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# Does the COVID-19 Outbreak form a Force Majeure Event: An Indian Perspective

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The novel coronavirus or COVID-19 outbreak has managed to take the whole world by storm and disrupted the lives of millions across the globe. At the time of writing this post, The World Health Organization (WHO) has declared the COVID-19 outbreak as a pandemic and has over three hundred thousand confirmed cases with over fourteen thousand lives lost.[1] In an attempt to fight the spread of the virus a number of major events worldwide have been either cancelled or postponed. With the markets across the world also taking a tumble amid the virus outbreak, a downturn akin to what happened to global markets during the SARS outbreak in 2003, businesses have suffered with multiple contracts and transactions being terminated. In India the Indian Premier League, a high-profile cricket tournament which sees participation from cricketers from across the globe, has been postponed for a later date during the year. The India Fashion Week which was supposed to take place in March in New Delhi has also been postponed indefinitely. With parties being unable to fulfill their obligations under various agreements a common question which arises is whether the inability of a party to perform its obligations under an underlying agreement due to the circumstances caused by the COVID-19 outbreak would be classified as a force majeure event in India? The *prima facie* answer to this question is that it would depend on the nature of events covered by the force majeure clause in the agreement, which gives a party the option to treat the agreement as void.

India unlike civil law countries like the United States[2], Germany[3] and France[4] does not codify the definition of force majeure into any legislation. The Law on Force Majeure in India is fairly similar to the English Law. Parties have full autonomy to draft force majeure clauses into their contracts, and to constitute an event of force majeure, the circumstance should be covered under the ambit of the clause. Though not in specific terms, Section 32 of the Indian Contract Act, 1872 ["**Contract Act**"] which provides for 'Enforcement of Contracts contingent on an event happening' can be referred to provide a statutory foundation to force majeure in India. Just as in case of contingent contracts (where contract is performed on happening of a stipulated event), force majeure clauses would stipulate those contingent events which would result in parties abandoning their obligations of performance of contract. However Indian courts tend to provide a very specific and restrictive interpretation to the events listen in the force majeure clause, so unless the contract specifically provides

for ‘pandemics’ as a force majeure event, it is unlikely for the COVID-19 outbreak to be classified as a force majeure event.

But courts in India have on multiple occasions recognized the doctrine of frustration as the same is enshrined in the provisions of the Contract Act. Section 56 of the Contract Act specifically provides that if a contract becomes impossible to perform or unlawful, then such a contract is void. Thus, under Indian Law if the contract is frustrated, it has no legal existence post the frustration and hence parties are discharged of their obligations. The test for frustration under Indian Law is a three pronged one

- There should be a contract subsisting
- There should be some part of the contract that is yet to be performed
- The performance of the contract has become impossible later.

What is to be noted is that the performance of the contract should become impossible after agreement becomes a contract. Thus, parties would not be able to escape from the performance of obligations of their contracts, if the contract was entered into during the COVID-19 outbreak in which case parties would be presume to know the risks and hindrances of performances while entering into the contract.

Indian Courts have however held that the threshold for frustration is impossibility and mere hindrance or economic losses would not absolve parties of their contractual obligations.[5] Even when the performance of the contract gets delayed due to a supervening event, that delay would only amount to frustration if the delay is of such character as would totally upset and destroy the fundamental basis of the contract that the parties had. Thus, the threshold for claiming frustration is extremely high under Indian Contract Law.

A similarly high threshold of impossibility exists in India while interpreting Material Adverse Change (MAC) Clauses in merger and acquisition agreements, which are basically force majeure clauses for mergers. The Securities Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 [“**Takeover Code**”] is the law regulating mergers and acquisitions of listed entities in India. Regulation 23(c) of the Takeover Code provides the opportunity to an entity which has made an offer to acquire a listed entity in India, to withdraw that offer if an event beyond the reasonable control of the acquirer occurs due to which the conditions specified in the offer cannot be met. However, it has been held that merely a change in circumstances as specified in the MAC Clause is not what is envisaged in Regulation 23(c), but a complete impossibility of performance of the merger.[6]

The Indian Government has already issued a notification, with regards to contracts made with it by parties for goods and services, that COVID-19 outbreak is a force majeure event and can be classified as ‘natural calamity’ in the standard force majeure clause in government contracts. For other contracts between private parties, this could serve as a reference to include the COVID-19 outbreak within the ambit of the force majeure clauses in their contracts. However, given that the Indian Government has announced a nationwide lockdown and curfew till April 14$^{th}$, 2020, it would be impossible for parties to honor their time bound contract and hence this

could squarely fall under the category of 'impossibility' envisaged in Section 56 of the Contract Act and Regulation 23(c) of the Takeover Code.

**Conclusion**

The COVID-19 outbreak has certainly been a disaster of seismic proportions, with countries around the world announcing lockdowns, which has in turn impacted several business's and contracts. As discussed above, for purely domestic contracts in India unless the parties expressly include pandemics as an event of force majeure in their respective contracts the parties are unlikely to be able to be discharged of their obligations due to the COVID-19 outbreak. However, seeing the severity of the lockdown imposed by the Indian Government within the domestic boundaries of India, the performance of many contracts would become seemingly impossible and illegal and hence parties can be discharged of their obligations due to the doctrine of frustration of contracts.

The question also arises as to whether the COVID-19 outbreak would be a force majeure event in cross border contracts involving Indian parties. The difficulty with this is that since India unlike England does not have a codified system of Conflict of Laws, frustration can be only claimed in these contracts if the governing law clause in the contract is specified as Indian Law. The seeming consensus among all jurisdictions seems to be that in case of absolute impossibility, parties are discharged of their obligations. With COVID-19 cases reaching alarming numbers, we soon may enter into that stage where businesses just would not be able to honor contracts regardless of the jurisdiction they fall under.

[1] For updated statistics regarding COVID-19 outbreak *see* https://www.who.int/emergencies/diseases/novel-coronavirus-2019.

[2] *See* Section 2-615 of the Uniform Commercial Code of the United States for statutory definition of force majeure in US.

[3] *See* Art. 275(1)-(3) of the German Civil Code which provides for exclusion of the duty of performance on the happening of a *force majeure* event.

[4] *See* Art. 1148 of the French Civil Code which provides for the doctrine of *force majeure* in France.

[5] *See* Energy Watchdog v. CERC, (2017) 14 SCC 80.

[6] *See* SEBI Whole Time Member order in the matter of open offer of M/s Jyoti Limited, WTM/SR/CFD/39/08/2016 *available at* https://www.sebi.gov.in/sebi_data/attachdocs/1470054168949.pdf

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