

CHAPTER V

Coronavirus – ‘Force Majeure’ A Vaccine for Contracts

*"Authored By - Adv. Ashutosh K. Sharma & Adv. Aliya
Durafshan"
(Advocate High Court Delhi)*

Covid-19 or the Corona virus was declared as a pandemic by World Health Organization. This has led to lockdowns and financial slowdown across the world in all sectors. The Government of India also imposed a nationwide lockdown to tackle the spread of the deadly virus. Apart from the annihilator impact that COVID-19 continues to unleash on living creatures across the countries worldwide, it has also reached commerce and business. The impact of COVID-19 on the businesses has been severe, and consequently the obligations under contracts are being revisited to assess these impacts.

Due to the nationwide Lockdown, many vendors would not be able to fulfill their contractual obligations or would be delayed. The companies might not be able to honor their agreements. Under such scenarios, each party to the contracts would try to find out a way to save themselves from legal actions. It seems that the force majeure clause would be a determining factor to understand the implications of these events. ‘Force Majeure’ clause might emerge as the effective vaccine for the contracts affected by COVID-19.

- *FORCE MAJEURE – ITS MEANING & REQUIREMENTS*

The expression force majeure is taken from the Code Napoleon and has a more extensive meaning than “Act of God” or “vis major”. The term ‘force majeure’ has been defined in Black’s Law Dictionary, as ‘an event or effect that can be neither anticipated nor controlled.’ A force majeure clause provides temporary reprieve to a party from performing its obligations under a contract upon occurrence of a force majeure event.

A force majeure clause mentions specific circumstances or events, which qualify as force majeure events. As such, for a force majeure clause to become applicable (should any force majeure event occur), the occurrence of such events should be beyond control of the parties and the parties will be required to demonstrate that they have made attempts to mitigate the impact of such force majeure event.

If an event or circumstance comes within the ambit of a force majeure event and fulfils the conditions for applicability of the clause then the consequence would be that parties would be relieved from performing their respective obligations to be undertaken by them under the contract during the period that such force majeure events continue. While force majeure has neither been defined nor specifically dealt with, in Indian statutes, some reference can be found in Section 32 of the Indian Contract Act, 1872 envisages that if a contract is contingent on the happening of an event which event becomes impossible, then the contract becomes void.

The requirements of force majeure are:

- a) It must proceed from a cause not brought about by the defaulting party’s default.
- b) The cause must be inevitable and unforeseeable.
- c) The cause must make execution of the contract wholly impossible.

Force majeure clauses can usually be found in various contracts. This clause is important for businesses as it relieves the parties from performing their respective obligations and which are to be undertaken under the contract and consequential liabilities, during the period covered under force majeure.

The Procurement Policy Division of Department of Expenditure, Government of India has issued an Office Memorandum dated 19.02.2020 with respect to the 'Manual for Procurement of Goods, 2017', wherein the Government clarified that the disruption of the supply chains due to COVID-19 shall be considered as a case of natural calamity and force majeure clause may be invoked following the due procedure.

Further, the Ministry of New & Renewable Energy (MNRE) also issued an Office Memorandum dated 20.03.2020 clarifying that the delay occurred on account of disruption of the supply chains due to COVID-19 will be treated as force majeure event. However, these OM's cannot be made applicable for every contract as the clause needs to be interpreted based on different circumstances, still hold persuasive value in interpreting the contracts under Indian legislation.

- ***PROTECTION OF FORCE MAJEURE CLAUSE***

A force majeure clause cannot be implied under Indian law. It must be expressly provided under the contract and protection afforded will depend on the language of the clause. In the event of a dispute as to the scope of the clause, the courts are likely to apply the usual principles of contractual interpretation.

- **CLAUSE AVAILABALE**

If the Clause of force majeure is available in the contract, any of the party to the contract can invoke the said clause as per the procedure agreed between the parties. The party claiming force majeure is usually under a duty to show that it has taken all reasonable endeavors to avoid or mitigate the event and its effects. This will be interpreted on a case-to-case basis. A party claiming force majeure is typically required to establish that it was the force majeure event that caused the party to be unable to fulfill its contractual obligations.

Force majeure clauses commonly provide for a prompt and time bound notice requirement, which can operate as a contractual condition precedent to relief or not. Such provisions are generally enforceable, and so complying fully with all notice requirements will be important for parties seeking to invoke force majeure.

There are two possible instances, which may suggest that a force majeure clause covers a pandemic: if the contractual definition of a force majeure event expressly includes a pandemic; or if the force majeure clause covers extraordinary events or circumstances beyond the reasonable control of the parties. Therefore, if it is determined that the factual circumstances caused by the pandemic are beyond reasonable control of the affected party it will be covered under the said clause. Hence, treatment of COVID-19 under Force Majeure clause will depend on each particular contract and the language of the clause mentioned in those contracts.

- **CLAUSE NOT AVAILABALE**

If the contract does not include a force majeure clause, the affected party could claim relief under the *doctrine of frustration* under Section 56 of the Indian Contract Act, 1872. However, in order to claim that the contract is frustrated, it must be established that the performance of the contractual obligations has become impossible by reason of some event which the claiming party could not prevent and that the impossibility is not self-induced by the claiming party or due to his negligence.

Under the doctrine of frustration, impossibility of a party to perform its obligations under a contract is linked to occurrence of an event/circumstance subsequent to the execution of a contract and which was not contemplated at the time of execution of the contract. However, in case of a force majeure, parties typically identify, prior to the execution of a contract, an exhaustive list of events, which would attract the applicability of the force majeure clause.

With widespread disruption in business, due to COVID-19 the stage seems set for India to see a flood of 'force majeure' invocations. It is expected that over a period of time more and more Indian companies may invoke 'force majeure' clauses in their contracts resulting perhaps in a spew of litigations. Further, in cases where a contract does not have an explicit clause on force majeure, there could be circumstances where parties may try to seek shelter under Section 56 of the Contract Act and seek frustration of a contract.

However, in those cases the Indian courts will then have to ascertain whether the contract has become impossible to perform and whether the doctrine of frustration of contract could be made applicable to such a contract.

Keeping the above discussion into consideration, the implications of the COVID- 19 would have to be decided

on the case by case basis. However, it will be interesting to see the stand which the insurance companies will take vis-a-vis insurance policies taken by companies to cover loss arising due to certain unforeseen circumstances in their businesses, and whether COVID-19 will be covered under these policies. Also, the bidders who had given the Resolution Plan under IBC may seek a payment moratorium or timeline extension in places where they have already submitted bids.

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