of *force majeure*–meaning 'superior force' in French–refers to an unforeseeable and irresistible event that prevents a party from performing a contract.[21] Unlike the relatively rigid common law doctrine of frustration or a legislative iteration of it (such as Section 56), these clauses afford a great deal of flexibility to the parties involved–right from choosing what events constitute *force majeure* to determining the effect of this event on the contract.

Usually, the list of catastrophic events constituting *force majeure* includes earthquakes, floods, and war etc. However, very few contracts in India include a pandemic as a *force majeure* event.[22] This can be extremely problematic, especially if the clause is drafted exhaustively to only account for those events explicitly mentioned thereunder. Alternatively, if a *force majeure* clause is open-ended with words such as 'any other happening' or 'any other such event', it will be interpreted *ejusdem generis*, to engulf within its fold other man-made happenings or natural catastrophes which are of nature and type illustrated in the clause.[23] The COVID-19 situation is extremely unique, however, insofar as it includes both a 'naturally occurring component' (i.e. the virus) and a 'government action component' (i.e. quarantines, lockdowns, curfews, etc.).[24]

Most sports contracts are bound to suffer from the issue discussed above as well, given that 'epidemic' or 'pandemic' is very rarely included in the boilerplate *force majeure* clause that these contracts include. The National Basketball Association (NBA) sticks out as perhaps the only notable exception here, as Article XXXIX of the Collective Bargaining Agreement (CBA) between the NBA and the National Basketball Players' Association (NBPA) includes

[21] Nick De Marco, *Coronavirus, Sport & The Law of Frustration and Force Majeure*, SPORTS LAW BULLETIN (Mar. 13, 2020), https://www.sportslawbulletin.org/coronavirus-sport-law-frustration-and-force-majeure/.
[22] Sugata Ghosh, *How Coronavirus may cause legal wrangles,* THE ECONOMIC TIMES: POLITICS AND NATION (Mar. 26, 2020), https://economictimes.indiatimes.com/news/politics-and-nation/how-coronavirus-may-cause-legal-wrangles/articleshow/74815141.cms.
[23] POLLOCK & MULLA, *supra* note 16, at 921.
[24] Vanessa Miller & Nicholas Ellis, *Managing the Commercial Impact of the Coronavirus Outbreak: Force Majeure Declarations,* THE NATIONAL LAW REVIEW (Jan. 30, 2020), https://www.natlawreview.com/article/managing-commercial-impact-coronavirus-outbreak-force-majeure-declarations.

epidemics under its purview.[25] Given that the World Health Organization had declared COVID-19 to be a pandemic, the NBA was empowered to invoke the *force majeure* clause of the CBA, if it wanted to. Stakeholders in Indian sports will most likely not be able to readily avail such a clause, and instead, any dispute regarding the categorization of COVID-19 as a *force majeure* event will depend greatly on the precise wording of the impugned clause and the apparent intention of the parties. These stakeholders could also possibly rely upon Office Memorandum No. F-18/4/2020 (dated 19 February 2020) issued by the Deputy Secretary to the Govt. of India, Ministry of Finance, Department of Expenditure, Procurement Policy Decision to the Secretaries of all Central Govt. Ministries/Departments, wherein it was stated:

> "*2. A doubt has arisen if the disruption of the supply chains due to the spread of coronavirus in China or any other country will be covered in the Force Majeure Clause (FMC). In this regard, it is clarified that it should be considered as a case of natural calamity and FMC may be invoked, wherever considered appropriate, following the due procedure as above*."

Though this Clarificatory Order does not directly apply to contracts in the realm of Indian sports, parties with similarly worded clauses (as that put forth in the Office Memorandum) can rely upon this order as an external aid holding high persuasive value in a bid to invoke their *force majeure* clauses. Ultimately though, given the subjectivity involved in the drafting of each contract and their *force majeure* clauses, one cannot predict the classification of this novel virus as a *force majeure* event with absolute certainty and it must invariably come down to individual factual analysis.

Furthermore, even if governing authorities in sport lay down a clear mandate that pandemics, such as COVID-19, qualify as *force majeure* events, it is still possible that activation of the *force majeure* clause could be questioned on account of a lack of good faith. For instance, the Football Players Association of India (FPAI) contended that activation of a *force majeure* clause by a club to terminate its players' contracts should be disallowed in instances where the term of the contract is nearing its end (i.e., 1-2 months left before expiration of the contract) or where a club terminates one player's contract merely to sign another player for the upcoming

[25] Collective Bargaining Agreement, Article XXXIX, Section 5 (Jan. 19, 2017), https://cosmic-s3.imgix.net/3c7a0a50-8e11-11e9-875d-3d44e94ae33f-2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf.

season.[26] Such an argument is seemingly premised on the implicit duty of good faith and fair dealing under contract law, which adds another complex layer to the termination of sports contracts in the unprecedented contractual landscape brought about by COVID-19. However, the Act is conspicuously silent on 'good faith' obligations arising under one's contractual duties and there is a glaring lack of substantive judicial pronouncements on this issue as well,[27] with the Delhi High Court's call for "*an implied covenant of good faith and fair dealing*" under Indian contract law, in *Association of Unified Telecom Service Provides of India v. Union of India,*[28] being brushed aside as obiter by the Supreme Court in the subsequent appeal.[29] Accordingly, it is unlikely that termination of Indian sports contracts via *force majeure* clauses could be reprimanded or disallowed by a judicial authority for lack of good faith or fair dealing.

On an ancillary note, pandemic insurance could also now be viewed as an essential investment for national and international sports organizers. The All-England Lawn Tennis Club (AELTC); organizers of the Wimbledon tennis tournament) bought approximately $1.9 million per year in pandemic insurance since the SARS outbreak in 2003.[30] However, what appeared to be perhaps an exercise in excessive caution, now sticks out as an extremely sensible investment since the AELTIC is set to receive an insurance payout of around $142 million in light of the cancellation of 2020 Wimbledon Championships.[31] Consequentially, one can expect more sports organizers to take their cue from the AELTC and make pre-emptive disaster management a priority going forward.

3. CONCLUSION: LESSONS LEARNED MOVING FORWARD

The unprecedented impact of COVID-19 has manifested itself in all aspects of our lives, with government lockdowns and social distancing becoming 'necessary inconveniences' that society must acclimatize to for the time being. While work-from-home may be a viable alternative for many businesses and professions during this period, it is not exactly amenable

[26] IANS, *Can't terminate contracts prematurely and sign players at same time: FPAI,* DT NEXT (Apr. 27, 2020), https://www.dtnext.in/News/Sports/2020/04/27174102/1227192/Cant-terminate-contracts-prematurely-and-sign-players-.vpf.
[27] Angad Singh Makkar, *Doctrine of Good Faith and Fair Dealing: Lacuna in Indian Contract Law*, INDIACORPLAW (Dec. 6, 2018), https://indiacorplaw.in/2018/12/doctrine-good-faith-fair-dealing-lacuna-indian-contract-law.html.
[28] 207 (2014) DLT 142.
[29] *Association of Unified Telecom Service Providers of India v. Union of India*, AIR 2014 SC 1984.
[30] *Wimbledon shows how pandemic insurance could become vital for sports, other events,* INSURANCE JOURNAL (Apr. 13, 2020), https://www.insurancejournal.com/news/international/2020/04/13/564598.html.
[31] *Id.*

for the intrinsically distinctive structure of sports industries. Cancellations, lengthy postponements, or indefinite suspensions have ensued across sports globally, which are likely to generate a plethora of future legal disputes. As highlighted above, this could force stakeholders in sports to get creative and prepare legal defences premised on the common law doctrine of frustration. Though the success of such defences would greatly depend on the facts of each case, litigation along these lines will empower courts to dole out decisions exerting momentous influence on the jurisprudence of commercial impossibility and frustration. Alternatively, parties with the foresight to include broadly-worded *force majeure* clauses or clauses which expressly categorize pandemics as *force majeure* events (such as the NBA/NBPA) could be seen as trailblazers of contract drafting, to the point where pandemics/endemics would be automatically included in any standard *force majeure* clause. Similarly, sports events organizers that have availed insurance policies whose coverage extends to pandemic-induced event cancellations, such as the AELTC, will be lauded as trendsetters for a new era of prudent sports governance. Ironically enough then, all the uncertainty and chaos accompanying COVID-19 will certainly shape the legal landscape around sports contracts for years to come.