COVID-19 and Supreme Court Contractual Disputes in India

A Law and Economics Perspective

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The COVID-19 pandemic has unleashed a catena of contractual disputes. The paper synthesises the Indian Contract Act and relevant case laws to present a legal position on *force majeure*, frustration of contract and contractual gaps, in the context of COVID-19. Using the economic analysis of law, it examines contractual disputes from various sectors, including power, construction and real estate, rental, event management and hospitality, and analyses these disputes from legal- and economic-efficiency points of view. Where contracts are not a good instrument for achieving equitable distribution of economic gains and losses, public policy is better suited to address equity and other related issues arising from long-term contracts.

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People enter into legal agreements guided by various considerations. Employment contracts are signed to secure supply of labour to the employer and income to the employee. Debt contracts provide purchasing power to the borrowers. Insurance contracts shift the burden of risk from the insured to the insurer. Contracts serve as the bedrock for exchanges related to production, commerce, and trade.

However, the COVID-19 pandemic has unleashed a catena of contractual disputes. Lockdowns, widely adopted to contain the pandemic, have made it costly for many companies and enterprises to meet their contractual obligations. Many of them find it impossible to meet the terms of the contract. Borrowers have failed to service debts; contractors have not delivered projects on schedule; employers have refused the promised employment benefits—consequently triggering legal claims of compensation from the counterparties.

Consequently, several parties have invoked COVID-19 as a *force majeure* (FM) event that refers to an occurrence that is beyond the control of the parties involved and renders contractual performance impossible. Most contracts contain an FM clause to catalogue events like war, riot, strike, etc, in which the parties would prefer to either terminate the agreement or put it on hold. "Acts of god," such as flood, cyclone, earthquake, hurricane, epidemic, etc, and "acts of government," like a prohibitory lockdown to contain COVID-19, are some events listed under the FM clause. The objective is to reduce the scope of dispute in case of the occurrence of an FM event. The problem, often, is that the clause contains ambiguous and catch-all phrases which can be exploited by one of the parties involved in the agreement. In the aftermath of COVID-19, many parties are seeking termination of agreements by citing the pandemic as either an FM event or the reason for frustration of contract. Furthermore, ambivalent statements by government agencies have added to the confusion.

Recent orders of the Bombay and Delhi High Courts suggest a tendency among contracting parties to use the crisis in a self-serving manner. Instances include OYO's decision to suspend payments to partner hotels citing commercial unprofitability due to loss of revenue (Chaturvedi 2020); retailers and other commercial tenants are demanding rental waivers due to closure of shopping malls; various electricity distribution companies (DISCOMS) are withholding monthly payments to power-producers citing reduced consumer demand. These suggest that the FM clause is being invoked rather arbitrarily.

How the courts and regulators adjudicate contractual disputes will determine the distribution of losses among the parties involved as well as the quantum of the economic cost of the pandemic. In this context, we synthesise the Indian Contract Act (ICA), 1872 and relevant case laws to present the Indian legal position on FM, frustration of contract and contractual gaps. We examine claims and counterclaims of parties in power purchase agreements, construction contracts, rental contracts, event management and hospitality contracts, among others. We identify the contexts in which contracting parties are using the pandemic disingenuously to extricate themselves from their contractual commitments.

An economic efficiency point of view guides our analysis of the merits of contractual disputes triggered by COVID-19, as well as an examination of the recent rulings by the Indian courts on FM and frustration of contract. The motivation behind the economic analysis is to draw the attention of courts and policymakers towards the important economic implication of their decisions. We find that some of the court orders seem to underappreciate the long-term economic consequences of COVID-19-related disputes.

Long-term contracts such as debt contracts, employment, and insurance contracts are quite different from typical short-term, transactional contracts, and need careful examination. This allows for a discussion on why public policy, rather than court intervention, is better suited to mitigate the economic-losses faced by debtors, employees, and the insured.

The paper discusses the economic and legal reasoning behind FM and frustration of contract. It then provides an overview of the relevant Indian legal position. This is followed by a multi-sectoral analysis that discusses claims and counterclaims of the parties involved. And, finally, a discussion on why public policy is more appropriate in addressing equity and related issues.

Economic Foundations of *Force Majeure* and Contracts

Contracts are the foundation of the market economy and a means to enhance exchange-related social surplus. To illustrate, consider a sales contract. A buyer values a good at ₹150 (v), and the producer can manufacture it at a cost (c). They write a contract where the producer promises to supply the good, six months from now, at a price of ₹120. If it turns out that $c = 100$, the social surplus[1] from this transaction will be $(v\text{-}c) = 50$ and if the two sides keep their end of the bargain and transaction takes place, the buyer and seller will gain ₹30 and ₹20, respectively. This example captures the essence of most contracts—voluntary agreements are beneficial for all parties involved. In the terminology of economics, voluntary contracts lead to Pareto superior outcomes (Singh 2018).[2] Simply put, contracts create complementary pairs of demand and supply for the mutual benefit of contracting parties.

As legally enforceable agreements, contracts provide credibility to surplus enhancing promises, of the types mentioned above. A party in breach of the contract terms must compensate the other side. Accordingly, a contract of carriage provides for the refund of ticket amount in case the carrier cancels the flight, due to circumstances beyond its control. A buyer refusing supply of goods at a contractually agreed price must forgo the advance payment or pay a penalty to the promisor. Contracts are useful instruments for minimising the risk of reneging on either side.[3]

This in turn encourages people to create opportunities of mutual benefit by making productive investments. A power producer after signing a power purchase agreement with a power distribution company (DISCOM) can make a costly investment in plant equipment and technology without fearing the refusal of supply from the distributor. Similarly, after signing a construction contract, the contractor can invest in the material needed for construction.

However, contracts are not a panacea against all kinds of risks. After signing of the contract, the cost of production for a producer (c) may turn out to be high or low depending on the economic situation at the time of production. Based on the illustration above, suppose c can take values: 50, 80, 100, 130, or 200. If c turns out to be 130, the producer will want to refuse the promised delivery unless the delivery prices is increased. However, the buyer may still want the delivery. This will result in a dispute. Many of the COVID-19-related disputes are of this type. The pandemic and attendant lockdowns have increased the cost of contractual performance for numerous parties. For example, the ban on the movement of non-essentials increased the cost of supplying industrial inputs as promised, inducing their suppliers to seek termination or suspension of the deals. In other cases, FM events can merely delay performance. For instance, lockdowns halted construction activities leading to project delays.

At times, FM makes the promise impossible to fulfil. COVID-19 is not a FM per se, instead it is the pandemic-related lockdowns and bans that made many contractual obligations impossible to meet. For instance, a ban on flights made it impossible for airlines to fly passengers as promised in air tickets. When performance becomes impossible, it is as if the cost of performance becomes infinitely large. In such a situation, the social surplus discussed above will cease to exist, even though the promisee may still demand performance at the agreed price.

To deal with such scenarios, most contracts contain an FM clause to catalogue events that can render contractual performance impossible for reasons beyond the control of parties. Acts of government like lockdowns, and acts of god like flood, earthquake, tsunami, etc, are listed under a FM clause. If a listed FM event occurs, the contract is terminated or put on-hold depending on details of the agreement. The idea is to reduce the scope of disputes in a situation where the promised performance is impossible.

COVID-19 has frustrated purpose of many contracts in that they do not serve the intended purpose anymore. For instance, a ban on large gatherings during the lockdowns meant that the very purpose of catering contracts—to be able to host friends and relatives for wedding and other occasions—was defeated for the hosts of these events. Under such a contingency, the promisee hosts would want to refuse contractually agreed delivery of the food and decoration services, etc. When a contract gets frustrated in this sense, the value of the contract to the buyer (v) becomes zero or very small and the contract ceases to generate social surplus.

The problem is that COVID-19 is an unforeseen event, and hence cannot be expected to be listed under FM clauses. Moreover, the effects of COVID-19 and lockdowns vary across sectors and across contracts within a sector. Therefore, how should courts adjudicate the pandemic-related disputes? We provide three propositions in response, which engage with a law and economic analysis:

Obligation for performance (delivery) should be waived if COVID-19 and/or lockdowns have made performance impossible: Economic analysis suggests that a party should not be absolved from its contractual obligation just because the obligation has become costly for the party. Cost fluctuations are salient to most business and commercial contracts. In our above example, from an efficiency point of view the promise should be fulfilled if $c < v$. In particular, the supplier should deliver even if the cost rises to ₹130 whereas the contract price remains ₹120. While the delivery will become unprofitable to the promisor, it will still generate a social surplus of ₹20 ($=v\text{-}c$). This reasoning follows from a widely used efficiency criterion in law and economics known as Kaldor–Hicks efficiency (Singh 2018).

However, it is difficult for a court to correctly assess c and v in the face of conflicting claims by the parties. While the contracting parties would know whether c has gone up or if v has come down, the courts usually would not. Moreover, the contracting parties know which one of them is more capable of bearing the risk. So, it is plausible that the contracting parties will allocate risk to the party who can bear the risk at a lower cost. Therefore, courts should stick to the letter of the contract. If a contract is vague about the risk in dispute, courts should apply the principle of *ejusdem generis* while interpreting ambiguous or catch-all terms—"where general words follow an enumeration of particular things, those general words are construed of the nature or class as those specifically mentioned."[4] For instance, consider the disputes between the owners of malls and wedding venues and their insurance companies; the former are demanding compensation from the latter for business income losses due to COVID-19. Such claims should be granted by the courts only if the insurance contract allows compensation in the event of an epidemic.

Courts should interpret the contract narrowly: Legally speaking, courts should apply the "four corners" rule and stick to the letter of contract (Posner 2004: 22–29).[5] When the contract has a "gap" in that it is silent about a risk, courts can use clearly defined and articulated default rules[6] to allocate risks (Cooter and Ulen 2012: 349–52). A narrow interpretation of contracts along with a clearly defined default rule provides clarity to the law and is efficient on the following counts: first, it reduces the possibility of courts assigning a risk to a party least suited to bear it (Posner and Rosenfield 1977: 117), and second, it discourages opportunistic behaviour and litigation that tend to favour the rich.

Public policy should address the issue of equity or distress caused by FM: Modification of contractual terms is fully justified if the contract violates the law or infringes upon rights of the third parties or when public interest is at stake. However, economic analysis prescribes that courts should avoid changing the terms to redistribute gains and losses among the parties. But the issues related to redistribution of economic surplus are better addressed through public policy.

Force Majeure and Case Law

The ICA does not define FM. However, the Supreme Court in *Satyabrata Ghose v Mugneeram Bangur and Others* (1954), *Energy Watchdog v Central Electricity Regulatory Commission* (2017) and *National Agricultural Cooperative Marketing Federation of India v Alimenta SA* (2020) has held that an express or implied FM clause in a contract is governed under Section 32 of ICA, which deals with "enforcement of contracts contingent on an event happening."[7]

For an occurrence to qualify as an FM event requires a case-specific evaluation of facts, nature, and subject of the contract in question. Once the invoking party establishes that the occurring event is catalogued and has rendered performance impossible, it can seek suspension or termination of the contract, subject to language of the provision.[8] For COVID-19-related disputes, the courts are required to assess: whether the contract cannot be performed under the circumstance, whether the impossibility of performance can be attributed to COVID-19 or the lockdowns, and whether appropriate steps were taken to avoid, overcome or mitigate the event and its consequences.

When a contract is incomplete regarding the list of FM events, Indian courts tend to use the principle of *ejusdem generis* while interpreting the FM clause. For instance, in *Halliburton Offshore Services Inc v Vedanta Ltd and Anr* (2020), the contract explicitly listed a pandemic among FM events. Applying the principle of *ejusdem generis*, the Delhi High Court accepted COVID-19 as an FM event in the context of the dispute. However, the court refused to accept that the non-performance by Halliburton Offshore (the plaintiff contractor) was attributable to the pandemic since the contractor had already missed several deadlines even before the COVID-19 outbreak. Therefore, the Supreme Court refused to allow non-performance by the plaintiff.

As to the "frustration of contract," the ICA does not define the word "frustration." However, in *Boothalinga Agencies v V T C Poriaswami Nadar* (1969), the Supreme Court has held that the doctrine of frustration of contract comes within the purview of Section 56. This section of the ICA deals with agreements to do acts that have become impossible after the contract was made or those acts that do not serve the intended purpose on account of an event ex post to the signing of the contract. Section 56 provides that an agreement to do an impossible or illegal act after the contract is made is void. However, relief under this section is not available if the frustration is self-induced.[9] Accordingly, the Indian courts offer relief under Section 56 of the ICA if an ex post event destroys the entire purpose or basis of contract. In *Satyabrata Ghose v Mugneeram Bangur and Others* (1954), the Supreme Court has explained that "if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it

impossible to do the act which he promised to do." In other words, to allow a claim of frustration, the courts test whether an ex post event has upset the very foundation of the bargain that was agreed or contemplated at the time of contract formation.[10]

Clarifying the distinction between frustration and FM, the Supreme Court in NAFED (2020) has held that

> Section 32 of the Contract Act (ICA) applies in case the agreement itself provides for contingencies upon happening of which contract cannot be carried out … In case an act becomes impossible at a future date, and that exigency is not provided in the agreement … the contract becomes void as provided in Section 56.

Finally, consider the issue of a contractual obligation becoming economically unaffordable after the agreement has been signed. Again, the ICA does not explicitly deal with this issue explicitly. However, in several notable judgments, including *M/S Alopi Parshad and Sons Ltd v the Union of India* (1960)[11] and *Naihati Jute Mills v Hyaliram Jagannath* (1968), the Supreme Court has held that if a contractual obligation becomes economically unprofitable for a contracting party, this in itself cannot be a ground for absolving the party of its commitment.[12] For instance, a producer cannot be allowed to renege on the promised delivery just because their cost of production has gone up after the signing of the contract.

Litigation over Contractual Disputes

Following the previous sections, where the existing case law as well as economic analysis of contract law was examined, a multisectoral analysis of contractual disputes needs attention.

Power purchase agreements: DISCOMs have invoked FM under their power purchase agreements to suspend payments to power producers. Power producers, on the other hand, have argued that the lockdown has not affected the distribution companies' ability to offtake electricity as power generation and distribution are essential services and faced no restrictions during the lockdowns.

Indeed, COVID-19 or the lockdowns did not make performance of contractual obligations by DISCOMs temporarily or completely impossible. Therefore, it cannot be treated as an FM event. Moreover, as discussed earlier, an agreement becoming commercially onerous is no ground for absolving a party of its obligations. This view has been reinforced by the Supreme Court in the Energy Watchdog case (2017), where the apex court has held that an increase in the cost of coal for a power plant cannot justify reneging on contractual obligations by it. In the same spirit, an instance of reduced demand does not qualify as FM or serve as a ground for termination of a contract. Therefore, the claims of the power producers do not have a legal ground to stand on.

Construction and real-estate contracts: The contract between home buyers and developers are governed by the Real Estate (Regulation and Development) Act (RERA), 2016. The act provides for a penalty for non-performance or delayed delivery of apartments or housing units. The lockdowns saw real-estate projects come to a grinding halt. Hence, promoters cited COVID-19 as FM under Section 6 of the RERA and have sought exemption from liability for delay in transferring possession.

The claim that lockdowns are FM by the real-estate developers has merit because during lockdowns construction activities were impossible. Moreover, even after the lockdowns were lifted, the supply chain of construction material remained broken for weeks. Although the Ministry of Home Affairs (MHA 2020b) did allow construction work, it was subject to on-site worker availability. Workers were not allowed to be brought from outside. Hence, the inevitable delay in timely completion of projects. Therefore, the union finance minister was spot-on in providing a six-month extension to registered real-estate projects on account of bans on construction during the lockdowns.

However, the defence of lockdowns cannot be allowed to justify pre-COVID-19 delays. Accordingly, the Delhi High Court in the Halliburton (2020) case has denied relief to the contractor who had breached terms of the contract even before the lockdown. The court has categorically stated that "a *Force Majeure* clause is to be interpreted narrowly and not broadly. Parties ought to be compelled to adhere to contractual terms and conditions and excusing non-performance would be only in exceptional situations."

Rental contracts: Lease agreements, leave and licence agreements, depending upon the case, serve as contracts between commercial tenants, such as restaurants, retailers, multiplexes, and the premise owners. In the aftermath of COVID-19, many tenants have sought rental waivers from premise owners, citing FM on account of government-ordered closures of non-essential businesses.

A pandemic is not a FM event under a typical lease agreement. Hence, in *Ramanand and Others v Dr Girish Soni and Anr* (2020), the Delhi High Court has observed that claims for rental waiver are permissible only if the FM clause expressly provides for it. In the absence of an FM clause, the relationship between parties is governed by Section 108 (B)(e) of the Transfer of Property Act, 1882 which requires the property to be "wholly destroyed or rendered permanently unfit for use" for invoking a rental waiver. In *Raja Dhruv Dev Chand v Harmohinder Singh and Anr* (1968), the Supreme Court has held that a temporary non-use does not render the property "substantially and permanently unfit." Thus, there is no contractual relief available to the commercial tenants. The distress caused to them by COVID-19 should be addressed through public policy.

Event management and hospitality contracts: Public gatherings were made illegal during the lockdown period. It was an FM event for suppliers of event management services—caterers, event managers, venue owners, wedding planners, and vendors for decor and entertainment—who could not provide the promised service. These groups have claimed lockdowns as FM events. On the other hand, clients who had provided security deposits/booking amounts have filed claims for refund, citing frustration of contract by the government orders. Both sides have legitimate claims.

COVID-19 and measures to contain it have affected the hospitality sector, also. For example, OYO has cited COVID-19-related reasons for claiming frustration of contracts signed with partner hotels under the "minimum-guarantee deal"—a model that guarantees revenue regardless of business generated. Affected hotels have argued that OYO was in default on payment of its minimum guarantee since December 2018 and was using the pandemic to brush away its contractual obligations (PTI 2020). Criteria developed above for using FM clause or frustration of contract suggest that there is no justification for OYO's action. Also, loss of revenue and attendant losses cannot be a ground for breach or termination unless the contract explicitly allows a termination owing to reduced profits. Besides, OYO seems to be the superior risk bearer as the terms of the minimum guarantee deal were framed by OYO. Therefore, OYO's case is untenable.

Insurance contracts: Mall owners, airline operators, wedding venue owners have filed claims with their insurance companies for business income losses during the lockdowns. Contesting these claims, insurers have argued that the only admissible losses are those arising out of damage to business equipment or premises, unless the insurance is a comprehensive all-risk/open-peril policy—without an exclusion of pandemics. The problem is that the losses caused by FM tend to be highly correlated. That is, an FM event simultaneously affects many insurees. For this reason, insurance policies normally do not allow compensation for epidemics. On the other hand, premium amounts for all risk/open-peril commercial insurance policies designed for epidemics are very high and have found very few takers (Walsh 2020).[13]

Most insurance policies require a physical loss to trigger compensation claims, such as losses caused by fire, windstorms, burglary, and machinery breakdown. Neither the lockdown nor the pandemic have caused actual physical damage to the property. Therefore, from a legal viewpoint, insurers are not liable for business-interruption losses (BIL). Moreover, the insured cannot claim benefits under the rule of "contra proferentem," which is a rule of interpretation where ambiguity in the wording of the policy/contract is to be resolved against the party who prepared it. This is because the Supreme Court in *Sushilaben Indravadan Gandhi v the New India Assurance Company* (2020) has clarified that the rule be applied only if there is real ambiguity in the wording of the policy. In fact, as far as accident claims are concerned, the Supreme Court has tended to interpret insurance contracts strictly as evident in *Export Credit Guarantee Corporation of India Ltd v M/S Garg Sons International* (2014): "It is a settled legal proposition that while construing the terms of a contract of insurance, the words used therein must be given paramount importance, and it is not open for the Court to add, delete or substitute any words."

Debt contracts: A debt contract is a commercial arrangement between a lender and the borrower at a specified rate of interest. Following COVID-19, many debtors have found themselves incapable of servicing their loan. In view of the severity of the crisis, the Reserve Bank of India (RBI 2020a, 2020b) allowed a moratorium for six months on equated monthly instalments (EMIs) for all term loans. However, in *Gajendra Sharma v Union of India and Anr* (2020) and other connected petitions, petitioners have challenged the RBI notification to the extent that it allows charging of "interest on the interest" during the moratorium period. The petitioners have filed these petitions under Article 32 of the Constitution[14] claiming that charging of interest on interest is violative of their fundamental rights to life and livelihood guaranteed under Article 21 of the Constitution. They have demanded for full interest waiver since their means of livelihood were curtailed during the lockdown.

Applying the discussion on "courts interpreting contracts narrowly" suggests that this applies to debt contracts, as well, and whether the genuine distress of debtors is best addressed via public policy.

Employment contracts: A similar logic applies to employment contracts that are explicitly based on the principle of "no work, no wage."[15] Employment contracts secure supply of labour to the employer and income to the employee. From a legal viewpoint, it is a voluntary exchange wherein employers and employees make commitments to provide wages and labour, respectively. During the government ordered lockdowns, such exchanges were either prohibited or limited for those employed in non-essential businesses.

In a notification, the MHA (2020a) ordered employers to make payment of wages to workers in industries, commercial establishments, and shops without deductions for the lockdown period. Subsequently, the order was withdrawn but remained effective for the first 50 days covered by it. Employers have challenged the order. In *Ficus Pax Private Ltd v Union of India* (2020), employers have argued that the order: interfered with the right of employers by forcing their establishments into insolvency, and even caused a loss of control of business; violated the principle of "equal work, equal pay" and "no work, no pay" as it did not distinguish between workers not working or workers working in permitted establishments during the lockdown; and was arbitrary, unreasonable and violative of Articles 14 and 19(1)(g) of the Constitution.

On strict application of contract law, the claim of employers has merit. Employers are not contractually bound to pay wages without work—unless the contract entitled the workers to wages. Moreover, the economic stimulus packages provided to businesses had no concessional component to ease the burden of wages. Rather than being guided by a contractual perspective, in an interim order the Supreme Court has asked the parties to settle the dispute through negotiations, failing which a request can be submitted to the concerned labour authority.

The stance of the Aurangabad bench of the Bombay High Court is a little strange. In *Rashtriya Shramik Aghadi v State of Maharashtra* (2020), the petitioner—a contract labourers' union—has argued that its members were willing and able to work for the defendant temple trust; but due to the lockdown, they could not. The Aurangabad bench observed that the employer cannot use the principle of "no work, no wage." It held that

> this Court cannot turn a Nelson's eye to an extraordinary situation on account of the Corona virus/COVID-19 pandemic. Able bodied

> persons, who are willing and desirous to offer their services … are unable to work since the temples and places of worships in the entire nation have been closed … Even the principal employer is unable to allot the work to such employees in such situation.

The court has accepted the fact that the inability of the defendant temple trust to employ workers was due to an act of government. Moreover, neither workers nor the court has argued that the trust was contractually bound to pay the wages for no work. Still, the court ruled that "the principle of 'no work, no wages' cannot be made applicable in such extraordinary circumstances," and ordered that full wages be paid for the months of March, April and May 2020.

Contracts versus Public Policy

While contracts are pivotal to the functioning of an economy, they are not a good instrument for achieving equitable distribution of economic losses caused by COVID-19. The pandemic has taken a heavy toll on the livelihood of workers in both the informal and formal sector, owners of small shops and enterprises. Their interests should trump financial interests of banks, corporations, and insurance companies. However, this does not justify modification of contract terms by courts, to protect the debtors, employees, and the insurees, wherein changing the terms of contract can be counterproductive!

As discussed earlier, the contract price depends on how the risks are allocated between the contracting parties. Consider debt contracts, where a bank will charge a higher rate if it must forgo the interest on counts of some risks faced by the debtors. Indeed, allowing an interest waiver can be counterproductive. It will raise interest rates for future debt contracts, hurting the long-term interest of borrowers and investors. In addition, allowing the demand for an interest rate waiver can jeopardise the stability and financial health of banks, harming everyone in the process.

Court rulings on employment contracts, such as in Rashtriya Shramik Aghadi (2020), create obligations for employers well beyond their contractual responsibilities. While big employers can absorb the cost of uncontracted wages, many small and medium employers do not have pockets deep enough to absorb the costs imposed on them by such judicial findings and are bound to resist. The result will be unnecessary litigation that small employers and workers cannot afford.

COVID-19 has inflicted large-scale losses across sectors. However, contractual disputes to reallocate these losses are a zero-sum game as both sides—employees and employers, debtors and banks, insured and insurers, tenants and owners—have been hit hard by the crisis. Larger public-policy issues are involved here in balancing the interests of the two sides. Basic economic reasoning and international experience suggest that a public policy comprising of monetary support, tax concessions and waivers is better suited to achieve the objective.

For instance, the Pandemic Risk Insurance Act, 2020 in the United States (US) establishes a system of shared public and private compensation for business losses incurred during the pandemic. Compensation is paid by the government if the losses exceed a given threshold. Similarly, Singapore's COVID-19 (Temporary Measures) Act, 2020 offers protection to individuals and businesses unable to meet their contractual obligations on account of COVID-19. The act does not absolve contractual obligations but provides for a "fair sharing of economic hardship between the government, landlords and tenants" by granting partial rental relief to small and medium enterprises (SMEs) and tax waivers for property owners (Monetary Authority of Singapore 2020).

Similarly, the Denmark Parliament has passed a law providing temporary wage funding schemes to prevent COVID-19-related layoffs by private companies.[16] Besides, the Danish government has offered a subsidy scheme to help companies meet expenses, such as rent, insurance, maintenance, etc. Another good example of using public policy comes from Germany. To save jobs and livelihoods, the Bundestag (national Parliament) has passed a law[17] that protects pandemic affected companies from insolvency, while also protecting the interests of lenders.

In India, the moratorium on EMIs, the RBI's COVID-19 regulatory package have helped cushion the economic hardship for debtors and SMEs. Similarly, amending the Insolvency and Bankruptcy Code, 2016 has restricted the filing for corporate insolvency resolution process for a period of six months. However, the only meaningful way to help such workers, small businesses and debtors is through additional fiscal support. In a welcome move, the government has agreed to bear the cost of compound interest during the moratorium period for small loans and credit card dues up to ₹2 crore. Further, the government has also decided to offer a "cash back" to borrowers who did not avail the moratorium and paid their dues on time. The workers who have lost their jobs should also be compensated directly by the government through direct benefit transfers or through funds available under the Employees' State Insurance Corporation (ESIC). This approach to sharing of economic losses through public policy will enhance and contribute to social welfare while preserving the sanctity of contractual relations and the associated benefits.

Conclusions

We have argued that COVID-19 is not FM per se. It is the lockdowns and not the virus that has made it impossible for airlines, hotels, caterers, and other service providers to deliver as promised; contractors to complete real estate and infrastructure projects on schedule. Under such contexts, the promising party is justified to use the FM clause. However, this does not imply that the promisor is excused from fulfilling conditions attendant to the use of FM clause. In other contractual disputes, such as those involving power producers and DISCOMs or OYO it appears that parties have used the FM clause disingenuously to extricate themselves from their contractual commitments, often to cover pre-COVID-19 defaults.

The economic analysis of disputes covered in the paper has attempted to draw the attention of courts and policymakers towards the economic implication of their decisions. Our analysis of the recent court orders on COVID-19-related disputes suggests that in several cases, courts seem to underappreciate the

long-term economic consequences of their rulings. We have used the inferences following from economic analysis to propose criteria for efficient and predictable judicial rulings. We have argued that clear and predictable rulings are a public good that enhance social welfare by encouraging settlements through bilateral negotiations or other dispute resolution mechanisms, thereby avoiding socially wasteful litigation. However, for multiparty contracts where economic losses are highly correlated, public policy is better suited to cater the interests of all stakeholders.

NOTES

1 Mainstream Law and Economics defines "social surplus" from a transaction as the gross gains for the buyer (V) minus the cost of production (C), that is, social surplus is V-C. If a contract imposes costs on a third party, then the social surplus will be (V-C) minus the third-party costs. In other words, the social surplus is defined as "all the gains" minus "all the costs" associated with a transaction. For details, see Singh (2018).

2 Outcome x is said to be Pareto superior to outcome y, if the former is at least as good as the latter for all parties involved, and at least one of the parties strictly prefers x over y. See Singh (2018).

3 Generally, fairness is not guaranteed especially by the *standard form contracts* between parties with unequal bargaining power. However, even these contracts promote (Pareto) efficiency as long as they are voluntary.

4 For details refer *State v Eckhardt* (1910).

5 The rule implies that if there is an ambiguity of terms of a contract, the court must rely on what is written in the agreement rather than using extraneous evidence.

6 A default rule is a risk allocation criterion applied by courts when the contract is silent on the risk or cost under-dispute.

7 One of the very first judgements on the concept of *force majeure* is *Edmund Bendit and Anr v Edgar Raphael Prudhomme* (AIR 1925 Mad 626).

8 For instance, in *Standard Retail Private Ltd v G S Global Corp and Others* (2020) the contract only allowed the seller to either terminate the contract or delay its performance for a reasonable period.

9 *Raja Dhruv Dev Chand v Harmohinder Singh* (1968), also, see *Ramanand v Girish Soni* (2020).

10 For greater details refer *Energy Watchdog v CERC* (2017).

11 In this case the Supreme Court held that the promisor (supplier of ghee) could not wriggle out of his pre-war contract merely because World War II had increased his costs. It held that commercial difficulty did not amount to impossibility to perform.

12 This is true internationally. See *Tsakiroglou and Co Ltd v Noblee Thorl GmbH* [1962]. The appellants/seller had agreed to ship groundnuts to Hamburg by sea. The seller argued that he could not ensure supply as after signing of the contract, the Suez Canal was closed for navigation due to military operations by Great Britain and France against Egypt. The contract had a *force majeure* clause. However, the court held that closing of the Suez Canal did not make the delivery impossible. Appellant goods could have shipped around the Cape of Good Hope, even though this route was almost twice as long, and the freightage would have cost much more.

13 In 2018, an insurance product called Pathogen RX was offered by Marsh in collaboration with Munich Re and Metabiota to protect businesses in the US from an infectious-disease outbreak. But, it was unable to sell a single policy for months (https://www.marsh.com/pr/en/campaigns/pathogenrx.html).

14 Article 32 gives right to a citizen to move to the Supreme Court if their fundamental rights have been violated.

15 For greater details, refer the definition of wages under Section 2(h), Industrial Disputes Act, 1947. Also, see Section 7(2) and Section 9 of the Payment of Wages Act, 1936 which authorises the employer to make deductions for absence from duty grounds. Also, see the S Supreme Court's ruling in *Airport Authority of India v S N Das* (2008).

16 See the act on the Legal Position of Employers and Employees in Wage Compensation of Companies in connection with COVID-19 (https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/Bgbl_Corona-Pandemie_EN.pdf%3Bjsessionid=41DF935443698765777F4F3DDC2BBB02.1_cid324?__blob=publicationFile&v=2).

17 See act to Mitigate the Consequences of the COVID-19 Pandemic under Civil, Insolvency and Criminal Procedure Law, 2020 (https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/Bgbl_Corona-Pandemie_EN.pdf%3Bjsessionid=41DF935443698765777F4F3DDC2BBB02.1_cid324?__blob=publicationFile&v=2).

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