

CORONAVIRUS - FORCE MAJEURE

A **Force Majeure clause** in general terms is generally understood as a provision in a **contract** that allows a party to suspend or terminate the performance of its obligations when there are certain circumstances beyond their control, making performance of obligations commercially impracticable, illegal or impossible. Has the Coronavirus epidemic created a situation to trigger application of the force majeure clause ? That's the debate in this story today... ..

Force Majeure

As anyone writing contracts would know, the "force majeure clause" does exist in most contracts; but is often classified as a 'boiler plate' clause - something relegated to the backburner almost forever.

Rarely invoked. Never discussed during contract negotiations. But suddenly very important in the wake of covid-19 outbreak; it is the most discussed clause.

"Force majeure" is French phrase meaning "superior force" an act of God, an event for which no party can be held accountable. Normally, very important in building contracts, supply of goods etc. The force majeure events usually covered are natural disasters, war, hurricane, tonado, earthquake, etc. No one ever imagined an epidemic.

The legal basis for the force majeure clause is section 32 read with section 56 of the Contracts Act 1832 which provides that if after an agreement has been made, it becomes impossible or impracticable to perform one's obligations, the contract is void. In other words, where it is impossible to perform obligations under a contract, parties may seek discharge or suspension from performing their obligations.

The force majeure clause has been interpreted by the Supreme court in the case of Energy Watchdog vs CERC [(2017)4SCC80] relieves a party of their contractual obligations when performance becomes impossible or impracticable; it amounts to frustration of the contract.

One has to demonstrate that it became entirely impossible to perform the contract. Thus, the threshold or bar is not to cover any and every event; but something that makes performance impossible.

Strictly speaking, the current scenario would not be covered as a force majeure event in a contract unless the clause included 'epidemics' or 'widespread diseases'.

However, given that the entire nation is under a complete lockdown, of which even judicial notice has been taken and courts have suspended their functions, this event would be classified as 'natural disaster' and form sufficient basis to invoke the 'force majeure' clause.

How is this relevant for IP ?

Payment of royalty: The force majeure clause could be invoked by a party to delay payment of royalty.

Non-disclosure agreements: Many agreements are entered into in order permit a party to test and approve a product for prior to its commercial launch. Some are time-bound. Such testing cannot be done, leading to delay in performance of obligations.

Next steps - force majeure clause:

In case your contract already provides for a force majeure clause, you simply, invoke the same. However if your contract has no such clause, then it would be in your interest to review the agreement and agree upon fresh timelines or manner of performing/dischARGE of your obligations.

It is recommended that by way of abundant precaution, you may need to notify the other party that your obligations under the contract remain excused or suspended or that you should be absolved from performing the obligations until covid-19 situation returns to normalcy. You will have to make a case that it is "impossible" for you to perform your obligations; not just that it is financially burdensome or economically unviable. Better be proactive, than simply assume that your obligations would obviously be suspended.

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