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# ГРАЖДАНСКОЕ ПРАВО

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## The doctrine of frustration and the doctrine of force majeure in Indian law enforcement practice in the digital era

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**Abstract.** The article delves into the comparative legal analysis of the doctrines of force majeure and frustration in Indian legislation, which are the most relevant in contemporary scenarios. The objective is to examine the legal essence of these concepts, identify similarities and differences, and outline the characteristics of circumstances leading to contract impossibility and constituting force majeure events. Through a review of Indian legislation and judicial precedents, the article seeks to explore the application scope of these doctrines, including in the context of digitalization and the rise of electronic document management. The employed methods include theoretical approaches such as formal and dialectical logic, comparative-legal logic, interpretation, and description. Specific scientific methods comprise juridical-dogmatic analysis and the interpretation of legal norms. The results highlight that in Indian law, the doctrine of force majeure is invoked in the presence of a specified «force majeure event» outlined in the contract, while «impossibility» encompasses other unforeseen circumstances not covered by the force majeure clause. Notably, in Indian practice, «impossibility» is construed as «impracticability» not solely as literal physical «impossibility». In conclusion, a key distinction between frustration and force majeure lies in the event's impact on the contract. Nevertheless, despite these distinctions, both legal institutions share a common objective of mitigating potential losses for contractual parties when unforeseen circumstances impede the fulfillment of obligation.

**Key words**: doctrine of force majeure, doctrine of frustration, impossibility of execution, electronic document management, the Indian Contract Act 1872, digitalization, electronic contracts

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# Доктрина тщетности (a doctrine of frustration) и доктрина форс-мажора (a doctrine of force majeure) в индийской правоприменительной практике в цифровую эпоху

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**Аннотация.** Проведен сравнительно-правовой анализ наиболее актуальных доктрин форс-мажора («force majeure») и тщетности договора («frustration») в индийском законодательстве. *Цель:* исследовать правовую природу указанных концепций, выделить общие черты и различия, а также признаки обстоятельств, влекущих невозможность исполнения договора и являющихся форс-мажорными, посредством анализа индийского законодательства и судебной практики исследовать сферу применения данных концепций в условиях цифровизации и увеличения электронного документооборота. *Методы*: теоретические методы формальной и диалектической логики, сравнительно-правовой, интерпретации, описания; применялись также частно-научные методы: юридико-догматический и метод толкования правовых норм. *Результаты*: доктрина «форс-мажора» в индийской практике применяется в случае определенного «форс-мажорного события», предусмотренного в контракте, тогда как «невозможность» охватывает другие непредвиденные обстоятельства, которые не подпадают под действие положения о форс-мажорных обстоятельствах. При этом в индийской практике «невозможность» означает «неосуществимость», а не просто буквальную физическую «невозможность». *Выводы:* основным отличием концепции фрустрации от форс-мажора в индийской практике является влияние события на договор, при этом, несмотря на имеющиеся различия, данные правовые институты имеют общую цель, которая состоит в уменьшении возможных убытков участников договора в случае возникновения непредвиденных обстоятельств.

**Ключевые слова:** доктрина форс-мажора, доктрина тщетности договора, невозможность исполнения, электронный документооборот, Индийский закон о договорах 1872, цифровизация, электронные договоры

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## Introduction

India has emerged as a successful developing country and is a strategic partner of Russia across several sectors of the economy. Bilateral scientific and technical cooperation between Russia and India spans various fields, including nuclear energy, military-technical cooperation, and space exploration. Noteworthy differences in the national legislations of the two countries, belonging to distinct legal systems, predetermine the use of agreements as the primary legal instrument for facilitating international relations among commercial enterprises. While the foundational legal principle of "pacta sunt servanda" (contracts must be respected) holds paramount significance in contract law, commercial scenarios often present challenges where external factors beyond the control of the parties involved may render the fulfillment of obligations in foreign economic transactions unfeasible.

Natural calamities, political and economic instability, repercussions of the COVID-19 pandemic, as well as restrictions and sanctions impact not only national economies but also individual economic entities engaged in foreign trade agreements. These factors introduce additional risks of contract execution impossibility. This issue assumes heightened significance in today's era characterized by digitalization and rapid technological advancements. The prevalence of electronic contracts is escalating rapidly, offering advantages such as enhanced business communication and streamlined interaction between parties. It brings more convenient ways of processing documents, which, in turn, leads to the widespread use of electronic document management and remote digital technologies in commercial practice (Begichev, 2022a). However, the use of electronic contracts in civil transactions, including foreign trade dealings, presents novel challenges for legal scholars and practitioners that necessitate prompt resolution. The execution of these transactions might encounter obstacles due to unforeseen circumstances. Adapting traditional legal principles to the digital era poses a complex challenge, prompting a reevaluation of established doctrinal approaches. In this regard, it appears pertinent to analyze the doctrines of force majeure and frustration within Indian legislation in the context of a digitally evolving society. These legal doctrines permit the discharge of a debtor the cessation of contractual obligations upon the occurrence of circumstances leading to implementation impossibility. Such analysis is crucial for devising optimal legal mechanisms to safeguard contract parties and mitigate risks for Russian companies engaging in international economic activities.

## Definition of force majeure and frustration

The use of the doctrines of force majeure and frustration as legal models and norms in situations of contractual impossibility is well-documented in the scientific literature (Fonotova & Indinok, 2022).

Let us first examine the historical foundation of these doctrines. Since ancient times, the impact of unforeseen, uncontrollable circumstances has been acknowledged. Even in Ancient Indian law, principles were established for exemption from liability in the event of performance impossibility. In the Arthashastra or Political Science (Statecraft) Kautilya mentions "general disasters," encompassing various natural calamities such as fires, floods, diseases, famine and plague[1]. Similarly, in the laws of Manu dating back to the 2nd century BC, "a misfortune that occurred by the will of the gods" served as the basis for exempting the carrier from a penalty (Laws of Manu)[2].

The term "vis major" (superior force) originates from Roman law and denotes "the inevitability of harm despite the precautions of a diligent owner (diligentia diligentis patris familias)" (Pirviz, 2010). Roman jurists defined "vis major" as "an unavoidable event that cannot be resisted, even if it was known in advance – casus cui resisti non potes" (Novitskii & Pereterskii (eds.), 2014). Moreover, if a loss occurred as a result of force majeure (e.g., during an earthquake, landslide or shipwreck), the debtor was released from liability, except in cases where force majeure event was preceded by the debtor's negligence.

The modern formulation of the doctrine of force majeure emerged in the French Civil Code. It should be noted that both earlier and current editions of the code[3] do not provide a legal definition of this concept; they simply stipulate that losses resulting from force majeure, leading to non-fulfillment of an obligation, are not subject to compensation. In such cases, the debtor is obliged to provide evidence that their failure or delay was not due to their fault and that they acted in good faith, borrowing from Roman law. Under French law, the characteristics of force majeure are unforeseeability and unavoidability.

In contemporary legal doctrine, various theories seek to elucidate the legal nature of force majeure, which also affects the burden of proving its occurrence, including the objective, subjective and objective-subjective theories. The objective theory understands force majeure as an event unrelated to the behavior of the parties to the obligation, having an external nature in relation to the debtor. According to this theory, the obligation does not terminate, and the debtor remains liable if the impossibility arises from reasons other than unforeseen event and force majeure. This theory is grounded in the external

[1] Arthashastra or «The Science of Politics» (1993). Translation from Sanskrit edited by V.I, Kal'yanova M. Russian Academy of Sciences «Ladomir» Scientific Publishing Center.

[2] The Laws of Manu, trans. by Elmanovich S.D., verified and corrected by Ilyin G.F. (1960) Publishing House of Oriental Literature.

[3] Civil Code of France (Napoleonic Code) dated March 21, 1804 (as amended and supplemented of September 1, 2011) Electronic resource. Consultant Plus Reference Legal System. Available at: https://online11.consultant.ru/cgi/online.cgi?req=doc&base=INT&n=55696&cacheid=7818B7C6E6CD55E6BD421E47FEB2D44A&mode=splus&rnd=m0cdIg#6U1nM7UiwI4b42lp [Accessed 12nd March 2024].

indicators of events that, while causing damage, effectively eliminate the probability of the debtor's culpability in breaching the obligation.

The subjective theory considers force majeure as the actions of third parties or natural phenomena that entail harmful consequences that cannot be eliminated or prevented, even if the debtor exercises the care required under the given circumstances (Tololaeva & Tserkovnikov, 2023a; 2023b). Thus, the event is assessed based on the debtor's behavior, i.e., whether it was possible for them to prevent the event by exercising due diligence. According to the subjective theory, force majeure is dependent on the fault of the relevant party to the contract.

The literature also highlights the objective-subjective theory (Korshunova, 2008) of force majeure, which considers both objective, external and subjective factors, such as the absence of the debtor's fault in the occurrence of negative consequences due to unforeseen circumstances. Advocates of this theory, led by the German legal scholar L. Ennekzerus, define force majeure as events that, although external in origin, lead to negative consequences that cannot be prevented, despite the taken efforts (Ennekcerus, Kipp & Wolf, 1950).

In Russian civil legislation the term "force majeure" is not used. The Civil Code of the Russian Federation refers to "force majeure circumstances," which are understood as extraordinary and unavoidable under given conditions. The Supreme Court of the Russian Federation[4], in its Review of certain issues of judicial practice related to the application of legislation and measures to counter the spread of a new coronavirus infection in Russia, also acknowledges the relative nature of force majeure. It should be noted that the concepts of force majeure, emergency and unpreventability are evaluative; they lack clear definition and boundaries. In this context, the necessary criterion that allows the court to determine a circumstance as a force majeure circumstance, considering the assessment of specific conditions and facts, is the simultaneous manifestation of these characteristics.

The Supreme Court established a legal position defining emergency as an event exceeding ordinary circumstances, unrelated to life risk, and unavoidable if all parties similar to the debtor could not prevent its occurrence or consequences.

Consequently, modern domestic science identifies several characteristics of force majeure circumstances, including extremeness, unpreventability, external origin, relative nature, and the causal link between the event and its resulting consequences.

In international law enforcement practice, force majeure is defined as "a situation in which an entity is forced to act contrary to an international obligation as a result of force majeure or an uncontrollable unforeseen event" (Lukashuk, 2007).

[4] Review of selected issues of judicial practice related to the application of legislation and measures to counter the spread of the new coronavirus infection (COVID-19) No. 1 on the territory of the Russian Federation (approved by the Presidium of the Supreme Court of the Russian Federation on April 21, 2020). Bulletin of the Supreme Court of the Russian Federation, No. 5, May, 2020, Official documents, No. 18-19, 05/19/25/2020 (weekly supplement to the Accounting, Taxes, Law newspaper). Consultant Plus Reference Legal System. Available at: https://online11.consultant.ru/cgi/online.cgi?req=doc&base=LAW&n=350813&cacheid=5E39F74BD549D70FCA213A024950DA9F&mode=splus&rnd=m0cdIg#Zk3oM7UMVgVpbWF72 [Accessed 12nd March 2024].

Provisions addressing events that entail a situation of impossibility or significant difficulty in contract performance are also enshrined in a number of international acts. For instance, paragraph 1 of Article 79 of the Vienna Convention of 1980[5] contains the following provision: "a party is not liable for a failure to perform any of its obligations if it proves that the failure was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences." Similarly, the grounds for exemption from liability for non-performance of obligations under a commercial contract are defined in paragraph 1 of Art. 7.1.7 UNIDROIT Principles[6].

Hardship provisions are contained in Art. Art. 6.2.1–6.2.3 Principles of UNIDROIT. "There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished." The essential conditions for the application of this legal institution are: the events became known to the party (arose) only after the conclusion of the contract; they could not have been foreseen (reasonably taken into account) by the parties at the time of concluding the contract; are beyond the control of the parties; and according to the contract, the party did not assume the risk of such an event occurring.

When examining approaches to formulating the concept of "force majeure" in international acts, it is worth noting that Article 79 of the Vienna Convention of 1980 refers to circumstances that represent an obstacle beyond the control of a party. The same reference exists in Article 7.1.7. UNIDROIT Principles, which is titled Force Majeure. Consequently, the developers of the UNIDROIT Principles have incorporated the concept of "obstacle beyond control" set out in the Vienna Convention of 1980 using the French approach. Additionally, "the use of abstract categories by the developers of the Vienna Convention, such as "obstacle beyond control" instead of the concept of "force majeure", in turn, ensures its universality" (Kanashevsky, 2008).

Differences in legal ideology and national legal systems have led to variations in the interpretation of concepts such as "force majeure", "hardship" and the doctrine of frustration. These differences complicate the formulation of universally applicable definitions. The formulation of force majeure proposed by the developers of the UNIDROIT Principles seems to encompass situations included in the doctrine of frustration but is not identical to them.

[5] United Nations Convention on Contracts for the International Sale of Goods (Concluded in Vienna on April 11, 1980) Consultant Plus Reference Legal System. Available at: https://online11.consultant.ru/cgi/online.cgi?req=doc&rnd=DXcaVQ&base=CMB&n=17547&dst=100136&field=134#YHboM7UoFYipsWJo [Accessed 12nd March 2024].

[6] Principles of international commercial agreements (UNIDROIT Principles) (1994). Consultant Plus Reference Legal System. Available at: https://online11.consultant.ru/cgi/online.cgi?req=doc&base=LAW&n=14121&dst=1000000001&cacheid=0EFB13F20ACB10A959250419E77C1C61&mode=splus&rnd=DXcaVQ#32soM7UjNyu0C3wB [Accessed 12nd March 2024].

The doctrine of frustration is a widely accepted common law concept aimed at relieving parties from performance of an obligation in the event of an unforeseen occurrence at the time of contract formation. A key feature of this legal institution is that the actual performance, following an unforeseen event, would significantly differ from the originally agreed terms, rendering such performance meaningless and excessively burdensome.

In contrast to force majeure, the doctrine of frustration terminates the contract rather than suspending it, and does not imply its modification. Additionally, the doctrine of frustration applies only in cases of contractual obligation breaches where the parties did not include corresponding provisions (such as a force majeure clause) in the contract.

The definition of the concept of futility of a contract was initially articulated by Lord Radcliffe in the case of Davis Contractors Ltd v Fareham UDC, 1956: "Frustration occurs whenever the law recognizes that without the default of any of either party, a contractual obligation has become incapable of being performed because of the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. "Non haec in foedera veni" (Latin for "this is not what I promised to do")" (Beatson, Burrows & Cartwright, 2010). The formation and subsequent development of the doctrine of frustration in English law has been the subject of research by a number of scientists (Protopopova & Botvinnik, 2020) and modern English theory categorizes all grounds for applying the doctrine of frustration into three groups of situations: "impossibility, frustration of purpose, and illegality of execution" (Gimadrislamova & Timofeeva, 2021).

In domestic legal science, the opinion is expressed that the doctrine of frustration, formulated in common law, combines several different institutions of Romano-Germanic law. Russian law does not include a legal definition of impossibility of execution. However, the Civil Code of the Russian Federation (Chapter 26) encompasses a system of grounds and methods for terminating contractual obligations, and the list of these grounds is not exhaustive. According to a number of researchers, the legal mechanisms for implementing the termination of obligations in the event of impossibility of fulfillment contain the provisions of Articles 416, 417 and 451 of the Civil Code of the Russian Federation (Arhipov, 2020).

In general, it should be noted that in the Russian civil doctrine, clear distinctions between the categories of impossibility of performance and circumstances of force majeure do not exist, as confirmed by the position of the Supreme Court of the Russian Federation[7]. The court distinguishes between force majeure and impossibility of performance based only on the removability of the circumstance preventing the fulfillment of the obligation. According to the court, the occurrence of force majeure circumstances does not itself terminate the debtor's obligation if

[7] Resolution of the Plenum of the Supreme Court of the Russian Federation No. 6 of June 11, 2020 On some issues of application of the provisions of the Civil Code of the Russian Federation on termination of obligations. Consultant Plus Reference Legal System. Available at: https://online11.consultant.ru/cgi/online.cgi?req=doc&base=LAW&n=355061&dst=1000000001&cacheid=613E74B72751CE128244E589657B6A42&mode=splus&rnd=DXcaVQ#Tn8pM7UOW6Xzeq3m [Accessed 12nd March 2024].

performance is possible after they cease to exist. In this case, the party is released from liability for delayed performance; however, the contract may establish special conditions for terminating obligations due to force majeure. Consequently, the obligations of the parties are preserved if the circumstance is temporary.

Based on the specifics of the institution itself, as well as based on the peculiarities of English contract law, particularly the absolute nature of the obligation, we can conclude that the application of the doctrine of frustration entails the termination of contractual obligations and the release of the party from their performance in the event of such circumstances where further performance becomes impossible and does not imply a change in the contract. Meanwhile, the doctrine of force majeure implies the release of the debtor from liability for non-fulfillment or improper fulfillment of a contractual obligation in the event of unforeseen, extraordinary circumstances, which are often temporary in nature and do not always entail termination of the contract.

## Application of force majeure and frustration doctrines in Indian legislation

It is widely acknowledged that the English legal tradition has significantly shaped the formation of modern India's legal system. A substantial influence stemming from England's system of governance has impacted India's constitutional framework and legal institutions of India. As Rama Rao (Rao, 1958) pointed out, many laws in India were created by English minds. However, it is essential to recognize that Indian law possesses distinct characteristics influenced by several factors such as the country's unique material and spiritual development, customs, traditions, standard of living, and the amalgamation of diverse legal systems.

As highlighted by V.A. Belov, the legal experiment conducted by English lawyers in implanting, codifying, and applying general principles of English law within Indian legislation forms the basis for numerous English laws. The Indian Contract Act of 1872[8], for instance, is a prime example of such legislation, with its Chapter VII provisions laying the groundwork for the English Sales of Goods Act 1893 (Belov, 2014).

Moreover, the resemblance of many legal institutions contributed significantly to the assimilation of English common law. For example, as noted by N.A. Krasheninnikova, the adoption of the English concept of consideration within Contract Law found a parallel in Hindu law (Krasheninnikova, 1982).

Despite the considerable influence of the English law on Indian law development, it is crucial not to perceive Indian legislation as a mere replica of English law, particularly concerning interpretations of doctrines like frustration of contract and force majeure.

In India, the regulations governing force majeure (Article 32 of the Contract Law) and frustration (Article 56 of the Contract Law), blend statutory requirements with civil law principles, notably from French law, defining force majeure

[8] The Indian Contract Act, 25 April 1872 [Electronic resource]. Available at: https://www.indiacode.nic.in/handle/123456789/2187?sam_handle=123456789/1362 [Accessed 12nd March 2024].

as any subsequent event or contingency impacting a party's ability to fulfill an agreement.

Legal practice in India employs a complex vocabulary with nuanced meanings to address performance impossibilities, encompassing terms like objective or subjective impossibility, impracticability, purpose defeat, and force majeure.

Indian legal scholars note similarities between the doctrines of force majeure and impossibility, with force majeure releasing the debtor from obligations under specific contract terms, while the doctrine of impossibility covers unforeseen circumstances not covered by contractual force majeure clauses[9].

While the terms "frustration" and "force majeure" are not explicitly mentioned in the Contract Act, the concept of impossibility is utilized to address such scenarios.

The term "impossibility" is employed in Article 32 of the Contract Act, pertaining to contracts made under specified conditions. If a contract hinges on the occurrence of an uncertain future event, it remains ineffective until the event materializes. If the event fails to unfold within a specified period and becomes impossible, the contract is deemed void and its execution terminates.

Under Article 56 of the Contract Act, the legal ramifications of the impossibility (illegality) stemming from unforeseen event are delineated. As highlighted by V.A. Belov, these provisions attribute such consequences not to the debtor's culpability, but to "whether he knew, or, acting with reasonable prudence, should have known" about such impossibility (illegality). Belov astutely observes that "situations rarely arise where, at the contract's inception, fulfillment of an obligation is still possible, but one party (the debtor) knows with certainly that it will soon become impossible" (Belov, 2014). This viewpoint aligns with English law, were a contract is not voided if an anticipated event occurs at the contract's initiation. In this case we can speak about the possible distribution of risks between the parties. In Indian law, the doctrines of force majeure and frustration have matured through judicial precedents, shaped over decades, including the influence of English courts decisions. The seminal case of Davis Contractors Ltd v Fareham UDC, where Lord Radcliffe defined the doctrine of frustration, significantly impacted Indian jurisprudence.

Indian jurisprudence defines force majeure as an uncontrollable event preventing one or both parties from fulfilling contractual obligations. The Madras High Court in Mohamed Hussain vs The Government of Tamil Nadu, 2021 described force majeure as a contract clause specifying events whose occurrence entails non-fulfillment of contractual obligations.

In the case of Dhanrajamal Gobindram vs Shamji Kalidas And Co., 1961, the Supreme Court defined force majeure as an unforeseeable or uncontrollable event, encompassing acts of God (e.g. floods and hurricanes) and human actions (e.g., riots, strikes and wars) aiming to shield the performing party from uncontrollable consequences.

[9] Raj A., Naidu V. M. Extending the Doctrine of Impossibility to Court Orders: A Conundrum//NLUJ Law Review. 2021. Available at: http://nlujlawreview.in/contract-law/extending-the-doctrine-of-impossibility-to-court-orders-a-conundrum [Accessed 12nd March 2024].

The Supreme Court's ruling in National Agricultural Cooperative Marketing Federation of India (NAFED) vs Alimenta SA, 2020 delineated the grounds for applying Article 32 and Article 56 of the Contract Act. The court noted that Article 32 applies when unforeseen circumstances specified in the contract render unenforceable, along with the consequences of their occurrence.

The determining factor in the application of Article 32 of the Contract Act is the presence of implied or explicit conditions in the contract, providing for a situation where the fulfillment of obligations will be considered completed upon the occurrence of a conditional event. In this case, the court determines whether such a clause will be a conditional contract in relation to the event based on the change in the obligations of the parties provided for by the contract when it was concluded upon the occurrence of the specified event.

If there is no such clause or the event does not fall within the scope of force majeure as provided for in the contract, then section 56 of the Contract Act will apply. This section deals with situations where the performance of an obligation was feasible at the time the contract was made, but due to some subsequent action or situation or situation beyond the control of either party, it became impossible, thus undermining the contract's foundations.

The provisions of Article 56 of the Contract Act are applied in cases where the contract does not include a clause regarding force circumstances that would render it execution impossible. It is important to note that an agreement to perform an impossible action is deemed invalid. Furthermore, if, after the contract is concluded, performance becomes impossible or illegal, the contract becomes void upon the occurrence of such impossibility or illegality. Additionally, the specified circumstances must align with the indications of impossibility. Once it is established that an event has rendered the contract's performance impossible, the contract is terminated or void and the defaulting party is released from liability without recovery of damages.

The doctrine of frustration, as highlighted by the court in Boothalinga Agencies vs V.T.C. Poriaswami Nadar, 1968, is part of the concept of terminating obligations due to the impossibility or illegality of an act agreed upon by the parties and, therefore, falls under Section 56 of the Contract Act.

The fundamental concept underlying the doctrine of frustration in Indian law is the literal impossibility of performance. As observed by the court in the case of Delhi Development Authority v Kenneth Builders and Developers Limited, 2016, if the parties foresee circumstances that could affect contract performance but expressly stipulate that the contract will remain valid despite such circumstances, the doctrine of frustration does not apply. In this scenario, despite the occurrence of a specific event, obligations remain in force, and obligations are subject to fulfillment.

The effectiveness of a contract referred to as "frustration", depends on the actual events and their impact on the ability to fulfill the contract. In the case National Agricultural Co-Operative Marketing Federation of India v. Alimenta S.A. Civil Appeal 667, 2020, the court stated that if one party claims there was "frustration" and the other

party disputes this, the court must decide the issue "ex post facto" based on the factual circumstances of the case.

In the case Energy Watchdog vs Central Electricity Regulatory, 2017, the Supreme Court, citing Chitty on Contracts (31st edition, paragraphs 14–151), indicated that such concepts as "hindered" or "prevented" must be interpreted according to their meaning in the particular context, taking into account the words that precede and follow them. Additionally, it is essential to take into account the nature and content of the general terms of the contract. By considering this, the court interpreted these concepts as meaning "completely" prevented or "partially" hindered. Thus, the court found that the unforeseen event (increase in coal prices) referred to by the party did not affect the purpose of the contract; accordingly, the doctrine of frustration cannot be applied.

In determining the grounds for application of the doctrine of frustration under Section 56 of the Contract Act in the case of Industrial Finance Corporation of India Limited v. Cannanore Spinning and Weaving Mills Limited, 2002, the court simultaneously assessed the existence of the following three conditions: the existence of a valid and enforceable contract between the parties; the non-fulfillment of part of the contract, and the impossibility of fulfilling the obligation under the contract after its conclusion.

The Indian doctrine of impossibility of performance is broader than the English doctrine of frustration of contract, since it covers not only initial but also subsequent impossibility of performance. The English doctrine of frustration is relevant in cases where an event prevents contract performance, assuming such performance was initially possible.

In the context of the study, the Supreme Court decision in the case Satyabrata Ghose v. Muneeram Bangur & Co, 1954 not only clarified the scope of Section 56 of the Indian Contract Act but also highlighted the differences between the English and Indian doctrine of frustration. In this particular case, the developer undertook a large-scale land development project for the construction of residential buildings, selling subdivided lots to potential homeowners. Some plots within the development scheme were seized by the state, leading to a legal dispute. The developer informed the buyer about this and proposed to consider the obligations under the transaction terminated. As an alternative, the developer suggested that the buyer pay for the site in full and accept performance immediately after the land was returned and circumstances permitted completion of the work begun. The developer then indicated that if none of the proposed options were implemented, the contract would be considered terminated and any amounts paid would be forfeited. The plaintiff was not interested in either of the two options and filed a claim to recover the paid amounts from the developer.

The Supreme Court acknowledged that the government's order was unforeseen but refused to find that it materially affected the contract. The court noted that the period of validity of the order to withdraw the plots was limited and that other plots of land were still available for development. The court also noted that difficulties in performance may not be a ground for claiming that the fundamental basis of the contract has been affected. Additionally, when concluding the contract, the parties were aware of possible

difficulties in fulfilling their obligations under the contract, taking into account the conduct of military operations in this territory. Moreover, the agreement did not specify a specific time frame for construction; the work had to be completed within a reasonable time, which, given military events, could be lengthy. The key point that the court made in this case is that "impossibility" in section 56 of the Contract Act means "impracticable", that is, "impracticability", and not just a literal physical "impossibility". In English law, when applying the doctrine of frustration, this refers to the interpretation of the implied terms of the contract on which the parties based the assumption regarding the performance of the obligation. When an unforeseen change in circumstances makes the contract impossible to perform, the English courts apply the principle of reasonableness. Indian law regulates these institutions by the rules of positive law, namely Articles 32 and 56 of the Contract Act and does not leave this issue to the discretion of the parties. Impossibility under section 56 of the Contract Act is not limited to anything that is not physically possible. If the performance of a contract becomes impracticable or pointless, taking into account the object and purpose that the parties had in mind when concluding it, then, it should be assumed that the performance of the contract becomes impossible.

Thus, Indian jurisprudence indicates that the occurrence of an unforeseen extraordinary event under the given circumstances entails the impossibility of fulfilling the contract and exempts the party from its further performance, due to physical impossibility, while the English doctrine uses the concepts "impossibility" and "frustration" as synonyms.

It should be noted that although Indian courts do not directly refer to English precedents when deciding disputes, they may be relevant in illustrating how English courts handle similar cases. This was evident in the above-mentioned case where the terminology of the English doctrine of frustration was used to explain the concept of "impossibility".

As noted by Terdi E.K. "despite the fact that the Indian institution of impossibility of fulfillment of obligations cannot be called directly adopted from English law, it is somehow based on the English doctrine of frustration of contract and for the most part corresponds to its content" (Terdi, 2018).

Typically, parties include in the terms of the contract a force majeure clause containing a specific list of events that may significantly affect the party's ability to fulfill its obligations, as well as the consequences of such events. However, often the parties limit themselves to a short, open-ended clause. Courts usually interpret such a clause based on the principle of "ejusdem generis". For example, in the case of Dhanrajamal Gobindram vs Shamji Kalidas and Co, 1961, the Supreme Court interpreted the term of the contract "subject to the usual force majeure clause" based on the customary commercial practice in the industry in which the parties were operating.

In addition to the above circumstances, we can also highlight the following main points that courts take into account when applying the consequences of the doctrines of force majeure and/or impossibility of performance.

Firstly, the occurrence must be unforeseen. The circumstance that renders the fulfillment of the obligation impossible and/or illegal must be unforeseen by the parties during their negotiations and execution of the contract. In particular, circumstances that could have been reasonably anticipated in the normal course of business do not meet the criteria of unforeseenness. For example, price fluctuations and difficulties in fulfilling a contract do not meet the criterion of unforeseenness.

It is important to note that Russian courts have repeatedly emphasized that the increase in average prices for products, the financial crisis and the unfavorable economic situation is not considered as force majeure, but rather natural business risks. However, in certain cases, Russian courts recognized unpredictable price increases that arose from geopolitical situation and sanctions as force majeure circumstances. Russian courts also classify circumstances such as difficulties in working with counterparties, transportation breakdowns, and unfavorable weather as business risks.

Secondly, Indian courts indicate, for example, in the case of Satyabrata Ghose v. Muneeram Bangur AIR, 1954 that the events must be of such a nature that they materially affect the purpose of the contract. When evaluating whether the purpose of the contract was significantly affected, the court proceeds from whether the fulfillment of essential obligations established by the parties when concluding the contract was impossible. If the court finds that the unforeseen event did not significantly affect the purpose of the contract, it will not be recognized as a basis for applying the consequences of contract futility. As the Supreme Court explained in the above-mentioned case, a party must not only prove that the event that rendered the contract impossible to perform occurred, but also prove that the event materially affected the purpose of the contract as originally determined by the parties.

Third, a party cannot be excused from performing its contractual obligations simply because such performance has become burdensome due to the occurrence of an unforeseen event. As noted by the court in M/S. Alopi Parshad & Sons, Ltd vs The Union Of India, 1960, a change in prices or exchange rates alone does not constitute grounds for exemption from fulfilling obligations under the contract, nor does it give the party the right to demand compensation higher than that agreed upon by the parties when concluding the contract.

Fourthly, the parties must comply with the notification procedure. A party shall notify the other party of the occurrence of circumstances that hinder the fulfillment of obligations under the contract. The Contract Act, similar to the Civil Code of the Russian Federation, does not stipulate rules requiring a party to notify the counterparty of the occurrence of such circumstances, however, courts take into account the existence of such notification. Furthermore, in practice, parties often stipulate in contracts that if one party does not timely notify the other party of the occurrence of an unforeseen event, the affected party subsequently loses the right to refer to these circumstances. Failure to comply with notification deadlines, as well as the absence of necessary elements, such as a detailed description of the nature of the event and its impact on the fulfillment of a contractual obligation, entails a denial of the application of force majeure consequences or contract futility.

However, there are exceptions. Thus, in the decision in the case of MEP Infrastructure Developers Ltd. v. South Delhi Municipal Corporation W.P. dated June 12, 2020, the court indicated that due to the presence of a notification from the Ministry of Road Transport defining COVID-19 as a force majeure event, the parties were not obliged to follow the notification procedure, despite the contract containing specific obligations for notifying in the event of a force majeure event. However, researchers suggest that this practice is mainly applicable to government contracts involving a government agency as one of the parties[10] (Shetty Smaran & Budihal, Pranav, 2020).

It is worth noting that when safeguarding their interests, the parties have the right to rely on legal guarantees that ensure their right to protection, regardless of the type of evidence provided and the methods of gathering and recording it (Begichev, 2022b; Rusakova & Frolova, 2022). This is particularly significant in the era of digitization and increasing electronic document flow (Bezbakh & Frolova, 2022).

The Karnataka High Court confirmed the validity of the email correspondence in the case of Sudarshan Cargo Pvt. Ltd. v. M/s. Techvac Engineering Pvt. Ltd, 2013. The court clarified that a communication sent by email falls under Section 2(b) of the Information Technology Act, 2000. Therefore, the parties have the right to send notification of the impossibility of fulfilling the contract and/or the occurrence of unforeseen circumstances by email, unless otherwise provided by the terms of the contract.

One of the challenges that legal science faces today is the application of the doctrine of frustration and/or force majeure in relation to electronic contracts.

Article 160 of the Civil Code of the Russian Federation establishes a rule that, when making a transaction, it is necessary to have the opportunity to reproduce its contents unchanged on a tangible medium[11]. Indian legislation does not directly contain these provisions.

The sources of legal regulation of legal relations in the field of electronic contracts in Indian legislation are the Contract Act and the Information Technology Law of 2000. Thus, according to Art. 10 of the Information Technology Act, "a contract expressed in electronic form shall not be considered unenforceable solely on the ground that such electronic form or means were used for that purpose"[12]. However, the contract must contain all the essential conditions established in Article 10 of the Contract Act.

[10] Shetty Smaran and Budihal Pranav. Force Majeure, Frustration and Impossibility: A Qualitative Empirical Analysis (August 1, 2020). Available at: http://dx.doi.org/10.2139/ssrn.3665213 [Accessed 12nd March 2024].
[11] Civil Code of the Russian Federation (Part One) No. 51-FZ of November 30, 1994 (as amended on March 11, 2024) Electronic resource. Consultant Plus Reference Legal System. Available at: https://online11.consultant.ru/cgi/online.cgi?req=doc&base=LAW&n=471848&dst=100915&edition=etD&rnd=0p0mDA#kVXcx8UKSY3vqDfC [Accessed 12nd March 2024].
[12] The Information Technology Act, 2000 [Electronic resource]. Available at: https://www.indiacode.nic.in/bitstream/123456789/15983/1/the_information_technology_act%2C_2008.pdf [Accessed 12nd March 2024].

It appears that the doctrines of force majeure and frustration apply to electronic contracts in the same way as traditional contracts concluded in writing.

Based on the analysis of Indian judicial practice, it should be noted that counterparties rarely resort to the doctrine of frustration due to the rather complex conditions for applying this concept. In practice, the parties prefer to include a force majeure clause in the terms of the contract, which allows to prove the occurrence of force majeure and obtain relief from liability, rather than rely on the provisions of the doctrine of contract frustration.

## Conclusion

The doctrine of frustration of contract and the doctrine of force majeure share similar features such as their external nature, unforeseenness, irresistibility, and the occurrence of an event after the conclusion of the contract. However, they differ in that for the doctrine of "frustration" to apply, the possibility of fulfilling an obligation must be excluded and its purpose must disappear upon execution, while the force majeure concept does not always entail the termination of obligations. The main difference between the two concepts is the impact of the event on the contract. Despite these differences, both legal institutions share a common goal, which is to reduce possible losses of participants in contractual relations in the event of unforeseen circumstances affecting the feasibility of obligations.

In Indian practice, the doctrine of force majeure is applied in the event of the occurrence of a force majeure event provided for in the contract terms, while the doctrine of impossibility of performance covers other unforeseen circumstances that are not covered by the force majeure clause established in the contract. Moreover, in Indian practice, "impossibility" refers to actual impossibility, and not just a literal physical impossibility.

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