



UPDATING FORCE MAJEURE CLAUSES FOR INDIA-JAPAN CONTRACTS

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Most commercial contracts contain a force majeure clause, answering the important question: What happens when an event beyond the control of a party renders performance of its obligations impossible?

For many decades, this clause was treated as a standard condition in contracts between Indian and Japanese companies. In general terms, it referred to events such as floods or earthquakes – and once agreed on, business proceeded without much attention to the clause.

Force majeure drafting lessons 2020

However, when factories shut down, supply chains collapsed and borders closed overnight with the onset of the COVID-19 pandemic, the force majeure clause – once a quiet provision – suddenly became the most important part of a contract.

It rescued some businesses while costing others, often depending on how the clause was drafted. In many cases, the outcome turned on a single word. Where the contract included terms such as “pandemic” the affected party could seek protection. However, where the clause was limited to narrower expressions such as “natural disaster” parties were left to litigate their claims.

The position was especially complex in India as the law did not provide a statutory definition of force majeure, and when a contract lacks a force majeure clause, parties must rely on the doctrine of frustration in section 56 of the Indian Contract Act, 1872. This provides that where an unforeseen event renders performance impossible, the contract may be declared void.

Indian-Japanese force majeure contract terms

Indian courts examine cases based on contract terms. While lockdowns and government restrictions have in certain cases been recognised as force majeure, claims based entirely on financial distress have generally not been accepted because economic hardship is not sufficient to invoke frustration.

Likewise, under Japanese law and general commercial practice, a contract becoming uneconomic is not usually considered force majeure. Standard Japanese construction contracts treat price adjustment clauses as distinct from force majeure provisions, viewing them as separate legal mechanisms applicable in different circumstances.

This distinction, however, was not always clearly reflected in contracts by Indian companies with Japanese counterparts and the pandemic exposed this gap – often leaving parties uncertain whether they could suspend performance or be required to continue fulfilling their obligations.

Modern force majeure and law changes

Lessons were learned on both sides with contracts between Indian and Japanese companies today differing significantly from those of the past, and drafting force majeure clauses evolved.

Instead of references such as “acts of God”, modern contracts now enumerate events such as pandemics, quarantines, port closures, import and export restrictions, supplier insolvency, cyberattacks and geopolitical disruptions. These clauses are also increasingly accompanied by obligations such as timely notification, proactive mitigation, appropriate insurance and periodic updates on remedial steps.

A second significant development is the “change in law” clause, addressing situations where government action alters the legal/regulatory framework. While force majeure concerns unforeseen disruptive events, change in law deals with shifts that affect the performance of a contract.

Indo-Japan contract risk clauses evolve

This has been particularly relevant for Japanese companies when changes in GST regulations, foreign investment policies and data protection laws have impacted ongoing arrangements. Similarly, export licensing restrictions in Japan relating to semiconductors and AI technologies have affected agreements with Indian partners.

In response, companies have increasingly revised contracts to account for foreseeable regulatory and economic changes, including provisions permitting renegotiation where government action renders the original terms unworkable.

However, the most fundamental change has been the attitude of parties. Force majeure and related clauses are no longer treated as boilerplates to be signed and forgotten. Instead, they are now significant provisions where parties acknowledge uncertainty and agree in advance on how to address disruptions – rather than leaving such issues to litigation.

The Indo-Japan business relationship continues to expand with more than 1,400 Japanese companies operating in India across sectors such as manufacturing, infrastructure, technology and finance. While the pandemic has been a difficult experience, it has led to contracts that are clearer in risk allocation and better equipped to address future uncertainties.