

INDIA-Insights on force majeure in light of Covid-19

After the outbreak of the coronavirus (Covid-19) being declared a pandemic by the World Health Organisation on March 11, 2020 and in view of the global scaling up of threat, the Central and the State Governments in India have rapidly responded to the challenge. Measures ranging from invoking of the Epidemic Diseases Act, 1897 (a statute enacted during an outbreak of the bubonic plague in Victorian India), complete lockdown of the country (except notified and essential services), shutdown of government/commercial/private/industrial establishments, suspension of passenger flights and trains, social distancing measures etc. have been implemented. Further, advisories have been issued for people to stay in their homes and follow self-quarantine measures. In light of such unprecedented measures and in compliance thereof, corporations across the country have scaled down operations leading to deep disruptions in the businesses and consequent wide ranging contractual issues.

Ordinarily such disruption, particularly in regarding to manufacturing/service/supply contracts, may make the contracts commercially unviable or in other circumstances frustrate them on account of impossibility of performance. In the former case, contracts may become commercially unviable as they can be stretched over a period of time and leading from the disruptions created by the government measures may have a domino effect leading to such contracts becoming commercial unviable. Such circumstances are not contemplated under the contracts and may result in a party suffering on account of such disruption without any recourse in law or contract. However, in the latter case, the contract could be considered to be frustrated on account of impossibility of performance. The remedy in such circumstances is often both in law and contract. More often than not, commercial contracts contemplate situations of 'Force Majeure' which would absolve the parties of the obligations under the contracts without assuming any further liability. In case of existence of such Force Majeure clause in a commercial contract, it is imperative to refer to the definition of the Force Majeure events contemplated therein to come to a conclusion if the Covid-19 disruptions would be covered by such clause. In the situations wherein the Force Majeure clause is not sufficiently wide to cover event such as

Covid-19 or there is non-existence of Force Majeure Clause, the Indian Contract Act, 1872 (hereinafter 'ICA') would come to the rescue of parties.

In case of existence of a Force Majeure clause, it is stated that such clause may differ from one contract to another. A pandemic like the COVID 19 may fall within the category of 'act of god' or 'other circumstance which hinders the performance of the contract' through *ejusdem generis*. However, this would require an inclusive, rather than an exhaustive definition. Some definitions of Force Majeure may expressly include disease or epidemic. To illustrate, the Standard Technical and Commercial Interconnection Agreement [CAS] prescribed by the Telecom Regulatory Authority of India in the Telecommunication (Broadcasting and Cable Services) Interconnection Regulation, 2004, includes any war, civil commotion, strike, Satellite Jamming, Satellite Failure, lockout, accident, epidemic or any other event of any nature or kind whatsoever beyond the control of the parties in its definition of Force Majeure. Furthermore, invocation of such clause may be subject to other conditions. Like the Bulk Power Transmission Agreements in India may require written notice of Force Majeure within a reasonable time for a party to avoid paying transmission charges for the period of force majeure when it cannot use the transmission line.¹

Recently, on February 19, 2020, the Government of India clarified that the spread of coronavirus in China or any other country will be covered in the Force Measure clause of the Manual for Procurement of Goods, 2017. The said manual defines Force Majeure '*as extraordinary events or circumstance beyond human control such as an event described as an act of God (like a natural calamity) or events such as a war, strike, riots, crimes (but not including negligence or wrong-doing, predictable/seasonal rain and any other events specifically excluded in the clause)*'.²

Further, in the absence of a Force Majeure clause, or in case where one which is not sufficiently wide to cover events such as Covid-19, the parties to the contract may take recourse to Section 56 of the ICA. The said provision is based on the English 'doctrine of frustration'. Section 56 provides that an agreement to do an impossible

¹ See Himachal Sorang Power Ltd. v. Central Electricity Regulatory Commission & Ors, 2015 SCC OnLine APTEL 148.

² Clause 9.7.7.

act is void. It further clarifies that an event which after the contract is made and makes the contract impossible to perform will also be void. Thus, the circumstance of Covid-19, which may not have been contemplated by the parties at the time of entering into the contract, would also stand covered and parties would be discharged from performance of the contract by operation of law.

The doctrine of frustration would also apply to those contracts which were entered into after the outbreak, unless otherwise agreed to, when there were some uncertainties which subsequently made the contract impossible or unlawful as the pandemic progressed. Performance is considered to become impossible when change of circumstance totally upsets the very foundation upon which the parties entered their agreement. It is a settled principal of law, however, that unprofitability, mere difficulties or rise in prices would not be considered as impossibility³. Therefore, a seller cannot avoid the performance of contract on the plea that the contract had become commercially impossible or onerous due to an unexpected turn of events. In any case, the difficulty to the parties in falling back on Section 56 of ICA is that India has not, historically, issued 'force majeure certificates' leaving the burden of proof on the party invoking Section 56 or the Force Majeure clause.

The pandemic has given rise to an unprecedented situation which is changing daily, and in some aspects, on an hourly basis. The above analysis is based on the restrictions at the time of writing the article and may require significant modifications as the State's response progresses.

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³ Energy Watchdog & Ors. v. Central Electricity Regulatory Commission & Ors., (2017) 14 SCC 80.