

Understanding ‘force majeure’ and its application in India in the times of the COVID-19 outbreak

After recovering from the Great Recession beginning of the late 2000s, the world collectively has par-taken in international trade and commerce at such an exponential pace that the ultimate aim of the unique economic phenomenon of globalization has been achieved. The expanse of reach of international trade and commerce has been felt across the 195 countries and their dependencies. With technology playing a major role, trade and commerce arrangements have been entered between parties belonging to countries spread across continents. Due to the very nature of these commercial agreements/ contracts, the performance of such agreements becomes the cornerstone of a global market place to carry out one’s business or trade effectively. To protect performance of contracts as well as the interests of the parties, most of the commercial contracts tend to have certain ‘force majeure’ clauses. These clauses are incorporated, as at times, occurrence of certain events or external factors over which neither party could have control, would have an adverse impact on the performance of such a contract.

The beginning of 2020 has however, altered the fine balance of the global market place. The outbreak of the pandemic known as the COVID-19, has thrust the entire world into a mode of survival that few would have experienced in their living memory. Much like the international trade and commerce, the COVID-19 virus has adeptly made its presence felt across the globe resulting in loss of lives, social distancing, shutdown of businesses and also nationwide lockdowns being imposed in some countries. This has resulted in trade and commerce (barring essential services/requirements), both domestically and internationally, coming to a standstill. During this period of unprecedented human tragedy, all efforts rightly so, are being made to safeguard and secure the lives of as many people as possible across the globe with such efforts taking precedence over trade and commerce and performance of contracts between parties.

It is in this context that the ‘force majeure’ clauses in the commercial contracts have suddenly gained universal significance.

1) What is ‘force majeure’?

The term ‘force majeure’ has been derived from the French Language and means ‘a *Superior Force*’. A ‘force majeure’ clause in contracts intends to cover occurrences that may impact the performance of a contract and are beyond the control of the parties. Some commonly listed events of ‘force majeure’ include act of God like earthquakes, volcanic eruptions, as well as government intervention, strikes, lockouts etc. Invocation of a ‘force majeure’ clause usually results in suspension of the rights and obligations of the parties to the contract for a temporary period. However, depending on the provisions of the contract in certain cases, occurrence of a ‘force majeure’ event may result in the contract’s termination.

2) Treatment of ‘force majeure’ clauses in India

In most Civil Law governed countries such as China, France and Germany the term ‘force majeure’ is codified and therefore a party can resort to the same even if such a clause is not

provided for in the commercial contract. However in the Indian context where contracts are governed by the Indian Contract, Act, 1873 (“**Contract Act**”), the statute does not specifically provide for ‘force majeure’. Through Court precedence, ‘force majeure’ has been held to be governed by the provisions of Section 32 of the Contract Act. In so far as a ‘force majeure’ event occurs *de hors* the contract, it is dealt with by a rule of positive law (Doctrine of Frustration) under Section 56 of the Contract Act. It is for this reason that ‘force majeure’ in India is a creation of the contract between the parties and the protection of ‘force majeure’ is to be governed as per the provisions of the relevant contract and to be considered on a case to case basis. The Courts in India generally consider ‘force majeure’ clauses in a contract to be essentially inclusive in nature and therefore interpret the same narrowly. The burden of proving the occurrence of ‘force majeure’ event or its adverse impact on performance of the contract is typically on the party claiming protection under it.

Considering the interpretation of ‘force majeure’ clauses The Supreme Court of India through its judgment in the case of ***Energy Watchdog Vs. Central Electricity Regulatory Commission & Ors.*** (2017) 14 SCC 80 has provided the following guiding principles for invoking ‘force majeure’ clauses.

- (a) That the ‘force majeure’ event is beyond the reasonable control of the promisor and thus cannot be held liable for non-performance of obligations under the contract;
- (b) Best endeavours have been taken by promisor to mitigate ‘force majeure’ event or its impact on performance of the contract; and
- (c) The ‘force majeure’ event was unforeseeable by the parties.

3) **Treatment of Covid-19 as a ‘force majeure’ in India**

In a recent judgment in the matter of ***Standard Retail Pvt. Ltd. vs. M/s. G.S. Global Corp. & Ors.*** the Bombay High Court vide its order dated 8th April, 2020, denied relief to a party seeking protection of ‘force majeure’ on account of outbreak of the COVID-19 as the party was not eligible for the same as per the terms of the contract. This decision further strengthens the legal position in India, that the grant of protection of ‘force majeure’ would be governed as per the provisions of the relevant contract and on a case to case basis.

4) **Treatment of impossibility and frustration of contracts in India**

In the event parties to a contract have not incorporated a ‘force majeure’ clause, then they can resort to the Doctrine of Frustration enshrined under Section 56 of the Contract Act. A contract is considered to become frustrated when an intervening or supervening event occurs that makes it impossible to fulfil the contract. Invoking of the Doctrine of Frustration would typically discharge a party of its obligations and terminate the contract. The burden of proving that there has been an occurrence of an intervening or supervening event or the same has impacted the performance of the contract is on the party claiming protection under Section 56 of the Act. The essential requirements for invoking the doctrine of frustration have been delineated by the Supreme Court in the celebrated judgment of ***Satyabrata Ghose v. Mugneeram Bangur and Co. and anr.*** AIR 1954 SC 44, are as below:

- (a) There must be a valid and subsisting contract between the parties;
- (b) There must be some part of the contract which is yet to be performed;

- (c) That part of the contract, which is yet to be performed, should become impossible or unlawful;
- (d) That the impossibility should be by reasons of some event which the promisor could not prevent or which is beyond the control of the promisor; and
- (e) Impossibility would envisage situations where performance of contract has become impractical and/or useless for the parties involved.

5) Aspects that parties can consider in order to deal with 'force majeure' clauses in contracts in times of the COVID-19 outbreak

To conclude, whether a party seeks protection under a 'force majeure' clause or impossibility to perform a contract under Section 56 of the Contract Act, the burden of proof is very strict and the same are construed narrowly by the courts. As already detailed hereinabove, the Bombay High Court declined to give protection to party on account of the outbreak of Covid-19. Since, the courts in India ascertain both 'force majeure' event and impossibility on a case to case basis, it becomes essential for a party to keep the following aspects in mind while dealing with 'force majeure' scenarios in ongoing contracts:

- (a) Clear assessment of the relevant clause in the contract to ensure further actions can be worked out accordingly -
 - (i) Reviewing the contracts to examine 'force majeure' clause and assess whether the situation one is dealing with would qualify as a 'force majeure' or a similar event giving such a party a right to avail the protection;
 - (ii) The spread of 'COVID-19 virus' has been declared as a natural calamity by the Central Government and its impact on the performance of certain kinds of contracts may be regarded as a 'force majeure' event. A subsequent lockdown imposed by the Central Government may also be construed as 'force majeure' event in applicable cases;
 - (iii) In cases where contracts do not provide for such a clause, provisions of Section 56 of the Contract Act are attracted to safeguard the non-performing party;
 - (iv) The use of the 'impossible' in Section 56 of the Contract Act would not envisage a situation where there is a physical and/or literal impossibility to perform of contract, rather it would capture circumstances where the performance of the contract with regard to its object and purpose has become impracticable and useless;
 - (v) Merely because performance of contract has become 'onerous' or expensive the same would not save a party from consequences of non-performance especially when an alternative means to perform the same is available; and
 - (vi) Some action has been taken to mitigate the harm and/or loss, to the extent possible, occasioned due to the 'force majeure' event.
- (b) Ensuring pre-conditions provided in the contract are satisfied -
 - (i) Pre-conditions incorporated in the contract have to be complied with in a timely manner including issuance of notice invoking the 'force majeure' clause; and

- (ii) Certain contracts may also provide termination on account of an event subsisting for a certain period. If the event goes beyond such period, parties should endeavor to re-negotiate or terminate the same with a prior notice/intimation.
- (c) Effective Communications -
 - (i) When communicating the occurrence of a 'force majeure' (or like event) it is important the communication is clear and unambiguous. Identification of the event, circumstances leading up to the same, difficulty in performance as a result of the event and relief requested are important ingredients of such communication;
 - (ii) Response to a communication invoking a 'force majeure' (or like event) should clearly state whether the request is being adhered to or denied and reasons for the same should be set out; and
 - (iii) A communication which is clear and finds its basis under contract and law would be of great assistance when the same is to be produced before a court/tribunal in support of an argument.

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