

# COVID-19, FORCE MAJEURE AND ITS IMPACT ON PERFORMANCE OF CONTRACTS

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## Introduction

We all are aware of the COVID-19 outbreak and the way it has adversely affected human lives around the world. To prevent its further spread, various countries of the world have taken various precautionary measures. One such measure is the 'lockdown' wherein all business and economic activities are suspended temporarily, although for an indefinite period of time. Though such lockdown does help in preventing the further spread of virus and save lives but they do have a negative impact on the economy of a nation. Since all commercial activities except for essentials are suspended, the economy of the entire nation gets negatively affected. In this article we would be discussing COVID-19 and its impact on performance of contracts. The discussion is streamlined in context of two types of contracts, (i) Contracts that are regulated by the provisions of the Real Estate (Regulation and Development) Act, 2016 ("RERA Act 2016") along with the provisions of the Indian Contract Act 1872; (ii) Contracts that are regulated only by the provisions of the Indian Contract Act 1872, and as per mutually agreed terms by the parties i.e. purely contractual domain contracts. It is also pertinent to see whether these Acts and contracts entered into between the parties provide for any provision of force majeure or act of god. However before proceeding with the discussion it is important for us to understand few terminologies and statutory provisions that are involved in this discussion.

## Terminologies

COVID-19, Force Majeure event or an act of God

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### PREFERRED CITATION

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On 30.01.2020, World Health Organization (WHO) in its second meeting of the Emergency Committee convened by the WHO Director-General under the International Health Regulations (IHR) (2005) regarding the outbreak of novel coronavirus 2019 in the People's Republic of China, with exportations to other countries, even before naming it as COVID-19, had identified pandemic outbreak of COVID-19 as a "public health emergency of international concern" advising governments across the world to take emergency measures to prevent spread of COVID-19.<sup>1</sup> World Health Organization (WHO) on 11.02.2020, announced in a media briefing official name for the disease that is causing the 2019 novel coronavirus outbreak. The official name given to this dangerous and contagious disease is coronavirus disease 2019 which is abbreviated as COVID-19. COVID-19 is spelled as C-O-V-I-D hyphen nineteen.<sup>2</sup>

### **Force majeure or act of God**

'Force Majeure' is an irresistible force or compulsion or the circumstances are beyond one's control. 'Force Majeure' is a French term which literally means 'a superior force'. The expression *force majeure* also means an act of god, war, insurrection, riot, civil

commission, strike, earthquake, tide, storm, tidal wave, flood, lightening, explosion, fire, and any other happening which the parties to the contract would not reasonably be able to prevent or control.<sup>3</sup> Further, an act of god can be any act or accident happened as a natural calamity or natural cause without any human intervention and which could not have been prevented had it be known to human being. Thus, it can be said that the spread of COVID-19 falls within the definition of 'Act of God' or in other words the pandemic can be tagged as a force majeure event.

### **Statutory provisions / rules / orders:**

- a. Section 6 of RER Act 2016, Model form of agreement as per Rule 10 (1) of The Maharashtra Real Estate (Regulation and Development) (Registration of Real Estate Projects, Registration of Real Estate Agents, Rate of Interest and Disclosure on Website) Rules 2017 ("RERA Rules 2017"), Clause 6 of Model form of Agreement under RERA Rules 2017.
- b. Section 6 (2) (i) and Section 10 (2) (l) of the Disaster Management Act, 2005, Order No. 1-29/2020-PP (Pt. II) dated 24.03.2020 passed by

<sup>1</sup> Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV) available on WHO website i.e. <https://www.who.int>

<sup>2</sup> WHO Director-General's remarks at the media briefing on 2019-nCoV on 11 February 2020 available on WHO website i.e. <https://www.who.int>

<sup>3</sup> Md. Serajuddin v. State of Orissa, AIR 1969 ORI 125

National Disaster Management Authority.

Section 6 (2) (i) provides for power and function of National Disaster Management Authority to lay down policies on disaster management and Section 10 (2) (1) provides for powers and functions of National Executive Committee to lay down guidelines for, or give directions to, the concerned Ministries or Departments of the Government of India, the State Governments and the State Authorities regarding measures to be taken by them in response to any threatening disaster situation or disaster.

### **Section 56 and Section 32 of the Indian Contract Act 1872**

As per Section 56 of Indian Contract Act, 1872, a contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. For example: A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void. This is called as doctrine of frustration of contract. Further, Section 32 of the Indian Contract Act, 1872, provides for contingent contracts whereby it paves way to force majeure. Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law

unless and until that event has happened. If the event becomes impossible, such contracts become void.

### **Contracts that are regulated by the provisions of the Real Estate (Regulation and Development) Act, 2016 (“RERA Act 2016”) along with the provisions of the Indian Contract Act 1872**

As we all know the RERA Act 2016 has been passed by the central government and rules have been framed by the respective State Governments which mainly seeks to protect home-buyers in the real estate industry. Section 6 of RERA Act 2016 provides for extension of registration of project under RERA on account of *force majeure*. The explanation provided to the said section has defined *force majeure* to mean a case of war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature affecting the regular development of the real estate project. Further, model form of Agreement provided in RERA Rules 2017 as applicable to the State of Maharashtra entitles Promoter to have reasonable extension of time to deliver apartment to home-buyer on account of (i) war, civil commotion or act of God and (ii) any notice, order, rule or notification of Government and / or other public or competent authority / court. Under Section 6 (2) (i) of the Disaster Management Act, 2005, the National Disaster Management

Authority has issued an order<sup>4</sup> directing the Ministries/ Departments of Government of India, State/UT Governments and State/UT Authorities to take effective measures so as to prevent spreading of COVID-19 in India. In exercise of powers conferred under Section 10 (2) (l) of the said Act, the Ministry of Home Affairs, Government of India came up with guidelines under Order No 40-3/2020-DM-I(A) dated 24.03.2020. Under the guidelines all commercial and private establishments except for essential services listed were asked to remain closed for a period of 21 days with effect from 25.03.2020. The list of exceptions of essential services does not include real estate or construction services and hence all construction activities of real estate projects have come to a standstill from the date. Thus, the force majeure clause “(ii) any notice, order, rule or notification of Government and / or other public or competent authority / court” in model form of Agreement provided in RERA Rules as applicable to the State of Maharashtra can be invoked. Thus, Maharashtra Real Estate Regulatory Authority (MahaRERA) after analysing the entire situation like (i) declaration made by WHO, (ii) lockdowns announced by State of Maharashtra, (iii) 21 days complete lockdown announced by Government of India and (iv) RBI’s decision to provide a three month

moratorium on fixed term loans and EMI payments to borrowers, MahaRERA has extended the period of validity for registration of the projects whose possession date expires on or after 15.03.2020 be extended by three months and consequently MahaRERA is going to issue project registration certificates, with revised timelines for such projects.<sup>5</sup>

Thus, contracts which are regulated by the provisions of the said RERA Act 2016 and rules made thereunder RERA Rules 2017, along the provisions of the Indian Contract Act 1872 shall have the benefit of force majeure event like COVID-19 even though the Agreement does not specifically contain a force majeure clause. From the perspective of agreement even if there is no clause in the Agreement executed as between a Promoter and an Allottee, specifically foreseeing COVID 19 as a force majeure event, thereby entitling extension of time in respect of agreed timely performance of obligations thereunder, still the Order bearing No. 13/2020 dated 02.04.2020 passed by the MahaRERA, would be taken as force majeure event, falling under point “(ii) any notice, order, rule or notification of Government and / or other public or competent authority / court” thereby entitling extension of time in respect of an

<sup>4</sup> Order No. 1-29/2020-PP (Pt.II) dated 24.03.2020 issued by the National Disaster Management Authority.

<sup>5</sup> Order no. 13/2020 dated 02.04.2020 passed by MahaRERA.

agreed timely performance of obligation thereunder.

**Contracts that are regulated only by the provisions of the Indian Contract Act 1872, and as per the mutually agreed terms by the parties i.e. purely contractual domain contracts**

On the other hand, the contracts which are governed only by the provisions of the Indian Contract Act 1872, and as per the mutually agreed terms by the parties i.e. purely contractual domain contracts force majeure event will not necessarily mean only an event which is outside the control of the parties and its applicability would also depend upon what is written in the contract itself. It is important for parties to a contract to envisage an event at the time of entering into a contract that adversely impacts performance of the agreed obligations under the contract and that the said event is an event which is beyond the reasonable control of the parties and further parties should also devise a term to suspend performance of the agreed obligations till particular time period while the event is subsisting and if the event subsists till the agreed suspension time period is over then after the said suspension time period cause performance of the agreed obligations to be excused by terminating the said contract for frustration. If a contract is silent on some event like COVID-19 and because of which event a party to a contract is not able to

perform its agreed obligation, then such party will not be able to suspend performance of its agreed obligations under the contract to a future date. Further any such party cannot even be excused from performance of its obligations also if the event subsists thereby making performance of the agreed obligations impossible. However where a contract contemplates an event at the time of entering into it which adversely affects performance of the agreed obligations thereunder and that the said event is an event beyond the reasonable control of the parties and that the said contract also provides for a term to suspend performance of the agreed obligations till particular time period is over while the event is subsisting and if the said event happens then a party to the said contract can suspend performance of its obligation till the end of the said agreed suspension time period and if the event subsists till the agreed suspension time period is over then after the said suspension time period the party can also be excused from performing its agreed obligations by terminating the contract for frustration.

Another important point to be noted in the said context is that if a force majeure event was not in existence when parties entered into a contract then it can be said to be a subsequent event. Let's assume a situation wherein parties enter into a contract today when COVID-19 situation is prevailing in the country. In this situation parties will not

be able to take shelter of force majeure as parties are aware of the situation and it is in existence unless parties have agreed otherwise in a contract.

Thus, in order to take benefit of force majeure clause, either of suspension of agreed obligations till the agreed suspension time period is over or that of excusing performance of the agreed obligations if the force majeure event subsists even after the agreed suspension time is over, a party to a contract will have to show that parties have foreseen the force majeure event at the time

of entering into contract and that the force majeure has happened and that the said event is outside the control of the parties and parties have complied to the agreed term of temporary suspension of agreed obligations and also excuse of performance of agreed obligations if the envisaged force majeure event subsists after the agreed temporary suspension period is over in the event the agreement is terminated for frustration.

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