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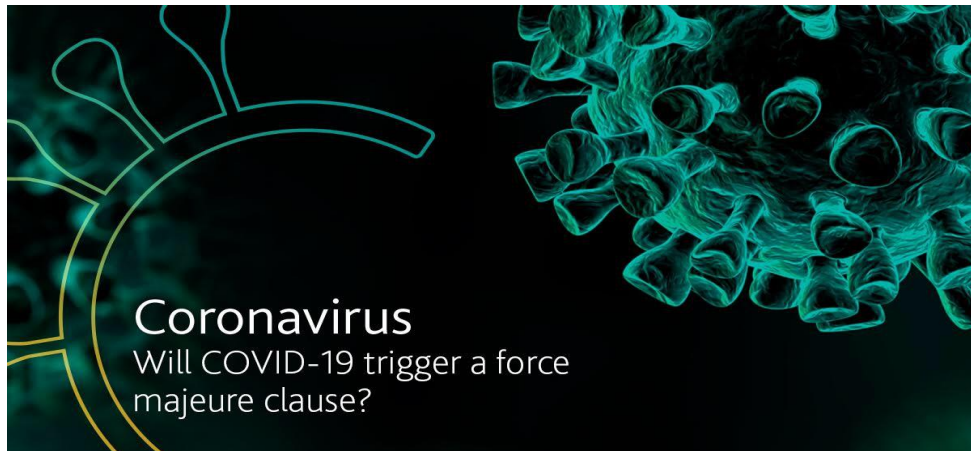
May 23, 2020

Covid 19 – Power Sector Legal Preparedness



Introduction

Today we are facing a truly difficult situation. The global coronavirus pandemic is affecting our life and communities. Most businesses are in uncharted territory. In a bid to curb the spread, the Government of India has announced unprecedented nation wide lockdown. There is lot of anxiety over the impact of a continued lockdown on the economy. Industries and business have started accessing the financial and legal implication of the pandemic.



Force Majeure

In the last couple of weeks much has been written about force

majeure clauses and the impact of the pandemic on contract and performance obligations of the parties under various commercial contracts.

Force majeure refers to a contractual provision that limits liability due to unforeseen events outside the control of the parties that delay or entirely prevent performance of the contract. It must be expressly provided for under the contract and the relief will depend on the language of the relevant clause.

Typically, a force majeure clause is part of the boilerplate provision of any contract and is divided into - definition and operative clauses. Since this is a contractual provision, it is open for negotiation and therefore may vary from contract to contract. Any definition of force majeure may either provide an exhaustive list of event (*including but not limited to acts of God, acts of nature or severe weather events, war, acts of terrorism, acts of governmental authorities, strikes and labor disputes, etc*), or set out broad criteria (*like act of god, unforeseen*

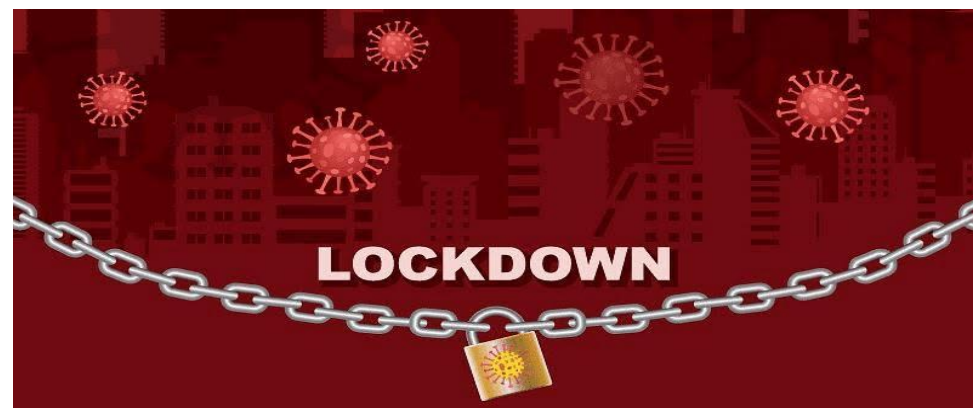
events, beyond the parties' reasonable control and such other language). In other contracts it may even be a combination of the two. The operating clauses generally provide for timely notice, mitigation steps, reliefs, dispute resolution procedure, etc.

Impact on Power Sector and steps taken by Government

The lockdown has adversely impacted the energy sector (renewable and non-renewable). The demand for electricity by industrial and commercial establishment has nosedived. However, power generation, transmission and distribution units/services have been exempted from being shut down as they are classified as essential services.

The Government has from time to time taken into consideration the various difficulties being faced by this sector and has introduced slew of regulatory measures like relaxing the payment security mechanism by reducing requirement of prepayment or providing Letter of Credit for entire cost of power sought to be scheduled to 50% of the cost of power.

Extension of time has been granted to project developers on account of disruption of supply chain due to spread of coronavirus in China and other countries. Even few State Governments have taken steps like extending the last date to pay electricity bills, waiver of fixed electricity charges levied on industrialists and shop keepers. Now they will be charged only for their actual electricity usage.



The Ministry of Power has recently issues instructions providing moratorium to DISCOMs for making payment to generating companies, since then various State Discoms have started curtailing renewable power terming this as force majeure condition. The Government of India has after considering the

situation clarified that renewable energy generating station have been granted must run status, which will continue during lockdown and has clarified that since renewable energy comprises only a minor portion of total electricity generation of the country, the payment to renewable energy generators be done in regular manner as per the established procedure.

Issues to Ponder



The problem is not only about the off take of energy under power purchase agreements (PPAs), power sale agreements (PSA) but involves plethora of other agreements which also needs to be considered like civil works, erection, testing and commissioning agreement, onshore and offshore supply

agreement, BTG Agreement, engineering, procurement and construction (EPC) contracts, operation and Maintenance (O&M) agreements, distribution agreements, interconnection agreements, project finance or land lease agreements and other ancillary contracts.

Not only the Discoms, but even the independent power producer (IPP), captive generators and the various project participants are facing problems due to hold on construction, supply chain disruption, execution delays and sticking to the timelines. All this would increase the pre-operative expenses and the overall project cost, which in turn would have impact on the expected returns. Under such circumstances, the obvious fundamental questions that comes to mind are whether:

- there is a force majeure clause in the relevant contract;
- the definition of the term is exhaustive, broad or a combination of the two;
- the definition covers or can be extended to pandemic or epidemic;

- performance by the affected party is prevented, hindered or delayed;
- there are other project agreement that may also be affected;
- there are “back-to-back” projects agreement or provision;
- force majeure only excuses a party from performing under the relevant contract or includes a provision specifically referring to circumstances where a party is prevented from performing its obligations also under other agreement;
- in the absence of contractual force majeure clause, can the doctrine of frustration be applied;
- the affected party has to take steps to mitigate;
- notice is required to be sent by the affected party and within what timelines;
- a simple notice invoking force majeure should be enough or something more;
- the affected party needs to approach the counter party to discuss allocation of risk and other possible alternatives.

Remedies available



Force majeure is a contractual provision and cannot be implied under Indian law. The language of the force majeure clause will determine the remedies available to the parties. Some contracts may provide for immediate termination of the contract upon the happening of the force majeure event. Others may provide that the contract will be put on hold until the force majeure event is resolved. In few contracts extension of time, suspension of obligations (even those excluding payment, whether accrued and/or on going basis) may be allowed though for a certain time period after which the

contract may be terminated. In certain cases the parties may be excused from its obligations and/or liability under the contract, without any damages being payable by either party. It is therefore, essential in each case to ascertain the rights, obligations and liabilities of the parties to the contract. There may also be certain agreements which may be co-terminus or may trigger cross-default provisions, further increasing the complexities and challenges being faced by the affected party.

Absence of Force Majeure and Frustration



If the contract does not explicitly provide a force majeure clause, the affected party may in certain cases claim relief

under the doctrine of frustration under Section 56 of the Indian Contract Act, 1872. This section allows termination in the event that a contract is frustrated and cannot be performed due to supervening impossibility or illegality of the act agreed to be done for reason not induced by the affected party.

Other contractual recourses

It is also prudent for the parties to consider other contractual clauses like material adverse effect, price adjustment, exclusions carved out in the contract, liquidated damages, continued payment obligation and other ramifications.

Up your preparedness

Before the parties consider to take shelter under any of these clauses, it is pertinent to ascertain the legal implication, challenges, time and cost effect of this exercise.

Now is, therefore, the right time to get the contracts reviewed, to understand the contractual obligations to perform and ensure adequate steps to mitigate losses. The Companies can

up its preparedness level and not be taken by surprise. Though a small exercise, this will save businesses from any future inconvenience.

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