

COVID 19 and Force Majeure

On 11th March 2020, the World Health Organization (“WHO”) characterized the COVID – 19 outbreak as a ‘*pandemic*’. The impact of COVID – 19 on domestic and international businesses is severe. It is not only affecting several countries, but it is also creating chaos across sectors. A pandemic is defined by WHO as “*an epidemic occurring worldwide, or over a very wide area, crossing international boundaries and usually affecting a large number of people.*” This means a disease outbreak will be labelled as a pandemic when it is widespread, over several countries or continents, usually affecting a large number of people, and is also infectious. Until recently, WHO had stopped short of calling the outbreak a pandemic because local spread was limited, and most cases had a connection to China or other emerging hotspots – for instance Iran or Italy. But now, evidently, local transmission is widespread, with over 115 countries detecting the virus and more than 10 confirming over 500 cases.

Considering the disruption caused by the COVID – 19 outbreak, it is likely that performances under many contracts will be interrupted, delayed or even cancelled. Initially, the industries that were heavily dependent on supplies from China seemed to be in disruption. For example, the solar industry in India which depends heavily on China for module supplies, was in a major supply chain distress through February 2020.

On 17th February 2020, the China Council for the Promotion of International Trade (CCPIT), revealed that it had already issued over 1,600 Force Majeure Certificates’ to firms in 30 sectors which covered contracts worth over USD 15 billion. In India, the Department of Expenditure, Procurement Policy Division, The Ministry of Finance issued an Office Memorandum on 19th February 2020 in relation to the government’s ‘Manual for Procurement of Goods, 2007’ which states ‘*A Force Majeure (FM) means extraordinary events or circumstance beyond human control such as an event described as an act of God (like a natural calamity) or events such as war, strike, riots, crimes (but not including negligence or wrong doing, predictable/seasonal rain and any other events specifically excluded in the clause). An FM clause in the contract frees both parties from fulfilling their obligations under the contract. An FM clause does not excuse a party’s non-stop 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 situation affecting the purchase organization only. In such a situation, the purchase organization 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 other obligation under this contract is prevented or delayed by any reason of FM for a period exceeding 90 days, either party may at its option terminate the contract without any financial repercussion on either side’ and ‘A doubt has arisen if the disruption of the supply chains due to spread of corona virus in China or any other country will be covered in the Force Majeure Clause (FMC). In this regard, it is clarified that it should be considered as a case of natural calamity and FMC may be invoked, wherever considered appropriate following the due procedure as above.’*

On 20th March 2020, the Ministry of New and Renewable Energy also issued an Office Memorandum granting an extension of time in scheduled commissioning date of renewable energy projects considering the disruption of supply chains due to spread of coronavirus as a Force Majeure Event.

However, it is mandatory for all the project developers claiming the aforesaid disruptions to submit a formal application to the renewable energy implementing agencies along with all the documentary evidence(s) in support of their claim.

As COVID-19 spread across various parts of the world including the European Union, USA and Middle East, many industries slowly began reconciling with the serious impact of COVID-19 on various businesses.

The growing restrictions, curfews, lock down orders, Section 144 CRPC, orders imposed in various parts of India through March 2020 followed by the latest 21 day nation-wide lock down in India effective from 25th March 2020, have worsened the COVID-19 impact on the several sectors in India and globally as well.

In Indian context, the concept of Force Majeure is not codified and is introduced by way of a contract. Force Majeure is governed by the Indian Contract Act, 1872 ("**Contract Act**") and more particularly Sections 32 of the Contract Act. The courts in India have generally construed 'Force Majeure' clauses narrowly. Accordingly, unless a particular event may clearly fall within the ambit and scope of a 'Force Majeure' clause, the courts may not accept such event as triggering consequences of 'force majeure'. The primary focus while interpreting such clauses encompasses the type of event a contractual party claims is causing non-performance of its contractual obligations. It is also important to understand the Government of India believes that the spread of COVID – 19 falls within the definition of 'Act of God' as a 'natural calamity'. The government has made several relaxations to corporate and tax compliances as well as provisions of the Insolvency and Bankruptcy Code, 2016 when our Finance Minister, Nirmala Sitharaman raised the insolvency threshold of default to INR 1 crore, from INR 1 lakh to prevent triggering of insolvency proceedings against MSMEs.

The term 'Force Majeure' is derived from the French language and literally means a 'superior force'. The doctrine of force majeure is a vassal of contractual innovation. The occurrence of a force majeure event protects a party from liability for its failure to perform a contractual obligation, in the manner set out in the contract. A standard force majeure clause generally includes the following: Act of God, including but not limited to lightning, drought, fire, epidemic, earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado etc.

The general intention of the force majeure clause is to save the affected party from consequences of something over which it has no control. In '*Tennants (Lancashire) Ltd vs. G.S. Wilson & Co. Ltd.*',¹ the courts concluded that the relevant triggering event must "prevent" performance, i.e. the affected party must demonstrate that performance is legally or physically impossible, not just difficult or unprofitable. Force Majeure is thus a negotiated term of the contract and a successful claim under the same will depend upon the exact language of the contractual provision and the facts and circumstances of the affected party.

¹ [1917] A.C. 495

The affected party is required to notify the other party of the occurrence of a force majeure event within a specified time in order to claim relief. The affected party must also update the other party with periodic notices during the subsistence of the force majeure event stating the actions being taken to remedy the event. The burden to prove the impossibility or impracticability of performance of a contract under the force majeure event is also on the party claiming relief under it. The party would also have to prove that it could not have reasonably foreseen the event at the time of making the contract, nor could it have avoided or overcome its consequences. In such a scenario, the Courts could look into whether the COVID-19 pandemic was the direct cause of the non-performance, and if the performing party could have taken any mitigative or alternate steps to fulfil its obligation, and is not just using the force majeure event as an excuse to absolve itself of its obligations under the contract.

Due to lack of visibility in this current pandemic situation, such ongoing force majeure are looking to have severe financial impact on the global economy. In order to mitigate contractual risks in the best possible manner, it is important to monitor, intimate, minimize risk to the best extent possible, and eventually negotiate the impact of the business risk in the interest of all stakeholders.

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