

# Business Standard

## Firms looking at time, cost relief while invoking force majeure

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Surajeet Das Gupta Sudipto Dey & Avisek Rakshit | New Delhi/Kolkata Last Updated at April 1, 2020 22:01 IST



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The chairman of a leading business house in Mumbai has instructed his managers to go through all company contracts rigorously. The reason: He doesn't want any vendor to wriggle out of a contract by invoking force majeure.

His concern is not without reason. Leading Indian firms – from upmarket high-street retailers in shopping malls to movie exhibitions and from companies in broad swathes of the industry from cement, power, energy, logistics, ports, automobiles and tyres – have or are planning to invoke this magic clause. This is to protect themselves from any default on contractual obligations.

Corporates are relying on a government notification in February that says firms can invoke the clause as coronavirus can be considered a major “natural calamity.” Yet corporates and legal experts are not clear whether it will help.

Admitting that many in his mall have invoked the clause, Delhi-based Select City Walk Chairman Arjun Sharma said, “Yes, most retailers are worried and uncertain about the consequences. We will deal with it when it becomes clearer. For the moment, the definition of force majeure does not cover this pandemic as no one anticipated this event.”

Legal experts agree. Kshama A Loya, leader, international dispute resolution at Nishith Desai Associates, said that such notifications could be of limited effect or no standing, depending on the contractual language of the force majeure clause and the facts of the case. Experts, however, point out that in India, force majeure is a contractual right, and not a right codified under the law.

Anuja Tiwari, partner at DSK Legal, said most firms are looking at time and cost relief while invoking the clause. They would prefer a friendly re-negotiation to resolve the issues that could be like joint bearing the costs.

However, almost all experts agree that there would be a lasting impact of the pandemic on future contracts.

Experts say even as firms look at seeking force majeure relief, they are also likely to seek remedies under other contractual provisions, such as suspension, insurance claims, carrying and idling claim provisions and relief on account of emergency, among others. “These provisions could allow for both time and cost reliefs to the affected party unable to perform contractual obligations in the current circumstances,” said Tiwari. Loya added, “Going forward, parties will need to tailor their force majeure clauses to include unforeseen contingencies, such as public health emergencies, and even effects of such events resulting in severe acts of government.”

Many in the cement industry, for instance, are planning to use the clause. In the cement sector, firms enter into contracts with suppliers of pet coke, clinker and gypsum.

“In the near term, gypsum and clinker imports from West Asia, China, Thailand may stabilise and our suppliers might ask us to honour the purchase contract. One may not have an alternative other than invoking force majeure,” a cement firm executive said.

In the auto sector, Hero MotoCorp and Eicher have invoked the clause. The opinion here is divided. R C Bhargava, chairman of Maruti Suzuki, said, “With Maruti not producing anything during the lockdown and so being the case with vendors, there is any case no billing. So there is no issue for us.”

However, a two-wheeler company executive said: “Despite the Supreme Court order allowing sales of some vehicles in the (BS-IV) inventory after March 31, two-wheeler makers are invoking the force majeure clause to ensure they have no liability to compensate their dealers.”