

COVID- 19 AND INVOCATION OF “FORCE MAJEURE” IN INDIAN CONTRACTS

The COVID-19 outbreak has been labelled a pandemic by the World Health Organization. The outbreak of COVID-19 has brought challenges in performance and completion of mutual obligations under contracts for the entire business community. Therefore, it becomes necessary to analyze if COVID-19 can be classified as a “*Force Majeure*” event.

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“*Force Majeure*” may be defined as “*an event or an effect that can neither be anticipated nor controlled*”¹ or “*events outside the control of the parties and which prevent one or both parties from performing their contractual obligations.*”² The intention of a “*Force Majeure*” clause is to save the performing party from consequences of something over which it has no control. “*Force Majeure*” is an exception to what would otherwise amount to a breach of contract. Indian courts have generally recognized this concept and have enforced it where appropriate. The law in India has been laid down in the seminal decision of the Supreme Court of India in the case of *Satyabrata Ghose vs Mugneeram Bangur & Co.*³ and in the recent case of *Energy Watchdog vs CERC*.⁴

Thus, the law relating to “*Force Majeure*” is embodied under Section 32 (“*Enforcement of contracts contingent on an event happening*”) and Section 56 (*An agreement to do an act impossible in itself is void*) of the Indian Contract Act, 1872. It is also embodied in Section 108(e) of the Transfer of Property Act, 1882 with regard to Leases. Section 32 of the Contract Act is applicable where express or implied clauses form a part of a contract. In a situation where a “*Force Majeure*” event occurs de hors the contract, it is dealt with by a rule of positive law under Section 56 of the Contract Act. Further, with regard to leases under the Property Act usually “*Force Majeure*” is limited to violent natural calamities.

In the Indian context, most contracts contain detailed clauses wherein events and circumstances that may be considered as a “*Force Majeure*” event are described and these would be determinative of any

¹ Black’s Law Dictionary, 11th Edition; Page 788

² P Ramanatha Aiyar’s Advanced Law Lexicon, 5th Edition; Page 2077

³ AIR 1954 SC 44

⁴ (2017) 14 SCC 80

“36. The law in India has been laid down in the seminal decision of *Satyabrata Ghose v. Mugneeram Bangur & Co.* 1954 SCR 310. The second paragraph of Section 56 has been adverted to, and it was stated that this is exhaustive of the law as it stands in India. What was held was that the word “impossible” has not been used in the Section in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose of the parties. 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. It was further held that where the Court finds that the contract itself either impliedly or expressly contains a term, according to which performance would stand discharged under certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be dealt with Under Section 32 of the Act. If, however, frustration is to take place de hors the contract, it will be governed by Section 56.

interpretation. A typical “*Force Majeure*” clause may include one or more terms such as “*Acts of God*”, “*Natural calamity*”, “*Strikes*”, “*War*”, “*Epidemic*” etc. At times contracts also specifically set out events which shall not be considered as “*Force Majeure*” events.

The occurrence of a “*Force Majeure*” situation for events other than those specifically mentioned or excluded from the “*Force Majeure*” clause may be derived from an interpretation of the Contract, Contract Act or the Property Act as the case may be and shall vary from case to case. Page | 2

For contracts where “*Epidemic*” is not specifically provided for in a “*Force Majeure*” clause, reliance may be placed on other clauses such as “*Acts of God*” or “*Natural calamity*” and the fact that various States in India such as Karnataka, Haryana and the National Capital Territory of Delhi have already declared COVID-19 as an “*Epidemic*”⁵ and the Government of India also believes that the spread of COVID-19 falls within the definition of “*Acts of God*” like a “*Natural calamity*”⁶. It has recently been clarified that for the purposes of considering disruption of supply chains due to spread of COVID-19 in China and other countries, COVID-19 may be considered as a “*Natural calamity*” and “*Force Majeure*” Clauses may accordingly be invoked. While such guidance may not be universally applicable as law, it may still have persuasive strength in interpreting contracts with the Government of India. Additionally, the Supreme Court has previously endorsed an interpretation that “*Force Majeure*” may be extended to capture an “*Epidemic*”.

In such circumstances, it may be open for an argument that the inability of a party to perform their obligations under a contract are covered under “*Force Majeure*” even if an “*Epidemic*” is not specifically included. However, the consequences of invoking such a clause, how long it can be invoked and upon whom the risks and losses lie would be determined by a review of particular contracts. Therefore, we advise that entire business community be cautious and take appropriate steps to safeguard their business interests in view of the COVID-19 outbreak so that unforeseen liabilities can be avoided.

In case of any questions please contact:

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⁵ Circular No. PSR (4)/PR/11426/201920 dated March 13, 2020, Notification No. 46/4/2020-5HB-II dated March 11, 2020, Order No. F51/DGHS/PH-IV/COVID-19/2020/M/prescyhfw/2447-61 dated March 16, 2020

⁶ Office Memorandum No. F. 18/4/2020-PPD, dated February 19, 2020 of the Government of India, Ministry of Finance, Department of Expenditure, Procurement Policy Division