

Force Majeure Clause in Procurement of Goods

September 5, 2020

In the wake of the global economic slowdown and disruption in the movement of goods and services through international borders because of the COVID-19 pandemic, the Ministry of Finance recently issued an office memorandum **allowing entities to invoke the “force majeure” clause in contracts executed under the Manual for Procurement of Goods, 2017**. This has been on the grounds of supply chain disruption to mitigate the spread of COVID-19 in China or any other country.

Force Majeure Clause

The memo clarifies that such **instances should be considered as a case of natural calamity and the force majeure clause may be invoked** wherever appropriate in accordance with the procedures laid down in the procurement manual. Force majeure in contracts typically **allow parties to avoid performing their contractual obligations when inevitable, unforeseen, and uncontrollable circumstances arise, rendering the performance of the contract impossible**. This clause does not excuse a party's non-performance entirely, but **only suspends it for the duration of the force majeure**.

[As an illustration, if an Indian party enters into a contract with a foreign party to purchase a certain quantity of dairy products and at a later stage, Indian laws prohibit import of dairy products into India, then such contract becomes impossible and thereby void].

As per the Manual for Procurement of Goods 2017, a force majeure means extraordinary events or circumstances beyond human control such as an event described as an act of God (like a natural calamity) or events such as a war, strikes, riots, crimes (but not including negligence or wrong-doing,

predictable/ seasonal rain and any other events specifically excluded in the clause). While the memo only applies to contracts executed under the procurement manual with government entities, the **reasoning applied here may also be adopted and claimed in private contracts**, as applicable. However, the chances of successfully invoking the force majeure clause would be determined based on specific facts and circumstances of each case. **The argument is yet to be tested in the court of law.**

From an organizational standpoint, this is a crucial time for management, including general counsels, legal heads, chief financial officers, chief executive officers and key managerial personnel to prepare for the COVID-19 pandemic. **Organizations need to consider whether they can successfully claim impossibility of performing their contractual obligations and invoke force majeure clauses in their contracts.** Only foresight and careful planning will lead to a scenario where any upcoming losses can be mitigated.