



The Future Of Contract Law: Lessons From The Pandemic

Priya Yadav

LLM (Corporate Law) Student, GD Goenka University

Abstract:

Around the world, the COVID-19 pandemic has created hitherto unheard-of interruptions to commercial contracts and company operations. Along with restricting travel, the Indian government's lockdown has also interfered with the global supply of goods and services. Businessmen's capacity to fulfill their contractual duties has been hampered, which has led to operations being delayed or commitments not being fulfilled. In these situations, the parties to the contract may use the pandemic as justification for extending the terms of the agreement, including the date of performance, considerations to be paid, etc., or for exempting and terminating their contracts.

Keywords: COVID-19 pandemic, Digital Contract, Force Majeure

Introduction

Globally, the Covid-19 (Covid) public health disaster caused economic and social instability. Regulations to stop the spread of infection were introduced without much notice, giving businesses and individuals little time to prepare. As a result of the steps taken to stop the virus's spread, many contracts were suddenly rendered illegal, impractical, unaffordable, or possibly hazardous to the public's health. Customers discovered that occasions they had scheduled for months or years, such holidays and weddings, were postponed or cancelled. Significant cost overruns and major disruptions were experienced by businesses. Many successful businesses found themselves on the verge of going bankrupt as a result of the closure or reduction of production facilities. There were a variety of business reactions to the crisis. Some companies cancelled contracts, sometimes opportunistically, using legal doctrine (frustration) or contract clauses (force majeure) to excuse non-performance or justify withdrawal. In an attempt to preserve relationships and lessen the impact of the crisis, some used more cooperative approaches, attempting to renegotiate agreements or work with counterparties. To keep the economy afloat and guarantee the continuous supply of necessary goods and services, the government then launched an unprecedented series of interventions into contract enforcement.

For thousands of years, contracts and agreements have been essential to human cultures, enabling a range of social, political, and economic exchanges. The idea of contracts has existed since ancient times in India, a

country with a rich historical and cultural legacy. A variety of elements, including religion, trade, colonial administration, and legal changes, have shaped the development of contracts and agreements in India over the centuries. This article examines the intriguing evolution of Indian contract law, from its historical foundations to the current legal system. The Contract Act refers to a set of laws that regulate contracts in a particular jurisdiction. In general, a contract is an agreement between two or more parties that creates enforceable obligations. The Contract Act sets out the rules for forming and enforcing contracts, and it provides remedies in case of breach of contract.¹

In most countries, the Contract Act is based on common law principles, which means that the law is developed through court decisions. However, some jurisdictions have adopted a statutory approach, which means that the law is set out in a statute or code.

A contract is defined as "An agreement which is enforceable by law" in Section 2(h) of the Indian Contract Act, 1872². The agreement between two or more parties to do or refrain from doing what they decided upon in exchange for something, that is, a consideration, is what is known as a contract.

For the contract to be enforceable and have meaning, all of the aforementioned components must be present. An agreement does not become a contract and is not legally binding if any of these elements are missing. This means that while every agreement is a contract, not every agreement qualifies as one. In accordance with Section 10 of the Constitution, "All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void." This implies that if the requirements of a contract are satisfied, then all agreements are contracts.

The most significant position in the Commercial Law is held by the Indian Contract Act. It would have been challenging to engage in employment law and trade or any other economic activity without the Contract Act. The Contract Act affects everyone and is not just a problem for the business world. Ensuring that the rights and duties resulting from a contract are upheld and that individuals impacted have access to legal remedies is the aim of the Contract Act. This Act may be referred to as the Indian Contract Act, 1872 in accordance with Section 1.

Implications of Covid-19 Pandemic on the Contractual Obligations

Global corporate operations and commercial contracts have seen previously unheard-of difficulties due to the COVID-19 epidemic. Countries all over the world have implemented temporary lockdowns and restrictions on mass travel. It severely limited human mobility, resulting in an unparalleled cessation of both local and foreign commerce. Businesses' ability to transfer products and services both within and across national borders was severely hampered by the policies put in place by the governments of the individual nations. Global trade has been disrupted as a result of the production and supply chain disruptions. All of these changes had a significant impact on how the parties to the contract performed, which in turn decreased their capacity to fulfill their responsibilities. The pandemic scenario prevented certain contracts from being

¹https://deb.ugc.ac.in/Uploads/SelfLearning/HEI-Exempted-U-0748/HEI-Exempted-U 0748_SelfLearning_20231026135504.pdf

² Indian Contract Act, 1872, Act No. 9 of 1872

fulfilled, but others might be fulfilled if the other side agreed to the postponed performance. In certain situations, the parties invoke the common defense of frustration of contract or force majeure to escape paying damages for contract violations. When it comes to contractual performance in India, the court's ruling will be based on an analysis of the terms of the contract from the standpoint of the relevant law as well as the circumstances. The general principle that underlies Agreements must be upheld, or *pacta sunt servanda*. Therefore, if parties want to enter into a contract with one another, they cannot back out of it or avoid accountability for non-performance unless there is fraud or illegality.³

Nature of contract and its Performance

The fundamental conditions for a legally binding contract as well as the remedies for contract violations are outlined in the Indian Contract Act, 1872. Even though e-commerce was intended to be promoted by the Information Technology Act of 2000, and the aforementioned Act is silent on the conditions necessary for an e-contract to be deemed genuine. E-contracts are therefore also covered under the Contract Act. A contract is only enforceable if it satisfies all necessary conditions, including offer and acceptance, consideration, free assent, the parties' ability to engage into a contract, and the object's legality. The parties will enter into a legally enforceable agreement if all of these prerequisites are met, and they will then be required to carry out their respective contractual duties. A party to a contract gets released from it after fulfilling his end of the bargain. The agreement expires when both parties have fulfilled their corresponding responsibilities. However, the other party may seek redress in the form of monetary damages, an injunction, or specific execution of the contract if one of the parties does not fulfill his end of the bargain.

In a recent judgment of *M/S Citadel Fine Pharmaceuticals*⁴, Regarding the importance of the period of performance, the Indian Supreme Court ruled that, given the terms and nature of the contract, as well as the surrounding conditions Given that article 9 of the contract outlines the repercussions of failing to complete the contract by the deadline, it is evident that the parties were prepared to view time as crucial.

Nonetheless, in some circumstances, the legislation allows the contractor to extend the deadline past the predetermined completion date. Only an agreement between the parties may extend the time for performance, and doing so just constitutes a party's waiver of non-performance within the initial period. The law assumes that there isn't a time extension for performance if the other party didn't express any acceptance of the request.

Covid-19 Pandemic as Defence for Non-performance on Contract

Many contracts were not fulfilled as a result of the COVID-19 pandemic attack and the lockdown that followed, which had an impact on supply networks and the flow of products. Some contractors ended up with delayed performance because they were unable to complete the entire contract. Generally speaking,

³ Beale, H and Twigg-Flesner, C 'COVID-19 and English contract law' in Hondius, E et al (eds) *Coronavirus and the Law in Europe* (Cambridge: Intersentia, 2021) p 461 Google Scholar and, in the same volume, H MacQueen "'Coronavirus contract law" in Scotland' p 491, especially from p 497 ff.

⁴ *M/S Citadel Fine Pharmaceuticals v. M/S Ramaniyam Real Estates Pvt. Ltd. and Ors*, (2011) 9 SCC 147, available at, <http://www.theindianlawyer.in/blog/2018/06/20/timeessence-contract/>.

unless the contract or the law specifies an exception, the harmed party may seek remedies when the contractor fails to fulfill their obligations. The contentious question is whether the defaulting party can use the COVID-19 pandemic and lockdown conditions as a defense for non-performance. If the pandemic is deemed an Act of God or a Force Majeure event by the law or the contract deed, then the law permits the use of the pandemic as an excuse. Within the framework of a contract, force majeure refers to "an unforeseen circumstance or event that cannot be predicted or controlled, which prevents the person from doing or completing the promise he or she had promised under a contract." "Force Majeure clauses," which justify non-performance of a contract in situations beyond their control, are typically included in business contracts. These provisions, which include the repercussions of one party's decision to choose that clause, will be added to the contract as an obligation.⁵

Force Majeure and the COVID-19 pandemic on Contract Law

Such an unforeseen incident renders the contract impossible to perform; for an event to qualify as a "Force Majeure event," it must either physically prohibit the parties from performing the contract or the fundamental purpose of entering into that contract must be defeated. Only then will such an occurrence or shift in the situation be seen as a cause for annoyance, and it will be assumed that the incident renders the performance impossible. In order to apply this rule to the COVID-19 pandemic, the party must demonstrate that performance was impossible owing to a complete restriction on the subject matter's supply or a challenging circumstance that hindered performance; only then may he raise the defense of force majeure.

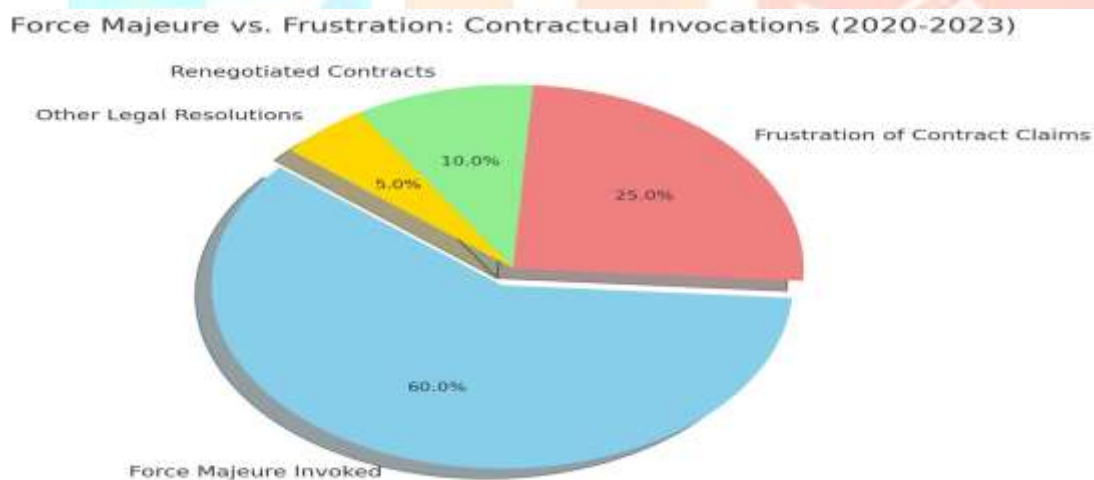


Figure 1: This figure showing force majeure relation with contractual invocations

Economic hardship is not the only reason to use the doctrine of frustration to invoke force majeure. An unanticipated incident cannot be deemed to be Force Majeure if its result is only an increase in the cost or expenses of carrying out the contract. Due to the prolonged economic damage caused by the COVID-19 pandemic, the party to the contract may have to pay more to perform the terms of the agreement. However, merely experiencing financial difficulties in carrying out the contract does not absolve the party of its obligations. If the parties can fulfill their obligations under the contract despite having to pay more, the courts will not take the Force Majeure claim into account. Therefore, if the party argues that the COVID-19 pandemic prevented the performance, he must demonstrate that the event prevented the performance rather than only causing financial difficulty.

⁵ <https://www.conventuslaw.com/report/india-a-closer-look-at-force-majeurefrustration/>

The incident must be unexpected and cannot be a passing circumstance. Applying the Force Majeure presumption also requires that the incident must not be one that a wise man with reasonable care could have foreseen or forecast at the time of the contract's execution. Despite being expressly mentioned in the contract, the "Force Majeure clause" is not relevant if the parties could have reasonably anticipated such a danger. Therefore, the court applies the "test of foreseeability" if the defense of Force Majeure is invoked. Furthermore, this defense is likewise inapplicable if the stated incident or circumstance lasts only a short time before things return to normal. Applying the standard of foreseeability to the current situation, a party claiming pandemic defense contends that the government's declaration of the epidemic and lockdown prevented him from performing under the terms of the contract, the court need not consider this to be frustration because the lockdown is only temporary and the contract can be fulfilled once the lockdown restrictions are lifted. However, courts must consider the circumstances and nature of the relationship before reaching a verdict. They cannot just conclude that there has been a breach of contract. In situations where the COVID-19 epidemic makes performance impossible and time is of the essence, circumstance, then the Force Majeure defense is appropriate since the circumstances were unanticipated and outside of the parties' control.

The recent judgment of the supreme Court in ***Standard Retail Pvt. Ltd. and Ors.***⁶Case The applicability of the COVID-19 epidemic as a Force Majeure defense to stop the encashment of Letters of Credit was the issue that the court was asked to decide. In this instance, a group of Indian steel importers petitioned the Bombay High Court for an injunction against South Korean exporters. The petitioners argued that the contract's Force Majeure provision excluded "epidemics" from fulfilling its obligations. However, the court found that the suppliers in this case are the only ones who can use the defense of "epidemics," not the importers, and that the suppliers/exporters had already fulfilled their end of the bargain. Additionally, steel transportation was unrestricted throughout the lockdown and was considered an essential service. Furthermore, the Court determined that the disputed Letter of Credit is an independent transaction and that the petitioners may invoke the Force Majeure defense based on the provisions of the contract. The petition was denied because the petitioners are accountable for the transaction.

The Supreme Court in ***Industrial Finance Corporation of India Ltd***⁷. Case, to determined that in order to use the defense of frustration, three requirements must be met: first, the contract must be a legitimate one already in place; second, either the entire contract or a portion of it must not be performed yet; and third, the contract must be entered into but cannot be performed before the performance date. In addition to these conditions, there are other requirements that are binding on both parties if they were agreed to at the time of the contract. The provision that a non-performing party must give prior warning to the other party in order to minimize the damage if he wishes to take use of the contract's Force Majeure clause is typically mentioned in commercial contract documents.

⁶ *Standard Retail Pvt. Ltd. and Ors. v. M/s. G. S. Global Corp & Ors.* Comm. Arbi. Petition (L) No. 404 /2020.

⁷ *Industrial Finance Corporation of India Ltd. v. Cannanore Spinning and Weaving Mills Ltd.*, (2002) 5 SCC 54.

Difference Between Invoking Force Majeure Defence under Section 32 and Section 56 under Contract Act.

Under Section 32, the "Covid-19 pandemic situation" may be applied as a Force Majeure incident if the contract deed expressly or implicitly mentions it in the Force Majeure clause. However, the COVID-19 pandemic is unprecedented, and the contracting parties never considered the lockdown situation; therefore, in many circumstances, the pandemic crisis may not be covered by the contract's Force Majeure clause. A party may use Section 56 of the Indian Contract Act to invoke the pandemic condition as a defense if the contract lacks a Force Majeure clause or if the agreement does not mention "epidemic" as a basis to exempt performance. In a recent landmark

judgement of the Supreme Court, Justice *R.F. Nariman* opined that Section 32 of the Act applies if the occurrence that frustrates the contract is stated explicitly or implicitly in a provision of the contract; if such criteria are not included in the contract, Section 56 of the Act applies to declare the contract frustrated.⁸

The Effect of Covid-19 Pandemic Defence under Contract Law

In Commercial contracts that contain a Force Majeure provision, either explicitly or implicitly, allow non-performance upon the occurrence of that event and the ensuing fallout from using the defense. A Force Majeure provision may waive penalties or damages for non-performance, deductions from consideration payments, etc., and provide an excuse for the failure to comply. The party in default is required to abide by the terms of the contract. Typically, the terms of contracts are customized to meet the needs of the parties, and the deed would also specify the repercussions of using that defense. Depending on the situation, Section 56 of the Contract Act or common law principles may offer remedy in the event of a successful Force Majeure defense claim in the absence of a Force Majeure clause. In the event that contract becomes null and unenforceable in the event of impossible or total frustration, and the party asserting Force Majeure must reimburse the other party for any advantages they obtained. After the declaration, the party that used the defense of frustration must give the other party back whatever benefits they obtained, including goods or services, in exchange for consideration.⁹

Future of Contract Law in India

The Contracts served as the cornerstone of human civilization and changed as society transitioned from barter to sophisticated contemporary economies. In the past, trust and the reputation of the community were used to seal deals. Written contracts became a vital instrument for tying people and organizations to their commitments as more structured trade became necessary. The contract formed the foundation of international trade, industry, and even diplomacy in the modern era. The codified Indian Contract Act, 1872 was adopted during colonial administration, which had a major impact on the development of contract law in India. The basic essence of contracts has changed since the introduction of digital technologies. Digital contracts, which are no longer limited to ink and paper, work across national boundaries and enable participants in various locations to instantly execute agreements. However, this new frontier necessitates new legal frameworks

⁸ *Energy watchdog v. Central Electricity Regulatory Commission*, 2017 (4) SCALE 580.

⁹ Shweta Vashist and Reshma Ravipati (2020). India: COVID-19 And Force Majeure. Retrieved from: <https://www.mondaq.com/india/litigation-contracts-and-forcemajeure/913932/covid-19-and-force-majeure>.

since it presents issues of security, jurisdiction, enforceability, and authenticity. The Information Technology Act of 2000 governs electronic contracts, digital signatures, and electronic transactions in India. However, adjusting to this quick digital change is a difficult task for the Indian legal system, which places a strong focus on procedural law and statutory interpretations.

However, Agreements made between parties electronically are known as electronic contracts. These electronic contracts are becoming more and more popular since they allow parties to sign agreements without using conventional paper signatures, which helps to get over geographical restrictions. According to Section 10A of the IT Act, electronic contracts are legitimate and enforceable in India. Additionally, as stated in Sections 3A and 5 of the IT Act, the need of signing is considered satisfied if it is verified by an affixed e-signature. With electronic contracts, the parties can easily conduct business across borders without physically being in one place to sign the paperwork as they would with traditional methods. Businesses must, however, also keep best practices in mind while putting such contracts into effect. To maximize enforceability and reduce legal risks, fair and reasonable conditions must be presented conspicuously and clearly, and user interfaces must be easy to use. These agreements serve as a set of rules that regulate how customers use digital goods and services. Although these agreements could seem onerous, they protect both parties by outlining their obligations and rights. It is important for customers to carefully read these agreements and comprehend the ramifications of accepting them.

Challenges While Implementing the Digital Contracts

A legitimate contract can only be made by a legally competent individual, as stated in Sections 10¹⁰, 11¹¹, and 12¹² of the Indian Contract Act, 1872. However, because they frequently have little information on the customer, businesses may find it difficult to evaluate the competence of parties participating in digital contracts. Contracts made with people who are incapable of entering into agreements, including children or people who are mentally ill, are regarded as null and void and may give rise to legal problems. Because the internet is decentralized, it might be difficult to determine the jurisdiction and applicable legislation for digital contracts. Due to the fact that firms and consumers sometimes live in different legal jurisdictions, there may be multiple jurisdictions involved. This intricacy is increased by the inconsistent nature of international law and the challenge of establishing the location and timing of offer acceptance. Uncertainty is further increased by the lack of solid legal precedents in the establishment of digital contracts.

A number of security and privacy issues have been brought to customers' attention by the growth of e-commerce. Large volumes of user data are frequently gathered and analysed by businesses, sometimes without adequate transparency. Unauthorized sharing of personal information, including that supplied upon

¹⁰ **Section 10. What agreements are contracts.** —All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void

¹¹ **Section 11. Who are competent to contract.** —Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

¹² **Section 12. What is a sound mind for the purposes of contracting.** —A person is said to be of sound mind for the purpose of making a contract, if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests. A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

registration, could result in identity theft or data breaches. When their personal information is misused or transactions are not permitted, consumers suffer financial and reputational harm. Methods such as hacking, phishing, and intellectual property theft make these difficulties worse, so it is the duty of businesses to make sure that strong security measures are in place to safeguard customer information.

The "Smart Contracts," or digital contracts recorded on a blockchain that are automatically executed when specific terms and circumstances are met, have become more popular as a result of recent technological advancements, particularly in the area of blockchain. Smart contracts allow trusted transactions and agreements to be created between anonymous, dispersed parties without the requirement for a centralized authority, a legal system, or an external enforcement mechanism. It is yet unclear how the law will function in establishing and enforcing these recently developed smart contracts, and the relationship between them and the legal system is intriguing and intricate. The public character and immutability of smart contracts, according to many proponents, eliminate the need for the legal system in these transactions.

A significant obstacle with smart contract transactions is making sure all regulations are followed. When smart contracts are used for transactions, multiple laws must interact, creating a plethora of techno-legal issues. The acquisition of land through a smart contract, for example, triggers the application of several laws, including those pertaining to contracts, property, registration, and taxes. To further on the registration context, the easy transfer of title using smart contracts raises concerns about the centralization of asset transfer registration. This hints to the possible difficulties in regulating smart contracts under the Contract Act; a comprehensive understanding of the problems is necessary to fully realize a smart contract transaction that is governed by statute.

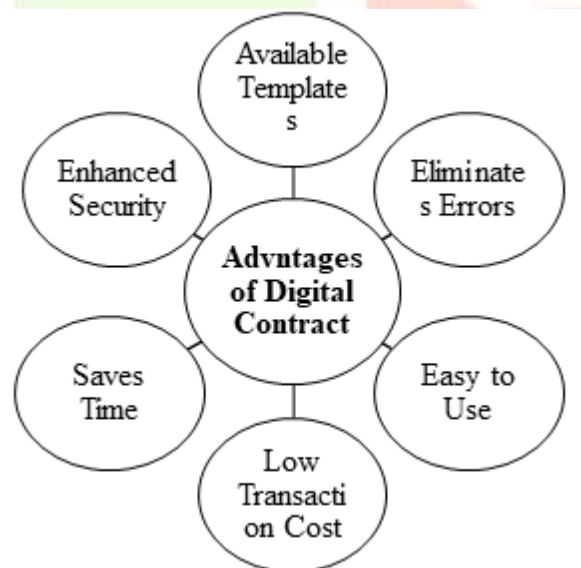


Figure 2: Advantages of Digital Contract In Modern Digital World

The Contracts have undergone a transformation due to the digital revolution, which has created both new opportunities and issues for consumers and enterprises. Digital contracts give businesses accessibility and convenience, but they also present difficult legal and jurisdictional challenges. Although they are a daring step forward, smart contracts in particular raise a number of concerns. Strong foundations are required to guarantee security, transparency, and equity in the future of digital contracts, which are at the nexus of law

and technology. New legal principles will be required as the legal system adjusts to the needs of a digital economy in order to protect the rights of all parties, particularly as new technologies continue to emerge.¹³

Scope of Contract Law with Digital Contract

Rapid advancements in technology invariably have a big effect on the law. The many facets of artificial intelligence's impact on modern legal theory serve as one example of this. One Examining the recent rise in popularity of smart contracts in the worldwide market helps to explain one such recent shift.¹⁴ Although contracts are essential to a company's operations and help it manage its connections with all supply chain participants, inadequate contract management procedures nonetheless have an adverse effect on businesses' bottom lines. Neglected fines, missed deadlines, lost income, lost savings, lost contracts, unanticipated renewals and expirations, concealed provisions that expose a business to liabilities, and possible harm to a company's reputation are all dangers associated with poor contract lifecycle management. Although many contract management vendors provide solutions, very few are able to integrate contract management into a company's broader digital transformation plan. Prior to the COVID-19 pandemic, 92 percent of businesses believed that digitization would need a change in their business models, and company executives anticipated that digital operations and offers would account for 80% of revenue growth. According to researchers, the use of digital technology by businesses and consumers has advanced five years in around eight weeks. The COVID-19 pandemic has highlighted our reliance on digital technologies and the need for flexibility and agility to reduce business risk in times of disruption.

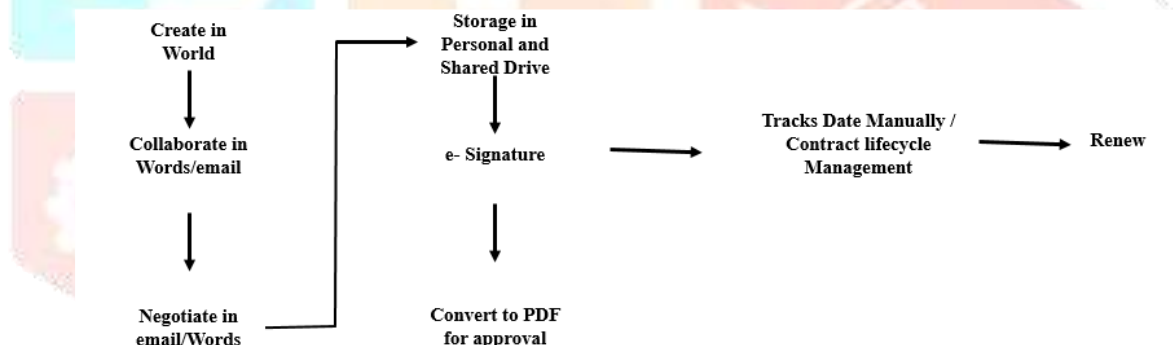


Figure 3: This figure showing Various Stages of Digital Contract Life Cycle Management

Businesses can digitize their contracts and contract lifecycle management (CLM) procedures through digital contract transformation, which makes them essential components of broader digital transformation initiatives. Businesses may benchmark, track, and optimize the key performance indicators that are most essential to them by utilizing data, which is their most valuable asset. In essence, it enables businesses to accomplish more with less, identify underperforming services, find more ways to cut costs, and maintain governance and compliance. The COVID pandemic has made it abundantly evident that efforts to implement digital transformation will not be ceasing anytime soon and will probably pick up speed. Businesses operate on contracts, and data and technology are the cornerstones of digital transformation. Because it not only modernizes contracting efforts but also allows them to use the data in their contracts to deliver actionable

¹³ <https://www.ahlawatassociates.com/blog/legal-challenges-future-directions-digital-contracts>

¹⁴ Srivats Shankar, Looking into the Black Box: Holding Intelligence Agents Responsible, Vol. 10, N L. Rev., 451 (2017). 2

business insights that are at the core of digital transformation, digital contract transformation is (and will remain) a fundamental component of an organization's larger digital transformation strategy.¹⁵

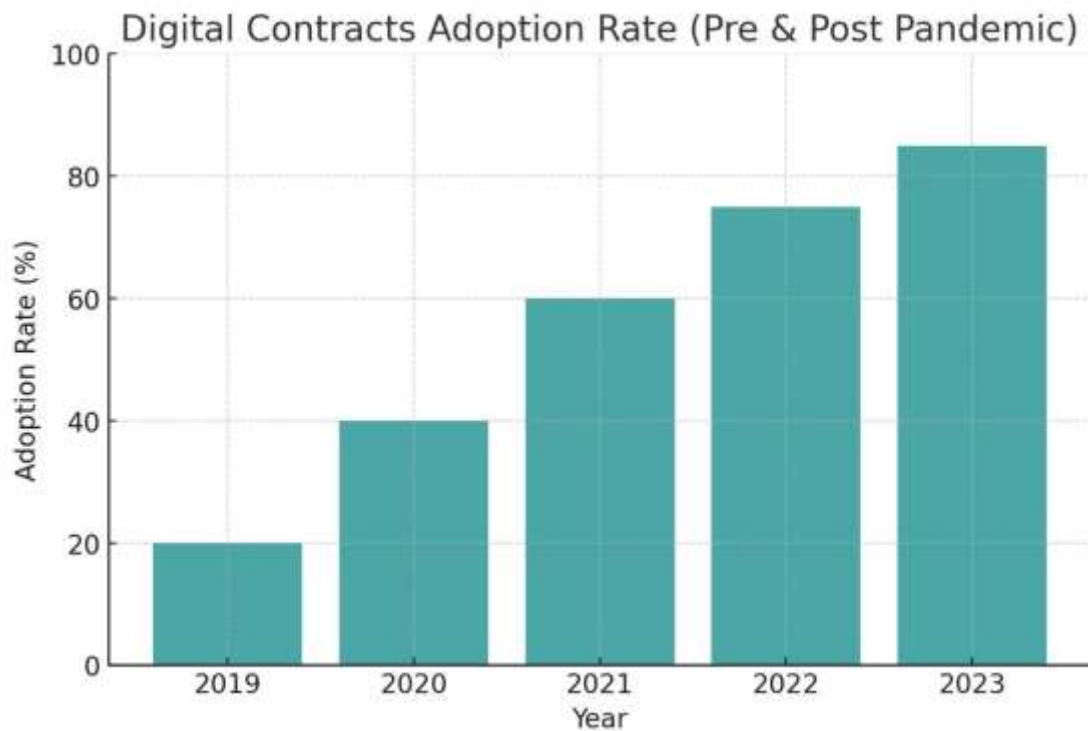


Figure 4: This figure showing Digital Contract Adoption Rate

Conclusion

The COVID-19 pandemic is a unique situation that falls within the definition of force majeure. The nature of the contract will determine whether this circumstance can be utilized as a defense for non-performance of the agreement. In the past, several nations regarded crises like SARS and Ebola that affected contract fulfillment as Force Majeure. The Covid-19 epidemic is regarded in government memos as a natural disaster, which permits the parties to such contracts to use the Force Majeure defense, but this provision has limited applicability. Depending on the terms of the agreement and the parties' intentions, can COVID-19 be used as a Force Majeure event to justify non-performance of the contract in standard commercial contracts. Furthermore, the party might validly assert the defense of Force Majeure for non-performance due to the existence of the frustration conditions. It seemed inevitable that legal claims would surface that required judicial engagement with various aspects of contract law, as few contracts were completely unaffected by the pandemic. These included the interpretation of express contract terms regarding "material adverse change" or force majeure; implied terms to allocate unanticipated pandemic risks; the doctrine of frustration in cases where a contract had become impossible or illegal to carry out; public policy in cases where performance posed health risks; principles of unjust enrichment in cases where paid-for goods and services were not provided; consideration and estoppel in cases where the outbreak forced the parties to amend their agreement. The fundamental judicial expectation of commercial contracting parties, which is that they will carry out the terms of the agreement even in situations when doing so may have become more challenging,

¹⁵ <https://www.contractlogix.com/contract-management/no-digital-transformation-without-digital-contract-transformation/>

burdensome, or expensive, has not changed, as the post-Covid case law shows. It goes without saying that legal contracts are made to enforce performance in situations when an agreement that seemed ideal at the time of creation is not ideal after it is carried out. Enforcing the terms will also encourage the parties to insert explicit clauses in their contract to address the effects of pandemics, thereby substituting private ordering through contract entitlements for governmental intervention.

