

COVID – 19:

Impact on Deals and Contracts

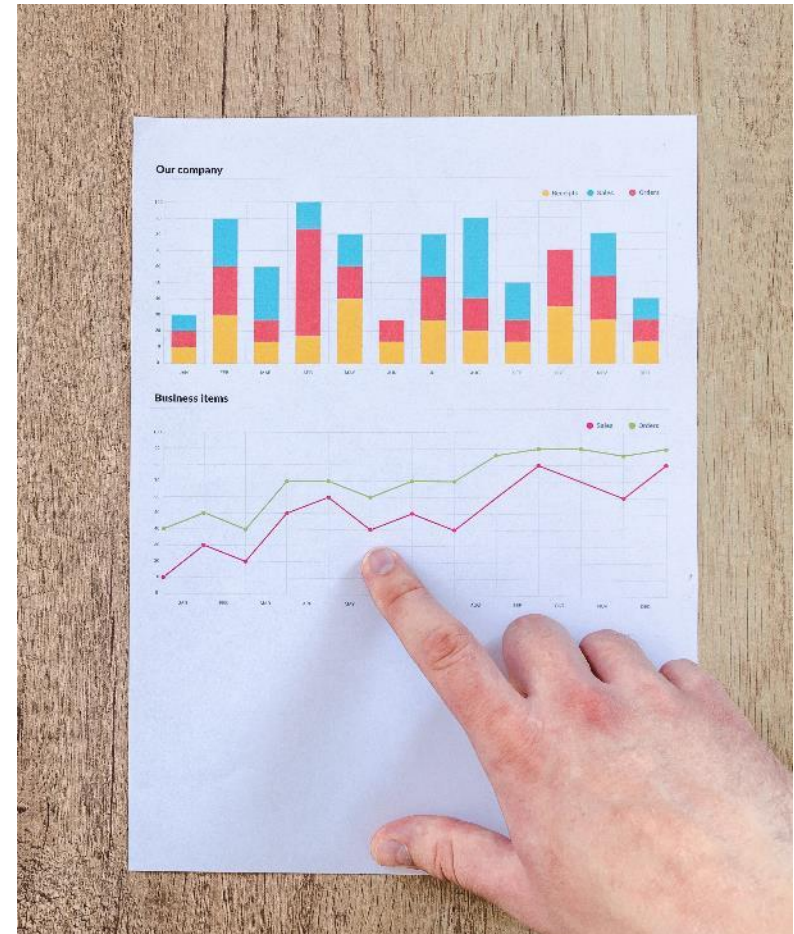
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Potential Impact

Deals

- Slow down in evaluation of target/portfolio companies due to lockdown restrictions
 - Access to due diligence information, interaction with management teams difficult
 - Financial information delayed – audit cycle delayed
 - Business continuity plans not clear – adapting by situation
 - Future outlook/projections not clear
- Market liquidity
- Breach of leverage covenants
- Early exits, valuation re-adjustment
- Long term value assets still attractive
- Leaning towards a Buyer's market? More distressed asset activity?



Impact on Contracts

Force Majeure Clauses

1 Beyond the reasonable control of the party

2 Unforeseeable event

3 Causation between FM event and inability to perform

4 Indirect and consequential impact cannot justify FM claim

5 Mitigation

“occurrence of an event beyond the reasonable control of the parties which prevents the party from performing the contract”

- No implied legal principle - express clause included
- Narrow interpretation of contractually defined scope
- Typically includes:
 - Natural calamities (flood, earthquakes, fire, epidemics)
 - War, riots, sabotage, terrorism, embargo, military action
 - Act of State, change in law, lockdown restrictions
 - Labour strikes
- Burden of proof is on party claiming inability to perform
- Consequence: Suspension of obligation to perform without liability or compensation

Force Majeure

Frustration of Contract

What held not to be valid Force Majeure claim

- Cost escalation: Fundamental basis of the contract not dislodged; alternate means of performing the contract available albeit at higher cost of performance
- Bureaucratic delays: Delays while dealing with governmental and public sector authorities, being reasonably foreseeable
- No direct impact; indirect or consequential impact on trade

Where there is no express Force Majeure clause: doctrine of frustration

Section 56, Indian Contract Act – contract becomes void and is automatically terminated when its performance becomes impossible

“the performance of an act may not be literally impossible but it may be impracticable ...if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the act which he promised to do”

“”a contract is also discharged if a specific thing which is essential to the performance of the contract is destroyed...”

Force majeure invocation

COVID - 19

INDIA

Ministry of Finance:

- Disruption caused in the supply chain due to spread of COVID 19 should be considered as a natural calamity under force majeure clause of the Manual for Procurement of Goods, 2017 (govt procurement contracts)

Ministry of New & Renewable Energy (RE):

- RE implementing agencies to treat delay on account of supply chain disruptions due to spread of coronavirus in China or any other country, as force majeure, if actually affected

Ministry of Road, Transport & Highways:

- Prevailing condition may be treated as force majeure under road concessions; Suspension of toll collection on highways during lockdown

Ports:

- Shipping Ministry advisory - coronavirus pandemic valid ground for ports to invoke FM clauses on port activities and operations

RERA:

- Real estate developers requesting project completion timelines to be extended under S.6 (FM conditions)

INTERNATIONAL

China:

- Judicial interpretation issued by Supreme Court of China during 2003 SARS outbreak
- CCPIT offering “force majeure certificates” to help companies deal with disputes with foreign trading partners arising from government control measures

Europe:

- French courts earlier ruled out the classification of force majeure invoked on the grounds of an epidemic when there was no causal link between Ebola virus and the decline in the company's activity.

Hong Kong:

- HK court rejected that a tenancy agreement was frustrated on account of an isolation order of 10 days due to SARS epidemic since it did not “significantly change the nature of the outstanding contractual rights or obligations” of the parties.

Material Adverse Change/Effect

MAC/MAE clauses

- Provide the right to 'walk-away' or re-negotiate the deal if an event or change in circumstance significantly deteriorates the financial condition, assets or prospects of the target
- Common in loan documents linked to each drawdown
- In equity transactions, MAC relevant as a condition prior to deal closure (no MAC has occurred)
- Limited jurisprudence under Indian laws

Relaxations

Subject	Relaxation/ Exemption
Compliance	<p>Corporate governance:</p> <ul style="list-style-type: none"> ▪ Physical board meetings not mandatory till 30 June 2020. Non-compliance of minimum residency rule of at least 1 director will not be a violation for FY 2019-20. ▪ COVID-19 related promotion of health care, preventive health care and sanitation and disaster management, eligible as CSR expenditure. ▪ No additional fee for late filings during moratorium period from 1 April to 30 September 2020. <p>Tax (Taxation and other Laws (Relaxation of Certain Provisions) Ordinance, 2020):</p> <ul style="list-style-type: none"> ▪ Extension of timelines for filing returns under Income Tax Act, central excise and customs act. ▪ Insertion of an enabling section the CGST Act empowering the government to extend due dates for various compliances, on recommendations of the GST Council. ▪ No penalty on delayed payment of tax. Interest on delayed payment to be charged at 9% instead of 12%-18% <p>Listed companies:</p> <ul style="list-style-type: none"> ▪ Extension of timelines for filings/ disclosures under SEBI Listing Regulations, SEBI Takeover Regulations
Insolvency Laws	<ul style="list-style-type: none"> ▪ Minimum default threshold for insolvency resolution and liquidation raised to INR 1 crore (from INR 1 lac). ▪ Period of lockdown to not be counted for the purposes of the time-line for any activity that could not be completed due to such lockdown in relation to a CIRP.

Relaxations

Subject	Relaxation/ Exemption
Loan forbearance	<ul style="list-style-type: none"> ▪ Banks and NBFCs permitted to grant a moratorium of 3 months on payment of instalments falling due between 1 March 2020 and 31 May 2020. Repayment schedule will be shifted by 3 months after the moratorium period. Interest will continue to accrue on the outstanding portion of the term loans during the moratorium period. ▪ In respect of working capital facilities, lending institutions are permitted to defer the recovery of interest during the period from March 1, 2020 upto May 31, 2020 - the accumulated accrued interest will be recovered immediately after the completion of this period.
Ministry of Power	<ul style="list-style-type: none"> ▪ Moratorium of 3 months to DISCOMs to make payments to generators and transmission licensees and not to levy penal rates of late payment surcharge ▪ Till 30th June, payment security mechanism to be maintained by DISCOMs with generating companies for dispatch of power is reduced by 50%
MNRE	<ul style="list-style-type: none"> ▪ Suitable extension of time may be granted for project completion ▪ Claimants to make formal application to implementing agencies SECI, NTPC etc. and demonstrate effect of supply chain disruption ▪ Clarification with 'must run' status to RE generating stations and DISCOMS to continue payments to renewable generators
Realization of export proceeds	<ul style="list-style-type: none"> ▪ Time period for realization and repatriation of export proceeds for exports made up to or on 31 July 2020 extended to 15 months (from 9 months) from the date of export

The **Q&A session** will start at the end of the panel discussion.

You can submit your questions using the **Q&A widget**.