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advocates & solicitors

MANAGING DISPUTES WHEN ANTICIPATING/DEALING WITH FORCE MAJEURE EVENT

1) The usage of a clause relating to 'force majeure' in a contract is included by the parties with the intention to safeguard the performance of a contract. As at times, occurrence of certain events or external factors over which neither party could have control, would have an adverse impact on the performance of such a contract. The 'force majeure' clause in a contract is essentially inclusive in nature and therefore narrowly construed.

2) Under Indian law 'force majeure' is governed by Chapter III dealing with contingent contracts, and more particularly, Section 32 of the Indian Contract Act, 1872 ("**Contract Act**"). In so far as a force majeure event occurs de hors the contract, it is dealt with by a rule of positive law under Section 56 of the Contract Act and pertains to situations wherein performance of contract has become impossible.

3) Under the Indian legal context, a 'force majeure' clause is a creation of contract and is included to capture situations which may delay or hamper the performance of the contract. Depending on the provisions of the contract in certain cases, occurrence of a 'force majeure' event may result in a contract's termination. Invocation of a 'force majeure' clause, typically results in suspension of the rights and obligations of the parties to the contract. Whereas, impossibility of performance (as provided under section 56) is applicable in the absence of a specific 'force majeure' clause under contract. A 'force majeure' event de-hors the contract may lead to impossibility of performance and result in its termination.

4) 'force majeure' clauses constitute an intrinsic part of modern commercial contracts. These contracts may relate to supply of goods, rendering of services, construction contracts, contracts relating to financial products etc.

5) Questions such as breach of contract, delay in performance, interruption in performance, impossibility of performance, termination of contracts, claiming damages and losses etc. stem from 'force majeure' events.

6) Currently, when the world deals with a situation which has had an effect on performance of contract by parties, it is paramount that parties are prepared to deal with recourse to 'force majeure' or like clauses.

7) Following is a list of pointers which should be kept in mind:
   (a) **Clear assessment of the relevant clause in the contract to ensure further actions can be worked out accordingly**
      (i) Reviewing the contracts to examine 'force majeure' clause or existence of a similar clause which envisages consequences for difficulty in execution of contract on account of external factors beyond control of parties;

      (ii) The question to be answered would be whether the situation one is dealing with would qualify as a 'force majeure' event (or any other similar clause in the

contract) giving such a party a right to avail the same as defense to non-performance.

(iii) In the current scenario, the spread of 'CoVID-19 virus' leading to an impact on the supply chain (which has been declared as a natural calamity by the Central Government for certain specific cases) can be regarded as a 'force majeure' event. A subsequent lockdown imposed by the Central Government may also be construed as 'force majeure' event in applicable cases;

(iv) In cases where contracts do not provide for such a clause, provisions of Section 56 of the Contract Act, 1872 are attracted to safeguard the non-performing party. The test for applicability of this provision is that whether the performance of the contract has become impossible or impracticable;

(v) In this context, it is apposite to mention that use of the 'impossible' does not envisage a situation where there is a physical and/or literal impossibility to perform of contract, rather it captures circumstances where the performance of the contract has become impracticable and useless from the point of view of the object and purpose of the parties. It is a settled position of law that merely because performance of contract has become 'onerous' the same would not save a party from consequences of non-performance. Therefore, where the performance of the contract is otherwise possible i.e. there exists an alternative mode of performing the contract, which is or may be more expensive; the performance of the contract need not be excused or discharged; and

(vi) In some contracts, an onus lies on the party relying on force majeure to mitigate the harm and/or loss, to the extent possible, occasioned due to the force majeure event. The parties to any contract, thus, are required to be conscious of this requirement. While, the extent of the mitigation requirement is fact-specific and will depend on the language of the provision as well as applicable laws and facts; the party relying on force majeure may still be found liable for not mitigating the loss or harm derived from its non-performance.

(b) **Ensuring pre-conditions provided in the contract are satisfied**

(i) Certain contracts provide for issuance of notice when a party to a contract seeks to invoke the 'force majeure' clause. Pre-condition of issuance of notice or any other such pre-condition should be duly examined and acted upon in a timely manner;

(ii) The term 'force majeure' defined in the contract is relevant to ascertain what events/external factors are either included in the definition of 'force majeure' or what events/external factors (& only those events/external factors) constitute 'force majeure'. Effectively, the contract may state that only certain events/external factors constitute 'force majeure' or certain events are carved out from being 'force majeure'; and

(iii) Certain contracts may also provide termination on account of an event subsisting for a certain period. If the event goes beyond such period, parties should endeavor to re-negotiate.

(c) **Effective Communications**

(i) When communicating the occurrence of a 'force majeure' (or like event) it is important the communication is clear and unambiguous. Identification of the event, events leading up to the same, difficulty in performance as a result of the same and relief requested are important ingredients of such communication;

(ii) Response to a communication invoking a 'force majeure' (or like event) should clearly state whether the request is being adhered to or denied and reasons for the same should be set out; and

(iii) A communication which is clear and finds its basis under contract and law would be of great assistance when the same is to be produced before a court/tribunal in support of the stand taken by a party as the same is adjudicated on a case to case basis.

(d) **Force Majeure clauses and arbitration proceeding**

(i) While courts may interpret a 'force majeure' clause on the principles of equity, the same latitude may not be applied by an arbitral tribunal;

(ii) An arbitrator or the arbitral tribunal is a creature of the contract itself and therefore cannot go beyond the terms of the contract. The consequence of the same would be that the arbitrator/arbitral tribunal would interpret the meaning of the term 'force majeure' strictly within the meaning provided under contract; and

(iii) When taking recourse to the defense of 'force majeure' in an arbitration proceeding, the definition of 'force majeure' as provided in the contract is of prime importance. A widely worded clause may include within its fold multiple situations and events.

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