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Contracts and force majeure during a pandemic

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As the spread of the COVID-19 pandemic casts a large shadow over commerce and industry, contracts have become difficult or even impossible to perform. Contracts therefore have to be reconsidered, contractual rights and obligations must be reassessed and the way in which performance can be completed has to be examined.

Legal issues: A number of questions have to be answered before assessing the validity of *force majeure* clauses.

- Does COVID-19 and its consequences constitute a *force majeure* event? If so, does the *force majeure* clause cover it?
- If the contract contains no *force majeure* clause, can a party be relieved of its obligations through other principles of law such as the doctrine of frustration of contract?
- What are the consequences of invoking either the *force majeure* clause or the doctrine of frustration?

Invoking *force majeure*: *Force majeure* is an occurrence that cannot be anticipated, preventing a party from completing something that they had undertaken to do. It includes both acts of nature, such as floods and hurricanes, and acts of man, such as riots, strikes and wars. A *force majeure* clause relieves the defaulting party of its obligations under the contract when a *force majeure* event prevents the performance of the contract.

The law accepts that a *force majeure* clause is binding although *force majeure* is not statutorily defined and the parties are free to agree contractual terms. However, section 32 of the Indian Contract Act, 1872 (act), which provides for contingency contracts, may be considered a statutory starting point.

COVID-19 may be considered a *force majeure* event if (i) the clause defines epidemics or pandemics as such; (ii) the clause is merely indicative and does not provide an exhaustive list of events; or (iii) when the clause uses generic words or phrases such as government decision, national interest, travel restrictions or natural calamity.

The government issued office memorandums dated 19 February and 20 March 2020 treating the spread of COVID-19 as a *force majeure* event applicable to contracts to which it is a party. The memorandums do not bind parties to private commercial contracts, but may be of persuasive value. The consequences of invoking a *force majeure* clause should be set out in the clause itself, and may include the suspension of contractual obligations during the currency of the *force majeure* event, the termination of the contract, and the suspension of contractual obligations with termination should the *force majeure* event continue beyond an agreed period.

Invoking doctrine of frustration: Where a contract does not include a *force majeure* clause or where it cannot be construed to cover COVID-19, a party unable to perform its obligations may have recourse to section 56 of the act, which codifies the common law doctrine of frustration. The doctrine may be invoked provided that three conditions exist: (i) there is a valid and subsisting contract between the parties; (ii) there is some part of the contract yet to be performed, and (iii) impossibility of performance after it is entered into for reasons beyond the party's control.

Accordingly, it may be contended that contracts, even those not containing a *force majeure* clause are considered frustrated by virtue of section 56 of the act, due to the spread of COVID-19. Where a contract is held to be frustrated, it shall be considered void and therefore unenforceable.

Recommendations: Whether a contracting party may invoke a *force majeure* clause or the doctrine of frustration, will depend entirely on the facts of each case and the terms of the contract, including the *force majeure* clause agreed by the parties and whether the defaulting party has to rely upon the doctrine of frustration. The defaulting party should:

- consider the consequences of invocation of the *force majeure* clause;
- consider adopting mitigation measures that best serve their commercial interests;
- consider whether there are any preconditions that have to be fulfilled before invoking the *force majeure* clause or the doctrine of frustration;
- issue notices in the manner and by the mode prescribed in the contract. Usually, contracts contain a clause setting out the way in which the defaulting party must give notice of claiming *force majeure* or frustration, including the mode of service, such as email, courier or in person, and an address for service;
- consider that the burden of proof of establishing the *force majeure* or frustrating event is on the defaulting party;
- ensure that all communications with the other party are recorded and reduced into writing, as far as possible.

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