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# CORONA VIRUS (COVID-19) AND FORCE MAJEURE



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## COVID-19 (Corona Virus)

- In December 2019, the world watched in concern as scenes of chaos, misery and rapidly mounting death tolls emerged from China due to the spread of Covid -19. Covid-19 has quickly developed from a local to a global threat with tragic human losses that take priority over its economic impact.
- Thereafter, Covid – 19 has been detected in at least 29 countries.
- In January 2020, the World Health Organization (for short “WHO”) had declared the outbreak of Covid - 19 as a “public health emergency.”
- Covid - 19 outbreak has disrupted the supply chains not just in India but also across the globe, meaning many domestic companies may be at the risk of defaulting on their obligations with their business partner resulting in penalties in monetary term.
- Moreover, the spread of Covid – 19 have a profound impact on business and underlying contractual relationships. In such times, the force majeure clause can come to rescue of businesses.

## Force Majeure

- The term "Force Majeure" synonymous with the Latin term "Vis Major" means "superior force", and includes "acts of god" (such as earthquakes or tsunamis) and certain acts of man of a disruptive and unforeseeable nature, such as industrial action.
- The law relating to Force Majeure is embodied under Sections 32 and 56 of the Indian Contract Act, 1872. It is a contractual provision agreed upon between parties.
- The occurrence of a force majeure event protects a party from liability for its failure to perform a contractual obligation. Typically, force majeure events include an Act of God or natural disasters, war or war-like situations, labour unrest or strikes, epidemics, pandemics, etc.

- The intention of a force majeure clause is to save the performing party from consequences of something over which it has no control. Force Majeure is an exception to what would otherwise amount to a breach of contract.
- Force Majeure clauses are commonly included in commercial contracts in case certain defined circumstances prevent performance of contractual obligations.
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- A force majeure clause cannot be implied under Indian law.
- Force Majeure Clause must be expressly provided for 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.
- If one of the events listed in a force majeure clause occurs, the clause will usually prescribe what the parties must do next, e.g. a party claiming force majeure may have to notify its counter party and take reasonable steps to mitigate the effect of the event impacting performance. For this reason, in most cases, the requirements for invoking force majeure and the consequences of so doing will depend upon the precise terms of the contract in question.

## Absence of Force Majeure Clause:

- In India, absence of a force majeure clause may result in the reliance on the Doctrine of Frustration as set forth in the Indian Contract Act, 1872, which states that an agreement to do an impossible act is void.
- The provision also relieves a party from the discharge of their duties in event of an intervening act which renders the performance of the contract impossible or unlawful.

- If the contract does not include a force majeure clause or if the Covid-19 outbreak falls outside the scope of that clause, the parties may have to ascertain whether the common law doctrine of frustration is applicable to discharge them from their contractual obligations

#### **Outbreak of Covid-19 a Force Majeure Situation**

- On February 19, 2020, the Ministry of Finance, Government of India, issued an Office Memorandum wherein it is notified that Covid-19 will be covered under the Force Majeure clause and should be considered as a case of natural calamity.
- Further, the ministry has stated that this clause can be invoked wherever appropriate, subject to due procedure being followed. It is to be noted, the clause does not excuse a party's non-performance entirely but only suspends it for the duration of a period.
- **Para 9.7.7. of the “Manual for Procurement of Goods 2017” states that:**

A Force Majeure (FM) means extraordinary events or circumstances beyond human control such as an event described as an act of God (like a natural calamity) or events such as a war, strike, riots, crimes (but not including negligence or wrongdoing, predictable/seasonal rain and any other events specifically excluded in the clause). An FM clause in the contract frees both parties from contractual liability or obligation when prevented by such events from fulfilling their obligations under the contract. An FM clause does not excuse a party's non-performance entirely, but only suspends it for the duration of the FM. The firm has to give notice of FM as soon as it occurs and it cannot be claimed ex-post facto. There may be a FM situation affecting the purchase organisation only. In such a situation, the purchase organisation is to communicate with the supplier along similar lines as above for further necessary action. If the performance in whole or in part or any obligation under this contract is prevented or delayed by any reason of FM for a period exceeding 90 (Ninety) days, either party may at its option terminate the contract without any financial repercussion on either side. Notwithstanding the punitive provisions contained in the contract for delay or breach of contract, the supplier would not be liable for imposition of any such sanction so long as the delay and/ or failure of the supplier in fulfilling its obligations under the contract is the result of an event covered in the FM clause.

**A Covid-19 pandemic could make it more difficult for parties to perform their contractual obligations. There are two possible instances, which may suggest that a force majeure clause covers a pandemic:**

- a) if the contractual definition of a force majeure event expressly includes a pandemic. Inclusion of pandemic to the list of force majeure events will provide clarity as to whether Covid-19 outbreak would trigger a force majeure clause in a contract; or
- b) if the force majeure clause covers extraordinary events or circumstances beyond the reasonable control of the parties. Such general, catch-all wording may be invoked if it is determined that the factual circumstances caused by the pandemic are beyond reasonable control of the affected party.

Therefore, whether a party can be excused from a contract on account of Covid-19 being declared a pandemic is a fact-specific determination that will depend on the nature of the party's obligations and the specific terms of the contract.

#### **Conclusion:**

- Covid-19 is a Force Majeure Situation.
- Companies should review all contracts in which force majeure (or frustration) may be a factor and consider which existing contracts may be impacted by closures or delays, or where a counter party may seek to terminate or suspend the contract.
- To invoke a force majeure clause, time limits and notice for doing so should be considered.
- If there are any alternative ways of performing contractual obligations and taking appropriate mitigation steps (whether by you or your counter party) these should also be thought of.
- All evidence of disruption, including documents proving delay/ cancellation should also be retained.
- Furthermore, if entering into new contracts, draft clauses sufficiently clearly to cover eventualities such as the Covid-19 outbreak.