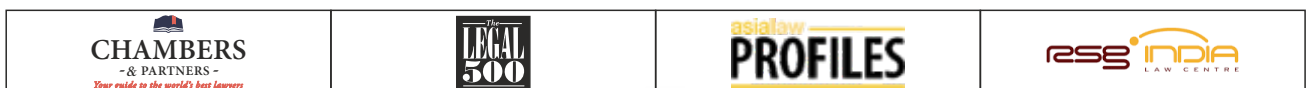




# FORCE MAJEURE IN PROJECT FINANCING & INFRASTRUCTURE PROJECTS



**RECOMMENDED BY**



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## MEANING OF FORCE MAJEURE

Force majeure is a French term that literally means “Superior force” A force majeure event refers to the occurrence of an event which is outside the reasonable control of a party and which prevents such party from performing its obligations under a contract. It is related to the occurrence of an event for which no party can be held accountable so long as the event is unforeseeable, external to the parties of the contract, and unavoidable.

The Hon'ble Supreme Court in the case of **Dhanrajmal Gobindram vs. Shamji Kalidas**<sup>1</sup>, has held that the term force majeure is of wider import. Judges in the past have agreed that where the reference is made to force majeure, the intention is to save the performing party from the consequences from the anything over which he has no control.

In **Satyabrata Ghose v. Mugneeram Bangur & Co.**<sup>2</sup> and in, **Energy Watchdog v. Central Electricity Regulatory Commission**<sup>3</sup> the Supreme Court applied the following tests to determine validity of Force Majeure events:

- Whether the event qualifies as force majeure under the contract?
- Whether the risk of non-performance was foreseeable and able to be mitigated?
- Whether performance is truly impossible?

## GOVERNMENT NOTIFICATION

In view of the aforesaid discussion, it is important to understand the effect of the Government notifications issued in reference to the COVID-19 pandemic. The Government has taken note of the effect this pandemic is causing across various industrial sectors as well as the Indian economy. Accordingly, the Central Government has released various notifications and advisories to help stabilize the market. With respect to Force Majeure as well, several governmental departments have clarified their respective stance on the same.

The Ministry of Finance released a notification dated February 19, 2020 wherein it has been clarified that Force Majeure under Manual of Procurement of Goods, 2017 would be applicable in the current situation due to disruption of supply chains. It has also been stated that the pandemic should be considered as a natural calamity and the Force Majeure clause should be invoked following the due procedure. Similarly, the Ministry of New & Renewable Energy with respect to solar project developers, vide office memorandum dated March 20, 2020 has declared that parties can invoke the Force Majeure clause to avoid financial penalties if they miss the contractual obligations on account of COVID-19. Other ministries have also followed suit and issued respective notifications pertaining to invoking of Force Majeure clause.

## FORCE MAJEURE CLAUSE IN CONTRACTS

A party can seek respite for a FME basis the terms of the contract, however this will depend entirely on the wording of the clause and its setting and therefore, will differ from contract to contract. Furthermore, most contracts contain a specific FME clause and its interpretation will heavily rely and vary accordingly. For instance, it may include terms such as epidemics, pandemics, diseases, action by government, nation/statewide lockdown, etc., which ultimately hinders the fulfilment of contractual obligations of the parties.

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<sup>1</sup>(1961) 3 SCR 1020

<sup>2</sup>AIR 1954 SC 44

<sup>3</sup>(2017)14 SC C 80,

Some criteria that parties can rely upon to invoke a Force Majeure clause is as follows:

- The impediment is beyond the reasonable control of the affected party;
- The impediment could not have been foreseen by the affected party while concluding the contract;
- The event hinders the affected party's ability to perform the contractual obligations; and
- The affected party has taken all reasonable steps to avoid or mitigate the event or its foreseen consequences.

Certain contracts such as concession agreements entered with National Highways Authority of India specifically include an 'epidemic' as a force majeure event. Other contracts such as power purchase agreements for renewable projects entered with Solar Energy Corporation of India Limited do not specifically include an 'epidemic' as a force majeure event. A standard 'force majeure' clause in public procurement contracts of the Government of India generally includes natural force majeure events. One such example is,<sup>4</sup>

*“Act of God, including but not limited to lightning, drought, fire and explosion, chemical or radioactive contamination or ionising radiation (to the extent of the fire, explosion, chemical or radioactive contamination or ionizing radiation originate from a source external to the Power Station Land), **epidemic**, earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred (100) years”.*

The COVID-19 pandemic is a FME that can be covered under contracts but, not all contracts have the same clause. For the coverage of this pandemic in the Force Majeure clause, it should encompass within its ambit, 'prevention of fulfilment of obligations due to governmental restrictions', 'any unforeseen circumstance that prevents the fulfilment of obligations' or specifically mentioning a 'pandemic/epidemic' as an event that would come within the ambit of Force Majeure. However, some clauses do not have the same wording and are limited to a few circumstances only, in which case invoking the clause would not do much good unless both the parties to the contract mutually decide to suspend the operation of the contract for a specific period of time. In the absence of such mutual understanding the party which is not able to fulfil the terms of the contract may invoke the 'Doctrine of Frustration'.

As far as standard financing documents are concerned, a force majeure event may not exclude debt servicing obligations and a borrower is expected to service the debt under the relevant financing documents. Therefore, developers of leveraged projects should ideally, report the effects of the pandemic to the lenders and decide what measures are to be taken for rescheduling of repayment instalments and waiver for any breach of financial obligations as set out in the contract.

### **IMPACT OF COVID -19 ON PROJECT FINANCE**

The general norm as far as financing documents are concerned, is that obligations to make payments are not suspended on the occurrence of a force majeure. Financing agreements for project finance usually have certain intricacies that specific to infrastructure and are primarily secured by cash flows generated by the project.

Further, where the FME occurs during the construction period (where there is a moratorium on repayment under financing documents), concession agreements usually provide for extended timelines for repayment. However, the financing documents may not always account for corresponding revision of repayment schedules, thereby exposing the borrower to cash flow risks.

Considering the fact that the prospective ramifications of the pandemic are so monumental in terms of defaults, the lenders are understandably nervous. This uncertainty regarding defaults is further exacerbated by the fact that banking laws and regulations are typically centered on security cover, and do not deal with pandemic situations.

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<sup>4</sup>Draft Standard Power Purchase Agreement as provided by the Ministry of Power, Union of India on its official website <https://powermin.nic.in/en/node/5167>



As mentioned above, most financing agreements, do not have force majeure clause that could be triggered to terminate the loan agreement and seek relief from repayment obligations. What complicates matters further is that there also do not seem to be specific banking regulatory guidelines for dealing with pandemics. Only certain lending agreements, like those related to corporate funding, or those dealing with EPC (engineering, procurement, and construction), O&M (operations and maintenance) and supply, generally contain force majeure clause have force majeure clauses that provide protection to the lenders in terms of their obligation.

While on one hand, the government has clarified that the COVID-19 pandemic is a force majeure event, on the other hand, this relief does not, in most cases, impact the repayment obligations of the borrower under the financing documents. In fact, such lack of respite has a ripple effect on lenders including but not limited to occurrence of material adverse event, breach of financial ratios, failure to comply with ancillary project documents, and inability to achieve the timelines set out in the agreement etc. Further, the lending ability of banks might also get affected due to non repayment of dues to lenders.

It may be noted that regular contracts that don't account for FM clauses, reliance can be placed on Section 56 i.e. Doctrine of Frustration under the Indian Contract Act and therefore, a contract can be terminated on those grounds. However, such respite in case of banking-related contractual obligations may be difficult to achieve as such obligations are premised on prepayment of the loan amount.

#### **Typical issues with defaults on bank loans**

- \*There are no specific banking regulatory guidelines for dealing with pandemics
- \*Most loan-related contractual agreements don't have force majeure clause
- \*A payment default could trigger default in other financing documents
- \*Inability to recover dues may also affect the lending ability of banks

#### **What should lenders & borrowers do:**

Lenders: Must carefully review the underlying project documents and analyse the impact on timelines

Borrowers: Immediately revisit all their critical loan agreement to analyse if they can claim any genuine concession from the lender, notwithstanding any legal recourse, banks may look at principles of natural justice and equity as a way of providing relief to the borrowers. Therefore, borrowers and lenders may enter into an arrangement to mitigate their losses.

\*The borrower should intimate the lender of any impending default and request for a moratorium on payments

#### **IMPACT ON INFRASTRUCTURE PROJECTS:**

The Ministry of Road Transport and Highways (MoRTH) has declared COVID-19 as a force majeure event and informed National Highways Authority of India (NHAI) as well, however, a corresponding guideline or notification has not been issued by NHAI. Therefore, in the absence of any strict guidelines to rely upon, the officers on ground have been acting on their own accord, some even going so far as rejecting COVID-19 as a force majeure event in certain cases.<sup>5</sup>

Such a situation has not only led to a lot of confusion but has very serious implications for the contractors and developers. Concern regarding levy of damages and penalties for not meeting project deadlines and not carrying out maintenance obligations and reduction in annuity payments is only increasing with each passing day.

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<sup>5</sup>According to the National Highway Builders Federation (NHBF).



Furthermore, issues such as a negative impact on project cash flows, will impact project economics even if the concession period is extended. An increase in financial stress will also come about, if a developer has issued bonds, as the Reserve Bank of India's measures do not allow moratorium for outstanding bond exposures.

In a bid to seek clarity, developers and concessionaires have forwarded their concerns to MoRTH and have sought waivers in penalties and damages for a 6 month period outside of the project completion timelines. However, the impact of the lockdown is likely to be felt for a much longer duration than just the lockdown period. Issues like a downgrading of credit ratings and an increase in borrowings cost are likely to crop up in the near future.

As per exchange announcements by two of the leading service providers Ashoka Buildcon and IRB, the prevailing conditions may be treated as force majeure as per their concession agreement and therefore the respective project SPVs are entitled for relief as per the terms of the concession agreement. They would also seek a moratorium on loan repayment to banks and extension of the financial year closure timelines by at least three months to tide over the crisis.

### **Some Examples of Force Majeure Clauses are as Follows**

#### **National Highways Authority of India**

*Force Majeure as used in this Agreement, the expression "Force Majeure" or "Force Majeure Event" shall mean occurrence in India of any or all of Non-Political Event, Indirect Political Event and Political Event, as defined in Clauses (1), (2) and 2(i) respectively, if it affects the performance by the Party claiming the benefit of Force Majeure (the "Affected Party") of its obligations under this Agreement and which act or event (i) is beyond the reasonable control of the Affected Party, and (ii) the Affected Party could not have prevented or overcome by exercise of due diligence and following Good Industry Practice, and (iii) has Material Adverse Effect on the Affected Party*

Non- Political event covers Act of God and Epidemic etc.

Political event covers Change in Law.

Government of India (**GOI**), Ministry of Home Affairs, vide Order No. 40-3/2020-D dated 24.3.2020 directed complete lockdown in the country which will continue till 17-05-2020 with some relaxation/modifications. The said order was passed by **GOI** under the Disaster Management Act 2005 which has an overriding effect over any other law in force.

It is therefore relevant to understand whether the Force Majeure in terms of the above contract condition would be a Non-political event bringing Covid under the ambit of Act of God or Epidemic or would it be a Political event because of change of law caused due to aforementioned order dated 24-03-2020 passed by GOI.

A rational way of looking at it would be to conclude that the present Force Majeure condition which resulted in stoppage of work and/or hindrance in performance is a result of both Non-Political and Political Event.

Definitely the Change in Law i.e order dated 24-03-2020 has resulted into stoppage of works but the said order was issued by the GOI because of Covid conditions and hence it would be covered under both political and non-political event.

#### **GAIL (India) Ltd.**

*The term "Force Majeure" as employed herein shall mean acts of God, earthquake, war (declared or undeclared), revolts, riots, fires, floods, rebellions, explosions, hurricane, sabotage, civil commotions and acts and regulations of respective Government of the two parties, namely the EMPLOYER and the CONTRACTOR.*

Under the above condition as well Force Majeure would be covered under Act of God and also would be as a result of Change of law. The relevant factor would also to be examined if the contractor under the Force Majeure conditions are entitled to compensation or not.

### Steel Authority of India Limited

*Force Majeure" shall mean any event beyond the control of the Employer or of the Contractor, as the case may be, and which is unavoidable notwithstanding the reasonable care of the party affected, and shall include, without limitation, the following: a) war, hostilities or warlike operations (whether a state of war be declared or not), invasion, act of foreign enemy and civil war. b) rebellion, revolution, insurrection, mutiny, usurpation of civil or military government, conspiracy, riot, civil commotion and terrorist acts. c) strike, sabotage, unlawful lockout, epidemics, quarantine and plague. d) earthquake, fire, flood or cyclone, or other natural or physical disaster.*

The Covid condition would definitely fall under epidemic and disaster in terms of the above clause and would be a Force Majeure condition.

### Change in Law and Extension of Time

- The accepted position of law is that the lockdown rules bear all traits of law and are thus binding. Therefore, the introduction of such law amounts to a 'change in law' under appropriate clauses in construction contract. Such change in law would thus entail a proportionate extension of time for completion.
- One has to see if the contractors in such cases are also entitled to compensation or not.

NOTE- it may be kept in mind that although the lockdown amounts to a change in law, it however does not only target a specific activity or construction activity in particular and further impacts both the employer and contractor, thereby not leaving only one party in a disadvantageous position.

- As regards regulations in this regard, it is pertinent to note that- Following the office memorandum dated 19 February 2020, Ministry of New & Renewable Energy issued an office memorandum dated 20 March 2020, therein recognizing supply chain disruption due to the COVID-19 outbreak as a force majeure event and directed all renewable energy implementing agencies to grant a suitable **Extension Of Time(EOT)** to project where the force majeure clause is invoked.

Interestingly, the construction industry is anticipating a reasonable relaxation and extension of time in regulatory compliances as well as fast track approval process to reduce project costs. Developers are hopeful that-

- The government would reduce the statutory / development charges, premiums, GST and stamp duty and
- Provide input tax credit benefit to the sector for at least one year to overcome the existing liquidity crisis
- The three months moratorium to be provided by banks to developers and apartment purchasers as well as extension provided by RERA to developers over and above three months is being sought to be further extended for a reasonable period

### Duty to Mitigate

- As discussed earlier, a party that aims to take the benefit of force majeure is under a duty to show that it has taken all reasonable steps to mitigate the event and its impact. This is a subjective standard and is subject to facts and circumstances of each case
- The force majeure event should be the cause of the breach of contract and the onus is on the party claiming its benefit to establish that it was the particular force Majeure event (and not any other) that disabled the party to fulfil its contractual obligation.
- All communication related to the event must be meticulously recorded and stored so as to aid in establishing that the party did everything reasonably possible to mitigate losses



For example, a supplier 'A' could consider using other manufacturing lines in a different location which may not be impacted by the event, or a project owner 'B' could seek other suppliers for material required at site. Having said that, the reasonableness of a mitigation measure will be considered keeping in view any additional cost etc. that the party incurs, as well as availability of alternative options.

### **Measure of Extension of Time and Damages because of Force Majeure**

Ordinarily based on the contract conditions related to Force majeure, the contractor in such situations are either entitled to extension of time or Extension of Time along with damages.

The current scenario is unprecedented, therefore in order to navigate these troubled water, both the employer and contractor must understand their options under the construction contract and weigh the potential risks and costs that may be associated with it

The general perception of the Contractor while claiming damages on account of such Force Majeure conditions are that even if they make their claims for EOT, idling of resources, they would not get it without a Dispute Adjudication Board/ Dispute Review Board and Arbitration process. Government and its various department needs to take extra care to change such mind set of the Contractors especially in the present Covid situations.

In other cases where certain Government Departments would be open to consider such claims without dispute resolution process, the contractors are under the general impression that they would not get more than 10-20% of what they would claims as damages. There would be lot of hurdles, delays and redtapism in deciding such damages under the present Force Majeure conditions.

The reality lies somewhere in between. Not all contractor would be entitled to damages because of Covid Conditions.

### **Quantum of Damages**

One would have to establish that the delay or disruption of the works was because of the present conditions.

The quantum of damages would be dependent on the following:-

- a. Stage at which the works are. If at the initial stages of planning and not much mobilization have been done, the contractor cannot claim damages.
- b. If the project is at a very advanced stage and lot of men and machine have been mobilized, the contractor can claim damages based on the idling of such resources.
- c. The other relevant factor would be the manner in which the contractor had been performing. If there were delays from the inception attributable to the Contractor, it cannot claim damages. The previous Running Account bills would also be reflective of the pace of works of the contractor.
- d. On the basis of the Monthly Progress Reports and Detailed Project Reports can be used as a basis to assess the actual deployment of resources at site to quantify the damages.
- e. What steps have been taken by the contractor to mitigate the losses likely to be suffered by it because of Force Majeure?

The amount of interest obligation of the contractor towards the bank would also be a relevant factor for determining the quantum of damages.

### **WHAT THE COURTS HAVE HELD ON THE PERFORMANCE OF CONTRACTS**

**In Alopi Parshad and Sons Ltd. Vs. Union of India (UOI)<sup>6</sup>**, the Hon'ble Supreme Court of India held as follows:

*"There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract, merely because on account of an un contemplated turn of events, the performance of the contract may become onerous."*

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<sup>6</sup>AIR 1960 SC 588

Subsequently, in **Naihati Jute Mills Ltd. v. Hyaliram Jagannath**<sup>7</sup>, the Supreme Court also referred to the English law on frustration, and concluded “ *that a contract is not frustrated merely because the circumstances in which it was made are altered. Section 56 of the Contract Act inter alia provides that 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. It also provides that where one person has promised to do something which he knew, or, with reasonable diligence might have known, and which the promisee did not know to be impossible or unlawful, such a promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance. As envisaged by S. 56 impossibility of performance would be inferred by the Courts from the nature of the contract and the surrounding circumstances in which it was made that the parties must have made their bargain upon the basis that a particular thing or state of things would continue to exist and because of the altered circumstances the bargain should no longer be held binding. The courts would also infer that the foundation of the contract had disappeared either by the destruction of the subject matter or by reason of such long interruption or delay that the performance would really in effect be that of a different contract for which the parties had not agreed. Impossibility of performance may also arise where without any default of party the contractual obligation had become incapable of being performed because the circumstances in which performance was called for was radically different from that undertaken by the contract. But the common law rule of contract is that a man is bound to perform the obligation which he has undertaken and cannot claim to be excused by the mere fact that performance has subsequently become impossible.*

**10.** .....*For, if the parties foresaw the circumstances which existed at the date of performance they would provide for them in the contract; if they did not, that meant that they deliberately took the risk and therefore no question of an implied term could really arise.*

**16.** .....*The contract, no doubt, contained the printed term that the buyers would not be responsible for delay in delivering the licence but such delay as therein provided was to be excused only if occurred by such reasons as an act of God, war, mobilisation etc., and other force majeure.....*

**17.** ..... *A contract is not frustrated merely because the circumstances in which it was made are altered. The Courts have no general power to absolve a party from the performance of his part of the contract merely because its performance has become onerous on account of an unforeseen turn of events.*

Therefore, in this case as well, it was made clear that in general, the courts have no power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events.

The Supreme Court of India in **Energy Watchdog v. Central Electricity Regulatory Commission** (Supra) , lucidly stated that “*insofar as a force majeure event occurs that de hors the contract, it is dealt with by the rule of positive law under the Section 56 of Indian Contract Act. The performance of an act may not be literally impossible, but it may be impracticable and useless from the point of view of the object and purpose of the parties*”.

In the case of **Krishna Kilaru and Ors. vs. Maytas Properties Limited**<sup>8</sup>, the Hon'ble High Court of Andhra Pradesh made the following observations :

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<sup>7</sup>1968 (1) SCR 821

<sup>8</sup>(2013)2 C omp LJ 322(AP)



*“Before examining the question whether the reasons furnished by the respondent-company constitute force majeure events, it is useful to note that the doctrine of frustration of contract is an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and, hence, comes within the purview of S. 56 of the Indian Contract Act. S 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties. The word "impossible" has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and 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.*

*Courts have no power to absolve a party from liability to perform a contract merely because the performance becomes onerous. The expressed covenants in a contract cannot be ignored only on account of unexpected and unanticipated turn of events after the contract.”*

Therefore, in absence of a specific Force Majeure clause in the Project Financing Agreement, if the Borrower seeks benefit of Force Majeure, the Borrower would have to factually prove that the present pandemic and its resultant implications has affected its cash flows to an extent that it is impossible for the Borrower to perform its obligations under the project financing transaction. Further, the lender may also press for the same to determine the validity of the force majeure event claimed by the Borrower.

The Agreement may not strictly contemplate the present COVID-19 pandemic and its resultant fallouts including lockdown situation etc. as a force majeure and may not stipulate any specific relief for the Borrower as such. However, it may be borne in mind that these situations are unprecedented and extraordinary, and accordingly, it may need to be considered that the Borrower is dependent for its debt servicing on the projected cash flows. Thus, in the event the Borrower is unable to discharge its debt service obligations towards the lenders, , the default under the Agreement cannot be entirely attributed to the Borrower's fault” and it cannot be held that the Borrower has any mala fide intentions regarding its payment obligations under the Agreement.

Therefore, so long as the Borrower can establish that the outbreak of COVID-19 itself or the resulting government action for controlling infections has made it impossible for the Borrower to perform its obligations under the agreement; the lender should avoid taking any harsh measures against the borrower.

In the present scenario, it is suggested that lenders in terms of the relevant Financing Documents may consider granting suitable waiver / relaxation to the Borrower, as may be justified and necessary and proportionate, in view of the present situation caused due by COVID-19, subject to that extant RBI guidelines.

## **RBI'S REGULATORY PACKAGE**

To address these concerns, the Reserve Bank of India (**RBI**) announcement on March 27, 2020 of 'Covid-19 – Regulatory Package' (**Regulatory Package**) has provided much-needed succour to liquidity-starved borrowers. The Regulatory Package, which addresses the lending institutions<sup>9</sup>, demonstrates the efforts undertaken to mitigate the burden of debt servicing and ensure continuity of viable businesses by granting the following significant reliefs:

The RBI Regulatory Package grants the following significant reliefs:

- Moratorium of three months on payment of all instalments<sup>10</sup> falling due between March 1, 2020 and May 31, 2020, in respect of all term loans<sup>11</sup> (**Moratorium**)
- Restraint on degradation of asset classification of the loan accounts availing the benefit of Moratorium (**Asset Classification**)

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<sup>9</sup>All commercial banks (including regional rural banks, small finance banks and local area banks), all co-operative banks, all-India Financial Institutions, and NBFCS (including housing finance companies)

<sup>10</sup>Instalments will include the following payments falling due from March 1, 2020 to May 31, 2020: (i) principal and/or interest components; (ii) bullet repayments; (iii) Equated Monthly instalments; (iv) credit card dues.

<sup>11</sup>Including agricultural term loans, retail, and crop loans

### **Mandatory or Recommendatory in nature?**

There is much debate regarding the Regulatory Package being mandatory for lending institutions to abide by, or this being an advisory that recommends a certain course of action. The Regulatory Package does not contain sufficient clarity on this aspect and RBI too has not issued any clarification in this regard.

The Regulatory Package prescribes that Moratorium may be granted in respect of all the term loans and repayment schedule for such loans as also the residual tenor, will be shifted across the board by three months. However, FAQs issued by Indian Banks Association (**IBA**) in consultation with the Ministry of Finance provide that the benefit of the Moratorium is available to all loan accounts, which are 'Standard Assets' as on March 1, 2020.

In the midst of this ambiguity, a few recent judgements passed by the High Court of Bombay (**Bombay HC**) and High Court of Delhi (**Delhi HC**) touch upon the impact of Regulatory Package with regard to borrowing transactions.

In a recent ad-interim judgement dated March 30, 2020, passed by the Bombay HC in the matter of **Rural Fairprice Wholesale Limited & Anr v. IDBI Trusteeship Services Limited & Ors**, the Court granted interim injunction restraining lenders action of enforcement of pledge of shares upon occurrence of a payment default by the borrower under the lending documents and observed that present Covid-19 situation/lockdown has badly affected the market leading to fall in stock prices of the pledged shares and therefore allowing enforcement of pledge of such shares at their plummeted prices (due to the prevailing Covid-19 outbreak) will cause loss to the borrower and may put the borrower in commercially perilous position. The aforesaid judgment by the Bombay HC was challenged by way of a special leave petition in the Supreme Court (**SC**). The apex court has observed in its order dated April 17, 2020 that the interim nature of the order is not likely to be interfered with under Article 136 of the Constitution (i.e based on technical grounds) and has accordingly dismissed the special leave petition.

The Delhi HC has in its order dated April 6, 2020 in the matter of **Anant Raj Ltd v. Yes Bank Ltd**, ordered, inter alia, that the Moratorium relief is applicable even to loans which were on default as on March 1, 2020. Pertinently, the Delhi HC also observed that RBI's relief of Moratorium should be extended to a loan account categorized as a SMA-2 in the books of the lender (i.e. which was not a 'Standard Asset'), which is in contradiction with the FAQs issued by the IBA on 'RBI Allowed Banks to Declare Moratorium on Term Loans'. Further, the Delhi HC indicated that the extension of the said Moratorium should be extended to all borrowers across the board as mentioned in RBI Regulatory Package, and that the same is not a recommendatory.

The Bombay HC vide its order dated April 11, 2020 in the matter **Transcon Skycity Pvt. Ltd & Ors v. ICICI Bank & Ors** and **Transcon Iconica Pvt. Ltd & Ors v. ICICI Bank & Ors** has concurred with the view of the Delhi HC in Anant Raj case (discussed above) and held that the benefit of Moratorium as per the Regulatory Package shall be available to the borrowers, in the instant case who were in default as on March 1, 2020. The Bombay HC also observed that period of Moratorium during which there is a lockdown will not be reckoned by lender for computation of the 90-day period for Non-Performing Asset (**NPA**) declaration as per the extant RBI guidelines.

In another very recent order dated April 13, 2020 passed by the Delhi HC in the matter of **Shakuntla Educational & Welfare Society v. Punjab & Sind Bank** the Delhi HC concurred with the observations of co-ordinate bench in the matter of Anant Raj and observed that the intention of the RBI while issuing the regulatory package was to maintain status quo with regard to the classification of accounts of the borrowers as they existed on March 1, 2020. It is pertinent to note here that even though Shakuntla Educational & Welfare Society failed to pay the instalments which were due on or before December 31, 2019, the Delhi HC took due cognizance of the fact that the receivables of Shakuntla Educational & Welfare Society were affected due to State Government's directive prohibiting the collection of fees from the students. Accordingly, the Delhi HC directed that till the next date, the Punjab & Sind Bank stood restrained from declaring the Shakuntla Educational & Welfare Society accounts as NPA.

It appears that the courts are recognizing the current Covid-19 situation as a supervening event that impairs or affects the ability of borrowers under loan agreements. The underlying principle is that the borrowers have not committed a 'willful' default and the situation is beyond the 'reasonable' control of the borrower and these circumstances could not have been pre-empted or mitigated by the borrower. This is the classic legal definition of a force majeure.

The conclusions drawn from all the above-mentioned judgements, essentially stipulate that moratorium should be granted across the board to all borrowers, status quo should be maintained during the Moratorium and the asset classification of loan accounts should not be downgraded.

However, it is pertinent to mention about another recent judgements dated April 7, 2020, passed by the Bombay HC, in the matter of **Ideal Toll & Infrastructure Pvt Ltd and Anr. v. ICICI Home Finance Co Ltd and Anr** and **Mrs. Anuya Jayant Mhaskar v. ICICI Home Finance Co Ltd and Anr**, which to a certain extent has a slightly contradicting ratio. In the aforesaid judgement, the Bombay HC directed the borrower to repay the overdues which fell due before March 1, 2020, the Moratorium start date, as per the rescheduled repayment dates proposed by the Bombay HC, falling between April 18, 2020 and May 15, 2020. The Bombay HC further observed that no further pledge shall be invoked and the loan account shall not be classified as an NPA by the lender, unless there occurs a default in respect of the amounts payable by the borrower pursuant to the rescheduled repayment dates stipulated by the Bombay HC.

### **CONCLUSION**

Towards the end, the first task should be to ascertain whether there is a force majeure clause covering Covid-19 pandemic as a force majeure event in the contract documents. If yes, then a communication in this regard needs to be sent to the employer/other parties. Relief on account of force majeure will depend on a case-to-case basis, and generally one of the reliefs provided in the contract documents is suspension to perform the obligations during the force majeure period, which may give some preparation time for dealing with the situation.

However, if the force majeure clause is not provided in the financing documents, then it is imperative to list out the critical covenants which may have impacted the performance of the contract.

Since COVID-19 pandemic is already declared a force majeure, the parties are likely to resort to the same in case of any impossibility towards performance under a contract. In absence of force majeure clause in a contract, the parties may resort to frustration of contract under section 56 of the Indian Contract Act. However, even after being declared a pandemic by the World Health Organization and a force majeure by the Indian government, it is yet to gauge the long-term impact of COVID-19. As we all are aware that disruption creates opportunity, we should work to capitalise on the possible opportunities that may be created on account of COVID 19 and we should also learn to cope and live with the present situation.



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Singhania & Partners was set up by Mr. Ravi Singhania who is the youngest lawyer to be felicitated with the "National Law Day Award" for Corporate Laws (2006) by erstwhile Prime Minister Dr. Manmohan Singh. He is a board member in CRISIL Ltd., Asset Care Enterprise and Indian subsidiaries of some Fortune 500 companies. He is also a governing board member of Indian Council of Arbitration.

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