



26 March 2020

In an effort to combat the threat of the 2019 novel coronavirus (officially renamed, “COVID-19”) outbreak, numerous countries have instituted stringent policy measures to prevent the spread of the outbreak. As crucial as such policy measures are in curtailing the rampant spread of this outbreak, business operations of companies, both, inside and outside of India, are facing considerable commercial disruption as a consequence of these measures.

On 11 March 2020, the Indian Central Government, in exercise of powers under India’s *Disaster Management Act, 2005* advised all state governments to enforce measures relating to isolation and quarantine including by invocation of powers under the *Epidemic Diseases Act, 1897*, *Disaster Management Act, 2005* and other provisions under the *Indian Penal Code, 1860*. Since then, almost all state governments implemented social distancing measures such as closure of public spaces; closure of offices; significant reduction of presence of staff in Government offices; and postponing all non-essential social and cultural gatherings. Finally, on and from 12:00 am of 24 March 2020, the Government of India imposed a total lockdown over the entire country, including any movement of people and vehicles, other than essential services. The lockdown has been imposed for 21 days and is expected to be lifted on 15 April 2020.

Infrastructure Projects, being primarily dependant on government interactions, movement of people and goods, and provision of key services, are expected to be one of the worst impacted by the COVID-19 outbreak and the lockdown. Most ports and airports are closed, road traffic is severely disrupted, construction activities have ceased outright and power demand is expected to fall significantly. The impact on supply and value chains will be significant and long lasting. At the same time, several infrastructure players have to continue to operate under extremely challenging circumstances to keep critical infrastructure operative.

This edition examines *Force Majeure* in infrastructure documents, and how it can form an effective legal strategy in these trying circumstances. This is in furtherance of our note on *Force Majeure* in commercial contracts dated 16 March 2020.

Invocation of Force Majeure Clause in Infrastructure Contracts

Most infrastructure contracts incorporate *Force Majeure* clauses, some of which are highlighted below.

- **Concession Agreements of the National Highways**

Authority of India: From the perspective of operators managing toll roads, the lockdown would impact toll collection and performance of certain obligations under the concession agreement (including maintenance of the project highway). The Ministry of Road Transport & Highways has now advised the National Highways Authority of India to follow the lockdown orders in relation to toll plaza operations, meaning that all such operations will be suspended. Concession agreements stipulate force majeure clauses to cover events which: (a) are beyond the reasonable control of the parties; (b) the affected party has been unable to overcome the same despite exercise of due diligence and reasonable care; and (c) has a material adverse effect on the project. Force majeure events are usually divided into “political force majeure” (government actions) and “non-political force majeure”. The present situation can fall under both heads. A successful claim for force majeure can result in either financial compensation or an extension of the concession period, and in cases of prolonged events, a right of termination.

Concession agreements for other sectors including ports and airports are similarly constructed.

- **FIDIC standard form of EPC Contracts:** The Fédération Internationale des Ingénieurs-Conseils (“FIDIC”) standard forms of project contracts include provisions relating to the occurrence of a force majeure event (defined as an “Exceptional Event(s)” in the recently published editions).



26 March 2020

FIDIC standard forms (e.g., Red Book and Silver Book) include a list of indicative events which may be said to be a force majeure event such as war, munitions, natural catastrophes, rebellions, riots, etc. Any exceptional event which fulfils the aforementioned criteria for a force majeure / exception event, would qualify as a force majeure. The affected party is excused from its obligations (excluding any obligations relating to payment). Further, if the contractor is the affected party, he will be entitled to extension of time and payment of costs for the works.

- **Renewable Projects:** The model power purchase agreements (“PPA”) of the Ministry of Power (“MoP”) and Solar Energy Corporation of India Limited (“SECI”) classify force majeure as “natural”, “political” and “non-political”. Under the PPA, due to an event of force majeure, an affected party becomes entitled for extension of time to fulfil its obligations, and in certain circumstances, is entitled to deemed capacity charges.
- **Project Finance Documents:** Project financing documents are drafted to ensure that *inter alia* the rights of the lender to repayment is protected particularly by providing for various circumstances which may hamper debt servicing obligations of the borrower. While a typical force majeure clause is not generally included in financing documents including in the standard template of the loan market association’s (LMA) financing document, financing documents would otherwise contain provisions providing for an event causing a material adverse change (“MAC”) or material adverse effect (“MAE”). The occurrence of an MAC/MAE may eventually lead to termination of the financing document. Similarly, project financing documents may sometimes include the occurrence of a force majeure event under a material contract (such as a supply contract, a power purchase agreement or an EPC contract etc.) as a direct event of default under the loan agreement / project financing agreement. Most force majeure events will also trigger an information covenant to inform the lenders.

Borrowers will also have to review other reporting obligations, financial statements or technical advisers’ certificates, as professional advisors may not be able to carry out as usual audit works given the restrictions caused by COVID-19. It is here that the regulators may provide some breathing space

to the stakeholders e.g., the Securities and Exchange Board of India has vide its 19 March 2020 notification granted relaxations to listed entities from compliance stipulations specified under the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 pertaining to reporting requirements.

Clarification by Government Departments

- The Ministry of Finance on 19 February 2020 issued a notification to clarify whether the *force majeure* clause of the “Manual of Procurement of Goods, 2017” can be interpreted to cover spread of COVID-19 as a *force majeure* event. The relevant clause is set out below:

*“A Force Majeure means extraordinary circumstances beyond human control such as an event described as an act of God (like a **natural calamity**) or event such as a war, strike...”*
(Emphasis Supplied)

The ministry has interpreted the abovementioned clause to be covering the spread of COVID-19, as an event of *force majeure*. It has clarified that disruptions in supply chains due to the spread of COVID-19 would be considered as a “*natural calamity*”.

- On 20 March 2020, the Ministry of New & Renewable Energy (“MNRE”) has directed that delay on account of disruption of the supply chains due to spread of COVID-19 in China or any other country should be considered as Force Majeure. The MNRE directed that suitable extension of time should be granted to projects which have been affected by COVID-19. The State Renewable Energy Departments were also requested to apply a similar approach to Force Majeure.
- The Union Road Transport & Highways has advised NHAI that the COVID-19 related situation may be treated as “Force Majeure” under the Concession Agreements.

Please also refer to our earlier edition dated 16 March 2020 on Commercial Contracts that deals with analysing legal principle of force majeure and material adverse change (MAC) clauses.

Assessing Impact – Key Strategies.

Certain key strategies for making a pragmatic assessment regarding the impact of the COVID-19 outbreak on commercial contracts, are set out below.



26 March 2020

- **Tracking Disruptions:** Monitor and document disruptions in the project areas, particularly any associated supply chain disruptions, labour impacts and governmental actions such as lockdowns, curfews, quarantines and travel restrictions. Maintain records of all written instructions and correspondence from governmental and law enforcement authorities. Keep detailed records of the impact of the disruptions, e.g. construction delays or toll losses.
- **Review of material agreements.** Review all material agreements that may be effected by the COVID-19 outbreak, including all customer/supplier/distributor agreements, acquisition agreements, financing agreements and insurance policies.
- **Identification of impacted clauses.** Identify key provisions of material agreements that may be impacted by the change in circumstances due to the COVID-19 outbreak – this may include *force majeure* and MAC clauses, dispute provisions, representations and warranties, conditions and other covenants.
- **Evaluation of any requirements/rights triggered.** Evaluate whether any requirements (such as notice or intimation requirements), or rights (such as suspension or termination rights) under the material agreements have been triggered pursuant to the change in circumstances due to the COVID-19 outbreak.
- **Proactive mitigation.** Plan proactive steps to mitigate the issues and concerns resulting, and expected to result, due to the COVID-19 outbreak. To the extent possible, formulate alternate plans to meet contractual obligations.
- **Seeking legal advice.** Seek legal counsel regarding treatment of contractual issues anticipated due to the COVID-19 outbreak. Appropriate legal assistance is also needed for undertaking an assessment and analysis of key contractual clauses, and for obtaining advice on next steps – for example, for advice on the question of whether a *force majeure* clause can be invoked in the context of the applicable fact scenario.

Disclaimer

This article is provided by Shardul Amarchand Mangaldas & Co for informational purposes only, and is not intended to provide, and does not constitute, legal advice.

© Shardul Amarchand Mangaldas & Co