

CLIENT UPDATE

June 2020

COVID – 19

FORCE MAJEURE ADVISORY

Doctrine of Force Majeure

Force Majeure is a common clause in contracts, which frees parties from carrying out their obligations when an extraordinary event or circumstance beyond their control takes place and prevents contractual performance.

DISCLAIMER: No person should rely on the contents of this document without first obtaining advice from a qualified professional. This document is contributed on the understanding that the Firm, its employees and consultants are not responsible for the results of actions taken on the basis of information in this document, nor for any error in or omission from this document. Further, the Firm, its employees and consultants, expressly disclaim all and any liability and responsibility to any person who reads this document in respect of anything, and of the consequences of anything done or omitted to be done by such person in reliance, whether wholly or partially upon the whole or any part of this document.

For Private Circulation Only
© Juris Legal & Financial Services
2020

Advisories by the Government of India on COVID – 19 being Force Majeure

- Ministry of Finance

The Department of Expenditure, Procurement Policy Division, Ministry of Finance has issued an Office Memorandum dated February 19, 2020 in relation to the government's 'Manual for Procurement of Goods, 2017'; relevant portion of the Office Memorandum is extracted below:

“2. A doubt has arisen if the disruption of the supply chains due to spread of corona virus in China or any other country will be covered in the Force Majeure Clause (FMC). In this regard it is clarified that it should be considered as a case of natural calamity and FMC may be invoked, wherever considered appropriate, following the due procedure as above.”

[emphasis supplied]

Subsequent to the aforesaid, the Ministry of Finance issued another Office Memorandum dated May 13, 2020, wherein it was clarified that the parties may claim *force majeure* for non-performance of those duties directly attributable to the lockdown imposed by the relevant Government; an extract of the Office Memorandum is reproduced below:

“It is clarified that invocation of FMC would be held valid only in a situation where the parties to the contract were not in default of the contractual obligations as on 19th February, 2020. It is further clarified that invocation of FMC does not absolve all non-performances of a party to the contract, but only in respect of such non-performance as is attributable to a lockdown situation or restrictions imposed under any Act or executive order of the Government/s on account of COVID -19 global pandemic.”

[emphasis supplied]

- Ministry of New & Renewable Energy

The Ministry of New & Renewable Energy has issued an Office Memorandum on time extension in the scheduled commissioning dates of renewable energy projects, considering disruption of supply chains due to the spread of coronavirus and treating it as a *force majeure* event; relevant portion of the Office Memorandum is extracted below:

“(3).(a) All Renewable Energy implementing agencies of the Ministry of New & Renewable Energy (MNRE) are hereby directed to treat delay on account of disruption of the supply chains due to spread of coronavirus in China or any other country, as Force Majeure.” [emphasis supplied]

- Ministry of Shipping

The Ministry of Shipping has issued a letter dated March 24, 2020 to the Chairpersons of all Major Port Trusts on COVID-19; relevant extract of the letter is reproduced below:

“Major Port Trusts may consider COVID-19 pandemic as a valid ground for invoking Force Majeure Clause on port activities and port operations also.” [emphasis supplied]

- Ministry of Housing and Urban Affairs

The Ministry of Housing and Urban Affairs has issued an Office Memorandum on time extension of registration of real estate projects due to *force majeure* under the provisions of Real Estate (Regulation and Development) Act, 2016 (“**RERA**”). Relevant portion of the Office Memorandum is extracted below:

*“Section 6 of RERA, 2016 provides for ‘extension of registration of real estate project’ on account of ‘force majeure’, which includes any calamity caused by nature affecting the regular development of the real estate projects. **It is quite evident that current pandemic caused by nature is adversely affecting regular development of real estate projects. Hence, it attracts invoking the provision of ‘force majeure’.**”* [emphasis supplied]

Contracts Frustrated or Void where Performance becomes Impossible

Section 56 of the Indian Contract Act provides that a contract to do an act which, after the contract is made, becomes impossible, becomes void when the act becomes impossible. Relevant portion of Section 56 is extracted below:

*“**Contract to do an act afterwards becoming impossible or unlawful.**—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, **becomes void when the act becomes impossible or unlawful.**”* [emphasis supplied]

Contracts Frustrated or Void where Performance becomes Impractical and Useless

The Supreme Court in *Energy Watchdog v. Central Electricity Regulator Commission and Anr.* observed:

*“In so far as 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. **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.**”* [emphasis supplied]

Is Financial Hardship Force Majeure?

In the case of *M/s Alopi Parshad & Sons Ltd. V. Union of India*, the Supreme Court had observed:

*“The Act does not enable a party to a contract to ignore the express covenants thereof and to claim payment of consideration, for performance of the contract at rates different from the stipulated rates, on a vague plea of equity. Parties to an executable contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, for example, **a wholly abnormal rise or fall in prices which is an unexpected obstacle** to execution. This does not in itself get rid of the bargain they have made.”* [emphasis supplied]

Recent Judicial Pronouncements on Invocation of Force Majeure

The Bombay High Court in the case of *Standard Retail Pvt. Ltd v. M/s G. S. Global Corp & Ors* has refused to grant *force majeure* exemption to a set of steel importers, who had sought to restrain the encashment of their Letters of Credit by Korea based exporters on the ground that the lockdown had rendered the performance of contract impossible with Hyundai Corp and GS Global.

The Court also observed that distribution of steel has been declared as an essential service and therefore there is no restriction on its movement. Further, the Court held that since the lockdown would be for a limited period, it could not come to the rescue of a steel importer so as to enable it to withdraw from its contractual obligations to make payment. The Court in its Order also incorporated that losses cannot be a factor to invoke *force majeure*. The relevant extract is provided below:

“The fact that the Petitioners would not be able to perform its obligations so far as its own purchasers are concerned and/or it would suffer damages, was not a factor which could be considered and held against the sellers.” [emphasis supplied]

However, the Delhi High Court in the case of *M/s Halliburton Offshore Services Inc v. Vedanta Limited & Anr.*, held that the lockdown imposed in light of COVID – 19 is in the nature of *force majeure*, thereby restraining Vedanta Ltd. from invoking eight bank guarantees extended by Halliburton Offshore Services in connection with a development contract for certain blocks in Rajasthan. Relevant extract of the order is reproduced below:

“The countrywide lockdown, which came into place on 24th March, 2020 was, in my opinion, prima facie in the nature of force majeure. Such a lockdown is unprecedented, and was incapable of having been predicted either by the respondent or by the petitioner...”

...Prima facie, in my view, special equities do exist, as would justify grant of the prayer, of the petitioner, to injunct the respondent from invoking the bank guarantees of the petitioner, forming subject matter of these proceedings, till the expiry of a period of one week from 3rd May, 2020, till which date the lockdown has been imposed.” [emphasis supplied]

Conclusion

COVID – 19 may constitute a *force majeure* event for your business, entitling you to claim relief. However, claiming *force majeure* for non-performance of those duties not directly attributable to the lockdown, may not entitle you to a remedy.

For any assistance identifying your legal recourse, you may email us at delhi@jurislegal.org or call us on +91 11 4359 3370.