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MEMO

Force Majeure under the COVID-19 pandemic- FAQ's

This memorandum has been prepared to provide information on frequently asked questions relating to the potential implications of Force Majeure ("FM") under the current COVID-19 global crisis.

1. OVERVIEW

- 1.1 As the unprecedented situation of COVID-19 builds each day, governments across the globe have imposed various containment and lockdown measures, and businesses across sectors are faced with uncertainties and questions on whether this pandemic amounts to a FM event and/or can be covered under a FM clause in existing contracts.
- 1.2 The concept of FM exists under common law as the doctrine of frustration of contract. According to this doctrine, the parties to a contract are discharged when the fundamental purpose of the contract is destroyed, i.e. the contract is frustrated.

2. IMPACT OF FORCE MAJEURE

2.1 What is a FM event?

- A FM event constitutes an extraordinary event that is beyond the control of the contracting parties and may typically include, among other things, an ***epidemic***, including acts of God and may even be extended to include omissions or acts of public authorities and the government that prevent or delay the performance of an obligation ***which are beyond the control of the parties, or any other reasons which cannot be reasonably forecasted or provided against, and which cannot be predicted.***
- An act of government could include travel restrictions, quarantines, trade embargoes, or closure of buildings or borders.
- Given the unpredictable nature of the Covid-19 outbreak and the measures taken by governments across the world, it is possible that the pandemic would constitute a force majeure event under several types of legal contracts.

2.2 What constitutes FM under commercial contracts? What are the contractual obligations under a FM event?

- A FM clause is included in a contract to identify situations in which the performance of the contract by either or all parties becomes impossible. Parties to a contract can mutually decide the list of events to be categorized under the FM clause. A FM clause may allow parties to either ***temporarily suspend their contractual obligation*** until the FM event is resolved or ***terminate the contract if the FM event is not resolved within a specified agreed timeframe***.
- The party claiming force majeure is under a duty to show that it has taken all reasonable efforts to avoid or mitigate the FM event and its effects. This is typically interpreted on a case-to-case basis.
- It must be noted that a FM clause ***“does not excuse a party’s non-performance entirely, but only suspends it for the duration of the FM situation”***¹. It is imperative that the contracting party consider giving a notice of FM as soon as it occurs ***as the same cannot be claimed ex-post facto***.

2.3 What is the difference between statutory and contractual obligations in the FM scenario?

- In the absence of a FM clause in the contract, a person may rely upon the statutory recourse under the doctrine of frustration covered under Section 56 of the Indian Contract Act, 1872 (“**Section 56**”) which allows for discharge of obligations on grounds of impossibility and seeks to have the contract declared void under its provisions.
- The conditions to invoke Section 56 include (i) establishing the existence of a valid contract between parties, (ii) the pending performance of the contract and (iii) the fact that the contract has become impossible to perform due to the happening of an event or a change in law.
- Therefore, while a FM clause in a contract could potentially excuse either or both parties from their contractual obligations, the absence of a FM clause will require the parties to seek recourse under the statutory provisions of law.

2.4 Can employers impose unpaid leave on employees pursuant to a FM event?

¹ No.F.18/4/2020-PPD– issued by the Ministry of Finance (available at: <https://doe.gov.in/sites/default/files/Force%20Majeure%20Clause%20-FMC.pdf>)

- In India, state laws generally provide for about 15-21 days of earned/regular leave a year, up to 10 days of sick leave and a possible 10 additional days of 'casual leave'. Currently there is no clarity under Indian law to grant leave for COVID-19 patients in excess of what is statutorily mandated or contractually agreed upon.
- While airline companies in India have asked employees to take a pay cut, several companies have asked their employees to go on unpaid leave. The GOI has issued a direction to public and private employers to refrain from reducing salaries and retrenching employees amidst the COVID-19 outbreak.

2.5 How does FM apply to labourers?

- The GOI has clarified that COVID-19 is an event of FM and should be treated as a natural calamity and has issued an advisory to public and private employers to refrain from cutting salaries and sacking employees, particularly casual and contractual workers. The GOI has further advised that, ***“if any worker takes leave, he should be deemed to be on duty without consequential deduction in wages for this period. Further, if the place of employment is to be made non-operational due to COVID-19, the employees of such unit will be deemed to be on duty”²***.

2.6 For the purposes of payment of license fee or lease rent under a leave and licence or a lease agreement for leased premises, does COVID-19 amount to FM?

- In such contracts, the parties would either be required to have a FM clause in the contract or seek statutory recourse. Some contracts provide for a period of suspension, during a FM event, while the use of the property is impacted. Whether a FM clause in such agreements would suspend the obligation of payment of rent would depend upon the specific language contained in the FM clause and the contract itself.

Disclaimer:

Our memo is based on the laws prevailing at the present time in India and is subject to a further revisions subject to new law and regulations that may be issued. Any variance of facts or law may cause a corresponding change in our memo. This memo is limited to the matters expressly set forth herein and no opinion is implied or may be inferred beyond the matters expressly stated herein. The contents of this memo are not intended to be legal advice and you are advised to seek independent legal advice on any issues or concerns pertaining to you or your organisation that relate to the subject matter of this memo.

² No.F.18/4/2020-PPD– issued by the Ministry of Finance (available at: <https://doe.gov.in/sites/default/files/Force%20Majeure%20Clause%20-FMC.pdf>)