

## COVID 19 – a force majeure event?



Performance of contracts have been hugely affected due to the unforeseen circumstances that have arisen on account of COVID 19. But the big question looming over everyone's mind is whether COVID 19, can be considered to be a '*force majeure*' event?

### **What is force majeure?**

Under the Indian law, force majeure events are governed under the Indian

Contract Act, 1872.

However, the term force majeure is not itself defined. Generally speaking, force majeure means any act of God, a case of war, flood, drought, fire, cyclone, epidemic, earthquake or any other calamity caused by nature or events or circumstances that are beyond the control of the parties.

Further, specific laws or contracts may provide for a definition of force majeure and also its tenure and consequences. For instance, the Real Estate (Regulation and Development) Act, 2016 has defined force majeure as a case of war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature affecting the regular development of the real estate project.

### **Consequences of a Force Majeure event**

COVID 19 will have several repercussions on existing contracts. Each contract may have a different consequence in case of force majeure.

Force majeure consequences are based on the nature of the industry and the performance obligations under the contracts.

Typically, force majeure entitles a party to suspend its obligations under a contract, i.e. puts the contract in “cold storage” for the duration of the force majeure, but does not terminate the contract ipso facto. Outer time limits for contract frustration are often provided. It is also often provided that no party shall be in breach of its obligation in case the performance of its obligations is hindered or prevented on account of a force majeure event. Reasonable extensions for completing the obligations are also provided in case the performance is delayed on account of a force majeure event.

One needs to look into the respective contract to ascertain whether a force majeure clause exists in the agreement or not and how it impacts the performance of one’s obligations under the contract. Whether non-performance of its obligations during the force majeure event will be considered to be a breach of contract also needs to be looked into. There are also some leading judgements on the subject, which need to be applied.

In the absence of a specific force majeure clause in the contract, the other terms of contract will be required to be looked into, as the provisions of the Indian Contract Act, 1872 will continue to apply.

Recently, the Ministry of Finance, Government of India issued an Office Memorandum in which it has inter alia been stated that coronavirus should be considered as a natural calamity, however, it has also been provided that the force majeure clause is required to be invoked wherever it is considered appropriate and after following due procedure.

The insurance industry has also been affected, as the coronavirus has been declared as a “pandemic” by the World Health Organisation, a rare event which is a sine qua non for a “cat” claim.

## **The Way Ahead**

The short point is that it is imperative to revisit the contract in order to verify whether a force majeure clause exists in the agreement or not and consequences thereof. The terms of the contract will be needed to be looked into in order to ascertain whether the prevailing circumstances of COVID 19 fits into the category of “force majeure” in a particular contract. Once the same is done the parties can also apply for appropriate reliefs

under the terms of the contract in a timely manner. Whether services rendered are essential services or not and whether the same is impacted by the prevailing circumstances will also have to be considered.

Therefore, it seems inevitable that in the coming days many disputes may arise affecting the interpretation of the clause of force majeure in a contract arising from COVID 19. A legal opinion often needs to be obtained, which can be provided based on the analyses of the terms of your contract.

*Trupti Daphtary (Head, Knowledge Management)*

*Sadaf Shaikh (Partner)*

## **DISCLAIMER**

This newsletter is for informational purposes only, and not intended to be an advertisement or solicitation. This newsletter is not a substitute for professional advice. Hariani & Co. disclaim all responsibility and accept no liability for consequences of any person acting or refraining from acting on the basis of any information contained herein.

Copyright © : Hariani & Co. All rights reserved. Reproduction of this newsletter in whole or in part is allowed with proper reference to Hariani & Co.