

NOTE ON 'FORCE MAJEURE IN TIMES OF COVID-19'

Draft for Discussion
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1.0 FORCE MAJEURE IN TIMES OF COVID-19

In present circumstances, given the various disruptions in the business and economic infrastructure caused by the COVID-19 pandemic, where contractual obligations of parties to an agreement may be disrupted, delayed, or even outright terminated (as may be provided in the respective agreements), it is essential to have a look at the 'Force Majeure' clause.

2.0 WHAT IS 'FORCE MAJEURE' CLAUSE?

A 'force majeure' event generally includes any event, the occurrence of which is beyond the reasonable control of the parties and which could not have been foreseen at the time the parties entered into the contract. The term generally covers all situations beyond reasonable control of the parties, such as acts of God, war, act of terrorism, strikes, lockouts, blockade, riots, floods, natural calamities, Acts of public enemies, fires, **epidemics, pandemics**, typhoons, earthquakes, or volcanic eruptions, etc. The contracting parties may agree on such additional circumstances which may be covered by the 'force majeure' clause, depending on the industry or business circumstances covered by the agreement.

3.0 LEGAL BASIS FOR THE 'FORCE MAJEURE' CLAUSE

The 'force majeure' clause is one of the key components of a contract and is recognised by the Indian courts. It may be read and interpreted alongside the 'Doctrine of Frustration' wherein the contractual obligations become impracticable or impossible to perform. However, before a party may avail the benefit of the 'force majeure' clause, the courts would examine the specific terms of the agreement and other facts and circumstances surrounding the case. Hence, it is essential for the contracting parties to ensure that the clause is worded appropriately to cover all circumstances that may affect the performance of contractual obligations. The Department of Expenditure, Procurement Policy Division, Ministry of Finance issued an Office Memorandum on February 19, 2020, stating that the COVID-19 pandemic should be considered as a case of natural calamity and force majeure clause may be invoked, wherever considered appropriate, following due procedure, with respect to government's procurement guidelines under the 'Manual for Procurement of Goods, 2017'.

4.0 INVOKING THE CLAUSE AND DUTIES OF THE PARTIES

The clause may generally provide that a party prevented from performing its contractual obligations shall be required to serve notice on the other party, such as for example, providing written notice within 7 days of the occurrence of a force majeure event. Invoking the 'force

majeure' clause may help the parties in circumstances where the parties are unable to perform their respective obligations which may otherwise amount to a violation or breach of contract. The clause may also provide that parties shall be required to use best efforts to perform such part of their contractual obligations as may reasonably be possible even after occurrence of a 'force majeure' event and/ or to use best efforts to mitigate the effects and disruptions caused by the 'force majeure' event. The clause may also provide that a party may terminate the contract forthwith if the force majeure event continues for certain duration. The parties should be well aware of such terms and take action promptly to ensure to obtain maximum protection under the 'force majeure' clause.

5.0 REMEDIES THAT MAY BE OBTAINED UNDER A FORCE MAJEURE CLAUSE:

To summarise, following are some remedies that may be availed under the force majeure clause (provided such actions and remedies are covered within the scope of the clause):

- Temporary suspension of partial contractual obligations affected by the force majeure event during the period of force majeure;
- Temporary suspension of ALL contractual obligations during the period of force majeure;
- Resumption of contractual obligations as soon as the force majeure event ends and/ or ceases;
- Termination of contract if force majeure event continues for certain duration;
- Renegotiation and amendment of key contractual terms to serve the best interest of both parties to the contract.

6.0 ACTIONS THAT MAY BE TAKEN IN THE WAKE OF THE COVID-19 PANDEMIC

It is pertinent to mention that parties may consider examining and scrutinising existing agreements and contractual obligations to understand their rights, obligations and duties (including duties and obligations cast upon the parties by the force majeure clause) in the present circumstances and ensure appropriate and prompt actions are taken as required.

RSM INDIA's legal & secretarial team can be your valued partner in assisting you in safeguarding your contractual rights and business interests in the following manner:

- Review typical current contracts with customers, suppliers, employees, lessors and third-party service providers. Review certain identified large contracts as per client request.
- Review whether the contracts have a force majeure clause and if so, whether it covers epidemic or pandemic.
- In case the contracts do not have force majeure clause, the remedies available
- Draft templates for communication to customers, suppliers, employees, lessors and third-party service providers for delays in supplies, payments, deferment of contractual obligations, revised timelines etc.
- Assist in developing legal options for termination or invoking force majeure clause etc.

These actions are subject to review by the clients' legal teams and their legal advisor/s. Our role is to assist the clients in reviewing the contracts and develop possible responses and draft communications subject to the above review.

7.0 SCOPE AND LIMITATION

We have provided the general view of the relevant regulations based on limited facts and the same need to be analyzed in depth based on actual facts and circumstances prior to taking action. The above advice would be subject to our standard terms of engagement. In no case, our liability whether direct or consequential shall exceed the fees received from you, for the engagement.

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In this document, we have aimed to provide an overview of the impact due to the outbreak of the COVID-19 pandemic and the key risks faced by the small and mid-sized enterprises. We have also discussed the solutions we can provide to support the companies in managing the various risks emerging from the situation.

It may be noted that nothing contained in this document should be regarded as our opinion and facts of each case will need to be analysed to ascertain applicability or otherwise of the laws and regulations in place and appropriate professional advice should be sought for applicability of legal provisions based on specific facts. We are not responsible for any liability arising from any statements or errors contained in this document.

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