INSIGHT

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BEATING -COVID-19

Global Dispute Resolution and Risk-Management Solutions

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LAWYERS OF TOMORROW

INTRODUCTION

1. The Covid-19 outbreak represents an unprecedented threat to the web of commercial arrangements that holds the global economy together. The pandemic is impacting businesses worldwide, either directly, or indirectly, through the slew of government measures that have been brought to contain its spread.

2. In the past few months, several countries have imposed lockdowns, prohibiting everyday business and trade, and only allowing 'essential' commodities and services to be traded. This has led to stoppage of construction and infrastructure work in several jurisdictions.

3. Further, even where a service is essential, such as the energy sector, businesses continue to suffer due to shortages in supply of raw materials, or fall in demand of the end product.

4. Gradually, commerce has been allowed to resume to its normal levels in several countries. However, even then, businesses face shortages of labor and raw materials due to the upheaval of the past few months. Their counter-parties in other jurisdictions, where the pandemic is still extant, cannot uphold their end of the bargain.

5. Even where both parties are in a position to continue their contracts, parties find that the scope of their performance has been changed drastically because of having to comply with additional health and safety requirements.

6. In such situations, parties may be looking to understand what legal recourse they can take to mitigate the adverse impact of Covid-19 on their businesses. This article gives an overview of different legal remedies a party can possibly avail to overcome the effect of Covid-19.

7. When parties' performance of their contract is adversely affected by Covid-19, they have a variety of remedies available to them, which can be classified into the following four sources:

(a) Contractual remedies;

(b) Statutory remedies;

(c) The doctrine of frustration;

(d) Remedies under investment treaties.

CONTRACTUAL REMEDIES

8. Several template clauses can be typically found in contracts that provide a variety of remedies in case a party is prejudiced by situations beyond its control,

such as Covid-19. We discuss some of these generic clauses, the conditions that must be met generally to trigger each of them, the procedural requirements to be fulfilled to invoke each of them, and the remedies each of them typically provides.

9. While the features discussed below remain true generally, the language of each individual contract will ultimately determine the extent of protection a party is afforded.

(i) Force Majeure

10. Force majeure is a generic clause found in most contractual agreements. It provides protection in case a party is forced to default on its contractual obligations due to any event defined in the contract as 'force majeure'.

11. The first thing to note is that 'force majeure' is not a term of art. Therefore, what events constitute 'force majeure' will always depend on how the contract defines it. Typically, such clauses will follow one of the following three ways to define the term:

(a) The clause may contain an exhaustive list of circumstances that constitute 'force majeure', e.g.: war, rebellion, Act of God, fire, etc. In such cases, to apply such clauses to Covid-19, parties should see whether 'epidemic', 'pandemic', 'disease' or similar terms have been defined as 'force majeure'.

(b) The clause may define 'force majeure' by a broad, catch-all phrase such as *"circumstances beyond a party's control"* or *"circumstances that are unavoidable and insurmountable"*. In such cases, parties will usually be able to fit Covid-19 into the ambit of such broad terms.

(c) The clause may use a combination of a list of circumstances and a broad catch-all phrase. In such cases, parties must be aware that the scope of the broad phrase may be limited only to circumstances similar to those that are expressly listed. This is by application of the principle of *ejusdem generis*.

12. If Covid-19 can constitute a 'force majeure' under the language of the clause, parties must then determine to what degree must the force majeure interfere with contractual performance. Some clauses only exempt performance when the force majeure "prevents" the performance of contractual obligation. The term "prevent" is usually interpreted to mean that the performance must become impossible, and not merely more expensive. On the other hand, if the clause requires the force majeure to "disrupt" performance, courts have held that even commercial impracticalities in performance can trigger the clause.[i] Other clauses may provide that the force majeure must "hinder" or "delay" performance.

13. If all conditions for claiming exemption are met, the party will usually be

required to invoke the clause by sending a written notice to the counter-party. Parties must carefully review their contract to understand what contents such notice must contain, what time period such notice must be sent within and what person or address such notice must be addressed to within the counter-party's organization.

14. Another condition found in force majeure clauses is the 'duty to mitigate losses'. The party claiming force majeure must ensure that it has taken steps to prevent losses due to the force majeure as far as possible. For example, the ICC's template for force majeure clauses provides that a party must take *"reasonable measures to limit the effect of the event invoked upon performance of the contract."*[ii] As another example, the FIDIC's EPC /Turnkey Contract (1st Edition, 1999) ("**FIDIC Silver Book**") requires a party to *"at all times use all reasonable endeavours to minimise any delay in the performance of the Contract as a result of Force Majeure."*[iii]

15. When all substantive and procedural conditions for invoking force majeure are met, the party may be able to avail a host of remedies:

(a) Exemption from liability: If a counter-party alleges default, the party can use force majeure as a defense.

(b) Suspension: The party is not obligated to perform the affected contractual obligations for a period of time. This may be a defined period of time, such as 2 months, or it may be as long as the force majeure operates.

(c) Costs: Some contracts, such as the FIDIC Silver Book, may allow a party to claim any increase in the cost of performance caused due to force majeure.[iv]

(d) Termination: A party may be able to terminate the contract. This remedy will usually be available only as a 'last option', upon the fulfilment of some additional conditions. For example, the FIDIC Silver Book allows termination only when performance is prevented for a continuous period of 84 days.[v] On the other hand, the ICC's template allows termination when the force majeure substantially deprives the parties of what they were reasonably entitled to expect under the contract.[vi]

*(ii) Material Adverse Change / Material Adverse Effect ("**MAC**")*

16. This clause is typically seen in banking transactions, financial transactions, production sharing contracts or M&A contracts. These kinds of contracts involve a time gap between the execution of the contract and the actual performance thereof. The clause intends to exempt a party from performing the contract if material considerations change significantly within this time gap.

17. There are a number of conditions that must be typically met for invoking such a clause:

(a) *First*, the change in question must be unforeseen to both parties.[vii] A foreseeable change would obviously be a risk the parties willingly undertook.

(b) *Second*, the change must be in the target company's performance or the value of the subject matter of the contract. This would depend on the language of the clause.

(c) *Third*, the change must usually be permanent, and not temporary.[viii]

(d) *Fourth*, usually, the change must affect the subject-matter of the contract specifically. Changes affecting the entire economy, entire industry, changes to law, etc. that will affect similar parties generally will usually be carved out as exceptions that do not qualify as 'material adverse change'.[ix]

18. Parties may have difficulty establishing that Covid-19 had a permanent impact on a company's value or performance. Similarly, it will be difficult to show that Covid-19 affected a company specifically, as opposed to affecting the industry generally. However, it is nevertheless useful to study the language in each particular case, and only then proceed to rule out the application of MAC to Covid-19.

19. If all conditions for invoking this clause are met, then the party will usually be able to back out of the transaction, for example, by being exempted from acquiring shares (in the context of an M&A transaction) or by being exempted from issuing further advances (in case of a loan agreement). The effect would be that the party will no longer be obligated to perform its transaction.

(iii) Subsequent Change in Law

20. A subsequent change in law clause allocates risks that arise due to changes in law between the parties. The clause will usually provide that any increased cost of performance of the contract or increased tax liability which arises due to changes in law will be borne by one specific party. It may also provide that a party is liable to share the benefits of any reduction in costs with a counter-party.

21. Such an allocation of risks can prove very useful for parties in the context of Covid-19. The government-ordered shutdown of economic activities in response to the pandemic has disrupted global supply chains, making it more expensive for parties to procure supplies that are necessary for them to perform their contracts. Further, where the pandemic is nearing its end, and governments are allowing businesses to restart operations, such businesses are mandated to incur additional expenses to ensure the health of their workers, such as providing sanitation

facilities, masks, on-site residential accommodation, etc. If the change-in-law clause has allocated the risk of such costs to the counter-party, it can enable a party to continue with its contract in a feasible manner.

22. An important element determining the scope of such clause is how the term 'law' has been defined. Typically, it would be defined broadly, so as to include statutes, rules, regulations, notifications, circular, judgments, etc. However, it is prudent for parties to carefully review their change-in-law clauses to see if the legal instrument affecting their performance is covered by the clause.

23. If all conditions for invoking this clause are met, a party would be typically required to invoke the clause by sending a written notice to the counter-party. As mentioned before, parties must take care to fulfil any requirements as to content, time or addressee for such notices. Parties may also be required to provide documentary proof to the counter-party proving that the increase in costs is a consequence of changes in law.

(iv) Variation

24. These clauses are typically found in the construction industry, and are an important part of standard-form construction contracts such as FIDIC, JCT and NEC. They cover the consequences of any change in the scope of work under the contract.

25. A variation has to be 'instructed', or ordered, by the Employer in the construction contract.[x] Typically, parties often have disputes over whether an instruction actually changed the scope of work under the contract, or whether the instruction was part of the existing scope of work. The Contractor will typically have a right to object to the variation on reasonable grounds. For example, the FIDIC Silver Book allows a the Contractor to object to a variation by written notice on ground that *"(i) the Contractor cannot readily obtain the Goods required for the Variation, (ii) it will reduce the safety or suitability of the Works, or (iii) it will have an adverse impact on the achievement of the Performance Guarantees."*[xi] However, the Employer retains the right to order the variation irrespective of such variation.

26. This clause is relevant in contracts where the Employer instructs changes in the scope of work to ensure health and safety of workers against Covid-19 during the carrying out of the works. This may be true where such Employer is a public-sector undertaking ("**PSU**"), as the government may expect them to adhere to higher standards in preventing the spread of Covid-19 in their operations.

27. Some contracts also provide for the Contractor to itself propose a variation. This is allowed with the objective of incentivizing contractors to apply their expertise in increasing the efficiency or reducing the cost of the works.

Consequently, Contractors are allowed to propose variations only on limited grounds. For example, the 4th NEC Suite of Contracts' standard form for Engineering and Construction Contracts ("**NEC-ECC**") allows a Contractor to propose a change in the scope of works to reduce the contract price.[xii] Further, the Employer usually retains the discretion to reject such proposals.[xiii]

28. Such proposed variations may be useful in the context of Covid-19, where a contractor's performance is likely to be delayed or made more expensive due to Covid-19, and the contractor's proposal suggests an alternative which the parties had not agreed to, but which can prevent the delay or the increase in cost.

29. Where a Contractor proposes a variation, he will usually not have any benefit, apart from a reduction in cost that is consequent to his proposal. However, a variation instructed by the Employer will typically give rise to two remedies:

(a) Extension of Time ("**EOT**"): The Contractor will usually be entitled to an EOT to complete the increased scope of works. An extension will only be provided if the variation affects the 'critical path' for the completion of the works. Any variation which can be carried out in the gaps in the existing schedule will not be entitled to an EOT.

(b) Increase in Contract Price: The Contractor will be entitled to increased compensation for performing the additional works. This will typically cover both the increase in costs, as well as a reasonable profit.

30. The instruction / proposal of a variation, and the consequent EOT or increase in contract price requires both parties to follow several procedural steps. The exact order, detail and timeline of procedural steps will vary as per the contract. However, the contract will usually contain requirements as to the form in which an instruction / proposal must be made, a timeline for raising objections thereto, a timeline for accepting/rejecting the proposal, requirements to record costs of the increased scope of works, procedure for Contractor to propose the increase in time and price, and mechanism for increase in time and price to be decided.

(v) Extension of Time

31. An EOT is usually subsumed within other clauses, as it may be granted as a remedy for a variation, a change in law or a force majeure. However, typically construction contracts have a separate clause titled EOT, and therefore, it is useful to discuss this clause separately.

32. An EOT clause will list several circumstances in which a Contractor is entitled to an EOT. This will usually be limited to defaults by the counter-party, force majeure, variations or changes in law. However, sometimes the clause may contain stand-alone grounds that a party can invoke in the context of Covid-19. For example,

the FIDIC's Construction Contract (1st Edition, 1999) ("**FIDIC Red Book**") provides that an EOT may be granted as a consequence of "unforeseeable shortages in the availability of personnel or goods caused by epidemic or governmental actions".[xiv] It is advisable for parties to thoroughly review their EOT clauses.

33. As stated before, a Contractor is only eligible for an EOT if the work has actually been delayed, i.e., the 'critical path' of the works has been affected. So, for example, if the Contractor's actual progress was faster than his planned progress, and Covid-19 sets him back to his planned progress, then the Contractor may not be able to claim extension.[xv]

34. If all conditions for claiming an EOT are met, the Contractor must claim it by a written notice within the specified time-period. The notice must adequately describe the supervening event and its impact on the schedule.

35. Other than this, the Contractor should take all steps to prevent or minimize the delay. In this regard, for example, the Joint Contract Tribunals' standard form for Design and Build Contracts (2016) ("**JCT-DB**") provides that the Contractor *"shall constantly use his best endeavors to prevent delay"* and if delay occurs *"shall do all that may be reasonably required to the satisfaction of the Employer to proceed with"* the works.[xvi]

(vi) Price Escalation

36. An increase in the contract price is often a remedy for a force majeure, variation or a subsequent change in law. However, often contract contain clauses that may independently lead to an increase in the contractual price.

37. In invoking such clause, the party must carefully evaluate what event triggers the increase in price. Often the contract price may be tied to an external variable such as market value of the subject matter, the inflation index, the wholesale price index, etc. Any changes in these variables may trigger an increase in the contract price.

38. Due to Covid-19, the prices of several commodities have fluctuated beyond ordinary changes. For example, the price of the drug 'hydroxychloroquine', which has been found to be effective in helping patients of Covid-19 to recover, has skyrocketed due to its increased demands by countries globally. Price escalation clauses may therefore be extremely useful in the context of Covid-19.

(vii) The doctrine of 'frustration'

39. Frustration operates to discharge the contract. If a contract has been frustrated, it will be brought to an end automatically, and no action needs to be taken by the parties to the contract for release from further performance. If there is a dispute as

to whether a contract has been frustrated, the parties may wish to bring proceedings for a declaration to that effect, as well as consequential reliefs.

40. A contract will be held to be frustrated if, upon an objective review of the contract, it can be concluded that:

(a) an unforeseen event has occurred subsequent to formation of the contract, through no fault of either party,

(b) which has made the obligations and the performance therein impossible, illegal or made it radically different or fundamentally altered from that undertaken upon entry into the contract, and

(c) such that it would be unjust to hold the parties to the literal sense of the obligation.[xvii]

41. The success of invocation would turn on the circumstantial and factual analysis and investigation, and the nature, severity and **causal link** of the event's impact on the contractual performance.

42. However, this apparently straightforward summary belies the extraordinary difficulties faced by a party seeking to prove that a contract has been frustrated. The following are some cases illustrating that courts have not invoked the doctrine lightly:

(a) **In a 2003 SARS epidemic-related** case[xviii], a Hong Kong court rejected a tenant's claim that a tenancy agreement was frustrated because the premises were affected by an isolation order by the Department of Health due to the outbreak of SARS, and could not be inhabited for 10 days. The court held that a 10-day period was insignificant in view of the two-year duration of the lease, and it did not *"significantly change the nature of the outstanding contractual rights or obligations"* of the parties in the case.

(b) **If the performance has merely become onerous, expensive or unfair**: Numerous case laws illustrate that a contract will not be frustrated merely because the performance became delayed, onerous or unfair.[xix] For instance, in *Tsakiroglou & Co. Ltd. v. Noblee Thorl*[xx], despite the closure of the Suez Canal, it was held that the contract of sale of groundnuts in that case was not frustrated, as it could be performed by an alternative mode of performance by going around the Cape of Good Hope, even though the freight for such journey was also double. The House of Lords held that even though the contract had become more onerous to perform, it was not fundamentally altered.

(c) **If the main purpose is capable of fulfillment**: even when the majority of what might be regarded as the commercially important elements or objectives of the bargain can no longer legally be delivered; the courts have held the contract to be enforceable if the 'main purpose of the contract' is capable of fulfillment. For instance, *in Islamic Republic of Iran Shipping Lines v. Steamship Mutual Underwriting Association Ltd*, when blacklisting the defendant rendered most of the contract illegal but partly lawful, the court held that the contract's main purpose *"was to provide indemnity insurance" and "although the scope of cover is significantly narrower than it was before [the blacklisting] ... its nature is not different. It remains indemnity insurance"*

(d) **Self-induced**: A self-induced frustration will not render a contract frustrated. It would be self-induced if caused by breach of the contract or where the party seeking to rely on frustration broke the chain of causation between the supervening event and the non-performance. For instance, in *Maritime National Fish v Ocean Trawlers*,[xxi] the court held that the charterparty was not frustrated as the absence of license, in respect of the steam trawler in question, was on account of the party's choice as to the allocation of the limited resources. In Covid-19 circumstance, a possible exposure to Covid-19 on account of disobeying the orders imposed might be construed to be self-induced for performance of a personal contract.

43. In view of the above, in evaluating whether their contract is frustrated, parties can be guided by the following examples.

(a) **Supervening illegality** i.e. when a change in the law makes it illegal to perform the contract. In *Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd*[xxii], the Singapore Court of Appeal held that the ban on exports of sand from Indonesia imposed by the Indonesian government frustrated the contract, entered into for supply of ready-mixed concrete for which the parties had a common assumption that Indonesian sand shall be used. In the present circumstance, on account of introduction of new laws and imposition of restrictions in a particular jurisdiction, you might be able to conclude that it has rendered the contract illegal or has significantly changed the nature of the outstanding obligations.

(b) **Governmental requisition of the subject matter of the contract**: In Bank Line v. Arthur Capel & Co.[xxiii], the court held that the requisition and the long detention of the steamer by the Government destroyed the identity of the chartered service and entitled the defendants to treat the charterparty as at an end. Possible application in the present circumstances would be if, for instance, the government has called upon you to provide masks, ventilators, sanitizers, premises, or hydrochloronique; impacting your other contractual

obligations to such an extent or a duration, or to bring about significant changes than contemplated; that it would frustrate the purpose of the contract.

(c) **Cancellation of an event** i.e. contracts contingent upon a major event or the event representing the commercial purpose of the contract, may become frustrated as a result of that event being cancelled. In *Krell v Henry*[xxiv], a contract for the hire of rooms on Pall Mall for the purpose of viewing the coronation procession of King Edward VII in June 1902 was held to be frustrated by the cancellation of the coronation procession. For instance, if the contract is affected by the cancellation or postponement of an event (like Tokyo Olympics), the parties can examine whether the contract is frustrated.

(d) **Inability to obtain requisite regulatory approvals**: In *Sheng Shiong Supermarket v Carilla Pte Ltd*,[xxv] the failure to obtain the required regulatory approval to for a change of use of the premises was held to be a frustrating event.

(e) **Abnormal delay**[xxvi] i.e. the delay must be abnormal, in its cause, its effect or its expected duration, so that it falls outside what the parties could reasonably contemplate at the time of contracting[xxvii]. Possible application in the present circumstances would be if, for instance, quarantine/lockdown restrictions imposed in that jurisdiction affecting the supply chain for longer duration and causing consequent delay, might frustrate the contract, depending on the context and the impact.

(f) **Incapacity or death**: These are largely in cases of personal contracts where for example, a person is engaged for her special skill and is unable to perform due to illness, death, insanity or any other incapacity. In fact, Section 56 of the Indian Contract Act, 1872 provides for the doctrine of frustration where one of the examples in the Act fits in this category.[xxviii]

(g) **If the event was foreseeable, but beyond the manner foreseen** i.e. if a foreseen event lasts longer than the risk assumed by the parties so as to render the performance radically different than that contracted for.[xxix] In the present circumstances, possible instance would be if a strike foreseen and started before the lockdown restrictions, continues for a period longer than anticipated through the uncertain lockdown period, the parties may conclude that their contract is frustrated.

44. In the context of Covid-19, parties may be faced with a situation where only a part of the contract is impossible to perform. The doctrine of frustration does not, as such, recognize a 'partial frustration'.[xxx] Therefore, in such a situation, parties can

consider the following options:

(a) The parties' contract may contain the following options:

(i) The parties may invoke alternative contractual remedies (like a force majeure clause) which contemplate a partial impossibility.

(ii) Some contracts contain a clause titled 'severability', which usually provides that if specific terms of the contract are tainted by illegality or impossibility, those provisions would be severed, parties would continue the performance of the remaining contract.

(iii) If the contract contemplates separate adventures wholly distinct, separate and severable from each other where there was no interdependence i.e. one adventure did not depend in any way upon the performance or non-performance of other adventures; one adventure may be concluded to be frustrated.[xxxi]

(b) The parties can engage in negotiations to modify or amend their contracts, in order to continue with the remaining contract.

45. These options are usually considered viable as frustration is rarely commercially satisfactory to the parties as it brings the adventure they embarked upon to an end. The parties therefore, generally look to their contractual clauses or other available options before considering invoking the doctrine of frustration.

46. Parties are usually obligated to restore any advantage received under a frustrated contract. Similarly, they also have rights to claim any expenses incurred under such contract. For instance:

(a) The Frustrated Contracts Act, 1959 in Singapore and Law Reform (Frustrated Contracts) Act 1943 provide for sums to be repaid, court's discretion to permit a claim for expenses incurred before the frustrating event or claim of a just sum over a valuable benefit received by the counter-party before the occurrence of the frustrating event

(b) Under Section 65 of the Indian Contract Act, a person who has received any advantage under a void agreement is bound to restore it, or to make compensation for it, to the person from whom he received it.

(c) In terms of Article 704 of the Qatar Civil Code, on termination of contract for works on account of impossibility due to a foreign cause beyond the control of either party, the contractor shall have the right to demand the employer to reimburse any costs incurred by the contractor and such wages payable to him, commensurate with the benefit obtained by the employer from such work.

STATUTORY REMEDIES

47. In addition to the contract, statutory law of each jurisdiction can also offer parties relief in case of difficulties in performing contracts due to Covid-19. These remedies can be broadly classified into two types:

(a) General remedies, that are available for all kinds of situations;

(b) Special remedies, that are offered by statutes enacted specifically to mitigate the effects of Covid-19.

48. These remedies will vary from jurisdiction to jurisdiction. A party will only be able to claim those remedies that are part of the law which governs the parties' substantive contract. It is especially useful for parties to review their contracts for a 'governing law' clause when their transactions are international.

49. We have analyzed the statutory remedies available under laws of (i) Singapore, (ii) India, (iii) UK, (iv) Indonesia, (v) Turkey, (vi) Israel, (vii) United Arab Emirates ("**UAE**"), (viii) Dubai International Finance Center (DIFC), (ix) Qatar, (x) China and (xi) Germany in this section.

(i) Singapore

50. In response to Covid-19, Singapore has enacted the Covid-19 (Temporary Measures) Act 2020. This Act brings about a variety of temporary measures pertaining to performance of contracts, insolvency proceedings, court proceedings, property tax, etc.

51. The most relevant provisions are the reliefs provided for an inability to perform contracts. To be eligible for such reliefs, the following conditions must be met:

(a) The contract is a 'scheduled contract'.[xxxii]

(b) The Contract was entered into before 25 March 2020.

(c) The obligation in default was to be performed on or after 1 February 2020.

(d) The default has been caused due to Covid-19, or due to any laws brought in response to Covid-19.

(e) The party has served a notification for relief on it counter-party, informing the latter of the default and how it was brought about.

52. If these conditions are met, then the counter-party is prohibited from commencing, *inter alia*, any of the following actions:

(a) initiating court / domestic arbitration / insolvency proceedings against the party, its guarantors or sureties;

(b) enforcing security against any immovable property, or a movable property used for business;

(c) enforcing any award or judgment obtained against the party, its guarantors or sureties;

(d) where the contract is a contract for lease / license of immovable property, the contract cannot be terminated;

(e) where the contract is a construction or supply contract, the counter-party may not invoke any performance bond until 7 days before the expiry of the bond.

53. On 5 June 2020, this Act was further amended by Singapore to include the following additional reliefs, which are available only after the commencement of the amendment:

(a) The list of actions a counter-party is prohibited from taking, described at [52] above, was expanded to include:

(i) Forfeiture of consideration for any right which a party has been unable to exercise due to Covid-19;

(ii) Charging of late payment interest or other similar charges for non-payment of any contractual sums beyond prescribed limits;

(b) A new Part 2A was added, which prohibits landlords of certain prescribed non-residential properties from taking legal action against tenants who are unable to pay their debts on account of Covid-19;

(c) A new Part 8 was added, which enables parties to apply to an assessor for allowing contractual obligations to be varied/discharged, if such contract was affected by the delay in performance of another construction or supply contract.

(ii) India

54. The Indian Contracts Act, 1872 ("**Indian Contract Act**") provides important remedies for contractual breaches. Section 32 of this Act gives recognition to contractual force majeure clauses. Further, Section 56 of this Act recognizes the doctrine of frustration, which was discussed earlier in this paper.

55. The Insolvency and Bankruptcy (Amendment) Act 2020 made certain key amendments to the Insolvency and Bankruptcy Code 2016. The ones that are relevant to address the post COVID-19 economy are:

(a) The threshold to initiate insolvency proceedings for certain classes of financial creditor has increased such as debenture holders and real estae

allottees has been increased to 10% of the class of creditors or 100 members, whichever is lesser;

(b) The permits / licenses / quotas etc. granted by any level of government to a corporate debtor is not suspended or terminated by virtue of initiation of insolvency and subsists as long as payments due towards them are made; and

(c) The supply of goods or services to a Corporate Debtor that the Resolution Professional deems essential shall not be suspended due the commencement of insolvency subject to the corporate debtor making payments for such supply.

56. Additionally, the Insolvency and Bankruptcy Code (Amendment) Ordinance 2020 suspended the operation of Sections 7, 9 and 10 of the Insolvency and Bankruptcy Code which permit the initiation of Insolvency proceedings against companies and limited liability partnerships.

57. Additionally, the government has through notification:

(a) Increased the threshold of debt to initiate insolvency from 100, 000 to 10,00, 000[xxxiii]; and

(b) Included a state-owned real estate investment fund as an avenue for raising interim finance during an insolvency.[xxxiv]

58. These measures together, have created an insolvency regime that is aimed at ensuring that small and medium businesses survive during the post-Covid-19 economic disruption. The smallest companies are protected from insolvency claims while the chances of a larger corporate surviving as a going concern are increased.

59. In addition to the aforementioned statutory remedies, several Indian Ministries have issued memoranda providing varying degrees of relief in several sectors:

(a) Ministry of Finance:

(i) On 19 February 2020, the Ministry of Finance issued an office memorandum with respect to the force majeure clause at para 9.7.7 of the Manual for Procurement of Goods ("**MoF OM**"),[xxxv] noting that disruption of the supply chains due to Covid-19, in China and other countries, should be considered as 'natural calamity' and force majeure clauses may accordingly be invoked wherever considered appropriate.

(ii) The Ministry of Finance has decriminalized several minor offences of a regulatory nature in order to ease burden on the court system in light of

the COVID 19 pandemic. The offences include the offence of cheque bounce, failure to cooperate with the Life Insurance Company, failure to make certain regulatory filings, etc.

(b) On 20 March 2020[xxxvi], in line with the MoF OM, the Ministry of New & Renewable Energy ("**MNRE**") issued an office memorandum ("**MNRE OM**"), wherein MNRE *inter alia* directed all renewable energy implementing agencies of MNRE to treat delay on account of disruption of supply chains as a force majeure, and grant EoT if these agencies are satisfied that the claimants were actually affected on account of this disruption.

(c) The Reserve Bank of India:

(i) on 27 March 2020, inter alia, announced a Covid-19 Regulatory Package to mitigate the debt servicing burden in favour of maintaining the viability of the enterprises. By the virtue of which:

- in respect of all term loans, all commercial banks, co-operative banks, all-India Financial Institutions, and NBFCs have been permitted to grant a moratorium of three months on payment of all installments falling due between 1 March and 31 May 2020.
- in respect of working capital facilities sanctioned in the form of cash credit/overdraft, permitted the recovery of interest applied during the period from March 1, 2020 up to May 31, 2020 to be deferred.
- asset classification of the accounts (as SMA or NPA) will be determined basis the revised due dates and the repayment schedule after the deferment/ moratorium period[xxvii]

This circular did not expressly address the issue of asset classification for accounts which were already in default prior to the commencement of the moratorium period of 1 March 2020. Some borrowers moved the courts seeking relief from classification (see Schedule 1).

(ii) It appears that in light of the same, on 17 April 2020, introduced additional regulatory measures to the Covid-19 Regulatory Package, *inter alia* noting that in respect of account classified as standard as on 29 February 2020, even if overdue, the moratorium and the deferment period in terms of the Regulatory Package shall be excluded for asset classification and determination of out of order status respectively.[xxxviii]

(d) The Securities and Exchange Board of India

(i) On 30 March 2020, issued temporary relaxations with respect to documentary compliances for foreign portfolio investors in the wake of

Covid-19, and permitted to consider email requests for registration on the basis of scanned version of the signed documents (instead of originals) and copies of documents which are not certified.[xxxix]

(ii) On 24 June 2020 extended a circular that exempted the filing of financial results of listed companies until 31 July 2020.[xl]

(iii) On 9 June 2020 the regulations governing the fast track process for Further Public Offers (FPOs) were relaxed to make it easier for companies to raise additional capital.[xli]

(e) On 29 March 2020[xlii], the DGS order that operated until 3 May 2020 was issued advising the shipping lines to not:

(i) Increase container detention charges above their current rates; and

(ii) Impose a new / additional charge

(f) On 31 March 2020[xliii], the Ministry of Shipping issued an advisory operational until 3 May 2020 to the Major Port Trusts to not charge, levy or recover demurrage, ground rent beyond allowed free period, additional anchorage/berth hire charges, or any performance related penalties that may be levied on port related activities due to delay in evacuation caused by reasons related to lockdown measures for a period from 22 March to 14 April. This exemption/ remission is over and above free time arrangements that is currently agreed and availed as part of any negotiated contractual terms. [Emphasis supplied.] The party seeking to avail these exemptions must show the causation. This order was later extend to operate up to 3 May 2020.[xliv]

(g) The Ministry of Corporate Affairs has issued:

(i) General Circular No. 22/2020 on 15 June 2020 allowing companies to conduct their EGM and transact through postal ballot as per a set of procedures prescribed until 30 September 2020.

(ii) General Circular 23/2020 on 17 June 2020 permitting the exemption of filing charges for companies registering charges and has permitted the exclusion of the period until 30 September 2020 from computing the delay involved in registering the charge.

(h) The Ministry of Defense has extended the deliveries of all capital acquisitions by four months recognizing the supply chain disruption caused by the COVID 19 pandemic, this extension applies exclusively to Indian Vendors. Foreign vendors' claims will be examined by the Ministry on a case to case basis.

(i) The Ministry of Road Transport and Highways has announced sweeping relief for contractors who are engaged in the massive construction contracts. The reliefs include part repayment of the performance security, extension of time for completion of the contract, streamlined verification process for payment milestones and an extension in the period of concessions in toll concession contracts as long as the collections are less than 90% of the daily average in March 2020.

(iii) United Kingdom

60. The UK Government has enacted the Coronavirus Act 2020 which is an umbrella legislation governing a host of matters that are affected by Covid-19, such as enforcing lockdowns and social distancing, functioning of courts, etc. Notably, Section 82 of this Act provides relief to tenants under relevant business tenancies, i.e., tenancies to which Part 2 of the Landlord and Tenant Act 1954 applies. The landlords under such tenancies are prohibited from exercising a right to re-enter the property or forfeit the tenancy on grounds of non-payment of rent by the tenant. In any proceedings relating to re-entry or forfeiture that were commenced prior to this provision being enacted, the High Court and country courts must ensure that any order passed by them does not force the tenant to give up possession of the property before the end of the prescribed period. This prescribed period operates from 25 March 2020 to 30 June 2020. At the time of writing this insight, the UK government had announced plans to extend this moratorium to 30 September 2020.

61. The UK government has also presented a Corporate Insolvency and Governance Bill 2020, which, inter alia, contains temporary provisions for providing relief pertaining to insolvency laws to those affected by Covid-19. The Bill promises two key reliefs:

(a) Initiation of winding up petitions or winding up orders during a prescribed period (beginning from 27 April 2020) will not be permitted, unless the inability of the company to pay the debt was not due to Covid-19.

(b) Ordinarily, under UK law, directors are held personally liable where they allow a company to continue trading despite knowing that the company has no prospect of avoiding insolvency. The Bill directs courts to assume that directors are not liable for the worsening of the financial position of the company for a prescribed period (beginning from 1 March 2020).

However, certain kinds of financial services companies will be excluded from these reliefs.

(iv) Indonesia

62. Indonesia is a civil law jurisdiction, which has codified its contract law in the Indonesian Civil Code[xlv]. This Code provides for three concepts:

(a) Impossibility of performance due to an unforeseen event;

(b) Force Majeure; and

(c) Destruction / damage / extinguishment of goods.

63. Article 1244 of the Indonesian Civil Code permits a party to defend its non-performance or delayed performance of contractual obligations against a claim for damages / specific performance, if it was due to an unforeseen event for which the party is not responsible and if party was acting in good faith to perform the obligation. This Article does not require impossibility or onerousness in performance; it merely requires that the reason for non-performance must be attributable to an unforeseen event beyond the party's control.

64. Article 1245 of the Indonesian Civil Code provides as a defence against claims for damages / specific performance, an act of god (vis majore) as being the reason for non-performance or the performance of an act prohibited under the contract.

65. Additionally, for contracts involving sale of goods, Article 1444 of the Indonesian Civil Code discharges a seller from its obligations if the goods perish / are destroyed / become unmerchantable through no fault of his own. The seller must also prove that such destruction was unforeseen.

(v) Turkey

66. Turkish law also contains force majeure as a statutory remedy. This finds mention in two statutes:

(a) Law No. 4735 on Public Procurement Contracts[xlvi]

(b) Law No. 6098, the Turkish Code of Obligations

67. Article 10 of Law No. 4735 lists several circumstances (including "epidemics") that may qualify as force majeure if the following criteria are fulfilled:

(a) The circumstance did not arise from the contractor's fault;

(b) It constituted an obstacle in fulfilling the contractual obligations;

(c) The contractor could not afford to remove such obstacle;

(d) The contractor has notified the contracting entity in writing within twenty days as of the date which the force majeure has occurred; and

(e) The circumstance has been documented / certified by competent authorities.

68. If such conditions are fulfilled, the party must apply to the 'competent authority' of the public counter-party with an application for extension of time or termination of the contract. The Turkish government has released Circular No. 2020/5 dated 2 April 2020 to guide parties on how to claim force majeure due to Covid-19.[xlvii]

69. For all other contracts, force majeure is governed by Article 136 of Law No. 6098, which provides that if the performance of an obligation becomes impossible due to reasons that the obligor cannot be held responsible for, the obligation need not be performed.

70. The party which is so exempted must return any performance previously received from the counter-party, and also loses the right to claim any future performance from the counter-party. Further, if the party does not inform the counter-party of the force majeure without delay, or does not take necessary measures to prevent the loss arising due to force majeure, he is liable to compensate the counter-party for any losses arising due to the failure to inform or to prevent losses.

71. Finally, in addition to force majeure, Article 138 of Law No. 6098 provides for the doctrine of 'change in circumstances'. As per this provision, if the following conditions are fulfilled, a party may apply to the court for modification or termination of the contract:

(a) An event occurs which the parties had not reasonably foreseen at the time of execution of the contract,

(b) This event was not caused by the party approaching the court, and

(c) The event changes the circumstances existing at the time of execution of the contract to the detriment of the party approaching the court, such that continued performance of the contract would be contrary to the rules of good faith.

(vi) Israel

72. Israel is a unique jurisdiction, as it has transitioned from common law to civil law. Israel's contract law is governed by the Contract (General Part) Law and the Contract (Remedies for Breach) Law 1970.

73. The Contracts (Remedies for Breach) Law provides for the concept of impossibility of performance. Since Israel does not have a specific provision for 'force majeure' or 'acts of god', these contingencies are dealt with by its provision for impossibility of performance.

74. Article 3 of the Contracts (Remedies for Breach) Law specifically prohibits the enforcement of contracts where:

(a) Performance has become impossible; or

(b) Performance would be unjust in the circumstances of the case.

75. Article 18 of the Contracts (Remedies for Breach) Law permits the exemption from performance when:

(a) Breach is the result of an unforeseen circumstance;

(b) The party could not have avoided or mitigated the effect of the unforeseen event;

(c) The unforeseen event / circumstance renders performance:

(i) Impossible; or

(ii) Fundamentally different from what was initially agreed

The Court may order restoration of any benefit that has been passed on to the party whose performance was rendered impossible or pay damages for the value of any such benefit that cannot be restored.

76. It must be noted that Israeli law includes both frustration and a material change in circumstances under the ambit of instances where performance can be excused.

77. An interesting case study from Israeli law explains the requirement of foreseeability for invoking force majeure. In 1979, the Supreme Court of Israel had refused to allow a seller to invoke force majeure on the grounds of war, holding that war was always imminent in Israel, and was therefore foreseeable.[xlviii] The logic can be extended to Covid-19 as well. Parties who entered into contracts in late February or March could have easily foreseen that Covid-19 would be impacting businesses in several jurisdictions. In such contracts, parties will have greater difficulty invoking force majeure.

(vii) UAE

78. The United Arab Emirates is a civil law jurisdiction, and its contract laws are codified under the UAE Civil Code[xlix]. This Code provides for:

(a) The doctrine of impossibility of performance;

(b) Force majeure;

(c) Contracts whose performance has become oppressive due to an unforeseen event.

79. Article 273 of the UAE Civil Code is a specific force majeure provision that:

(a) Cancels the contract and cause the obligations to cease when a force majeure event renders performance impossible; and

(b) Permits severance of a portion of the contract if partial impossibility is the result of the force majeure event.

80. The UAE Civil Code recognises 'acts that cause harm' as acts that result in some loss to another person. The acts covered under this phrase are acts that are harmful and deliberate. It is the obligation of the person causing the harm to make good the loss of the person to whom the harm is caused.

81. However, Article 287 carves out an exception to this rule if the person can prove that an extraneous cause over which he had no control, such as 'a natural disaster, unavoidable accident, force majeure, act of a third party, or the act of the person suffering loss', then the obligation to make good the loss is waived.

82. The code also permits obligations under a contract to be modified by Court where the performance of the obligation has become oppressive due to unforeseen circumstances beyond the obligor's control. The Court may reduce the obligation to a level that it deems reasonable.

(viii) Dubai International Finance Centre

83. The UAE has created the Dubai International Finance Centre ("**DIFC**") where UAE's laws do not apply. The area is a Special Economic Zone with its own laws designed to attract investments.

84. Article 82 of the DIFC Law 6 of 2004, which governs contracts, is a force majeure provision that:

(a) Permits the extension of time for performance; or

(b) Avoidance of the contract

85. If an unforeseen event prevents the performance of the contract. The provision mandates that a reasonable notice of the occurrence of this force majeure event is provided to the party to whom performance is owed.

(ix) Qatar

86. At the outset, most prominently:

(a) Article 171(1) of the Law Number 22 of 2004 Regarding Promulgating the Civil Code ("**Qatar's Civil Code**") places strong emphasis on *pacta sunt servanda*,[l] and by the virtue of it, the parties are free to agree to terms of the contract between them like the ones discussed above, including force majeure,[li] allocation of risks of force majeure, EoT, change of law, etc.

(b) Unlike common law countries such as Singapore and England, the debate of performance in good faith is put to rest by Article 172 of Qatar's Civil Code,

where the parties are obligated to perform the contract:

(i) in a manner consistent with the requirements of good faith.

(ii) not limited by its provisions, but shall also cover whatever is required by law, customary practice and justice in accordance with the nature of the obligations contained in the contract.

87. Additionally, in light of the widespread effects and economic impact that Covid-19 has had both domestically and globally, it is almost inevitable that disputes will arise where neither party will want to accept responsibility for project delays or the additional costs that may arise. In this regard, the parties may wish to note the following relevant provisions.

(a) Articles 188 and 704 provide reliefs and choice with respect to non-performance on account of impossibility:

(i) where obligations that are critical to the overall performance of a contract become impossible to perform due to a cause beyond a party's control, the obligations would extinguish and the contract will be deemed to have been rescinded.

(ii) in the event of partial impossibility, the party who has the benefit of the obligations may choose between either enforcing the balance of the contract or demanding the termination of the whole contract.

(iii) with respect to termination of contract of works, the agreement shall terminate if the agreed work is impossible to perform due to a foreign cause beyond the control of either party.

(b) Article 171(2) provides relief to the parties if in case of an exceptional, general and unforeseeable event the obligations have become excessively onerous in such a way so as to threaten exorbitant loss to the obligor. In such an event, "*the judge may, according to the circumstances and after taking into consideration the interests of both parties, reduce the excessive obligation to a reasonable level*." [Emphasis supplied.] It is noteworthy that an agreement to the contrary shall be void.

(c) Though repudiation is a common law doctrine, in terms of Article 689, the employer can seek rescission of the contract without waiting for the time of delivery, if the contractor is:

(i) Delayed in commencing or completing the work, such that he is not at all expected to be able to carry it out as he should within the agreed period, or

(ii) if he acts as though his intention is not to fulfil his obligation, or

(iii) he does something that makes the obligation impossible to fulfil.

The contractors must note that the wrongful invocation of force majeure clause or termination mechanism, or claim for frustration may be construed as an intention not to fulfill obligations and thereby entitle the employer to rescind the contract.

(d) In terms of Articles 204 and 256, a party shall not be liable for damages, if it can demonstrate that:

(i) the damages have arisen from a cause beyond his control, such as force majeure, unforeseen incident or the fault of the victim or a third party; unless there is a provision to the contrary.

(ii) the non-performance or delay was due to a cause beyond its control.

(x) China

88. Force majeure is also a statutory remedy under Chinese law. Contractual force majeure clauses in contracts governed by Chinese law only apply insofar as they do not conflict with or derogate from the general principles set out under Chinese law.

89. Under Chinese law, 'force majeure is defined as an objective event or situation that is unforeseeable, unavoidable and insurmountable.[lii] The following conditions must be met to invoke force majeure:

(a) The force majeure rendered the performance of the contract impossible or hindered the performance of the contract;

(b) The party claiming force majeure promptly notified its counter-party of the force majeure;

(c) The party claiming force majeure provided proof of existence of force majeure, proof of impact of force majeure on performance and stated its claim for exemption from liability under the contract

90. If these conditions are satisfied, then the party claiming force majeure is exempted from the performance of its contractual obligations, insofar as they were prevented by the force majeure. However, where the force majeure has prevented the very purpose of the contract from being realized, the contract may also be terminated.[liii]

91. Another remedy that may be useful to parties in the context of Covid-19 is the doctrine of 'change of situation' or 'change in circumstances'. For this doctrine

to apply, the following conditions must be fulfilled:

(a) There must be a material change in circumstances after the execution of the contract;

(b) Such change must be unforeseeable;

(c) Such change must not amount to a force majeure;

(d) Such change must not be a commercial risk that either party undertook;

(e) Such change must make the continued performance of the contract patently unfair to a party

92. If these conditions are fulfilled, a party may apply to the PRC courts requesting a modification to the terms of the contract, or a termination of the contract. The court will review the fairness of requiring the party to perform the contract, given the change in circumstances.

93. As stated before, force majeure will typically apply when a party is unable to perform. But often, a party may still be able to perform a contract, but the performance may have become materially more expensive. The doctrine of change in circumstances is useful in the latter scenario.

(xi) Germany

94. Germany is a civil law jurisdiction whose contract law is codified as a part of the German Civil Code.[liv] The official translation of the Code is provided by the Federal Ministry of Justice and Consumer Affairs.[lv] Like most civil law jurisdictions, Germany has codified the concepts of:

(a) Impossibility / Impracticability of performance of the contract;[lvi] and

(b) Material changes in circumstances.[lvii]

95. The doctrine of impossibility in Germany is extended to included instances where the performance of a contractual obligation may not be impossible but may become grossly disproportionate to the consideration that the counter-party has provided for it.

96. In simple terms, if the performance of an obligation is significantly more than the money / performance owed by the other party, Article 275 of the German Civil Code can be applied to the situation.

97. Article 275 is structured as a defence against a claim for performance. It states that a claim for performance may be refused to the extent that the performance becomes impossible or impracticable for the obligor.

98. When the defence against a claim for non-performance is impracticability, the

Court must take into account whether the obligor is responsible for the obstacle to performance. It must be borne in mind however, that if the obstacle existed at the time of executing the contract, the performance of the obligation may not be excused.[lviii]

99. The oblige, or the party to whom performance is owed, may claim damages in lieu of performance subject to Article 275.[lix]

100. German law contemplates instances where the basis of the transaction / contract has itself undergone substantial change since execution. The Code[lx] allows a party to:

(a) Demand an alteration of the contract; or

(b) Refuse to perform an unaltered contract; or

(c) Revoke or terminate the contract if adaptation is not possible

If:

(d) The parties would not have entered into the contract with these terms had they foreseen the change in circumstances;

(e) If the material conceptions forming the basis of the contract are found to be incorrect

101. In addition to the aforementioned remedies, Germany has enacted several legislations to deal specifically with Covid-19 and its impact on the contractual relations. The most relevant amongst these is the 'Law to mitigate the consequences of the Covid-19 pandemic in Civil, Criminal and Insolvency Proceedings 2020'.[lxi] The relief provided by this law applies only when:

(a) The party is:

(i) A consumer;

(ii) A microenterprise (9 employees or less & revenue of less than 2 million euros).

(b) The contract in question was concluded before 8 March 2020

102. If these aforementioned conditions are met, this law allows parties to:

(a) refuse to perform contractual obligations, and

(b) refuse to make payments under contracts,

until 30 June 2020.

103. The Reichstag has clearly enacted this law to prevent small enterprises and the general public from being burdened with obligations and payments during

these economically strained times. The limitation of the applicability of the law to contracts concluded before 8 March 2020 is in line with the principle of foreseeability as the law recognises that a reasonable person could not have foreseen the effect of Covid-19 on her contracts prior to 8 March 2020.

TREATY REMEDIES

104. States frequently enter into bilateral or multilateral investment treaties (such as the North American Free Trade Agreement) to facilitate international investment in their countries. Therefore, it may be useful for parties that have made an investment in a foreign jurisdiction to examine investment treaties between the country where the investment flows from ("**Investor State**") and the country the investment flows into ("**Host State**").

105. The clauses in these treaties that need to be examined are:

(a) The definition of the term 'investor'

(i) The term investor is sometimes defined based on the amount invested;

(ii) The term may also be defined in terms of nationality / place of business;

(iii) The definition may also be sector specific; etc.

(b) The definition of the term 'investment'

(i) The term investment may be defined in terms the place of business / location of the investment;

(ii) The term investment may have a pecuniary limit;

(iii) The definition may include geographic or sectoral limits.

(c) The definition of the terms 'state' and 'state actions'

(d) The presence of umbrella clauses that raise contractual obligations to the level of treaty obligations (where the contracts are with state entities etc.)

(e) The dispute resolution mechanism of the treaty;

(g) The investment protections granted under the treaty.

(i) Protections

106. The protections granted under these investment treaties include:

(a) Expropriation

(b) Full Protection and Security;

(c) Fair and Equitable Treatment;

(d) Non-Discrimination;

(e) Most Favoured Nation status; etc.

107. Expropriation is a common protection that is granted in Investment Treaties Expropriation by state action is a common investment claim. Expropriation is essentially the usurping of the investment by the state. There are broadly two types of expropriation, direct and indirect. Another category of expropriation is creeping expropriation. Several countries such as Italy and Spain have enacted laws / policies that have nationalised hospitals and several pharmaceutical and medical manufacturing facilities to augment the capacities of their national health systems. If the pandemic grows in lethality, we may start seeing more widespread nationalisation in sectors such as food, transport etc.

108. Full Protection and Security clauses are designed to obligate the host state to protect the investment from 'harm'. This 'harm' is usually by either natural forces that are foreseeable or consequential or from non-state actors such as in instances of riots, anarchy etc. The 'full protection and security' clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force[lxii]

109. Fair and Equitable Treatment clauses are usually 'catch-all' clauses that oblige the host state to treat the investment with the standards of fairness and equity as are found in customary international law. Some treaties link this standard to treatment to an external source. A state's conduct must be:

(a) Substantially proper (not arbitrary and discriminatory); and

(b) Procedurally proper (compliance with due process and fair administration).[lxiii]

110. Non-Discrimination clauses ensure that an investment is not treated disadvantageously when compared to a domestic business of a similar / comparable nature through government policy. The standard of discriminatory treatment is well developed in International Law and most legal systems. It finds its basis in the concept of 'comparative advantage'. Such claims can even be made for the discriminatory treatment meted out by an individual government worker[lxiv].

111. Most Favoured Nation clauses are clauses that ensure that the host state treats the investment with the same standard of treatment that it affords any other foreign investment of a comparable nature. MFN clauses are usually used to import a standard of treatment of protection that may be granted by to a different country under a different treaty. In the White Industries case[lxv] for instance, the standard of "effective means of asserting claims and enforcing rights" was imported from a different treaty and formed the basis of the award.

(ii) Actions that can result in potential claims

112. Investment claims are claims made by investors against the host nation in accordance with the dispute resolution procedure under the treaty. These claims are usually monetary and are made for the violation of one of the protections or guaranteed standards of treatment mentioned above.

113. Covid-19 has elicited several strong responses from nations to combat the pandemic and the resulting economic disruption. These measures fall within the ambit of 'state action' as defined under most treaties.

114. Some of the possible claims under investment treaties:

(a) Emergency Powers – As nations grapple with the pandemic, several have declared states of emergency that grant the executive extraordinary powers which include the power to direct private industry to perform tasks, produce goods, provide services at cost. The exercise of these powers may often be selective and may for example be exercised only in a particular province / state leading to claims of unfairness and inequitable treatment.

(b) Protection of the domestic economy – With the world's economists predicting a recession, countries will invariably enact stricter measures to protect their domestic economies. These could include subsidies given to domestic manufacturers or taxes on foreign owned entities. India for instance, has instituted new restrictions on investment from certain countries out of fear of rampant acquisitions in its flagging domestic economy.

115. Host states however, can be expected to use the Covid-19 pandemic as their justification for several of their actions. Most BITs and MITs exempt state actions that are:

(a) Necessary;

(b) Actions in distress; and

(c) National security measures;

116. It seems apparent that most investment disputes will revolve around a tribunal's weighing of a state action violating a protection under the treaty against its justification for the said action in light of the Covid-19 pandemic.

117. The quality of counsel in these proceedings will ultimately serve to tilt the balance as their experience can be brought to bear on every stage of the dispute from choosing the arbitrators (nationality may play an important role) to presenting the case before the tribunal.

RISK MANAGEMENT

118. In addition to being aware of all legal remedies, parties must be aware of certain best practices that can be adopted while negotiating with the counter-party, options for amicable resolution of disputes, or preparing for dispute resolution.

(i) Negotiating afresh

119. Parties reach the best solutions when they negotiate with each other to overcome the consequences of situation such as Covid-19. If the parties are able to do so, and they plan to amend their contract, they must ensure that they comply with any statutory or contractually agreed procedure for amendment. For example, a "no oral modification" clause is a boilerplate clause found in most contracts, which provides that no modification or amendment to the contract shall be given effect unless it is agreed in writing and/ or signed by the parties.

120. If parties plan to enter into new contracts in the present situation, they must also ensure that the clauses discussed in Section II above are present in the contract, and their language is broad enough to include Covid-19 [for example, you may consider expressly defining a 'pandemic' as force majeure].

121. In either of these scenarios, parties may also consider agreeing to a specific 'Covid-19' clause to the contract. While drafting such a clause, parties should take note of the following points:

(a) How is the 'Covid-19' event defined in the contract [for instance, does it include governmental orders and memorandums issued to deal with Covid-19 and impacting the project];

(b) Does it contain an acknowledgement that Covid-19 has or may have impact on the contract;

(c) What reliefs are available in case Covid-19 disrupts the performance of the contract [for instance, suspension of further performance, no claims for breaches on account of Covid-19, termination in extreme circumstances, etc.]

(d) Does it contain a positive obligation for parties to mitigate the impact of Covid-19.

122. A sample Covid-19 clause may be as follows:

"The Parties hereto acknowledge the COVID 19 pandemic and its disruptive effects on global supply chains and financial markets. The Parties have entered into the present Agreement and specifically covenanted to perform the obligations listed in Clause [•] and [•] with full knowledge of the effects of the

aforesaid pandemic on their abilities to perform the said obligations. The Parties agree that a force majeure event such as a war, fire, earthquake, flood, subsequent change in the law, nationalization of a party, complete erosion of its ability to perform the obligations and other events that it could not have reasonably foreseen and mitigated, would result in the following:

(a) Extension of time to perform the obligations under clause [•] and [•] of the Agreement if the effect of the force majeure event is temporary, in any event lasting less than [•] weeks; and

(b) Termination of the Agreement with a restoration of the Parties to their pre-contractual positions if the effect of the force majeure event is permanent or lasts beyond the period specified in clause (a) above.

For the avoidance of any doubt, it is specifically clarified that COVID 19 and any disruptive effects thereof that have occurred prior to the execution of this Agreement are not regarded as force majeure events under this Agreement."

(ii) Amicable resolution:

(a) Mediation/ Conciliation:

(i) Mediation or consultation are neutral, cost-effective and time-effective alternatives to full scale litigation or arbitration. In these mechanisms, a dispute is resolved by arriving at a 'deal', rather than a decision.

(ii) Even if the parties' agreement does not have an amicable resolution clause, they can agree to the submit their dispute to mediation or conciliation.

(iii) There are multiple advantages to using these mechanisms:

- some cases are inherently better resolved mutually in a non-adversarial setting.
- it offers flexibility in favour of commercial necessity. For instance, in the event of multi-party contracts, the parties do not need to address the issue of joinder of parties or be bound by strict legal principles.
- the admissions, concessions or suggestions made during its course cannot be used subsequently by the parties in litigation or arbitration, should the mediation or conciliation fail.
- it helps maintain healthy relations, and offers practical solutions to the parties' needs and interests, confidentiality, ability to enforce the settlement agreement, and protection of the reputations.

(b) Dispute Boards:

(i) Another form of amicable resolution is through the dispute boards. A dispute boards is a panel of individuals, who in terms of the contract (or can be amended to add the clause):

- provide non-binding recommendations to the contracting parties on the issues; and/or
- make binding decisions in relation to such issues.

The former is usually submitted to Dispute Review Boards and the latter Dispute Adjudication Boards.

(ii) Dispute boards are most commonly found in the construction sector (for instance, clause 20 of the standard FIDIC contracts) and are now slowly been resorted to in other sectors as well. Notably, ICC launched its own ICC Dispute Board Rules.

(iii) Their prevalence and success in major construction projects, means that they are well suited to address the vital concerns, namely, (a) ensure the parties' ongoing and future cooperation, and (b) settle disputes over discrete issues.

(iv) Further, their relatively short and flexible procedures also mean that they could be used effectively to iron out the pressing issues during the ongoing disruption caused by COVID-19.

(iii) Preparing for Dispute Resolution

123. If parties are unable to reach an agreement on how to deal with Covid-19, and one party is planning to initiate dispute resolution to avail any of the aforementioned legal remedies, it would benefit from adopting the following practices:

(a) Documentation: A party should ensure that it:

(i) Maintains all internal documents, records, supporting evidence relevant to the impact of Covid-19;

(ii) Actively communicates with the counter-party using written means, and suggests reasonable alternative means of performance

(b) Ensuring procedural compliances in order to exercise remedies: A party must ensure that all procedural pre-conditions for availing the relevant legal remedies are fulfilled, such as giving adequate and timely notices, approaching the appropriate forum for each remedy, etc.

(c) Avoiding pigeonholing: If a party's claim can be made on several grounds, the party should not pigeonhole its case into one ground. Rather, the party should prepare for pleading all grounds in alternative to each other.

(d) Conducting a thorough risk assessment: A party should thoroughly review the reasonability of its claim and the quality of its evidence before initiating dispute resolution. This is particularly important, since wrongful invocation of certain remedies such as frustration may amount to a 'repudiation' of the contract. This entitles the counter-party to terminate the contract, and seek damages for non-performance.

(e) Considering interim reliefs: Since dispute resolution can be protracted, parties can benefit from seeking interim reliefs, such as interim payments or possession of certain assets, until the dispute is resolved. It is also useful to consider obtaining interim reliefs if the counter-party is likely to dissipate its assets.

(f) Reviewing financial capacity: A party should thoroughly review its ability to finance protracted dispute resolution. If a party does not have adequate cash-flow, it should consider obtaining third-party funding.

(g) Seeking professional legal advice: All of the aforementioned steps may be difficult for parties to conduct themselves. Therefore, it is always advisable to seek external legal advice in early stages of preparing for dispute resolution.

CONCLUSION

124. The Covid-19 pandemic has upended the world leading to chaos and worry across jurisdictions and across various industry sectors. While its extent of impact is unknown, we recommend that businesses be abreast with the legal issues impacting their obligations and develop a cohesive action plan to protect their rights and interests.

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[i] *Holcim (Singapore) Pte Ltd v. Precise Development Pte Ltd,* [2011] SGCA 1.

[ii] ICC-WBO, "Force Majeure and Hardship Clauses" (March 2020), available at <https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf>

[iii] FIDIC Silver Book, Article 19.3

[iv] FIDIC Silver Book, Article 19.4(b)

[v] FIDIC Silver Book, Article 19.6

[vi] ICC-WBO, "Force Majeure and Hardship Clauses" (March 2020), available at <https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf>

[vii] *Grupo Hotelero Urvasco SA v Carey Value Added S.L.,* [2013] EWHC 1039 (Comm).

[viii] *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All ER 573

[ix] This was the case in *Akorn, Inc. v. Fresenius Kabi AG,* 2018 WL 4719347 (Del. Ch. Oct. 1, 2018).

[x] This is usually done through the Employer's agent, who is referred to as the 'Engineer' or 'Architect', depending upon the language of the contract.

[xi] FIDIC Silver Book, Article 13.1.

[xii] NEC-ECC, Article 16.1.

[xiii] See, for example, Article 16.2 of the NEC-ECC and Article 13.3 of the FIDIC Silver Book.

[xiv] FIDIC Red Book (1999), Article 8.4(d).

[xv] Issaka Ndekugri & Michael Rycroft, The JCT 05 Standard Building Contract: Law and Administration, (Butterworth-Heinemann, 2nd ed.) p. 292

[xvi] JCT-DB, Article 2.25.6

[xvii] see including *Holcim (Singapore) Pte Ltd v Kwan Yong Construction Pte Ltd [2009] 2 SLR(R) 193, Energy Watchdog vs CERC* (2017) 14 SCC 80 ("**Energy Watchdog**"), *Satyabrata Ghose v. Mugneeram Bangur* 1954 AIR 44 ("**Satyabrata v. Mugneeram**"), National Carriers Ltd v Panalpina (Northern) Ltd [1981] A.C. 675, *Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd* [2014] 3 SLR 857, Metropolitan Water Board v Dick, Kerr & Co Ltd [1918] AC 119, *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696.

[xviii] *Li Ching Wing v Xuan Yi Xiong* [2004] 1 HKLRD 754.

[xix] see including *Davis Contractors Ltd v Fareham Urban District Council* [1956] UKHL 3; *Glahe International Expo AG v ACS Computer Pte Ltd* [1999] 1 SLR(R) 945; *Travancore Devaswom Board v. Thanath International* 2004 13 SCC 44; *Edwinton Commercial Corp & Anor v. Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2006] EWHC 1713 (Comm); *Alopi Parishad v. Union of India* 1960 AIR 588.

[xx] (1961) 2 WLR 633.

[xxi] [1935] AC 524

[xxii] [2014] 3 SLR 857. Also, see Denny, Mott and Dickson Ltd v James B Fraser & Co Ltd [1944] AC 265

[xxiii] [1919] A.C. 435.

[xxiv] [1903] 2 KB 740.

[xxv] [2011] 4 SLR 1094

[xxvi] In *Pioneer Shipping Ltd. v. B.T.P. Tioxide Ltd* (1982) A.C. 724 ("**Pioneer Shipping**"), Lord Roskill provide some guidance, "it is often necessary to wait upon events in order to see whether the delay already suffered and the prospects of further delay from that cause, will make any ultimate performance of the relevant contractual obligations "radically different," to borrow Lord Radcliffe's phrase, from that which was undertaken by the contract. But, as has often been said, business men must not be required to await events too long. They are entitled to know where they stand. Whether or not the delay is such as to bring about frustration must be a question to be determined by an informed judgment based upon all the evidence of what has occurred and what is likely thereafter to occur."

[xxvii] see Chitty on Contracts 31st ed (2012), vol 1, para 23-035 and Blankley v Central Manchester [2014] 1 WLR 2683.

[xxviii] Also see *Robinson v. Davison,* [1871] LR 6 Exch 269.

[xxix] See *Edwinton Commercial Corp & Anor v. Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2006] EWHC 1713 (Comm). Though on the facts of the case it was held that the contract had not frustrated; the court noted that "*acting as reasonable commercial men, would reasonably have forecasted that the ship would be delayed by the KPT… When seen in retrospect here, performance was rendered impossible for a period of time which represented almost six times the anticipated length of the contract which, on its face, plainly provides scope for an argument of frustration.*"

[xxx] See *Dominion Coal Company, Limited v. Maskinonge Steamship Company, Limited*. [1922] 2 K.B. 132; and *Moorgate Estates, Limited v. Trower* [1940] Ch. 206.

[xxxi] See Pioneer Shipping.

[xxxii] The Schedule lists eight types of contracts including secured loans, construction or supply contracts, lease of non-residential immovable property, contracts related to tourism or organization of events, etc.

[xxxiii] Notification No. S.O. 1205 (E) by the Ministry of Corporate Affairs dated 24 March 2020

[xxxiv] Notification No. S.O. 1145 (E) by the Ministry of Corporate Affairs dated 18 March 2020

[xxxv] Ministry of Finance, Department of Expenditure Procurement Policy Division Notification No. F .18/4/2020-PPD.

[xxxvi] Ministry of New & Renewable Energy, Grid Solar Power Division, Notification No. 283/18/2020-GRID SOLAR.

[xxxvii] RBI/2019-20/186 dated 27 March 2020.

[xxxviii] RBI/2019-20/220 dated 17 April 2020.

[xxxix] SEBI Circular No. SEBI/HO/FPI&C/CIR/P/2020/056 dated 30 March 2020.

[xl] SEBI/HO/CFD/CMD1/CIR/P/2020/106 dated 24 June 2020

[xli] SEBI/HO/CFD/CIR/CFD/DIL/85/2020 dated 9 June 2020.

[xlii] DGS Order No. 07 of 2020.

[xliii] DGS Order No. 08 of 2020.

[xliv] DGS Order No. 11 of 2020.

[xlv] The Indonesian Civil Code was [•]

[xlvi] Article 2 of this Law provides that it applies to "contracts concluded as result of tender processes carried out by public entities and institutions subject to the Law on Public Procurement"

[xlvii] Circular No. 2020/5, No. 31087, dated 2 April 2020.

[xlviii] *Katz v. Nitzhoni-Mirzahi Ltd.(1979)*. See also the later judgment in *Regev v. Ministry of Defence (2000)*, where the court allowed a party to invoke force majeure on the grounds of war, saying that the geopolitical situation had improved considerably since 1979, and it could not be said that war was always foreseeable.

[xlix] English translation of the UAE Civil Code by James Wheelan and Marjorie Hall; https://lexemiratidotnet.files.wordpress.com/2011/07/uae-civil-code-_english-translation_.pdf

[l] A contract duly and properly concluded between the parties must be kept, and non-fulfilment of the respective obligations is a breach of that contract.

[li] Article 258 of Qatar's Civil Code- The parties may agree that the obligor shall bear liability for force majeure or unforeseen incident.

[lii] Article 180 of the PRC General Rules on the Civil Law and Article 117 of the PRC Contract Law

[liii] Article 94 of the PRC Contract Law

[liv] Civil Code as promulgated on 2 January 2002 (Federal Law Gazette [Bundesgesetzblatt] I page 42, 2909; 2003 I page 738), last amended by Article 4 para. 5 of the Act of 1 October 2013 (Federal Law Gazette I page 3719).

[lv] The Federal Ministry of Justice and Consumer Affairs English Translation of the German Civil Code Link: https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0027.

[lvi] Article 275 German Civil Code.

[lvii] Article 313 German Civil Code.

[lviii] Article 311a German Civil Code.

[lix] Article 280, 283, 284 & 85 German Civil Code.

[lx] Article 313 German Civil Code.

[lxi] The Law to mitigate the consequences of the COVID 19 pandemic in Civil, Criminal and Insolvency Proceedings 2020; published in the Federal Gazette on 27 March 2020

[lxii] Saluka Investments BV v. Czech Republic (2006)

[lxiii] Ibid

[lxiv] Pope & Talbot Inc. v. Government of Canada

[lxv] *White Industries Australia Ltd.. v. Republic of India* (2011)

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(b) being well equipped to handle investigations, litigations, arbitrations and mediations across jurisdictions;

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(a) disputes arising out of business relations and projects in various parts of the world including Singapore, India, Israel, Indonesia, Nigeria, Malaysia, Saudi Arabia, Egypt, Sierra Leone, the Philippines, Turkey, The Bahamas, Italy, Kazakhstan, Somalia, USA, UK, and UAE.

(b) disputes governed by various laws such as laws of Singapore, England, Indonesia, India, Israel, Kazakhstan, Turkey, USA, Saudi Arabia, UAE, Egypt; and by transnational rules of law such as International Investment Law, Uniform Rules of Demand Guarantee, World Anti-Doping Agency Rules, and Convention on Contracts for the International Sale of Goods

(c) litigations across Singapore, Indonesia, India, Egypt, Sierra Leone, UAE, UK and Turkey;

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About the Authors

Prateek Bagaria is a partner with Singularity and an international disputes specialist with a decade of experience in complex commercial cross-border disputes. Legal 500 describes him as "responsive and dynamic" and "a very driven individual and a good lawyer who handles clients well". He possesses the domain expertise in advising funders and litigants seeking litigation finance.

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Jimisha Dalal is a counsel at Singularity Legal. She specialises in advising energy & resources companies, private equities and institutional investors in frauds and investigations, and their shareholder and joint venture disputes, operational disputes and sovereign disputes.Her range of experience includes advising clients in international arbitrations under various rules like ICC and SIAC; international mediations administered by SMC; and in cross-border disputes before courts in India, Indonesia, Singapore, and United Arab Emirates.

Sanchit Suri is a counsel at Singularity Legal. He specialises in advising shipping and insurance,sports and entertainment and energy and infrastructure companies, in their shareholder and joint venture disputes, operational disputes and sovereign disputes. He also represents athletes and sports federations in anti-doping and other sports disputes. His range of experience includes advising clients in international arbitrations under various rules like SIAC; and in cross-border disputes before courts in India, Singapore and United Kingdom.

Rohit Shankar is a counsel at Singularity Legal. He specializes in advising construction & infrastructure, and energy & resources companies in their shareholder and joint venture disputes, operational disputes, and debt recovery and enforcement proceedings. He also represents athletes and sports federations in anti-doping and other sports disputes. His range of experience includes advising clients in international arbitrations under various rules like SIAC, and in cross-border disputes before courts in India.

SINGULARITY
LEGAL

113-B, Mittal Court, Nariman Point,
Mumbai - 400021

t: +91 22 4976 5861
e: singularity@singularitylegal.com

www.singularitylegal.com