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"COVID-19: FORCE MAJEURE AND FRUSTRATION OF CONTRACTS"

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Abstract

The spread of the corona virus and the consequent restrictions imposed by the government have taken its toll on the economy and that has an ample number of legal implications as well, one of which was the delay or failure in performance of contractual obligations. This undoubtedly gives rise to varied legal questions as contractual parties try to find a way out of performing their responsibilities while their counterparts seek the safeguarding of their own interests.

This paper discusses these issues that may arise with commercial contracts due to the impediments caused by the spread of the covid-19 pandemic or due to the government orders with respect to the same, such as the nationwide lockdown or the compulsory payment of wages to workers. Thereafter, it delves into the various reliefs that the parties to a contract may avail if they find themselves unable to perform their obligations under the contract, the most common amongst them being the invocation of force majeure clause and the frustration of contract. It also goes into other reliefs like variation or the change in law clauses along with their scope of application with relation to each other. This paper also examines the ambit of each such relief and the statutory framework as well as the relevant judicial interpretation pertaining to each. Further, it goes into the specific effects of this pandemic on some key sectors like banking and finance, insurance, real estate and power, and the legal and commercial issues that they might face in the near future. Finally, the precautions to be taken for the drafting as well as negotiation of contracts in the light of the current scenario have also been discussed briefly.

A. INTRODUCTION

After the nationwide lockdown due to covid-19 many contractual parties have sought to delay or suspend their contractual obligations owing to the difficulties they faced during this pandemic, through the application of the doctrine of frustration of contract and the force majeure clause. It is important to note here that the business world runs on the basis of the principle of "pacta sunt servanda", that is, the sanctity of a contract, and a blanket application of these provisions might lead to further economic losses than what has already accrued.[1] Thus, it is essential to understand how the force majeure clause and frustration of contract may be construed with respect to commercial contracts and the ambit of their application in this context.

B. FORCE MAJEURE- CONCEPT

Force majeure has been derived from a French term which means "superior force". It refers to any event which is beyond the control of the parties to a contract and disables them from performing their contractual obligations. It not only includes natural calamities, but also extends to epidemics, wars, strikes and so on. As a general practice, commercial contracts usually contain a force majeure clause, which can be of two kinds. The first kind takes the broader approach by including any event that is "beyond the control of the parties" while the other kind covers only specific events and excludes the ones which are not specifically mentioned in the clause. Sometimes these two kinds are merged and the clause includes specific events as well as mentioning that any other event which is beyond the control of the parties will be covered.[2]

The wording of force majeure clauses also changes from time to time. For example, after 9/11, the phrase "acts of terrorism" started to be included in contracts. Similarly, after this

[1] K K Sharma, '*Covid-19 and Force Majeure: The Indian Legal Position*'(mondaq, 19 May 2020), < https://www.mondaq.com/india/litigation-contracts-and-force-majeure/936376/covid-19-and-force-majeure-the-indian-legal-position >

[2] Poorvi Sanjanwala and Kashmira Bakliwal, '*What is force majeure? The legal term everyone should know during Covid-19 crisis*' The Economic Times (May 21,2020), https://economictimes.indiatimes.com/small-biz/legal/what-is-force-majeure-the-legal-term-everyone-should-know-during-covid-19-crisis/articleshow/75152196.cms

covid-19 disaster, “pandemics” or “epidemics” and “government orders” will be included within the ambit of most force majeure clauses.

i. PRE-REQUISITES FOR APPLICABILITY OF FORCE MAJEURE CLAUSES

Before the application of force majeure clause, it is essential that the party who intends to invoke the clause, adheres to the contractual pre-requisites for doing so. Consequently, the contractual counter party should also perform his end of due diligence to ensure that his own interests are protected.

a. PROOF OF CAUSATION

There should be a direct nexus between the force majeure event and the impediment to the performance of the contract. The party who intends to invoke the clause must show that there is a causal link between the two. Although the government has, through its various notifications, considered the Covid-19 outbreak as a force majeure event, it cannot be used as a blanket term to suspend obligations in all contracts. In order to invoke the force majeure clause in a contract, it is pertinent for the party to show how Covid-19 has specifically affected that particular contract and he has to establish a direct link between the pandemic or the restrictive measures adopted due to it and the impediment to the performance of the contract. For instance, in a supply contract, if a party fails to deliver his goods to the buyer due to the lockdown, he may invoke the force majeure clause; but if the buyer, upon receiving the goods, refuses to make payment, he cannot take the benefit of force majeure. This is because the party’s ability of making payment is neither affected by the pandemic nor by the lockdown, thus the party will not be able to draw a link between the force majeure events and his inability to make payment to the seller.

b. COMPLYING WITH CONTRACTUAL CONDITIONS PRECEDENT

It is essential that parties to a contract strictly adhere to all the contractual conditions precedent because in case any disputes arise in the future, the communications and notifications sent to counter parties will become very important while asserting one's rights and settling claims. Although these requirements may vary according to the language of each contract, some of the common pre-requisites are given below:-

c. NOTICE

Force majeure provisions in contracts generally require the party invoking force majeure to send a notice to the counter party on the happening of the force majeure event. Depending on the language of the contract and the sector it deals with, sometimes strict timelines and procedures are provided for notifying the counter party. Even if the contract is silent regarding the notice, it is preferable that the party who intends to excuse his performance of the contractual obligations notifies the counter party, when the former is sure that the performance may be delayed or rendered impossible. On the other hand, the party who is on the receiving end of such notice should evaluate whether the delay claimed by the counter party is covered within the ambit of the force majeure clause or not. He should also examine whether the procedure and timeline for notification has been complied with and if necessary steps have been taken for mitigation of the losses. One more aspect that should be kept in mind with regard to notices, is that each party should have a common strategy for all issues, so that no conflict arises between one or more outgoing communication and no communication should look like that the party is trying to breach the contract or has an intention to not perform the contract.

d. MAINTAINING RECORDS

Since disputes are common with respect to the extent and duration of force majeure, it is essential that the parties keep records of all communication sent or received regarding this, in order to settle claims later. In addition to this, the party intending to invoke the force majeure clause should keep records and maintain documentation regarding not only the activities that have been impaired by the pandemic, but also the steps taken by them in order to mitigate the

delays or non-performance. It is advisable that the party also shares these updates regularly with the counter party so that transparency can be ensured at all times.[3]

e. MITIGATION

Even if an event qualifies as force majeure and the party notifies its counter party, he may still be held liable if he does not take necessary steps for mitigation of losses due to non-performance or delayed performance of his obligations. The extent of this mitigation may vary according to the terms of the contract, and if the contract provides for any alternate options to performance or if any such alternate modes of performance are reasonably possible, then the party may consider such alternative.[4]

There is high probability of this becoming a point of contention in any disputes regarding the claims. The counter party may try to prove that the party invoking force majeure could have, by reasonable means, performed its part of the contract. For example, if the supply chain was interrupted due to COVID lockdown, then he could have availed of an alternative supply chain, etc. Therefore it is very important that the party takes all possible and reasonable steps to mitigate the losses incurred. It must be noted, however, that measures taken for mitigation are subjective and should be judged on a case to case basis.

f. BURDEN OF PROOF

Force majeure being a question of fact, the burden of proof rests on the party who intends to seek the benefit of the force majeure clause, that the event in fact qualifies as force majeure and that the hindrance caused to performance of his contractual obligations, is due to such event. Another issue that must be borne in mind is to ensure whether the party seeking to invoke force majeure is in fact entitled to do so as per the terms of the contract because it is

[3] Sudip Mullick, Manavendra Mishra and Aaditya Gambhir, '*COVID-19 and Force Majeure A Practical Guide to the novel approach for safeguarding your interests*' (Khaitan & Co Publications, 3 April 2020) < https://www.khaitanco.com/covid-19/COVID19-and-Force-Majeure-A-Practical-Guide-to-the-novel-approach-for-safeguarding-your-interests>

[4] *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93

often seen that contracts happen to be titled more in favour of one party than the other. The Bombay High Court recently upheld this principle. The petitioners in this case were buyers of steel who imported material from sellers based in South Korea. Due to the lockdown, the consignment could not reach the petitioners in India although it had been dispatched by the sellers, because of which the petitioners refused to make payment, relying on the force majeure clause in the contract. This force majeure clause, however, gave only the sellers the exclusive right to claim relief by either terminating the contract or delaying the performance. Thus, the Court dismissed the application.[5]

ii. CONTRACTS WITHOUT FORCE MAJEURE CLAUSES- CAN WE IMPLY TERMS?

In a common law country, there is no such thing as an implied force majeure clause in a contract; it must invariably be captured in a clause in the contract. In the absence of statutory provisions governing force majeure clauses, relief can be granted with respect to performance of contractual obligations only if the contract contains an express force majeure clause. This must be kept in mind while considering invocation of this clause or to examine the other party's notice of invocation of force majeure.

In a recent judgment dated 21 May, 2020, the Delhi High Court has given a ruling on similar lines.[6] This was a dispute between the landlord and tenants regarding a shop in Delhi's Khan Market area. The tenants filed an Urgent Application praying for a waiver of their monthly rent due to the complete stoppage of business activities because of the lockdown. They relied on the plea that the circumstances were force majeure and beyond the control of the tenants. The court rejected the application, saying that the relationship between a landlord and tenant were strictly governed the terms and clauses of the contract and unless the agreement had any provision for such relief owing to force majeure events, the same could not be granted by the Court.

[5] *Standard Retail Pvt. Ltd. v. M/s G.S. Global Corp & Ors*., Commercial Arbitration Petition (L) No. 404 of 2020

[6] *Ramanand & Ors. vs. Dr. Girish Soni & Anr* [2017] RC Rev 447

a. CIVIL LAW VS. COMMON LAW

There is a difference, however, regarding this issue in a civil law country. Since most civil law countries have statutory framework addressing force majeure, it is not compulsory to include a force majeure clause in their contracts. For example, Section 206 of the German Civil Code provides that so long as a party is prevented from asserting its claims by force majeure, the limitation period will remain suspended; Article 1218 of the French Civil Code provides that even if a contract does not contain any such clause, a force majeure event permits the suspension or termination of the contract.[7] Therefore, if a country has a specific statute or provision addressing force majeure events and its applicability or consequences, then the terms may be implied in a contract, even if an express clause is absent.

C. CONSEQUENCE OF ABSENCE- FRUSTRATION?

An immediate response to the absence of a force majeure clause in a contract would be to seek the frustration of the contract. The doctrine of frustration says that if after the conclusion of a contract, some unforeseen event or circumstance happens which makes the parties unable to achieve their contractual objectives; in that case the contract can be terminated. These unforeseen circumstances may be accidents, sickness, change in law, war, strikes and so on but it does not include negligence, malfeasance or any wrongful acts.

In 1647, a question arose before the House of Lords, where a tenant was evicted from his home by Royalist Forces during the English Civil War, and thus he refused to pay the rent to his landlord. His contention was that since the forces had occupied his property and rendered him landless, he was absolved of his liability to pay rent. The House of Lords established the rule of absolute liability for contractual debts, and said that although the lessee had been

[7] Antoine F. Kirry, Alexandre Bisch, Floriane Lavaud and Philippe Tengelmann, '*French Law: COVID-19, MAE clauses, Force Majeure and Hardship'* (Debevoise & Plimpton Insights & Publications, 23 March 2020) <https://www.debevoise.com/insights/publications/2020/03/french-law-covid19-mae-clauses-force-majeure-and>

expelled by an invading army which was beyond his control, he was still bound to pay rent since the parties had not contemplated such terms in their agreement.[8]

This rigid rule of absolute contractual liability was relaxed in a subsequent case where the English courts held that a contract can be set aside if due to the happening of some unforeseen event, the basis of the contract is changed radically or the performance of the contractual obligations becomes impossible. This case laid down the basis for the doctrine of frustration of contracts.[9]

The concept of frustration of contract was again upheld in the landmark case of, where the plaintiff wanted to lease out his apartment from which the royal procession could be viewed directly. The defendant wanted to rent the said apartment for the purpose of viewing this procession. The royal procession was however, ultimately cancelled. As a consequence, the defendant refused to pay the plaintiff. When the plaintiff approached the court, the ruling was made in favour of the defendant. The court said that since the very purpose of the lease was to view the royal procession, that purpose became frustrated when the said procession was cancelled, and thus the defendant was under no obligation to pay the rent to the plaintiff. This rule was named the doctrine of frustration of contracts.[10]

Now it must be kept in mind that this doctrine is not applicable in all circumstances, neither is it applicable in all types of contracts, and whether the present scenario due to corona virus will qualify as an event to frustrate a particular contract, will have to be determined on a case to case basis.

i. STATUTORY FRAMEWORK

Section 56 (second paragraph) of the Indian Contract Act 1872, provides for frustration of the contract. Some might look towards Section 32 even, but it is pertinent to mention in this regard that there are some fundamental differences between these two provisions, viz-

[8] *Paradine v. Jane* [1647] EWHC KB J5
[9] *Taylor v. Caldwell* EWHC QB J1
[10] *Krell v. Henry* [1903] 2 KB 740

- Sec. 32 deals with a contemplated event, therefore it is applicable in case of force majeure events which were contemplated and thus captured in the clause of the contract.
- Sec. 56 (second paragraph) deals with an event beyond the contemplation of the parties, it is applicable in case of frustration of the contract, therefore it may be useful where force majeure clause is absent from the contract.

ii. JUDICIAL INTERPRETATION

If the very basis of a contract is frustrated by the occurrence of an event or a circumstance which is beyond the control of the parties, then Sec. 56 comes into play. If the happening of this subsequent event renders the performance of contractual obligations impossible or unlawful, then the contract may be terminated. The term "impossible" however, is not limited to physical or literal impossibility. It includes situations where although the contract may not be physically impossible but the performance of the act may become useless and impracticable from the point of view of the object and purpose of the parties.[11] It must, however, be noted that just because a contract becomes more onerous, it does not stand frustrated.[12]

iii. CAN FORCE MAJEURE AND FRUSTRATION BE INVOKED SIMULTANEOUSLY?

It was held by the Hon'ble Supreme Court that force majeure and frustration of contract were mutually exclusive of one another, and they could not be invoked simultaneously.[13] The Hon'ble Supreme Court has also observed that following the rule established in previous decisions, if the facts of the case attracted force majeure clause, Section 56 could have no application.[14]

[11] *Satyabrata Ghose Vs. Mugneeram Bangur*, AIR 1954 SC 44
[12] *Energy Watchdog Vs. Central Electricity Regulatory Commission & Ors.*, (2017) 14 SCC 80; *Alopi Parshad vs Union Of India*, AIR 1960 SC 588
[13] *Supra*, note 12
[14] *Supra*, note 11

iv. EFFECT OF FRUSTRATION

It must be remembered that Section 56 is a rule of positive law, and it does not depend on the intention of the parties. If a contract is rendered frustrated, that is, declared void, then as an immediate consequence, Section 65 comes into play, which provides for restoration of any benefit that a party may have received before the contract became void. In certain limited circumstances, recourse may be available under Section 70 and the principles of "quantum meruit" as well.

It must be mentioned in this context that application of the doctrine of frustration is comparatively easier in case of short term contracts compared to long term ones. Considering the fact that in most contracts time is of essence, short term contracts may get frustrated if the event in question continues beyond the time when the contract could have been reasonably performed. In case of long term contracts, on the other hand, application of this doctrine becomes difficult when the event causing impediments to performance of the contractual obligations is temporary in nature, because the counter party may contend that the contract should be performed once situations are back to normal.

D. ALTERNATIVES TO FORCE MAJEURE AND FRUSTRATION

A force majeure clause or frustration vide Section 56 are not the only reliefs available if the performance of contractual obligations become difficult due to COVID-19. In the absence of a force majeure clause, parties may take recourse under other clauses. There are alternative avenues such as variation or amendment or substitution, etc.[15]

i. VARIATION

Sometimes contracts include provisions for variation or amendment if the material is not available, or if the manner of performance or work protocol has become unworkable for the time being, or if there has been a substantive change in the manner of performance. These

[15] Ms. Anuja Tiwari and Mr. Aman Raj, '*Covid-19: Relief under contractual provisions other than force majeure*' (legal500, 27 April 2020) <https://www.legal500.com/developments/thought-leadership/covid-19-relief-under-contractual-provisions-other-than-force-majeure/>

clauses allow adjustments in the price of the contract or extension of the time required for completion. Alternatively, the parties may mutually agree to substitute, rescind or alter a contract- vide Section 62 of the Contract Act, provided the original contract permits such measures. In order to go through with these, attention must be given to other similar clauses in the contract, such as hardship clause or changed circumstances clause and under some circumstances the indemnity clause as well. For example, most supply contracts or works contracts provide clauses whereby a party may claim carrying costs or idling charges. Some contracts may also have express provisions for price escalation, suspension of work or extension of time, one or more of which may be relied upon depending on the wording of the contract and the applicability to the current scenario.

ii. WHETHER COVID-19 CAN TRIGGER MAC CLAUSE

Material adverse effect (MAE) and material adverse change (MAC) clauses are generally not exhaustive so as to include epidemics, pandemics and the like. For those M&A transactions and financing agreements that are presently in between the signing of the agreement and closing of the deal, the question whether COVID-19 will trigger a MAC clause becomes a crucial legal question.[16] Indian laws provide that whether or not an event can trigger MAC depends on whether the contract becomes impossible to perform for causes which are beyond the reasonable contemplation of the parties- vide Regulation 23(1) (c) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations.[17] It was held in a recent judgment by the Supreme Court of Delaware that whether an event can trigger a MAC clause is to be decided keeping in mind the long term impact and durational impact of such event on the M&A transaction.[18]

[16] Gail Weinstein, Warren de Wied, Steward Kagan, Fried, Frank, Harris, Shriver & Jacobson LLP, '*COVID-19 as a Material Adverse Effect (MAC) under M&A and Financing Agreements*'(Harvard Law School Forum on Corporate Governance, 4 April 2020) <https://corpgov.law.harvard.edu/2020/04/04/covid-19-as-a-material-adverse-effect-mac-under-ma-and-financing-agreements/>

[17] Rajesh Sivaswamy and Mohana Roy, '*COVID-19: A Pandemic, A Force Majeure and A Material Adverse Change*' (Mondaq, 24 April 2020) <https://www.mondaq.com/india/maprivate-equity/907230/covid-19-a-pandemic-a-force-majeure-and-a-material-adverse-change>

[18] *Akorn, Inc. v. Fresenius Kabi* AG 2018 WL 4719347

The Indian judiciary has not provided much clarity regarding this issue by not failing to formulate any concrete guidelines. This is because a one-size-fits-all policy cannot be applicable to MAE clause where it becomes pertinent to show how the event has caused "changes in general market, economic, financial, legal or political conditions". The courts have generally not permitted the buyer to successfully invoke a MAE clause. The Hon'ble Supreme Court held that SEBI only has limited powers when permitting abandonment of an offer and had to function strictly according to the statutory provisions.[19]

iii. CHANGE IN LAW CLAUSE

In the present COVID situation, change in law clauses might be more useful than invocation force majeure in some cases. Whereas force majeure only deals with situations where the contractual obligation becomes impossible to perform and not where the performance becomes onerous or financially difficult, change in law provides for the latter as well. Therefore, by relying on the change in law clause, it would be possible for a party would to claim the amplified cost of performance and any postponement of completion. There, however, remains a pertinent question as to whether the government orders may be construed as change in law, since the Disaster Management Act, 2005 already was in existence.

iv. CAN FORCE MAJEURE AND CHANGE IN LAW CAN BE INVOKED SIMULTANEOUSLY

If the contract provides for both force majeure as well as change in law clauses, there should be harmonious construction so that neither becomes redundant. This is because these two clauses, although similar in the events that they cover, they operate independently of each other. While force majeure clause applies to performance that is prevented or delayed, while

[19] *Nirma Industries Ltd. and Anr v. Securities Exchange Board of India* AIR 2013 SC 2360; Supratim Guha, Poonam Pal Sharma, Parag Srivastava and Simone Reis, '*Can Covid-19 Amount to a Material Adverse Change*?' (Nishith Desai News Details, 1 April 2020) <http://www.nishithdesai.com/information/news-storage/news-details/article/can-covid-19-amount-to-a-material-adverse-change.html>

the change in law clause applies to performance that is more or less costly and delays completion. They differ in the reliefs they provide as well. While force majeure clause suspends the performance for a specific amount of time, change in law clause adjusts the contract price by enabling the affected party to claim the increased cost of performance and provides for extension of the time for completion of the contract.

E. EFFECTS OF COVID-19 ON SPECIFIC SECTORS

i. BANKING AND FINANCE

In an attempt to relieve corporate borrowers, the government has decided to suspend Sections 7, 9 and 10 of the Insolvency and Bankruptcy Code for a year. Sections 7 and 9 provide for initiation of corporate insolvency proceedings by a financial creditor and an operational creditor while Section 10 provides for filing an application for insolvency resolution. Suspension of these provisions would mean that fresh insolvency proceedings cannot be initiated for one year.[20]

In order to relieve the financial distress and maintain liquidity in the economy, the RBI has, through its circulars allowed all lending institutions, that is, "commercial banks (including regional rural banks, small finance banks and local area banks), co-operative banks, all -India Financial Institutions, and NBFCs (including housing finance companies and micro-finance institutions)"[21] "to allow a moratorium of three months on payment of instalments in respect of any term loans outstanding as on March 1"[22]. This gave rise to confusion about whether

[20] PTI, '*Govt decides to suspend up to 1 year IBC provisions that trigger fresh insolvency proceedings'* The Economic Times (Apr.23, 2020), <https://economictimes.indiatimes.com/news/economy/policy/govt-decides-to-suspend-up-to-1-year-ibc-provisions-that-trigger-fresh-insolvency-proceedings/articleshow/75323344.cms?from=mdr>

[21] PTI,*'Coronavirus Lockdown 3.0: The RBI to consider proposal for extending moratorium on loans by another three months',* The Deccan Herald, (May 04, 2020), < https://www.deccanherald.com/business/economy-business/coronavirus-lockdown-30-rbi-to-consider-proposal-for-extending-moratorium-on-loans-by-another-three-months-833508.html >

[22] Bureau, '*Loan moratorium: SBI simplifies process to defer EMI payments*', The Hindu Business Line, (May27, 2020), < https://www.thehindubusinessline.com/money-and-banking/loan-moratorium-sbi-simplifies-process-to-defer-emi-payments/article31688203.ece>

the moratorium is applicable to the borrowers who are already in default as on March 1 or only to those whose instalments fall due between March 1 and May 31. Different High Courts gave different rulings while clarifying this question.

Recently, the Delhi High Court held that since the intention of the RBI is to maintain status quo during the COVID crisis, the moratorium will be applicable on all defaults, even those which were already in default prior to Moratorium Period.[23] On the other hand, the Bombay High Court held that the moratorium would not apply for defaults prior to March 1, but at the same time clarified that this was not to serve as a precedent and any such case would have to be decided on its own merits.[24] Again, in a subsequent decision, the Delhi High Court, restrained a lender from declaring the loans which were due before March 1, as an NPA until the next hearing.[25]

ii. INSURANCE

As millions of businesses try to recover their losses from their insurers, it becomes pertinent to explore whether insurance companies are liable to cover these losses, and if so, then to what extent. The instant answer would be that whether or not the losses can be recovered, will be inferred from the exact language in the policy contract. Insurance policies generally do not cover pandemics and epidemics because these are considered to be high risk claims and the situation is different each and every time, depending on the kind of disease. This also makes it very difficult for actuaries to ascertain the financial consequences associated with pandemics, which is why insurance contracts usually exclude pandemics from their coverage. The question, therefore, remains as to how businesses can recover their losses.

Corporations normally enter into two kinds of insurance contracts, viz. material damage policy and business interruption policy.[26] Material damage policy comes into effect when

[23] *Anant Raj Limited v Yes Bank Limited* [W.P.(C) URGENT 5/2020]
[24] *Transcon Skycity Pvt. Ltd. and Transcon Iconica Pvt. Ltd.* [WRIT PETITION LD-VC NO. 28 OF 2020 and WRIT PETITION LD-VC NO. 30 OF 2020]
[25] *Shakuntala Educational & Welfare Society v Punjab & Sind Bank* [W.P.(C)2959/2020]
[26] Bharat Vasani, Molla Hasan, Samiksha Pednekar and Esha Himadri, '*COVID-19: OFFICIALLY A PANDEMIC'* (India Corporate Law A Cyril Amarchand Mangaldas Blog, 18 March 2020) < https://corporate.cyrilamarchandblogs.com/2020/03/covid-19-officially-a-pandemic-faqs-coronavirus/ >

there is physical damage due fire, flood, earthquake or perils covered under Act of God etc. This implies that companies cannot make any claim under this policy because there has been no physical damage due to COVID-19. Thus, they might want to fall back on their business interruption policy, which is triggered when there is loss of profit or extra expenses incurred. The catch here, however, is that the loss of profit must have occurred due to the clauses covered under material damage policy. Business interruption policies are dependent on material damage policies, and they are usually not stand-alone. Therefore, corporations also cannot make any claims under their business interruption policies unless there has been actual physical damage. For example, if a cotton mill has incurred losses due to unavailability of labour during the lockdown period, they cannot recover their losses from their insurers. On the other hand, if a barrage broke down due to the same unavailability of labour during the lockdown period, then the losses incurred may be recovered, as there has been actual physical damage.

The real threat to the insurance industry is, however, from the government if it makes it mandatory for insurance providers to cover the losses suffered due to COVID-19. For instance, the Insurance Regulatory and Development Authority of India, through a circular dated 4th March, 2020, made it mandatory for health insurance providers to treat COVID-19 cases expeditiously.[27] If similar regulations are issued in respect of commercial insurance policies, the entire insurance industry might become bankrupt. If any such regulations are issued, the industry will protest heavily which might lead to a spate of disputes. These issues have already started coming up in various jurisdictions over the world, and while deciding one such dispute, a French court has directed an insurance company to cover two months' worth of losses sustained by a restaurant owner due to corona virus related business interruption. Although the defendant company may appeal, such rulings have the potential to pave the way for similar disputes.

iii. POWER SECTOR

The power sector has taken a major hit due to the lockdown. Since most of the industrial and commercial units remained shut during this period, the electricity demand from them has

[27] Insurance Regulatory and Development Authority of India, '*Guidelines on handling of claims reported under Corona Virus*'(REF: IRDAI/HLT/REG/CIR/054/03/2020)

reduced significantly, and this is reflected in the volumes traded on the electricity market and the clearing price. In India, DISCOMs provide a subsidised rate to domestic and agricultural consumers while charging more from industrial establishments, thus basically the industries were cross-subsidising the lower tariff paying consumers. This has taken a major toll on the whole industry.

The government has come up with various measures to relieve the industry. On March 24, 2020 by the Ministry of Home Affairs issued its guidelines, declaring power (including power generated by renewable energy sources) as an 'essential service', thus exempting power generation, transmission and distribution units or services, production of coal and minerals, transportation and activities supplementary to mining operations, from being shut down due to the nation-wide lockdown. On 17th April, Ministry of New & Renewable Energy issued an office memorandum asking all renewable energy implementing agencies to consider this lockdown due to COVID-19 as 'force majeure'.[28] There have been similar guidelines issued by other related ministries. Several state governments have also brought in similar policies for consumers, such as, Gujarat has extended the time period for payment of electricity bills, Uttar Pradesh has waived the fixed charges on power for industrial and commercial consumers, etc.

iv. REAL ESTATE

The already slowing down real estate sector was further burdened by the COVID-19 situation, mostly due to three factors, viz. the large scale exodus of migrant labourers, the liquidity crunch because of investors favouring the stable bond market and a drop in demand.[29] The supply chain has also been disrupted since most of the fittings and fixtures used in Indian real estate sector usually come from China. In this scenario it will be difficult for developers to complete their projects on time and Section 6 of the Real Estate (Regulation and Development) Act 2016 might come into play. This provision deals with extension of

[28] Ministry of New & Renewable Energy (MNRE), '*Time-Extension in Scheduled Commissioning Date of RE Projects considering disruption due to lockdown due to COVID-19*'(F. No.283/18/2020-GRID SOLAR)

[29] Taher D Mandviwala and Kaveri Varma, '*Covid-19: Impact on Real Estate'* (India Corporate Law A Cyril Amarchand Mangaldas Blog, 2 April 2020) <https://corporate.cyrilamarchandblogs.com/2020/04/covid-19-impact-on-real-estate/>

registration granted under Section 5 to a real estate project for not more than a year, in case of occurrence of any force majeure events.

In some states such as West Bengal, however, since RERA is not applicable, other statutes should be evaluated in this regard. For example, Section 6 of the West Bengal Housing Industry Regulation Act 2017 will be applicable which provides a similar point of view. Various regulatory bodies in different states have issued notifications in this regard. For example, SEBI permitted the Real Estate Investment Trusts an extension of time for filing and other compliances, RBI permitted banks to provide moratorium of three months for payment of instalments, the Maharashtra , the period of validity of registration and all other statutory compliances have been extended by three months, Karnataka has issued guidelines along similar lines and so on.

F. CONTRACTS- THE ROAD AHEAD

Having discussed about contracts which were entered into before the onset of this pandemic, it is equally important to know what precautions should be taken for contracts which will be entered into in future. Ideally, for new contracts which are going to be executed in the near future or which are under negotiations, the economic effects of this pandemic should be kept in mind while drafting the relevant clauses, such as inclusion of the terms 'government orders' along with 'pandemic' or 'epidemic' in the force majeure clause, or formulating a mechanism for proportionate division of costs in case situations like this arise again in future. In addition to this, for new contracts being entered into during this time, the timeline for completion of obligations may be kept relaxed to an extent, considering the fact that all the contractual parties were aware of the crisis when they entered into the said contract.