

Understanding the differences between Act of God & Force Majeure

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Anurag Pandey

NALSAR University of Law

“Editor’s Note: *The paper is on the differences between an Act of God and the concept of Force Majeure. The author defines both terms with reference to case laws and traces their origins along with an analysis of various case laws.”*

INTRODUCTION

This project is a research paper on the defense of Act of God and Force Majeure and will be dealing in details all the characteristics of these two clauses of inevitable accidents, their origin, present use, evolution, and what all is there in these clauses with their definitions derived from various authorities.

Introduction to Subject

Inevitable Accidents are defined as any accidents that could not have been foreseen or prevented by the due care and diligence of any human being involved in it.^[1] In another definition, An Inevitable accidents are those unavoidable accidents which could not by any possibility is prevented from happening by the exercise of ordinary care, Caution and skill. It does not apply to anything which the party to the accident can avoid or could have avoided.^[2] in the word of Sir Frederick Pollock :

“not avoided by such precautions as a reasonable man, doing such an act then there, could be expected to take”^[3]

It also includes any force which cannot be controlled by any human being. **“Act of God”** (*Vis Major*) a term in the world of legal practices which many defendant sides use to prevent themselves from getting convicted for the accusation they are facing. The term is one of the defenses present in the defense of *Inevitable Accident*. The other defense under the clause of inevitable accidents is **Force Majeure**. Literally both the term means the same but in legal uses both are different. Where act of God includes all causes of an inevitable accident to be occasioned by elementary forces of nature not connected with any agency of man or any other cause directly or indirectly^[4] on the other hand, the definition of Force Majeure is much wider term which not only includes the natural forces but also include other causes which may not be related to nature and can be connected to human agency directly and indirectly, but on whom the humans involved in the accident don’t have any control or the incident whose happening was inevitable and which can can’t be controlled.^[5]

“Force majeure clauses excuse a party from performance if some unforeseen event beyond its control prevents performance of its contractual obligations.” [6][7]

By the above mentioned definition of Force Majeure we can understand its subjectivity and wide range of clauses and examples include Wars, Machinery Breakdown, Strikes, and etc. [8]

Both these defenses are used by parties of contract and even in tort cases to get acquitted of the charges they are facing cause of not performing of there duties. As Act of God now runs under the clause of force majeure so in this projects both these will be dealt.

Origin

This term Act of God is tracing its history and use back down to 13th century specifically referring to all the acts which god has undertaken and is beyond the reach of human control. [9] This term later evolved in the legal field and was first used by Lord Ellenborough (16 November 1750 – 13 December 1818) in 1803 as:

“By Common Law, Carriers are insurers against every loss of property entrusted to their care, except losses arising from the Act of God, or the King’s enemies.” [10]

Later it was defined in various books and dictionary including Peter Simmonds’ *Dictionary of Trade Products*, 1858 as

“Any act which is outside human control and therefore not the responsibility of any individual or corporation.” [11]

Till this time this phrase was in use in both legal field and insurance sector where the insurance companies cannot be claimed for the damages occurring by any event which is covered under the phrase “Act of God”.

Force Majeure has traced back its origin to the “Napoleonic Code” [12], where as in common law system the concept has evolved from one of “physical impossibility” to “frustration of purpose” (U.K.) to “commercial impracticability” (U.S.). [13]

In Present Use

At present the defense of Act of God is claimed under the cases of contract where the parties to the contract are not able to fulfill their obligation or liabilities and in tort cases if the incidents which have caused damaged to the plaintiff is by the consequence of any force which was not under the control of humans.

In Contracts and Insurance

This clause along with the clause of force majeure can be seen and observed in various policy and agreement papers of insurance and other contract where the clause of both Act of God and Force Majeure can be find mentioned as the defense to the parties to the contract if the obligation was not fulfilled because of the uncontrolled force of nature or incident like wars and machinery or act of states which can be beyond control. In Indian context the clause of Act of God is observed mostly under the clause of force majeure and

is mentioned under the drafting of the act for highway infrastructure development^[14] and in Sec. 20 of Delhi Rent Act 1995^[15]. Where the Delhi Rent Act is absolving all the duties of renter to pay damages to land lord, if, the damages caused by any action, which is included under Force Majeure. In the former one the action which is under the force majeure if caused damaged will be compensated by the Government of India.

In most of the policy paper of insurance company generally dealing with insurance of property and business the damage caused by Act of god or force majeure is not covered.^[16] The same is observed under the case of *Union of India (UOI) v. Prabhakaran Vijaya Kumar and Ors.* Where the honorable judge expressed the Act of god and other form of inevitable accidents as an exception to be paid damages and of strict liabilities.^[17] In another case of *Kerala Transport Co. v. Kunnath Textiles* the court held that those acts which don't include human interference will be considered act of god but other inevitable accident will be included as Force Majeure and if both mentioned in the term of contract or insurance policy as non claimable, and if damages caused by acts which lies any of the two clauses then the petitioner can't claim the damage.^[18]

In other case of *P.K. Kalasami Nadar v. K. Ponnuswami Mudaliar and Ors.*, the court defined Act of God as

"... an act of god will be an extra-ordinary occurrence due to natural causes, which is not the result of any human intervention"^[19]

In this case the court has also said that accidental fire which may not be caused by human interfere cannot be said as act of god.

In the case of *Kerala Transport Co. v. Kunnath Textiles* the court also held that act of god is and can be an exception to absolute liability and can be claimed as a defense.^[20]

All the above cases are related to insurance or carriers transport services where the term Act of god has been deemed by court to absolve the liability of the parties and in case of *Kerala Transport Co. v. Kunnath* the court has also defined Force majeure as a defense to absolve the liabilities and it is to be noted that in all the cases because of the circumstances which was not under the control of humans, and if damages were occurred to the good because of those incidents then it can't be claimed from the insurance policy.

The above cases were dealing with the insurance companies but even coming to the cases related to a buyer and a seller or service provider, Act of God, and Force majeure act as a key point in contract and in the case of *Smt. Inacia P. Carvalho v Desk To Desk Courier and Cargo Limited* the honorable court has held that even in the event of Force Majeure a respondent can't plea for absolving of his duties and liabilities which he himself voluntarily took by the contract whose consent was also fulfill and is legal and enforceable and if that has happen then the respondent is liable to compensate the other parties of the contract and that Force Majeure and Act of god doesn't include every instances to cover up the deficiency in their services and their negligence. In this case the honorable court also said that it is always believed in good faith that a matter of professionalism will always be

shown by performing the obligation of contract and for escaping the liabilities by asking the plea of Force Majeure in any negligent unprofessional action is not acceptable. Hence, following the words the court in this case held the respondent liable for not delivering the courier with the clause of urgent printed above it on time and ordered the same to compensate the plaintiff.^[21]

In case of *Dharnrajmal Gobindram v. Shamji Kalidas* the honorable Supreme Court of India held that if the clause of Force Majeure is not defined then the contract can be deemed void.^[22]

In Cases of Torts and Other Civil Suits

Act of God

In the cases of torts and other civil cases Act of god and Force Majeure are used as a general defense under inevitable accidents.^[23] This term (Act of God) is mentioned and deemed as a defense for the accusation of strict liability under the case of *Burnie Port Authority v General Jones Pty Ltd.*^[24], and for this they have referred to the judgment of *Rylands v. Fletcher* from where the term of strict liability was coined. The judgment is as follows:

“The same result is arrived at on the principles referred to by Mr. Justice Blackburn in his judgment, in the Court of Exchequer Chamber, where he states the opinion of that Court as to the law in these words: “We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is primâ facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the Plaintiff’s default; or, perhaps, that the escape was the consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient.”^[25]

But in the case of *Railroad Company v. Reeves* the judge of the case has laid down some of the guide lines for the use of Act of God in its judgment which are:

“2d. If you shall be satisfied from the proof that the tobacco was injured while the cars upon which it was being shipped were standing at the depot in Chattanooga by a freshet which submerged the cars containing the tobacco, and that no human care, skill, and prudence could have avoided the injury, then such injury would be occasioned by the ‘act of God,’ and the defendant would not be liable. But, if you believe that the cars containing the tobacco were brought within the influence of the freshet by the act of the defendant, or its agents, and that if the defendant or agents had not so acted the tobacco would not have been damaged, then the injury would not be occasioned by the ‘act of God,’ and the defendant would be liable for the damage sustained.”^[26]

And

“.....and if you believe that while the train was so at the depot at Chattanooga the tobacco aforesaid was damaged as alleged, then the returning of the train to

Chattanooga was the immediate cause of the injury, and not the freshet; and the injury would not be caused by 'the act of God,' man's agency having intervened, and the defendant would not be relieved from liability, and the plaintiff will be entitled to a verdict in his favor." [27]

And

".....If the damage could have been prevented by any means within the power of the defendant or its agents, and such means were not resorted to, then the liability of the defendant would not be relieved, and the jury must find for the plaintiff." [28]

In this case the court has also relied on the maxim of "*causa proxima non remota spectator*" [29], which means that The immediate, and not the remote cause, is to be considered [30] for deciding whether the defendant was liable for his negligent act or whether his duties are absolved because of the sudden events which is beyond the control of man and is coming under the ambit of act of god. Hence, in the situation mentioned in the above mentioned judgment strict liability is defeating the defense of act of god and making the defendant liable for his negligent act.

Force Majeure

The same situation is now there in the case of Force Majeure where before deciding the case the court, have to look to the side that whether the act of defendant was playing the remote cause of damage or immediate and if it is found out that the later is in play then the defendant will be held liable, and it is to note that under common law both necessity and force majeure should be seen together and then should be interpreted. [31] In the case of *Lebeauvin v Richard Crispin & Co.* the honorable court has defined what all can be included in the clause of force majeure and its definition in which it has stated that

"Force Majeure. This term is used with reference to all circumstances independent of the will of man, and which it is not in his power to control, and such force majeure is sufficient to justify the non-execution of a contract. Thus, war, inundations, and epidemics, are cases of force majeure; it has even been decided that a strike of workmen constitutes a case of force majeure." [32]

In the case of *Md. Serajuddin v State of Orissa* the honorable high court of Orissa stated various situations which is not included in Force Majeure not considering the fact that it is hampering the work to be done or not. In this case the court mentioned that the non availability of land or bad weather will not be included under force majeure. [33]

In all the case mentioned above we can see and observed the subjectivity of the clause which has also showed us that this clause is still not a standardized clause and it depends on the precedents and on the discretion of court to accept what can be in this clause and what can't, referring to the situation of the cases.

Some famous and important cases of Act of God and Force Majeure

One most interesting thing about these clauses is that we have the right to sue the god for claiming compensation. In the history of legal field there are two cases which have attracted the attention of people by suing the god.

Pavel M. case

In this case the Pavel M. a Romanian prisoner serving 20 year imprisonment after getting convicted for committing murder filed the suit against Romanian Orthodox Church as the representative of god in Romania for failing to prevent him from devil and has also mentioned his baptism as binding contract. This suit was dismissed as defendant not being a person or company and stating the civil suit not being in jurisdiction of the court.[34]

Ernie Chambers

In the U.S. state of Nebraska, State Senator Ernie Chambers filed a suit in 2008 against God, seeking a permanent injunction against God's harmful activities this was done with an objective to publicizing the issue of public access to court system. But this case from the beginning have faced a problem of the address of god where he can be notified which is very essential for a case to proceed and even by various replies of petitioner based on the acknowledge of god done by court in this particular case god is acknowledged about the case filed against him. This case went through appeal to the Supreme Court of Nebraska where it was finally rejected on the very same ground of address.[35]

Matsoukis v Priestman & Co

In this case the judges of the case rejected the fact that force majeure is different than vis major and rejected the case on this ground even mentioned that both the clause included only and only the supernatural forces causing any unforeseen event hence only act of god, and other event which are not under Act of God in other words are not natural events cannot plea for defence of Force majeure or Act of God or inevitable accidents.[36]

Lebeaupin v Richard Crispin & Co.

The honorable court defined force majeure with all its characteristics and exception for the first time but even in judgment mentioned about the subjectivity of the clause and the discretion of court to decide whether a situation will be in force majeure or not for that case.[37]

Railroad Company v. Reeves

The judgment of this case gave the test of remote and primary cause test for the cases of act of god (Vis major) and Force Majeure. It has also specified the clause "sudden" for the incident and if the incident was not sudden and unforeseeable then it cannot take the plea of Act of god (Vis major) or Force Majeure.[38]

Smt. Inacia P. Carvalho v Desk To Desk Courier and Cargo Limited

This Indian case has included the professionalism as an exception to force majeure basically with the incident which according to the defendant of the case made the obligation vested on him by contract unable to perform. The court concluded that professionalism has certain specialties regarding the purpose or service for which the person or firm was hired and the professionalism of the person should understand the seriousness of the task taken, its urgency and importance then only should carry forward

the work on another day and mere excuse of a public holiday or strike which was foreseen by him and he can perform that duty and obligation by doing it before that event, can't absolve his duties and liabilities.^[39]

Evolution of Act of God & Force Majeure

The term Force Majeure has faced the evolution much more than that of act of god. Where previously both the cause were dealt separately now act of god is included under the wide ambit of Force Majeure and this can be observed in many contract and policy papers.^[40] Even as mentioned above, in the case of *Matsoukis v Priestman & Co.* the judge denied the fact that there is any difference in Force Majeure and Act of God, and went to their decision with the literal meaning^[41] but in the consecutive years as we are seeing the legal meaning of both these term has changed and Force Majeure is now a much wider term, with Act of god under its ambit. Now even the use of Force Majeure is a difficult task compare to the past years because of various characteristics included in the clause with its exception and tests which has been mentioned above and the language in which it has been defined and interpreted.^[42] We can even see that these terms of defense which was previously dealing only with the cases of torts but now is dealt in huge scale in the case of contract and Insurance, to absolve the liabilities of the parties.^[43] And even professionalism is checked on the plea of Force Majeure as per dealt in the case of *Smt. Inacia P. Carvalho v. Desk To Desk Courier and Cargo Limited.*

CONCLUSION

After going through all the sources, I conclude saying that the defense of Act of God (Vis Major) and Force majeure are not absolute and have changed considerably in changing times. There are various features added to the clauses in times which have changed the characteristics of these two words and their legal meaning too. Where the Act of God is still much or less the same with some minor changes mostly in the language and its interpretation the Clause of Force Majeure has got its ambit wider and now is even including Act of God in itself, hence both the clauses in a broader meaning are not separate any more. Hence, now we can conclude by saying that the clauses of defense has changed and developed significantly in times and is not as was mentioned in their sources.

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^[1] <http://www.merriam-webster.com/dictionary>

^[2] <http://www.articlesbase.com>

^[3] Ibid

^[4] Ratanlal & Dhirajlal, *The law of Torts*, 25th edition reprint 2009, Chapter V, sub issue 8. Inevitable Accidents, Pg. 92

^[5] Ibid

^[6] <http://www.lexology.com/library/detail.aspx?g>

^[7] Article 79, *The United Nations Convention on Contracts for the International Sale of Goods ("CISG")*

^[8] *Lebeaupin v Richard Crispin & Co.*, [1920] 2 K.B. 714

^[9] <http://www.phrases.org.uk/meanings/23550.html>

- [10] Ibid
- [11] Ibid
- [12] <http://www.lexology.com/library/detail.aspx>
- [13] Ibid
- [14] <http://www.infrastructure.gov.in/pdf/NH-SixLaning.pdf>
- [15] The Delhi Rent Act, 1995, Sec. 20 (5)
- [16] <http://www.icicibank.com/Personal-Banking/insurance/general-insurance/home-insurance/pdf/Home-Silver.pdf>
- [17] Union of India (UOI) Vs. Prabhakaran Vijaya Kumar and Ors. 2008(5)ALLMR(SC)917
- [18] Kerala Transport Co. v. Kunnath Textiles, 1984ACJ440
- [19] P.K. Kalasami Nadar v. K. Ponnuswami Mudaliar and Ors., AIR 1962 Mad 44
- [20] Kerala Transport Co. v. Kunnath Textiles, 1983 KLT 480
- [21] Smt. Inacia P. Carvalho v Desk To Desk Courier and Cargo Limited, 2001(3) CPR 248
- [22] Dharnrajmal Gobindram v. Shamji Kalidas [A.I.R. 1961 S.C. 1285]
- [23] Supra 1
- [24] Burnie Port Authority v General Jones Pty Ltd. ,[2003] UKHL 61
- [25] Rylands v. Fletcher, (1868) LR 3 HL 330
- [26] Railroad Company v. Reeves, 77 U.S. (10 Wall.) 176
- [27] Ibid
- [28] Ibid
- [29] Ibid
- [30] <http://legal-dictionary.thefreedictionary.com/Causa+proxima>
- [31] Supra 8
- [32] Lebeaupin v Richard Crispin & Co., [1920] 2 K.B. 714
- [33] Md. Serajuddin v State of Orissa, AIR 1969 Ori 152
- [34] Romanian prisoner sues God Novosti Russian News and Information Agency, 18 October 2005, accessed 20 October 2008
- [35] “Suit Against God Thrown Out Over Lack of Address “, *Associated Press* as published on yahoo.com. Retrieved 10/15/08.
- [36] Matsoukis v Priestman & Co,[1915] 1 K.B. 681
- [37] Supra 31
- [38] Supra26
- [39] Supra 20
- [40] <http://business.financialpost.com>; <http://www.icicibank.com/Personal-Banking/insurance/general-insurance/home-insurance/pdf/Home-Silver.pdf>
- [41] Supra 35
- [42] <http://business.financialpost.com>
- [43] Ibid