

WHO BEARS THE LOSS?

By **Shubham Shankdhar**

The owners of Magneto The Mall, a major commercial centre in Raipur, are in a peculiar bind during this lockdown. Four or five big firms occupying floor space in the mall have defaulted on payment of rent and maintenance expenses, citing losses from shutdown of business. Pleading helplessness in the current circumstances, the firms have all invoked the ‘force majeure’ clause in their contracts, which is legalese for a provision that gives parties to a contract temporary reprieve from fulfilling contractual obligations.

While the typical scope of force majeure does include ‘act of God’ events, such as wars and riots and epidemics such as the current one, the Indian government has yet to notify COVID-19 as a force majeure event. Anand Singhania, managing director of Magneto mall, may be clutching at straws, but he is quick to point out this all-important detail: “Their (the renting firms) notices mention force majeure even though the government

has not declared COVID-19 a natural disaster. If the government does so, even we will be able to make insurance claims to recover losses.” He is worried about his company’s ability to repay its bank loans if this ambiguity persists. “If nothing works out, we will have to take legal recourse,” he says.

This is not even an isolated case.

asked power generation companies, with whom they have signed power purchase agreements (PPAs), to stop production, citing force majeure. They have expressed ‘inability to pay until further notice’. The Association of Power Producers is crying foul, and says this is a violation of the PPA.

➤ PVR, the country’s largest multiplex

THE CENTRE’S NOTIFICATION ON FEB. 19 EXEMPTS ITS CONTRACTORS FROM PENALTIES IF THEY FAIL TO MEET OBLIGATIONS DUE TO COVID-19, BUT IT’S SILENT ON WHETHER THIS APPLIES TO PRIVATE BUSINESS DEALS AS WELL

Across the country, the crippling impact of the lockdown is seeing businesses increasingly invoke the force majeure clause—to either get a reprieve or even a waiver of contractual commitments. Consider these:

➤ In Uttar Pradesh, Punjab, Haryana, Telangana, Madhya Pradesh and Dadra and Nagar Haveli, discoms have

chain, has asked all landlords to waive rent. PVR has more than 800 screens in India and Sri Lanka.

➤ Hero MotoCorp, India’s largest two-wheeler company, has held back payments to vendors.

➤ Even small businesses, such as crane operators, are suffering. The Crane Owners Association of India has



RAJWANT RANWT

WHAT THE LAW SAYS

→ Force majeure is governed by **Section 32 of the Indian Contract Act, 1872**, and frees parties of contractual obligations in the event of a war, riot, epidemic or other 'act of God' (natural calamities).

→ **Section 56** of the Act relates to the 'doctrine of frustration', which refers to a change in circumstances that render it impossible to enforce a contract. "Parties use Sec. 56 when force majeure is not mentioned in their contracts," says legal expert Jeevesh Mehta. For instance, he says, if an event company had booked a concert that was impossible to hold during the lockdown, it would be considered a 'frustration of contract' because the contract cannot be executed. "In such a situation, the event company would have to return any advance it may have taken."

UNCERTAIN TIMES

A PVR theatre in New Delhi

written to Union MSME minister Nitin Gadkari for relief, flagging non-payment by clients citing force majeure, among other grievances.

▲ The contracted players of Kolkata-based East Bengal FC say they will move the Football Players' Association of India against the club's decision to revoke their contracts.

A Union finance ministry notification on February 19 said the COVID-19 situation qualified as a force majeure event, and government contractors unable to meet commitments due to supply disruptions from China would be exempted from penalties. But the notice is quiet on whether the same terms would apply to contracts between private business entities. "The government's attempt is to pre-empt litigation. (A finance ministry memo directs all ministries to treat disruption due to the virus outbreak as a natural calamity, providing relief to government contractors.) But it will apply only to contracts where the government itself is a party," says Sunil Garg, CEO of Faridabad-based law firm SSA Legal. "We may also see public sector banks extend reliefs such as deferral of [loan] instalments."

Can all businesses hope to get relief by invoking force majeure? Jaspal Singh Sethi, partner with the Delhi-based PS Law Group, says, "Who gets relief and who does not depends on the terms of the contract." Force majeure will apply in the case of COVID-19 only if epidemics are included under this clause in the contract. Sethi points out that smaller entities could be in trouble as their legal paperwork

is not robust, particularly house and shop tenancy agreements. He says one of his Delhi clients who had added 'acts of government' to the force majeure clause in his agreement with a tenant will be insulated from losses due to the lockdown.

Holding an insurance policy may not guarantee relief. C.R. Mohan, national head, property and risk engineering, Bajaj Allianz General Insurance, says: "Who benefits from insurance on the basis of force majeure will be determined by the terms and conditions of the policy. The insurance company will be paying only for the risk against which it has taken premium." Mohan underscores another critical aspect. "Usually small businesses take policies like fire insurance for factories, warehouses or stores because it is mandatory to obtain bank loans. But few go for a business interruption policy to cover losses due to any reason."

Legal disputes appear highly probable in the given situation. Jeevesh Mehta, lead partner of Delhi-based law firm Maven Legal LLP Advocates and Consultants, says, "The COVID-19 crisis is well understood by all, so we expect the focus to be on reconciliation. A large number of cases may still reach the courts." One of his clients sent a legal notice to a company that had contracted it to build a showroom, but then wanted the contract nullified when his client gave notice that the lockdown would cause delay. "Each case will entail a different set of problems. If parties fail at reconciliation, there will be litigation," says Mehta. ■