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COVID-19

A force majeure event or simply a pandemic?

Introduction

What is known to exist but is not visible is surrounded by mystery. It excites the imagination and people spin yarns about it. Though that is not true when it comes to novel coronavirus ("COVID-19"), the outbreak of which has been globally reported, COVID-19 has caused worldwide unprecedented disruptions to business operations; and the commercial turmoil continues. As the last several months have witnessed, the pandemic has severely impacted the ability of companies around the globe to maintain steady operations and perform their respective contractual obligations.

The unprecedented disruption, across the board, to performance under commercial contracts, has triggered companies to mitigate the impact of delayed operation and non-performance of the contracts through recourse to force majeure clauses contained in such contracts. An event of force majeure is typically defined to mean an extraordinary event or circumstance beyond the contemplation or control of either contracting party. Force majeure events include 'acts of God (such as a natural calamity), government restrictions or other extraordinary circumstances which prevent fulfilment of a contractual obligation by one or more parties. This article, This article discusses the extent of immunity offered by a force majeure clause under Indian law and whether the said immunity can still be claimed when there is no force majeure clause in the contract.

If Force Majeure clause is enshrined in the contract

A classic force majeure clause would require that the disruption of performance be beyond the invoking party's reasonable control and that the event was not reasonably foreseeable. The question as to whether COVID-19 would qualify as a force majeure event will depend on the wording of the force majeure clause in the relevant contract. If the

word "pandemic" is explicitly covered in the force majeure clause, then the residual burden of proof on the invoking party would simply extend to establishing that Covid-19 has directly affected its ability to perform its obligations under the contract. In the Indian context, in addition to the "pandemic", another event or set of event that have been widely deployed by contracting parties to contend force majeure are "lockdown" or "government lockdown" or "government restrictions". Where the force majeure clause in a contract explicitly provides for events such as "epidemics", "pandemics" or "government restriction", it is easier for a party to argue that its inability to perform a contract is attributable to force majeure. However, where a force majeure clause does not explicitly enumerate the specific events that would constitute force majeure, and simply uses the term "act of God" or "event beyond the reasonable control of parties", under these circumstances, it is harder for a party to claim force majeure to excuse its contractual performance. Apart from the above, a party's entitlement to invoke force majeure clause would depend on the following factors:

Whether the party invoking force majeure has notified its contractual counterparty, within the time period stipulated within the contract. In addition to notice periods, contracts in India may also stipulate that the invoking party is expected to outline an estimation of the impact and duration of effects resulting from the said event. Following the sudden imposition of a national lockdown in India by a notification of the Central Government in late March, 2020, the question that faced several contractors was whether they had declared, in explicit terms (and within the time specified in the contract), the occurrence of an event of force majeure thereby excusing the invoking party from performance of its obligations under the contract.

Under Indian law, the party invoking force majeure and the other party have an

obligation to mitigate the consequences of force majeure. In that case, what deserves consideration is whether there are alternative means through which a party can perform the contract or whether the party not affected by the force majeure event is obligated to mitigate its losses in some way. Depending upon the terms of a contract, the parties are expected to take reasonable steps towards mitigation.

Upon occurrence of an event of force majeure, various additional factors are required to be considered. For instance, performance of the contract may be suspended during the operation of force majeure event and performance may be suitably extended. The parties may also have the option of renegotiating and modifying the contract's terms, or termination of contract if the force majeure event continues beyond a specific period of time.

Nature of evidence on which the claim of force majeure would be based is of utmost importance. It is vital that the party invoking the force majeure clause must keep all documents related to the force majeure event, which might be required in case a dispute arises in future. In the present scenario, the said documents may include (i) national and state government notice and guideline imposing restriction of trade, (ii) news articles related to COVID-19 outbreak, quarantines, restricted travel and mandatory shutdown of airports, trains stations and seaports, (iii) cargo booking and freight agency agreement, (iv) cancelled flight or train ticket or anything other documents relating to travel itinerary, and (iv) cancelled visa or rejected visa application.

If contract does not have a Force Majeure clause

Where a contract does not have a clause on force majeure, to be excused from its obligations, it will need to rely on the doctrine of frustration prescribed under Section 56 of the Indian Contract Act, 1872 ("Act"). In a landmark judgement of the Supreme Court of

India titled *Energy watchdog Vs. Central Electricity Regulatory Commission* reported at 2017 (4) SCALE 580 the Court opined that for a party to succeed in a contention that a contract is frustrated the following conditions are required to be satisfied:

- I. a valid and subsisting contract between the parties;
- II. there must be some part of the contract yet to be performed; and
- III. the contract after it is entered into becomes impossible to perform i.e. subsequent impossibility.

Indian Courts are according relief on account of subsequent impossibility when it is found that the whole purpose or the basis of the contract has been frustrated by the intrusion or occurrence of an unexpected event or change in circumstances, which was not contemplated by the parties during execution of the contract or the performance of the contract becomes impracticable or useless having regard to the object and purpose the parties had in view.

Regulatory Initiatives by the Indian Government on Force Majeure

Apart from the above, the initiatives taken by the Government of India deserve a special mention. Following the pandemic, the Government of India announced various measures in order to prevent further disruption in international trade and

commerce by declaring outbreak of COVID-19 as a force majeure event. The Ministry of Finance issued an office memorandum dated February 19, 2020 ("Memorandum") which states that Force Majeure clause can be invoked in Government contracts if there is a "disruption in supply chain due to spread of corona virus in China or any other country". The Memorandum further states that COVID-19 should be considered as a case of "natural calamity". Further gaining strength from the Memorandum, the Ministry of New & Renewable Energy has issued an Office Memorandum dated March 20, 2020 which directs all Renewable Energy implementing agencies of the Ministry of New & Renewable Energy (MNRE) to treat delay on account of disruption of the supply chains due to spread of COVID-19 in China or any other country, as Force Majeure event.

Are we prepared for potential dispute?

The Indian legal position on force majeure continues to be an evolving one. Although currently it would be impossible to ascertain the quantum and extent of damage caused due to the outbreak of COVID-19, it would be prudent for any commercial organization to be adequately prepared to protect their respective businesses from the prospective disputes. Broadly, upon the occurrence of force majeure, the following steps should be taken by a party seeking to invoke force majeure:

- Ensure that the pandemic is covered by the force majeure clause in the concerned contract;
- Promptly notify the counterparty regarding the occurrence of a force majeure event, in the manner provided under the contract;
- Collate all documents related to the force majeure event, as the same would serve as a vital evidence at the time of dispute resolution;
- Ensure a detailed evaluation of the contract and other related aspects by a legal expert.

As the Indian economy limps back to normalcy, a question that has begun to arise is whether the ripple effects of the lockdown, and tapering restrictions on labour, social distancing, etc. will continue to entitle contractors to the full protection of force majeure. This, and other related question are likely to continue to be deliberated in times to come.

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