

**FORCE MAJEURE  
TRIGGERS DUE TO**



**COVID-19**

**(CORONAVIRUS)**



**FORCE MAJEURE**

**WHAT IS  
FORCE  
MAJEURES**



## Force Majeure

### WHAT IS FORCE MAJEURES

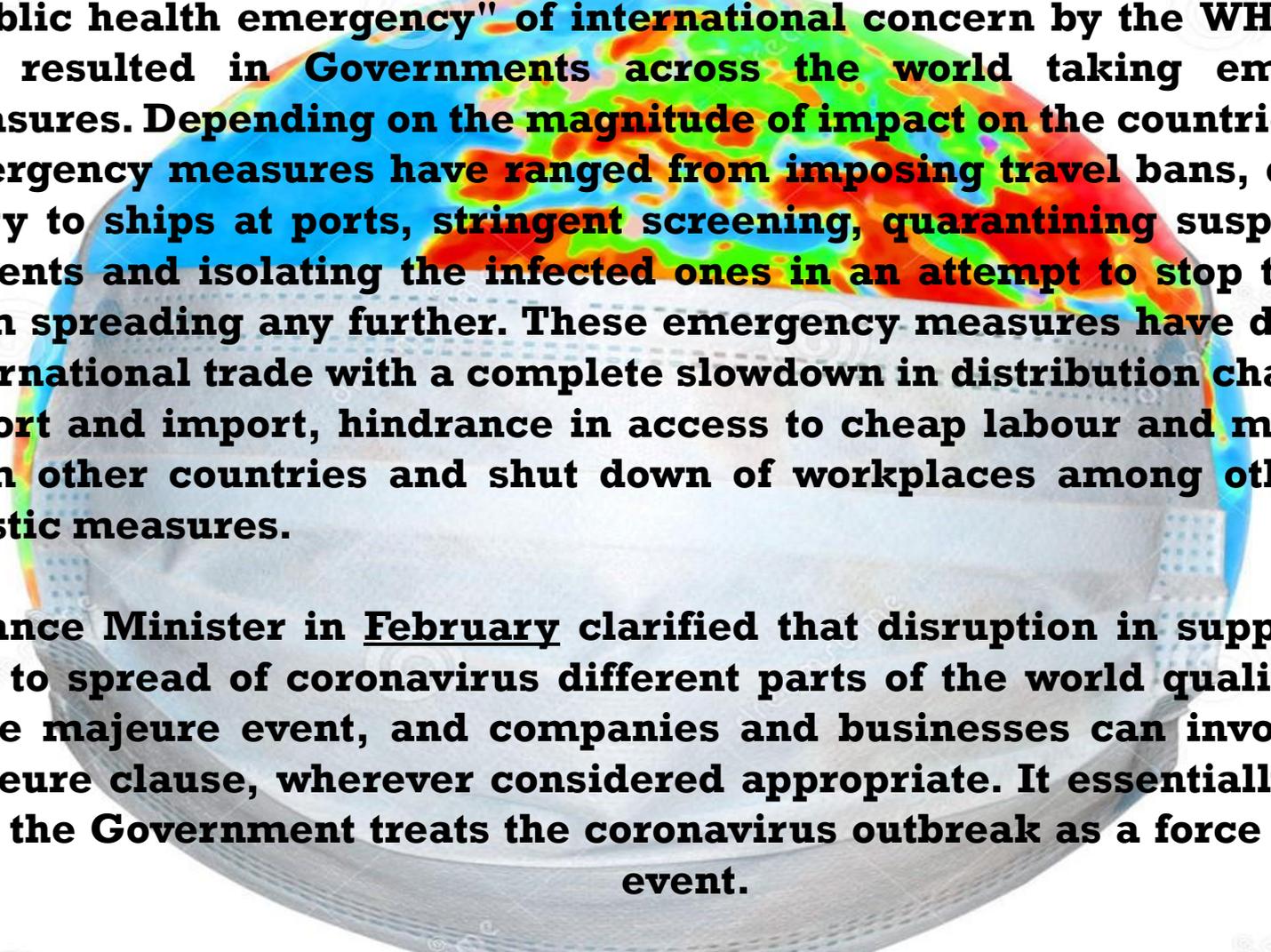
The occurrence of a force majeure event protects a party from liability for its failure to perform a contractual obligation. Typically, force majeure events include an Act of God or natural disasters, war or war-like situations, labour unrest or strikes, epidemics, pandemics, etc. The intention of a force majeure clause is to save the performing party from consequences of something over which it has no control. Force Majeure is an exception to what would otherwise amount to a breach of contract.

# **WILL COVID-19 TRIGGER A FORCE MAJEURE CLAUSE?**

**The outbreak and the rapid spread of COVID-19 has sent shock waves across global markets. It has disrupted supply chains, leading to the closure of several manufacturing facilities globally; serious disruption of air and sea traffic and closure of vital air routes, hence, EXIM Trade has been impacted the most. A combination of all these factors has led to a decline in the overall volume of global economic activity, forcing the world economy towards a possible recession. It is forcing Boards across the globe to confront a host of difficult questions on how business should be conducted during a global public health crisis.**

**The outbreak has created a great deal of uncertainty regarding trade and imports worldwide. The real estate industry is also not spared. The traders are skeptical of reduced production in the coming months.**

**Hence, Indian industry has urged the Government to provide relief measures in wake of the rapidly spreading Covid-19 that has derailed the Economy.**



**In fact, on 30 January 2020, the outbreak of COVID-19 was identified as a "public health emergency" of international concern by the WHO which has resulted in Governments across the world taking emergency measures. Depending on the magnitude of impact on the countries, these emergency measures have ranged from imposing travel bans, denial of entry to ships at ports, stringent screening, quarantining suspects and patients and isolating the infected ones in an attempt to stop the virus from spreading any further. These emergency measures have disrupted international trade with a complete slowdown in distribution channels of export and import, hindrance in access to cheap labour and manpower from other countries and shut down of workplaces among other such drastic measures.**

**Finance Minister in February clarified that disruption in supply chain due to spread of coronavirus different parts of the world qualifies as a force majeure event, and companies and businesses can invoke force majeure clause, wherever considered appropriate. It essentially means that the Government treats the coronavirus outbreak as a force majeure event.**

**Also The World Health Organisation (WHO) declared COVID-19 as a "Pandemic" on March 11, 2020.**

# **RELIANCE ON THE FORCE MAJEURE CLAUSE**

**A party seeking to rely on a force majeure clause must show that:**

**(a) The force majeure event was the cause of the inability to perform or delayed performance;**

**(b) Their non-performance was due to circumstances beyond their control; and**

**(c) There were no reasonable steps that they could have taken to avoid or mitigate the event or its consequences.**

**As a result, where a party anticipates falling into difficulty with meeting its obligations, for example due to staff shortages through self-isolation in accordance with Government guidelines or issues with the supply of materials, it is crucial to explore whether alternatives, such as alternative sources of labour or materials, are reasonably available – including at higher cost, unless this involves breaching existing contracts.**

# What is the procedure for relying on the clause?

A business seeking to rely on a force majeure clause must also comply with any procedural requirements under the contract, such as a requirement to give **NOTICE OF ITS INTENTION** to rely on the clause to the other party within particular timescales, including any formalities required for the service of notices. Some clauses may also require updates to be provided and/or an express obligation to mitigate.

# What is the effect of relying on the clause?

The usual remedy if a force majeure clause is invoked is for one or more of the parties to be excused from its obligations and/or liability under the contract, without any damages being payable. Force majeure clauses also sometimes provide for-

- excusing the affected party from performing the contract in whole or in part;
- excusing that party from delay in performance,
- entitling them to suspend or claim an extension of time for performance;
- or giving that party a right to terminate.



# TERMS & CONDITIONS

## **What if there is no force majeure clause?**

**In India, the doctrine of force majeure is enshrined in Section 56 of the Indian Contract Act, 1872 (Act), wherein it is stipulated that an agreement to do an impossible act is in itself void. Accordingly, it provides that a contract to do an act which, after the contract is made, becomes impossible or, by reason of some event which the promisor could not prevent, becomes unlawful - becomes void when the act becomes impossible or unlawful.**

**It was observed that Section 56 of the Act allowed for discharge of obligations on grounds of impossibility if "an untoward event or change of circumstance totally upsets the very foundation upon which the parties entered their agreement."**

**Advent of COVID-19 upsets the very foundation upon which the parties entered their agreement. The fundamental purpose of the contract stands FRUSTRATED due the party's inability to perform and therefore, that the parties stand discharged from performance of their obligations under the contract.**

## FORCE MAJEURES : THE DOCTRINE OF FRUSTATION OF CONTRACT

**1. Since force majeure is a creature of contract rather than a rule imposed by the general law, if there is no force majeure clause, an affected party will have to look to other provisions of the contract for potential routes out of its difficulties. If the contract does not provide any such routes, it may in certain circumstances be possible to rely on the doctrine of frustration of contract.**

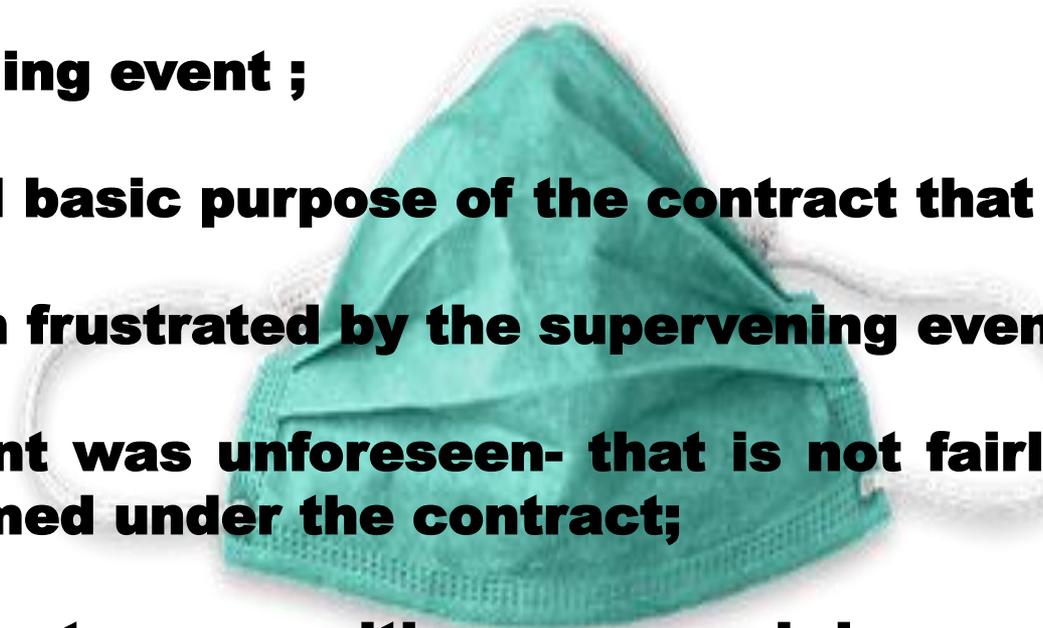
**2. However, it is very difficult to show that a contract has been frustrated. Frustration requires that an unforeseen subsequent event outside the control of the parties has made the contract impossible to perform, or has transformed performance of the obligations under the contract into something so radically different from that which the parties intended that it would be unfair to hold the parties to their obligations. One extreme situation where the courts have held that a contract was frustrated was when war broke out and the government banned the works and seized and sold the necessary equipment.**

**3. Frustration may also be commercially undesirable in some circumstances, since its effect, regardless of the wishes of the parties, is to bring all parties' obligations under the contract to an end immediately.**



# Frustration of Purpose

## FRUSTRATION OF PURPOSE REQUIRES:

- 
- 1. Supervening event ;**
  - 2. A mutual basic purpose of the contract that**
  - 3. has been frustrated by the supervening event;**
  - 4. The event was unforeseen- that is not fairly within the risks assumed under the contract;**
  - 5. The event was neither caused by nor within the avoidance or control of the party; and**
  - 6. The event renders the value of performance essentially worthless.**

**In the context of COVID-19, frustration of purpose may be caused by business closures, cancellation of events, and other disruptions.**

**In the context of COVID-19, one can imagine several circumstances that may make performance impracticable or impossible:**

- 1. A severe shortage of raw materials or supplies because of an unforeseen shutdown of major sources of supply causes a marked increase in cost or prevents performance altogether;**
- 2. A company may no longer be able to ship product to its customers due to forced closure or closures within its supply chain;**
- 3. A contractor cannot enter the premises because someone is infected with COVID-19;**
- 4. A restaurant may no longer be able to host an event because the Government is restricting gatherings of more than 10 people; or**
- 5. A hotel may have to cancel reservations because of Government-issued travel restrictions.**

# HOSTAGE

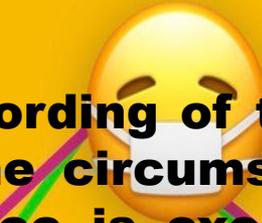
## TO DISCHARGE PERFORMANCE UNDER THE DOCTRINE OF FRUSTRATION, THREE REQUIREMENTS MUST USUALLY BE MET:

- (a) The frustration must relate to the principal purpose of the party in making the contract (both parties must understand that the contract makes little sense without the object that has been frustrated);**
- (b) The frustration must be substantial – it is not enough that the transaction has become less profitable; and**
- (c) The non-occurrence of the frustrating event must have been a basic assumption on which the contract was made.**

# PRACTICAL STEPS IF SEEKING TO RELY ON A FORCE MAJEURE CLAUSE

Parties seeking to rely on a force majeure clause should follow the following practical steps:

1. Consider in detail the precise wording of the force majeure clause, the contract as a whole and the circumstances that have arisen. Determining whether performance is excused by a force majeure clause can be a difficult and highly fact-sensitive exercise, so early legal advice should be sought.
2. Explore alternative means of performing, reducing delay, or minimising any loss to the other party. This may require considering alternative suppliers, or alternative methods of delivery, even if at higher cost.



**3. Serve any notices as required under the contract, as soon as possible and in accordance with the notice provisions. Consider carefully what event or circumstance you allege constitutes the force majeure event, taking into account the wording of the clause and the timescales required for service of notice: the outbreak of Covid-19 itself, or subsequent Government restrictions put in place.**

**4. Do not attempt to rely on increased costs to excuse non-performance or delay, as this will not usually be sufficient.**

**5. Keep a documentary record, particularly of: why performance was impossible, hindered or delayed as the case may be; the steps taken to find alternatives and mitigate loss; and the service of any notices.**

**6. If there is no force majeure clause, consider frustration, but be aware of the high bar for establishing that a contract has been frustrated.**

**7. Consider other routes and remedies, either under the contract or through agreeing binding variations to contracts with other parties.**

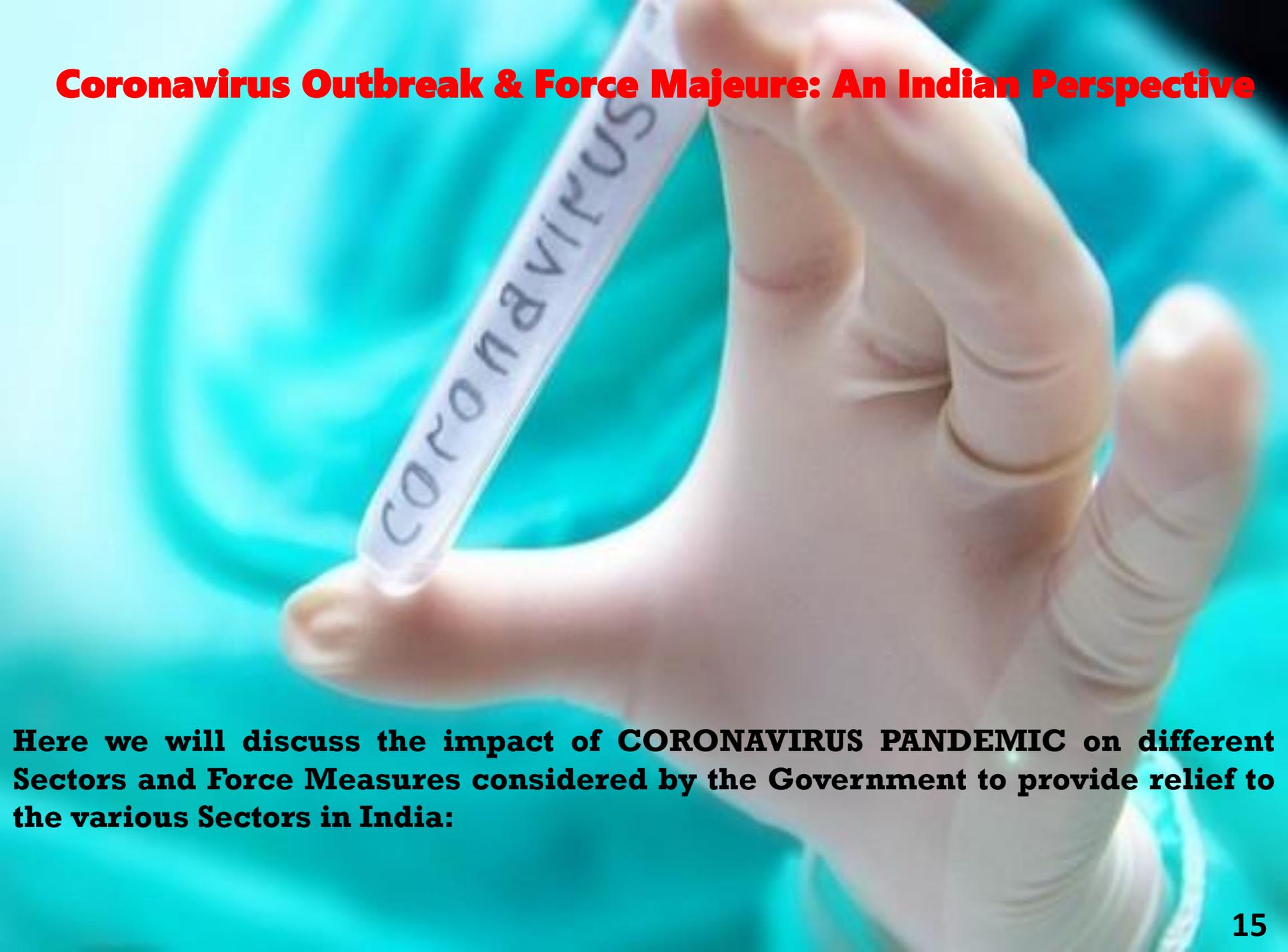
# **Business implications of the coronavirus**

**The rapid outbreak of the coronavirus presents an alarming health crisis that the world is grappling with. In addition to the human impact, there is also a significant commercial impact being felt globally. As viruses know no borders, the impacts will continue to spread.**

**It's possible that the coronavirus threat will eventually fade, as the Ebola, Zika, and Severe Acute Respiratory Syndrome (SARS) viruses have in recent years. But even if it does, the next devastating, yet-unnamed outbreak is not so much a matter of "if" but "WHEN."**

**An outbreak of COVID-19 impacted the whole world and has been felt across Industries. World's second-largest economy China became standstill. Its outbreak is declared as a national emergency by the World Health Organisation. In India the three major contributors to GDP namely private consumption, investment and external trade will all get affected. World and Indian economy are attempting to mitigate the health risks of COVID-19 with the economic risks and necessary measures need will be taken to improve it.**

# **Coronavirus Outbreak & Force Majeure: An Indian Perspective**

A hand wearing a white latex glove holds a clear test tube. The test tube has a white label with the word 'CORONAVIRUS' written in black, uppercase letters. The background is a vibrant blue with a faint, circular pattern that resembles a globe or a virus particle.

**Here we will discuss the impact of CORONAVIRUS PANDEMIC on different Sectors and Force Measures considered by the Government to provide relief to the various Sectors in India:**

A cardboard house model is centered on a blue background, surrounded by several red and green virus-like particles. The particles are spherical with protruding spikes, resembling coronaviruses. The house is made of brown cardboard and has a window with a cross pattern. The text "REAL ESTATE" is overlaid in large, bold, red letters across the center of the image.

# REAL ESTATE

# REAL ESTATE SECTOR

**The real estate sector is one of the largest employment generators in the country and has a multiplier effect on around 250 allied industries. The sector is expected to contribute to around 13 per cent to the country's GDP by 2025.**

**However, the year 2019 has been a mixed bag for the Indian real estate industry, having attracted investments worth ~USD5 billion. Around 66 per cent of these investments were in the commercial real estate market owing to healthy demand from private equity investors for stable rent yielding assets.**

**On the other hand, the residential real estate sector as witnessed poor demand and lower absorption in the past few years owing to the economic slowdown, the NBFC crisis, cynical buyer sentiment and developer defaults. This has led to higher unsold inventory across the major cities in India.**

**Revival of the Indian real estate sector, one of the largest employment generators, seems to have hit another brickwall in the wake of the panic generated by the spreading coronavirus, the rising death toll an economy in temporary lockdown.**

**With the onset of the COVID-19 outbreak that has affected the trade and industries worldwide, disruptions in business cycles are bound to impact the demand for commercial as well as residential spaces in the real estate market of India.**

**The housing sector is expected to see muted demand with significant reduction in the new launches.**

**With current lockdown situation in the country, retail sector has seen short term impacts and may continue to see the slowdown with the impact on supply chain and logistics.**

**There is a high possibility of postponement of REIT launching (earlier scheduled for listing in 2020), which would mean further liquidity pressure on real estate developers.**

**Fresh equity investments into the country's real estate sector would slow down, with almost all sectors going through turmoil.**

# **Current and potential impact on the Sector**

- 1. Price variations of key raw materials : Overall halt in the manufacturing sector activity including cement, steel and other building materials.**
- 2. Production shutdown: Profound impact on sourcing of building material and labour.**
- 3. Cash flow constraints: Weakening sale velocity and restricted travel would impact the cash flows in the residential, hospitality and retail segments.**
- 4. Labour force: Estimated job loss of ~30 per cent in the real estate sector**
- 5. Lockdown/restrictions impact: Weakened sales within residential segment and lower footfalls for retail and hospitality segment.**
- 6. Consumer sentiment: FDI within commercial segment to be on hold on account of limited new leasing activity due to the existing industry shutdown and potential change in user habits.**

**Hence, in order to provide relief to the Indian real estate sector, Government has announced the following Force Measures:**

**Before the Covid-19 outbreak, the Indian economy was one of the fastest-growing economies of the world (According to the International Monetary Fund). However, due to the Covid-19 breakout, the economy is on the back foot, so is the already stressed real estate sector. To handhold the real estate and construction sector, the Government has rolled out certain measures viz-**

- 1. Announcing the relief measures for already aggrieved real estate developers, the Government has increased the threshold for initiating the default proceedings under the Insolvency and Bankruptcy Code (IBC) 2016, from Rs 1 lakh to Rs 1 Crore. This will help keep a check on the unscrupulous and frequent insolvency proceedings against developers, especially during tough economic times.**
- 2. The Government has also assured that if the present strained economic scenario continues beyond six months, it will actively consider suspending Sections 7, 9 and 10 of the IBC (all related to starting Corporate Insolvency proceedings).**
- 3. Release of a relief package to the tune of Rs 1.71 lakh crore will primarily benefit the migrant construction labourers.**

**4. The Government has urged the State governments to utilise Rs 31,000 crore fund for the welfare of construction workers to minimise the adverse impact of the lockdown.**

**5. The massive reduction in the Repo rate (75 bps), Reverse Repo rate and CRR by the Reserve Bank of India (RBI) will lower the cost of borrowing for the real estate sector and will help the projects delayed due to want of funds.**

**6. The deferment of home loan Equated Monthly Installments (EMIs) will help the borrowers and business community utilise funds for the priority activities.**

**7. The deferment of dates for key filings such as ITR, composition scheme, and Aadhar-Pan linkage will ease the burden of compliances.**

**8. The State governments (Delhi, Maharashtra, Gujarat, Uttar Pradesh etc.) are offering compensation to the migrant workers for the loss of employment, arranging for temporary shelters and food. The Delhi government has also offered to pay rent of the migrant citizens so that they stay put at the place of residence.**

**9. A recent judgement of the Supreme Court of India to categorise the construction workers and labourers as consumers will also help in this regard. It will ensure that no statutory benefits are denied to this section.**

**10. Government has agreed to consider the Coronavirus epidemic a 'Force Majeure'. It clarified that no penalties would be levied on the contractors or developers for any delays attributed to the deadly pandemic.**

### **KEY POLICY RECOMMENDATIONS**

**I. Tax and compliances related :**

**(i) GST tax holiday for one year for the tourism/hospitality sector.**

**(ii) Relaxation for project delays in the residential segment (RERA compliance) for a maximum of six months.**

**(i) No interest repayment for three months for developers, then extending it to 12 months.**

**(ii) Lending rate for realty projects to be fixed at a lower repo rate**

**(b) NPA classification to be extended beyond 90 days for stressed projects.**

### **III. Others:**

**One year government subsidy on basic salaries for tourism/hospitality sector.**

**There is a learning curve involved in profiting from real estate, just like there is with stocks. Unlike stocks though, the stakes tend to be higher with real estate, the errors are less reversible, and the sources of high-quality information fewer. With this in mind, we have jolt down positives about Real Estate which one can consider after this Lockdown.**



**Import**

**Export**

**On March 19, the Federation of Indian Exports Organisations (FIEO) issued a press release stating that the micro, small, and medium enterprises (MSMEs) are likely to be worst-hit due to the coronavirus outbreak, particularly in the first quarter of FY 2020-2021.**

**The release said the export sector has started feeling the pinch with many requests from buyers to hold back shipments till further instructions and significant number of such requests may eventually lead to cancellation of orders.**

**According to FIEO, in cases where Indian exporters are adhering to the terms of contract, the force majeure clause is likely to be invoked by buyers to deny claim/liability raised by exporters.**

**On the other hand, Coronavirus to hit Indian exporters hard, defaults may rise:**

**The Federation of Indian Export Organisations (FIEO) has cautioned the Government over the possibility of higher defaults in the export business sector due to novel coronavirus (COVID 19) outbreak linked cancellations and reduction in orders.**

The Exporters wanted to apprise the Government there would be delay in declaration of company accounts. Also, it warned lack of business, coupled with fixed costs, would soon make many accounts technically NPAs .

(1) Stating that all businesses (with few exceptions) will take a hit in revenue and margins, with fixed cost remaining the same, FIEO wanted the government to enhance the existing working credit limits of exporters with the banks automatically by 25%. The apex exporters' body wanted collateral free lending upto Rs 2 crore to be implemented in its 'true spirit' and cap the collateral requirement beyond Rs 2 crore lending at 35-40%.

(2) The agency called for continuation of all existing export promotion schemes till at least 31 March, 2021.

(3) FIEO called for immediate release of all benefits that are due to exporters to ease liquidity issues. It wanted release of dues to even risky exporters after taking bonds from them.

(4) According to FIEO, the export obligation period under Advance Authorisation and EPCG needs to be extended by 1 year in the forth coming Foreign Trade Policy(FTP), The policy should also provide automatic revalidation to all duty-free authorisations by 1 year to enable the industry to import inputs at the right price, the exporters' body said.

**5)The exporters' wishlist included extension of remittance period from 9 months to 15 months, extension of exemption from caution listing of exporters from March 31, by another year; both to be done by the Reserve Bank of India(RBI).**

**6. India has asked the countries, with which it has free trade agreements (FTAs), to allow imports of goods without certificate of origin for the time being as the domestic authorities are currently not issuing the document on account of lockdown due to COVID-19 pandemic.**

**7. The government has allowed issuing certificates of origin-retrospectively to eligible exports under various India's trade agreements with other countries as offices temporarily closed and unable to issue the certificate of origin.**

# Manufacturing



# **COVID-19 IMPACT: MANUFACTURING GRINDS TO A HALT IN KEY SECTORS**

**Due to COVID -19, Manufacturing Sector in India, would be worst affected due the following reasons:**

**1. With Exporters hit hard and imports from many countries being halted, the Manufacturing Sector in India is likely to be worst affected by the evolving humanitarian crisis caused by COVID-19. We expect the pandemic to heavily disrupt both the demand behaviour as well as the supply and capability of companies to deliver goods to the market.**

**2. (a) Manufacturing in the country won't take off as soon as lockdown restrictions are lifted due to an acute shortage of workers who have returned to their home States.**

**(b) The automobile, textile and engineering industries, among others, depend primarily on outstation employees for working their plants.**

**(c) Even if workers manage to move back to their workplaces, they may not be welcomed by their landlords due to fear psychosis.**

### **3. Chain Reaction:**

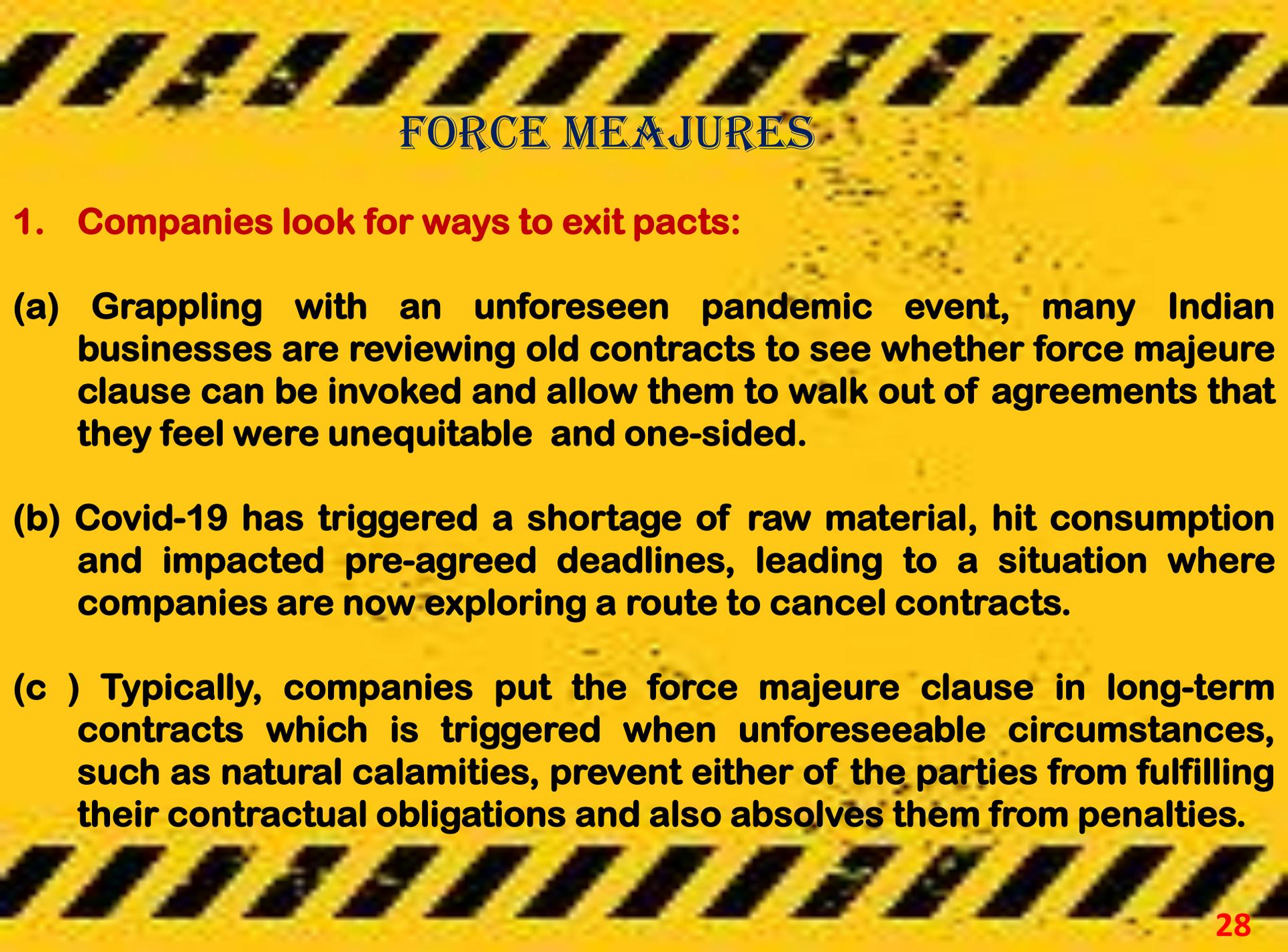
**It's a chain reaction. If the end consumer loses appetite, the effect will go right up to the producer.**

### **Supply Chain Disruption- Implications on Contracts:**

**Considering the supply chain disruption caused by the COVID-19 outbreak, it is likely that performances under many contracts will be delayed, interrupted, or even cancelled.**

**Further, companies may not be able to perform their obligations under their customer agreements because of their supplier's non-performance and may in turn seek to delay and/or avoid performance (or liability for nonperformance) of their contractual obligations and/or terminate contracts.**

**Parties may also cite COVID-19 as a basis for renegotiation of price or other key contractual provisions (example: volume of materials exported from or imported into affected areas due to shifts in supply and demand).**



## FORCE MAJEURES

### **1. Companies look for ways to exit pacts:**

- (a) Grappling with an unforeseen pandemic event, many Indian businesses are reviewing old contracts to see whether force majeure clause can be invoked and allow them to walk out of agreements that they feel were unequitable and one-sided.**
- (b) Covid-19 has triggered a shortage of raw material, hit consumption and impacted pre-agreed deadlines, leading to a situation where companies are now exploring a route to cancel contracts.**
- (c) Typically, companies put the force majeure clause in long-term contracts which is triggered when unforeseeable circumstances, such as natural calamities, prevent either of the parties from fulfilling their contractual obligations and also absolves them from penalties.**

## **2. If the contract does not have a force majeure clause:**

If the contract does not include a force majeure clause, the affected party could be to resort to the doctrine of frustration under Section 56 of the Indian Contract Act, 1872. However, in order to claim that the contract is frustrated, it must be shown that performance of the contract is entirely impossible and that it has become fundamentally different from the arrangement contemplated at the time of executing the contract.

## **3. Other possible consequences for contracts:**

Counterparties may attempt to invoke other contractual clauses like

- price adjustment clauses,
- material adverse change (MAC) clauses,
- limitation or exclusion clauses, to limit or exclude liability for non-performance.

The ability to invoke such other grounds will depend on the wording of the relevant clause, and how the clause is construed by courts or tribunals.

# Conclusion

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**While the full impact of the COVID-19 outbreak on businesses is not clear at the moment, and the outbreak is likely to spread in the coming days, this is an issue which is seemingly becoming critical by the week.**

**Conclusively, with Coronavirus reaching India, the real estate industry needs to brace itself for an even worse impact than previously thought. With the threat of infection affecting human lives, the real estate sector is already seeing a decline in property visits and buyer interest.**

**However, the world has faced similar outbreaks such as SARS virus, bird flu etc. in the past too and has successfully recovered. Every calamity is an opportunity to scale new heights. Indian real estate and allied manufacturing industries must find positivity in the scenario and benefit by increasing production and indigenous innovation. The Government would do well to stop further proliferation of the virus and handhold the industry in the times of crisis.**

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