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To Pay or not to Pay?

Is CoVID -19 a *Force Majeure* event which suspends performance of obligations? Frankly, there is no single / unambiguous answer to this. To know more, read on.

Amidst the outbreak of gruesome coronavirus (CoVID-19), businesses are struggling to conduct their operations, if not shut. In times of lock-down and virtual liquidity crisis, people are struggling to know if the "novel coronavirus", be deemed to be an exceptional situation (*force majeure*) in dealing with their obligations.

1) So, what is a force majeure event?

(a) It is evident from several rulings that the intention of a *force majeure* clause is to save the performing party from the consequences of an event which is beyond the control of such party. It has been observed in *Dhanraj Gobindram vs. Shamji Kalidas and Co.* that the term *force majeure* is not akin to the term *vis major* (i.e. act of God). It is a term of wider import.

In *Esjay International Pvt. Ltd., Mumbai and Ors. vs. Union of India and Ors.*, the High Court of Bombay observed that the term force majeure contemplates something happening suddenly which is not foreseen, and which is beyond the control of the person.

(b) A typical force majeure clause may cover within its ambit eventualities such as draughts, earthquakes, fire and explosion, natural calamities, strikes, lockouts, floods, cyclones, epidemics or "any other happening". Generally, force majeure clauses are construed in accordance with the words which precede or follow it and with due regard to the nature and general terms of the contract.

2) Coming back to the primary question, whether the recent CoVID-19 outbreak can qualify as a force majeure event?

(a) Section 56 of the Indian Contract Act, 1872 (**"ICA"**) may assist in dealing with the same.

Section 56 of the ICA deals with circumstances which can be termed as frustration of a contract. Circumstances under which performance of a contract is excused or dispensed with when *inter alia* such performance becomes impossible. One may contemplate as to how in the current scenario (i.e. the recent CoVID-19 outbreak) the performance of obligations under the agreements may be termed as impossible. In *Satyabrata Ghose vs. Mugneeram Bangur and Company and Ors.* the Supreme Court held that the word "impossible" in Section 56 of the ICA was not used to denote a physical or literal impossibility and the same must be construed in a practical manner. In *Sushila Devi and Ors. vs. Hari Singh and Ors.* the Supreme Court effectively stated that the impossibility contemplated by Section 56 of the ICA can also be something besides what is not humanly possible.

(b) In a recent judgment in *Energy Watchdog vs. Central Electricity Regulatory Commission and Anr.* the Hon'ble Supreme Court observed that the courts do not have

general power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events. The Hon'ble Supreme Court further observed that when a force majeure clause is incorporated in a contract, and it is held that the events set out in such clause qualify as *force majeure events* in a particular case, Section 56 of the ICA shall have no application. The issue in this case was whether amendment in laws of Indonesia which resulted in the coal to be used in the thermal plant becoming substantially expensive was a force majeure event or not.

(c) So, what does the Government of India have to say? The Ministry of Finance (Department of Expenditure Procurement Policy Division) on 19th February 2020 issued an Office Memorandum in which it clarified that disruption of supply chains due to spread of corona virus in China should be considered as a natural calamity and it must be considered as a force majeure event. As is evident, this was issued well before a lock down was imposed in India and was a response to the lock down imposed in parts of China. We see no reason why this should not apply all the more to what is now happening in India.

Where *force majeure* clauses in agreements provide for epidemic as one of the eventualities, then it is undoubted that the current coronavirus outbreak is a *force majeure event.* If such matters go to courts, then the courts will grant reliefs to the parties seeking exemptions from performance either partially or in full.

The reality is that most contracts have not provided for epidemics as one of the *force majeure events*. In such cases, the courts may well adopt the "positive law" approach and still consider the current coronavirus outbreak as a *force majeure event*.

And the difference between force majeure and frustration of contracts becomes even more relevant. The former merely suspends the obligation. Its only the latter which allows termination of the contract. Then there are contracts which have in built provisions allowing termination if force majeure continues beyond a pre-defined period.

3) How does the current situation affect you?

(a) It needs to be analysed if performance under a contract has merely become onerous or it has become impossible. In the past, the courts have adopted a very narrow approach while interpreting *force majeure* clauses in the event performance under a contract has become onerous. Having said that, in view of the current nation-wide lock-down it is quite likely that the courts in India may broaden the scope and treat the current situation as a force majeure event.

(b) Malls/commercial premises have been shut down across the country. Access has been denied to licensees who occupy shops in such malls or commercial premises in light of the extra ordinary situation prevailing. There is loss of business to the licensee as access to the premises is not available.

On the other hand, the licensor will still be incurring costs to maintain the premises during the lock down and to make such premises available (and in a useable condition)

to the licensees once the lock-down is lifted. Non-payment of rent may cast an additional burden on the licensor.

This opens a pandora's box for the licensors and licensees. In such a situation where both the parties to a contract are suffering, will the courts attribute the entire loss to only one party by citing *force majeure events.* Before resorting to any action, it will be crucial to analyse the provisions of the existing agreements and the overall obligations of the parties thereunder. While deciding any dispute, the agreements between the parties, the nature of relationship between the parties and the balance of convenience may be the primary criteria. To complicate matters, there will be factors of the mall operator having availed of Lease Rental Discounting and otherwise having to service borrowings which would have been based on anticipated rental receivables.

While it will be easy to initiate litigation, the time is ripe for parties to resort to mediation.

More of that later.

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