

EFFECT OF COV ID-19 AS A FORCE MAJEURE VIS A VIS LEAVE & LICENSE:

1. COVID-19 is undoubtedly, an event, which has been beyond contemplation of mankind in general, much less the parties to any contract. In fact, there has been unprecedented lockdown imposed and all institutions, considering the same, have granted extension for almost all statutory compliances, thereby, recognising the crisis as “force majeure” event. It is anticipated that there may be departure from the performance of contractual obligations in the immediate future due to the unforeseeable crisis. In these circumstances, the entities can fall back on “force majeure” clauses contained in their agreement to protect themselves from liabilities, arising due to default in performing obligations, caused by an event, beyond the control of the parties.
2. Contractually, the force majeure clause derives its force from Section 32 of the Indian Contract Act, 1872 (“the Act”), which provides for enforcement of contract, depending on the happening of a contingent event. It implies that upon happening of the contingency, such as a force majeure event, the parties get entitled to certain rights or protection which is envisaged or agreed by them under a specified force majeure clause. However, without a specific force majeure clause, the parties may still claim termination of the contract under Section 56 of the Act as an agreement to do an act which become impossible after the contract is made, is void. This principle is known as “Doctrine of Frustration”. It is anticipated that going forward and in light of the present crisis, both the provisions of the Act, Section 32 (where the contract contains force majeure clause) and Section 56 (in the absence of force majeure clause) will be put to liberal use and parties may get a chance to resile from the agreement.
3. The Indian Contract Act, does not define the term “force majeure”. The term force majeure has been defined in Black’s Law Dictionary as “an event or effect that can be neither anticipated nor controlled.” Though the term force majeure is described in some statutes, such as Real Estate (Regulation & Development) Act, 2016, it is not a standard meaning which runs with the word “force majeure”. The definition used in the statute may be helpful in cases to be dealt under that particular statute and may act as reference for the purpose of drafting or understanding the term in other matters outside the statute. In common parlance, force majeure includes Act of God or natural disasters such as flood, earthquake, drought, epidemic etc. or man-made contingencies such as war, war like situation, labour unrest or strike, change in laws, terrorism, explosions etc. However, there is no exhaustive definition that can be universally applied in all the cases. The Courts have time and again given rulings to interpret force majeure and its scope and ambit to include various events, specially, in the cases of **Dhanrajamal Gobindram Vs M/s. Shamji Kalidas & Co., AIR 1961, SC 1285.**
4. The application of the term depends completely on how the parties choose or agree to define it in their contract. The parties remain free to define the clause, based on the nature of transaction and the probable contingencies that may hinder the performance of their obligations. When the event occurred and where the parties are in dispute as to the interpretation of the force majeure clause, the Court would give weightage and focus to what has been agreed exclusively by the parties in the contract and not allow a party to protect itself from a liability arising out of an event, which was not intended in the contract. The same has been held in the case of **Energy Watchdog World Trade Centre Electricity Regulatory, (2017) 14 SCC 80.**

APPLICABILITY OF FORCE MAJEURE TO LEASE AND LICENSE AGREEMENT:

1. License is governed by the Indian Easements Act 1882, and has been defined under Section 52 of the said Act. However, the rights and duties of the parties are determined by the terms and conditions of the contract, unlike lease, which is governed by the Transfer of Property Act, 1882. As discussed hereinabove, the parties to the lease and license agreement have liberty to incorporate a force majeure clause to cover certain contingencies, which they find appropriate to protect their interests. When the contingency so arises, protection of the stipulated clause may be availed of by the party invoking the clause, by issuing a notice upon the other party. However, in order to invoke and claim the protection of force majeure clause, certain tests will have to be applied by referring to the force majeure clause.
2. **Invoking force majeure clause** - Under Section 32, when a party seeks to invoke a defined force majeure event, following are the key factors which may be considered to determine the rights and obligations of the parties.
 - i) Description of the event in a force majeure clause – In the present scenario, the use of the word “pandemic” would be inevitable. However, in the absence of the usage of the word “pandemic” the parties could also look for phrases such as “sudden change in Government policies”, “change in Indian Laws”, “mandatory directions/restrictions of law or by the Government leading to complete stoppage of business etc.” In the absence of stipulation of a particular event, the parties may make use of phrases such as “any other event or occurrence beyond the control of the parties” in order to avail the benefit of the clause. However, the vagueness of the term may obviate that the words are read coupled with the other clauses of the agreement to determine if the extent of protection desired was contemplated by the parties. **(Mohammed Serajudin Vs State of Orissa AIR 1969, Ori 152).**
 - ii) There is default in performance of the obligation of the contract, due to occurrence of the event.
 - iii) The default is due to the event being beyond the control of the party invoking the clause and not due to his personal shortcomings.
 - iv) The parties are required to see whether there is complete impossibility of performing the obligation or if there is only a temporary change in circumstance, which can be cured by an alternative, which may have been stipulated in the agreement.
 - v) The force majeure clause may not be automatically triggered at the happening of an event but can be invoked only after a point, where the parties have no other alternative to mitigate the loss despite having made all the efforts to allocate the risk, depending on the terms and conditions of the agreement.
3. Termination of the contract on the basis of “Doctrine of Frustration” under Section 56 of the Act is unlikely in case of a lease, as grounds of determination of lease are limited under the Transfer of Property Act. Lease is a right *in rem*, which entitles the lessee conveyance of some interest in the property, unlike license, where a licensee is only granted right to occupy. It is in this backdrop, that the Hon’ble Supreme Court in the case of **Dhruv Dev Chand V Harmohinder Singh, AIR 1968 SC 1024**, held that the doctrine of frustration in the law of contract, embodied in Section 56 of the Indian Contract Act does not apply to leases. The Court referred to Section 108(e) of the Transfer of Property Act, to observe that a lessee, at his option, may terminate the lease in the event of fire, tempest or flood, or violence of an army or of a mob or other irresistible force, where the property is wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let. This

provision appears to be analogous to the doctrine of frustration under Section 56 of the Act, though, for a limited set of events. However, a license which is governed under a different act and to which the Indian Contract Act applies, may give the option of frustration of contract to the licensor and licensees.

4. **“Doctrine of frustration”** - Where there is no force majeure clause in the agreement, there may be a situation where the contract stands frustrated and the obligations can no more be performed. Under such circumstances, the parties may invoke the doctrine of frustration under Section 56 of the Act, to seek termination of the agreement. The Hon’ble Apex Court in the case of **Satyabrata Ghosh v/s Mugneeram Bangur & Co., 1954 AIR 44** has set out in detail, as to what would amount to frustration of contract. Following are the essentials required to be proved by a party, claiming frustration of contract-
 - i) The parties, at the time of entering into the agreement could not have contemplated or foreseen the happening of an event which would render the contract impossible.
 - ii) The occurrence of the supervening event has a consequence of making the performance of obligation impossible or futile. The implication of the word “impossibility” under Section 56 of the act is not restricted to mere physical or literal impossibility and is required to be given a greater meaning to show that the character and fundamental of the contract are completely different from what was intended during its execution.
 - iii) The parties are required to show that there is no means of performing the obligation. Merely the obligation becoming onerous to perform cannot be treated as a force majeure, despite the fact that the party may incur additional burden, financial difficulty or would have to adopt a rather difficult mode to perform the obligation (**M/s. Alopi Prasad & Sons Ltd. Vs Union of India, 1960 AIR 588**).
5. The parties may attempt to show frustration of contract under Section 56 of the Act by taking a plea that the lockdown prevents them from making use of the licensed premises to run their business, for which purpose the license has been obtained. Since, the premises cannot be used for the purpose for which the contract was entered into, it may be argued that the contract stands frustrated. Hence, a licensee, in particular, may seek termination of the agreement. However, the plea of frustration of a lease and license agreement does not hold water, in this scenario (lockdown), since the licensor has not prevented or stopped the licensee from making use of the premises. Specially, in commercial licenses, the licensee continues to store its goods in the premises and during such period the licensor is not free to make any use or benefit of the premises, as per his volition. It may also be important to pay attention to the terms of the contract, as to how “the user of the premises” is defined and whether there is a classification of primary user and ancillary user of the premises, which may include provisions of storage of goods and other such facilities provided by the licensor. Therefore, the licensee may not be getting the benefit of running its business as a primary use but may be continuing to avail the ancillary benefits of the premises. Further, if the parties have agreed to pay the license fee, irrespective of the profit or loss of business or irrespective of prevention of running its business without any restriction imposed by the Licensor, such unconditional agreement to pay the license fee for the agreed tenure of the agreement, is a risk that the licensee chose to take, while entering into the agreement.
6. By not inserting any stipulation in the agreement, which, absolves him from making payment of the license fee, in an event, when he is not able to use the premises for running his business, the licensee is bound to continue making payment of the license fees. Even otherwise, in the absence of such an

event, the licensee binds himself to make the payment, irrespective of him, using the premises to run its business to the full capacity, despite there being no restriction imposed by the licensor. Therefore, at best, the licensee can cite financial difficulty to make the payment of license fee during the period of lockdown, when he is not able to run the business from the premises. However, this only makes it an onerous situation for him, without changing the basis of the contract or without going into the root of the contract. Therefore, this amounts to change or alteration of circumstances but not frustration of contract under Section 56 of the Act, as held in the case of **M/s Alopi Prashad and Sons Limited (Supra)**

7. Furthermore, the lockdown is only a temporary restriction imposed by the Central Government, which does not lead to complete impossibility of the licensee to run his business from the premises. Once the lockdown is lifted, the licensee is reposed to the same position, where he stood before the lockdown was imposed. Hence, the contract is capable of being performed for the remaining tenure. Therefore, the parties may bargain to relax the terms of the contract or suspend the obligation temporarily, until the lockdown is lifted.

CONCLUSION:

The lockdown is bound to shake the financial strength of most of the entities. Even after the end of lockdown it will take months to regain the economic viability for the licensor, as well as the licensee. The licensee may reel with financial setback and may not be prepared to pay the rentals as per the agreement, while, the licensor may be faced with the challenge of finding an interested licensee due to shortage of demand. Therefore, it is best that rather than completely suspending the obligation or terminating the agreement, the parties enter into arrangements which sustain their interest, equally. The parties may assess their economic position, the future prospects, the actual losses and hardship faced by them and evaluate their contract to deal with the crisis. Options such as (a) deferring of payment of license fee for a few months until the lockdown is lifted, (b) reduction of the amount of license fee for a few months by adjusting the same in the future payable license fee, (c) payment of the suspended license fee by way of feasible instalments in the forthcoming months, (d) where the license fees is due for escalation, waiving of such escalation for a year or for a period agreeable to the parties, (e) adjustment of license fee from the security deposit with further understanding to repay the security deposit at a later stage, etc. may help to ease off the burden of the licensees, while, ensuring inflow of income to the licensors.