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FORCE MAJEURE

FREQUENTLY ASKED QUESTIONS

CORPORATE LAW TEAM, INDUSLAW

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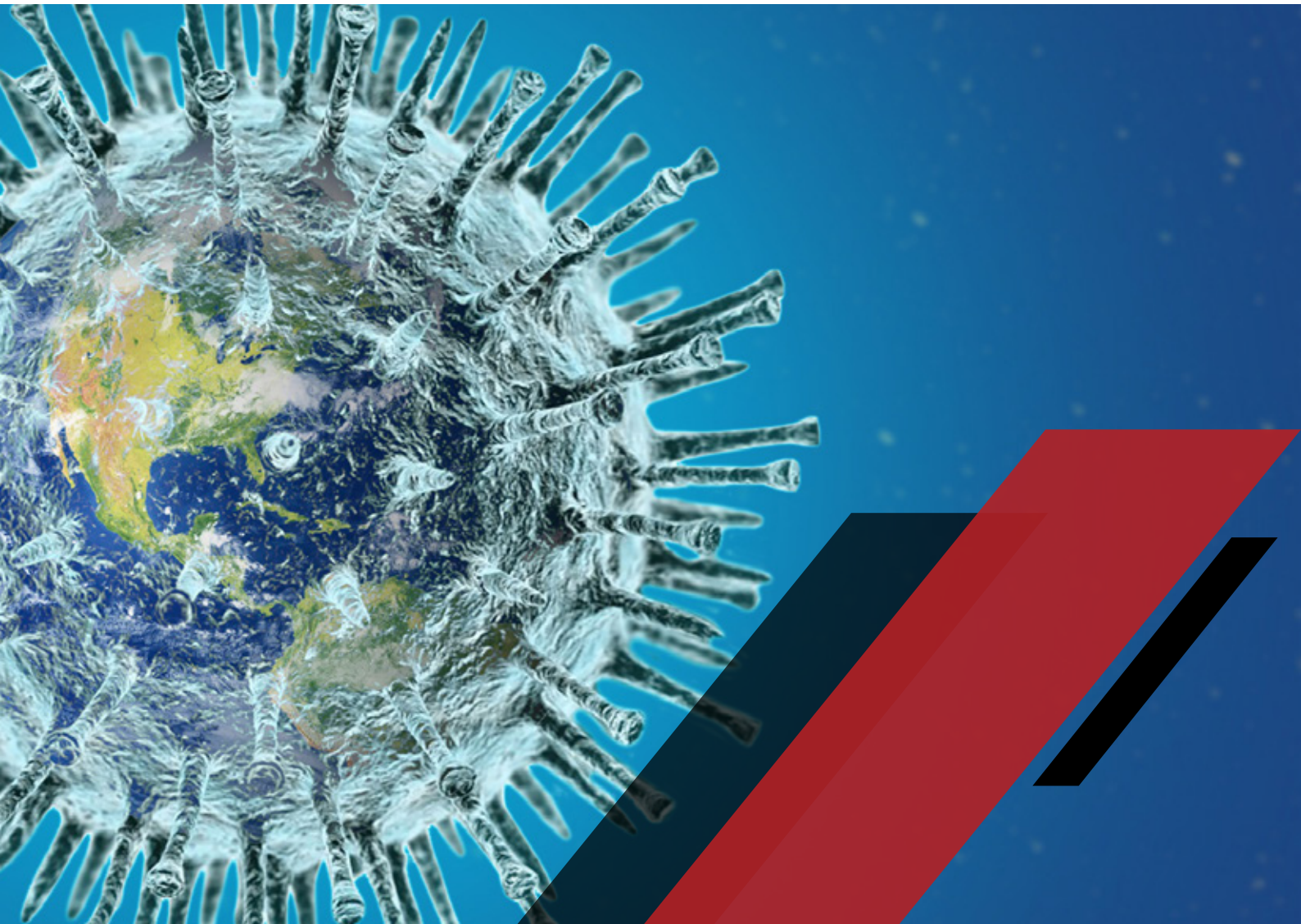
What is *'force majeure'*?

'Force majeure', also called *'vis majeure'* meaning 'superior force' refers to an unforeseen event or condition which occurs beyond the control of the parties to a contract, and because of which the parties are prevented from performing their obligations.

What events typically qualify as *'force majeure events'*?

Force majeure events typically include government action, war, terrorism, strikes, civil unrest, acts of god, floods, earthquakes, hurricanes and other natural calamities. Such events are essentially characterised by being unforeseeable by and being beyond the control of contracting parties, and have inevitable, unprecedented and material effects on the performance of a contract. The effects and consequences of these events are such that they fundamentally alter circumstances which the parties did not contemplate to be bound by at the time of making the contract.

Several governmental authorities have issued memorandums stating that the COVID-19 pandemic will be treated as a *force majeure* event and will cover delays in supply chains under relevant government contracts. Given the nature of the outbreak and the government measures it has led to, the performance of several contracts will be affected by this pandemic. Whether the effect of the COVID-19 pandemic is treated as *'force majeure'* will depend on the nature of the obligations and how they are affected by the pandemic.



Do all contracts have a *'force majeure'* clause?

Force majeure clauses are typically included in contracts that contemplate continuous performance. Such clauses usually contain the obligations of the parties in case of the occurrence of a *force majeure* event and the effect of such an event on the contract itself. However, there is no mandatory requirement to include a *force majeure* clause in a contract.

In the absence of a specific clause relating to *force majeure* in a contract, the consequences of a *force majeure* event on a contract and the obligations under it will have to be examined to understand whether the contract has been 'frustrated' or rendered 'impossible' under the law governing contracts.

What are the typical consequences of including a *'force majeure'* clause in a contract?

While detailing what events constitute *force majeure* events, contracts usually also set out the course of action to be taken by the parties if a *force majeure* event occurs. Such consequences usually include (a) suspending performance of the obligations until the *force majeure* event ceases to affect performance, (b) termination of the contract, or (c) an option to mutually renegotiate the contract. *Force majeure* clauses also typically set out obligations on the affected parties to notify the counterparties of the occurrence of a *force majeure* event and its effect on the performance of the contract. The affected parties may also be required to take all possible and feasible steps to mitigate the effect of such *force majeure* event.

Force majeure clauses essentially seek to limit or waive the liability for non-performance of a contract caused by circumstances beyond the foresight and control of the contracting parties.

In light of the COVID-19 pandemic, parties that are presently negotiating contracts should consider whether the lockdown conditions and a potential resurfacing of the virus could amount to a *force majeure* event for the purpose of their contracts. Contracting parties should also try to anticipate how such occurrences could affect the performance of their obligations and what measures and alternatives can be resorted to under such circumstances, and should make suitable changes to their existing contracts, if possible.

What are the typical consequences of not including a *'force majeure'* clause in a contract?

In the absence of a *force majeure* clause, the contract will have to be examined in the context of the doctrine of frustration. The effects of the *force majeure* event will have to be examined to establish whether it renders the contract impossible or impractical to perform. The terms of the contract will also have to be examined to understand whether the parties are entitled to any relief from performing such a contract. Section 56 of the Indian Contract Act, 1872 **("Contract Act")** deals with the frustration of contracts and states that if contracts which after being entered into become impossible or unlawful to perform, they will be rendered void automatically.

Unlike rescission of a contract, which requires parties to take positive steps upon frustration of a contract under Section 56 of the Contract Act, such contract automatically terminates if it can be established that it is affected by a change in circumstances not contemplated by the contracting parties at the time of entering into the contract, the effects of which render the performance of the contract impossible or impractical. When the contract is voided, both contracting parties are discharged of their subsequent obligations, and neither party has the right to sue the other party for breach of such contract.

What are the consequences of a *'force majeure event'* on contractual obligations?

The consequences of a *force majeure* event will depend on what has been mutually agreed upon by the contracting parties. *Force majeure* clauses usually provide for suspension of contractual obligations until the *force majeure* event ceases to affect performance. Further, the contracting parties may also have the option to renegotiate the terms of performance of the contract in order to achieve a commercial objective as close as possible to what was originally contemplated. In such scenarios, among other steps, the supply of goods contracted for could be scaled down and the time period for performance could be extended.

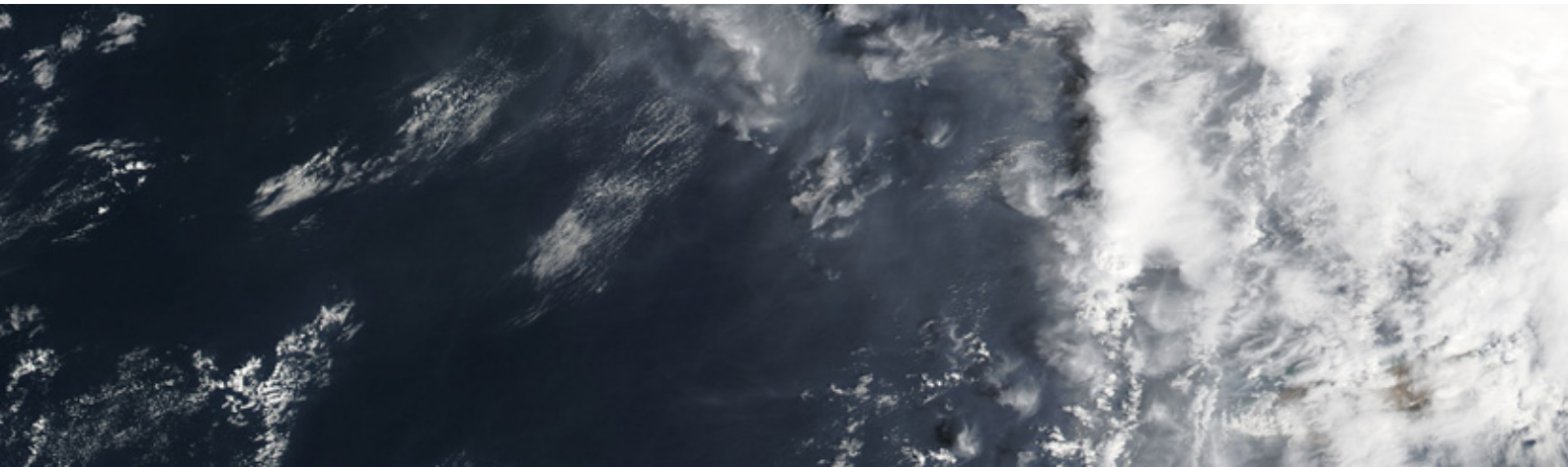
Upon occurrence of a *force majeure* event, whose occurrence and consequences are not detailed in an agreement, the contracting parties will be typically relieved of their obligation to perform the contract to the extent such performance is rendered impossible or impractical.

A word of caution here. The principles being discussed here do not automatically apply to leases since leases are specifically governed by the Transfer of Property Act, 1882. Leases which are in effect are deemed to be frustrated when a material portion of the property is wholly destroyed or rendered substantially and permanently unfit for use because of events like fire, flood or any other irresistible force. Even in such scenarios, such lease is not automatically terminated but it only becomes voidable at the option of the lessee. Typically a lessee will not be entitled to claim relief from payment obligations due to a *force majeure* event unless such understanding has been clearly captured under the lease agreement. It is also important to examine if a particular arrangement is a lease or only a leave and license arrangement which then is simply a contract and therefore the principles discussed here may apply. Unfortunately, whether an arrangement is in effect a lease or a license does not go merely by wording of the arrangement and hence one will have to look at the specific arrangement to determine implications and applicability of *force majeure* due to Covid 19.

When can you invoke *'force majeure'* as a ground for non-performance?

To invoke *force majeure*, the *force majeure* event must have materially affected the contracting parties' ability to perform the contract. The invocation of *force majeure* has to be in accordance with the terms of the *force majeure* clause and its consequences as may be mutually agreed upon by the contracting parties. In most scenarios, the affected party is required to notify the other party that a *force majeure* event has occurred and has delayed the performance of the contract or has rendered the contract impossible to perform.

In light of the COVID-19 pandemic, contracting parties will have to establish that the outbreak and its effects have had unforeseeable consequences on the performance of their contractual obligations.



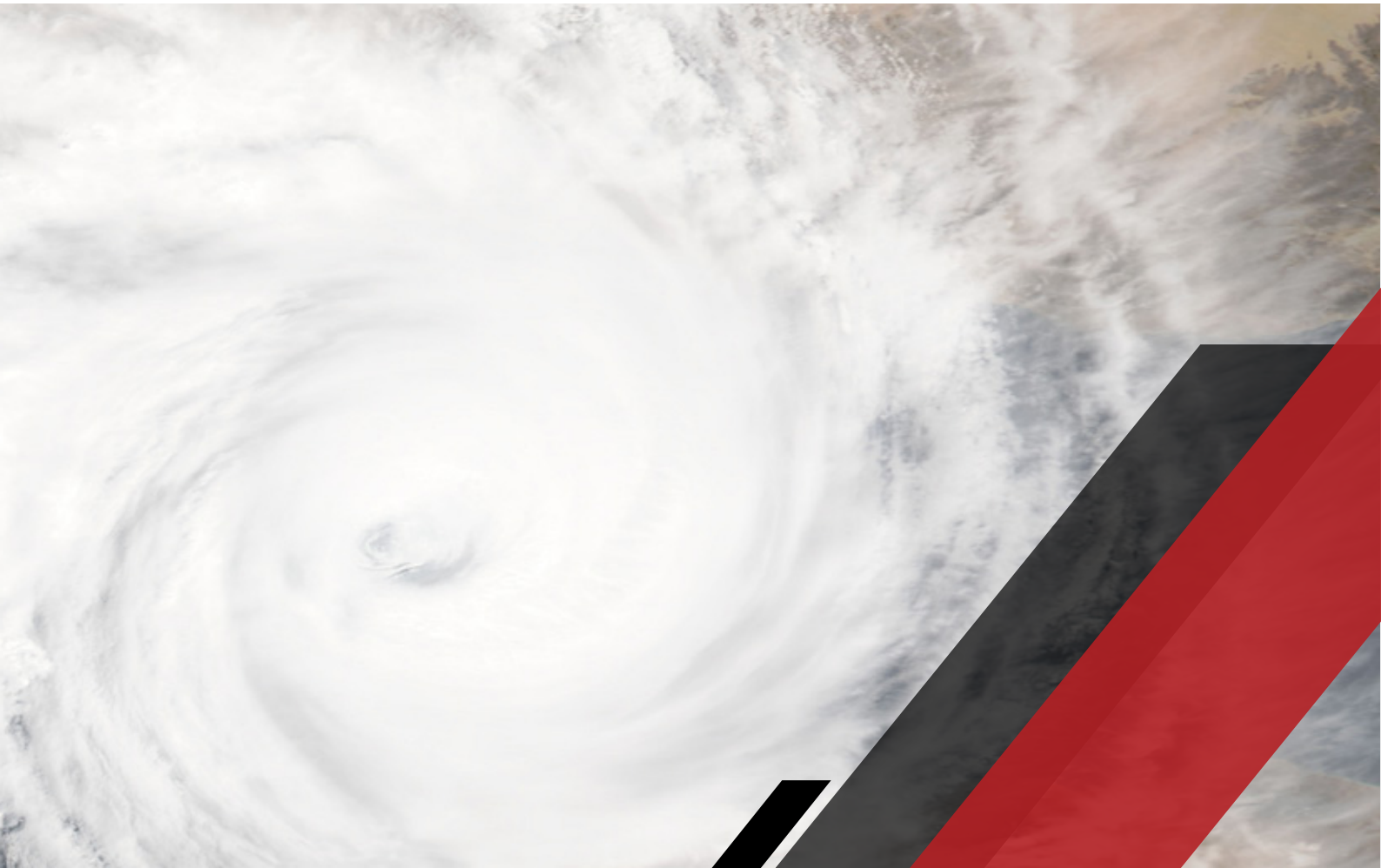
When can you not invoke '*force majeure*' as a ground for non-performance?

Force majeure cannot be claimed where delay or inability to perform the contract is not attributable to a *force majeure* event, whether or not expressly provided for in the contract. If performance is still possible as the contracting parties anticipated at the time of execution of the contract, contracting parties would not be entitled to invoke *force majeure*.

Mere inconvenience, increased burden of performance or circumstances which make the performance of a contract more onerous than originally contemplated do not, by themselves, qualify as valid grounds for avoiding performance.

What are the consequences of the invocation of *'force majeure'* being accepted?

In case of contracts which contemplate the *force majeure* events and their consequences, such agreements usually provide for a suspension or delay in the performance of the contract during the subsistence of the *force majeure* event. Such contracts most often also provide for termination of the contract if the *force majeure* subsists beyond a stipulated period of time. However, in the absence of a *force majeure* clause, if the contracting parties claim that the contract is frustrated under Section 56 of the Contract Act, the contract will be automatically voided and terminated in its entirety.



What are the circumstances under which the invocation of *'force majeure'* is not accepted?

In case of contracts which contemplate *force majeure* events and their consequences, courts will first look into whether the *force majeure* event or condition claimed falls under the purview of the clause, as such clauses are generally viewed as exhaustive in nature. Courts also look into the other provisions of the contracts to determine whether such contingencies have been provided for in any other manner. Even if the occurrence of a *force majeure* event has been established, courts will not accept a claim of *force majeure* if the performance of the contract has not been materially affected or prevented by such an event.

With respect to claims under Section 56 of the Contract Act, and in the absence of an express or implied *force majeure* clause, courts have rejected claims where the delay in performance or inability to perform the contract is attributable to the fault of the contracting party making such claim. Further, the courts do not generally allow claims of *force majeure* and frustration of contracts, where there has only been a mere inconvenience or difficulty in performing the contract, where the performance of the contract has become expensive or where there exists a valid and practical alternative for the performance of the contract.

Where a claim of *force majeure* or frustration has been rejected, the courts may also order specific performance of the contract or award damages if losses have been incurred on account of the non-performance of the contract or any delay in the performance of the contract.

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