

## COVID-19 AND FORCE MAJEURE EVENT

### What is Force Majeure Event?

- In general terms, “*force majeure*” refers to a contractual provision that limits liability due to unforeseen events outside the control of the parties that delay performance of the contract or prevent performance entirely. A party’s ability to delay or discontinue performance based upon a force majeure event depends upon the specific terms of the contract analysed in conjunction with applicable facts and law. Where only one of the contract parties asserts a force majeure defence, the party may be relieved from performance of its obligations and counter party may also be relieved, but this will depend on the nature of the obligations and the applicable law.
  - In India, the law on force majeure is embodied under Sections 32 and 56<sup>1</sup> of the Indian Contract Act, 1872. The occurrence of any force majeure event excuses a party from performance of its part of the contract<sup>2</sup>. The intention behind includ-
- ing such a clause is to relieve parties from liability under a contract on occurrence of an event which rendered performance of obligation impossible for reason beyond control of the parties. It can also be said that such an event is an exception to a breach of contract. In most contracts, unless otherwise stated, the force majeure clause does not absolve a party from performance of the contract completely and requires it to perform that part of the contract which is not affected by the force majeure event.
- In the United States, all contract law matters are governed by state law. Therefore, the ability to claim force majeure depends upon the existence of an express force majeure provision in the contract, and the scope of relief offered under applicable state law. In general, courts will enforce a force majeure provision according to its terms.

<sup>1</sup> *Satyabhrata Ghose Vs Mugneeram Bangur & Co. & Another AIR 1954 SC 44*

<sup>2</sup> *Energy Watchdog Vs Central Electricity Regulatory Commission & Ors. (2017) 14 SCC 80*

### What type of events qualify as force majeure?

- Every aspect of the force majeure provision must be considered on its own precise terms. Some general features common to most force majeure provisions include:
  1. The event was not reasonably foreseeable by the parties, and the effects therefore could not be avoided;
  2. The relevant event materially affects the ability of one or more of the parties to perform their contractual obligations for no fault of affected party;
  3. Act of God such as flood, tsunami, hurricane, earthquake, etc;
  4. Riots, pandemic, epidemic, etc; and
  5. The event was outside the reasonable control of a party.
- Hence, a force majeure provision applies when performance becomes impossible and not when it simply becomes onerous or economically unviable, unless such provision is made. Usually, the event which make performance onerous arise due to change in law event and are provided according-
- In general, a force majeure provision excuses performance based upon the occurrence of specific qualifying events that constitute force majeure or that fall within the purview of a broader category of events that may qualify as force majeure events. These may include “acts of God,” war, fire, national emergencies, labour strikes, diseases, pandemics, epidemics, natural disasters, governmental acts or regulations, and other “acts beyond the control” of the parties.
- The contracts usually provide for obligations on affected party to give notice, mitigate the losses.
- The consequences of force majeure are extensions of time for completion or performance for a specified time and no liability during such event and also the ability of parties to terminate or suspend performance (in full or in part).

### How does a party prove that an event was not “reasonably foreseeable” and therefore was outside its control?

- This is highly fact-specific. Most contracts contain specific lists of force majeure events that qualify as occurrences that are not “reasonably foreseeable” and are beyond affected party’s control.
- If a party wishes to have an event such as the COVID-19 outbreak considered as a force majeure event, it would be ideal for the relevant provision to specifically include “pandemics,” “epidemics” or “disease.”
- Even if the relevant force majeure provision does not contain such specific references, “catch-all” provisions such as “national emergencies,” “acts of God,” “governmental actions or regulations,” or acts beyond the control of the parties may also qualify COVID-19 and its effects or repercussions as a force majeure event.
- Having said that, nature of contract, terms thereof need specific analysis, to evaluate whether it can qualify as force majeure event and whether affected party’s per-

formance can be excused.

### What constitutes sufficient notice?

- Force majeure provisions generally require that the party asserting excuse of performance notify the counterparty of the relevant force majeure event(s) and provide required support or take steps to mitigate losses. Some contracts contain detailed procedures and timelines for such notice. Some countries require strict compliance with the notice provision in the contract when providing notice of force majeure.
- If the force majeure provision is silent concerning notice, the affected party nevertheless may want to provide preliminary notice of the possibility of force majeure once it becomes evident that performance may be delayed or rendered impossible. The notice can always be amended or supplemented as additional details become available.
- Parties should always take care before asserting force majeure to avoid a premature claim for breach of contract or anticipatory repudiation. The counterpart may also seek to terminate the

contract or avoid its own performance after receiving a notice of a force majeure event. If a legitimate force majeure defence is asserted, the party asserting the force majeure will not be liable for breach of contract.

#### How does a party prove that it attempted to mitigate or avoid the force majeure event?

- If an event qualifies as force majeure and proper notice was given to the counterparty, a party relying on force majeure may still be found liable for not mitigating the harm derived from the non-performance of its obligations. The extent of the mitigation requirement is fact-specific and will depend on the language of the provision as well as applicable law and the facts.
- Where an alternative to non-performance is available, the contracting parties should consider such alternatives on the basis of increase in burden and costs.

#### Can a party still be sued if a qualifying event occurs, proper notice is given and mitigation is undertaken ?

- Given that the determination of a qualifying event, proper notice and mitigation are all subject to interpretation, litigation may ensue if the parties do not agree on these elements.

#### Is outbreak of COVID-19 a force majeure situation?

- Force majeure clauses are a contractual feature. Indian laws do not specifically define "force majeure", from the perspective of contract laws, however, there is lot of jurisprudence in respect thereof.
- Hence the answer therefore lies in the question - what are the identified force majeure situations in your particular contract? Most contracts provide for various situations as "force majeure events". Some contracts use words like Order of Government" (of shutdown/lock down), epidemic, pandemic and any other situation wherein the conduct of business is impossible as examples of force majeure situations. Hence, COVID-19 would

fall under force majeure event in such cases. Having said that, if it falls in exemption provided by Government for example essential services, the rescue to force majeure may not be tenable.

- As force majeure clauses allows contractual non-performance, they are likely to be given a narrow interpretation if the facts and other provision do not support the contention.
- Whereas some contracts give a more restrictive definition of force majeure, limiting it to physical damage to the business premises
- Accordingly, to answer, outbreak of COVID-19 does not automatically become a force majeure situation, and its classification as such largely depends on the language of specific contract(s) and obligations of each party. For example; if a party engaged in essential service claims force majeure to get relief from performance of obligation to relieve some financial burden, the same in our view may not be tenable.

### Will consequences arising from COVID-19 constitute force majeure?

- The extent to which COVID-19 and its downstream effects and consequences constitute a qualifying force majeure event is highly fact-specific and depends on the terms of the contract, the specific facts, governing law, obligations of parties and how courts in the relevant jurisdiction(s) interpret force majeure provisions, among other things.
- Even if a contract does not have a specific force majeure provision, applicable law may allow a party to excuse performance under other theories in the face of unexpected events.
- The law is likely to evolve as a result of COVID-19, and many parties may approach courts for interpretation of force majeure on account of this pandemic.

### What significant impact is sufficient to demonstrate that COVID-19 had a “material impact”?

- The degree of impact or impairment of a party’s performance on its contractual obligations will depend on the facts and circumstances of each situation.

- A contract party asserting force majeure must establish a link between the relevant event and the party's inability to perform. For example, the current and evolving restrictions designed to prevent the spread of COVID-19 may make it impossible for timely performance of delivery of non-essential goods under the contract, however, payment for orders fulfilled may not be excused as banks are functioning and online facilities are also available<sup>3</sup>.
- The contract will dictate the circumstances under which performance will be excused (e.g., if a party's performance is "impeded," "hindered," "prevented" or "interfered with").
- A disruption that affects only the contract's profitability may not be sufficient to constitute a force majeure event unless there is express language addressing profitability.
- An economic downturn or generally adverse business conditions are probably insufficient to constitute a force majeure event, even if it can be proven that such downturn was specifically caused by COVID-19.

### Landmark Judgement

#### • **Carlill v Carbolic Smoke Ball Company [1892] EWCA Civ 1**

The Carbolic Smoke Ball Company of London ("Defendant"), placed an advertisement in several newspapers on November 13, 1891, stating that £100 (One Hundred Pounds Only) reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the influenza after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. Lilli Carlill ("Plaintiff"), believing Defendant's advertisement that its product would prevent influenza, bought a Carbolic Smoke Ball and used it as directed. However, despite usage as per directions, Plaintiff caught the flu after several weeks of usage of smoke balls.

Therefore, on the basis of the advertisement given by the Defendant, Plaintiff claimed compensation of £100 (One Hundred Pounds Only). However, her demand for compensation was declined by the Defendant. The Defendant argued on the intricacies of contract law. Further, in the absence of an offer from the Defendant and a subse-

<sup>3</sup>See Order dated April 8, 2020 of Hon'ble Bombay High Court in the matter of Commercial Arbitration Petition (L) Nos. 404-408 of 2020 Standard Retail Private Limited Vs M/s G S Global Corp & Others and 3 Ors.

acceptance by the Plaintiff, there was no lawful contract between them wherein the advertisement was only a wager and the Defendant had no intention of entering into a contractual relationship the Plaintiff.

The Court of Appeal of England & Wales, however, did not accept the contentions of Defendant. It held that the advertisement made by the Defendant was a lawful offer and the buying of Smoke Ball by Plaintiff consequent to the advertisement was acceptance of the said offer. Further, it was observed by the Court that the deposit of £1,000/- (One Thousand Pounds Only) by the Defendant in bank signified its intention to enter into a contractual relationship. The Plaintiff was awarded compensation by the Court.

In unilateral contracts, communication of acceptance is not expected or necessary. - If there is an offer to the world at large, and that offer does not expressly or impliedly require notification of performance, performance of the specified condition in the offer will constitute acceptance of the offer and consideration for the promise. Further, statements made in an advertisement may be a mere

“puff” and not intended to be legally binding. If the advertisement shows a clear promissory intention to be legally bound, it may constitute a unilateral offer.

#### Comments on the current prevailing situation

- Force majeure and frustration of contracts are contractually and legally viable tools that provide a real possibility to the businesses to deal with the current situation. The case to case assessment is however needed before opting for same.
- Needless to state that the current situation will have certain impact on way the force majeure clauses will be drafted in future. It is important to maximize force majeure protection by carefully drafting and then preserving rights under a contract that will excuse performance if faced with unexpected events beyond one's control.
- In light of the novel Coronavirus (COVID-19) pandemic, many businesses are impacted and may look for seeking relief or delay in performing their obligations under existing contracts.

However, some sectors have been given benefit of force majeure by the Government such as distribution licensees on delayed payment charges and Hon'ble Supreme Court has granted extension to automobile sector on sale of inventory of BS-IV vehicles beyond March 31, 2020. In addition, Government has granted certain extensions and exemptions on account of COVID-19 in filing of documents, payment of taxes, etc.

- One must revisit the contracts and take necessary actions including issuing force majeure notice and steps to mitigate risks, if any.



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