

Prevention is better than cure – Safeguarding your business from potential harms of COVID-19

With the coronavirus just raising its head in India apart from serious public health issues, various questions regarding performance/inability to perform commercial obligations and contracts by parties have come to the forefront. With the Finance Ministry clarifying that *Force Majeure* clauses can be invoked on account of the outbreak in appropriate cases and the virus not sparing anyone, it is advised that one should be well prepared for possible disruptions and the legal consequences thereof.

Through the present release, we seek to guide individuals/corporations who have already entered into contracts that may be affected due to the outbreak and those who are presently in the process of negotiating agreements or contracts.

The impact of the outbreak on contracts will be fact-specific as the rights of the parties are *inter se* governed by the specific contractual provisions. Parties are advised to review the following clauses of their contracts to understand & evaluate the impact of the outbreak:

- Representations/warranties clause;
- *Force Majeure* clause;
- Change in law clause;
- Notice requirements clause;
- Termination clause;
- Applicable law clause; and
- Breach related clauses;

Apart from the above, parties are advised to analyse and evaluate potential consequences of breach, alternative means to achieve performance, steps that can be taken to mitigate loss and impact on other contracts.

Most contracts provide for *Force Majeure* clauses under which the breaching party can take shelter in the event the breach occurs due to any circumstances beyond the control of the parties. The *Force Majeure* clauses under various contracts further need to be analysed under the terms of the agreement i.e the existence or non-existence of such a clause, the defined limits under which defence under the clause can be taken and the governing law of the contract in the event of absence of such a clause.

Force Majeure is broadly defined as “an event or effect that can be neither anticipated nor controlled”. A *Force Majeure* clause is a tool for the parties to effectively allocate risk in the event performance under the contract becomes impossible or impracticable.

Force Majeure clauses differ on a contract to contract basis and may either be exhaustive or non-exhaustive. Parties are advised to evaluate whether the outbreak would fall under the ambit of the clause so as to enable the party to invoke its provisions. Parties should also

ensure that they follow the procedure set out in the contract (such as any obligation to send a notice) while claiming *Force Majeure* and maintain proper records in order to successfully defend any future litigation. It is also important to keep in mind that for a party to successfully invoke the *Force Majeure* clause, the performance of the contract must be directly affected on account of the outbreak. Further, the clause is normally invoked when a party is prevented from fulfilment of certain obligations which could not have been reasonably avoided or overcome and have caused the non-performance of the contract.

As a result of the invocation of the *force majeure* clause, parties can claim various relief such as extension of time for performance of the contract, extension of payment obligations, suspension of the contract and in exceptional circumstances, termination of the contract.

In the event, the contract does not provide for *Force Majeure* remedy and the applicable law is Indian law then the remedy for an affected party by the outbreak lies under Section 56 of the Indian Contract Act, 1872 ('Act'), as the same may be covered depending on the facts, circumstances and the reliefs claimed under the contract to do an act which subsequently becomes impossible.

Section 56 of the Act provides that if an act under a contract becomes impossible due to an event which the promisor could not prevent, the contract becomes void. The Hon'ble Supreme Court of India in *Satyabrata Ghose v. Mugneeram Bangur & Co.*¹ held that the word 'impossible' has not been used in the Section in the sense of physical or literal impossibility and that if an untoward event or change of circumstance totally upsets the very foundation upon which the parties entered their agreement, it can be said that the promisor finds it impossible to do the act which he had promised to do. Whether the outbreak of the virus would render an act under the contract impossible would depend on the facts and circumstances of the case.

Further the Hon'ble Supreme Court while clarifying the interplay between Force Majeure and Section 56 of the Act in *Energy Watchdog v. Central Electricity Regulatory Commission & Ors.*² held as under:

“Force Majeure” is governed by the Contract Act, 1872. Insofar as it is relatable to an express or implied clause in a contract...it is governed by Chapter III dealing with the contingent contracts, and more particularly, Section 32 thereof. Insofar as a force majeure event occurs dehors the contract, it is dealt with by a rule of positive law under Section 56 of the Contract Act.”

For parties currently negotiating agreements, we advise to keep the following in mind:

- Scope and ambit of the *Force Majeure* clause;
- Possible future impact of the outbreak and consequents thereof;
- Supply chain disruption;
- Specific insurance coverage; and
- Allocation of risk in the contract.

With the presence of the virus increasing in India day by day (*at the time of writing of this release 29 cases have been confirmed in India*) business are bound to be impacted by the virus

and should be well equipped to handle the consequences and repercussions that may arise as a result of the present outbreak. It is also important to keep in mind that the virus has had varying degrees of impact in various jurisdictions and thus the threshold to get it covered under the exceptions may vary. We will be updating this release as and when there is any major development.

Apart from rendering the entire contract void, there is separate jurisprudence on delays in the performance of contracts due to reasons beyond the control of the parties notwithstanding the non-existence of a *Force Majeure* clause, which shall be covered in the next release shortly.

1. 1954 SCR 310

2. (2017) 14 SCC 80