



**KHAITAN  
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# **Impact of COVID-19: Challenges for the Power Sector**

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# Impact on Contracts

- Parties must comply with obligations
- Breach may expose parties to:
  - Damages' claim | monetary exposure
  - Indemnity (if in contract) | monetary exposure
  - Specific performance | operational exposure
  - Injunction | preventive action
  - Reputational impact
- Excuse of "force majeure" [superior force]:
  - Blacks Law Dictionary | "...contractual provision allocating the risk of loss if performance becomes impossible or impracticable, especially as a result of an event or effect that the parties could not have anticipated or controlled."



# Force Majeure (FM) / Frustration - Principle



- Two standards:
  - Contractual (FM) | Depends on language
  - Statutory (Contract Act) | Impossibility of performance
- High threshold | Commercial hardship or inconvenience not sufficient
- Evaluate pros and cons of invoking FM
- Invocation | Be specific
- Be wary of consequences | Damages/specific performance



# Critical Applicability Conditions

- i. Contract has an FM clause
- ii. Inclusion in definition of contract FM:
  - pandemic or epidemic
  - government actions or orders
- iii. FM event directly prevents, prohibits or makes contract obligations unattainable
- iv. Likely scope to mitigate impact of event on performance obligations

Y/N

Y/N

Y/N

Y/N



If answers to the first three questions are "YES", and the last one "NO", it may be possible to avoid/defer performance of obligations under a contract

# FM – Definition / Exclusions

1

Wide and inclusive, without specifically listing out events

- Possible to argue that events such as a pandemic/epidemic or government actions/orders are included

- "Force majeure means any event **including** acts of God or such other events beyond the reasonable control of and not attributable to the affected party."

2

Inclusive and lists out specific events and "catch-all" provisions

- *"...and all other events beyond reasonable control of parties"* may be interpreted by Court with reference to earlier list of events ('ejusdem generis')

- "Force majeure means and includes lighting, earthquake, tempest, cyclone, flood, volcanic eruptions, war, strikes and all other events beyond the reasonable control of and not attributable to the affected party."

3

Exhaustive

- No room for interpretation.
- "Force majeure shall mean war, armed conflict, flood, terrorist acts, storm, typhoon, tornado, natural disaster, fire and acts of god."

# FM – Other Considerations

## Lookout for Exclusions/ Exemptions

- FM clauses may specifically exclude certain events
- Potentially, pandemic or epidemic may be excluded
- Certain other obligations may also be excluded
- In a sale of goods contract:
  - Obligation to pay may be excluded where seller has dispatched goods that are in transit
  - Such clauses typically appear where risk around goods pass prior to actual or physical delivery

## Past obligations

- Payment due for goods supplied or services rendered in the past is an accrued obligation and beyond FM
- While past obligations may be specifically excluded even in absence of express exclusion, one may argue that:
  - Only future performance should be impacted by FM event [contract language needs closer examination]

## Commercial Hardship / inconvenience

- This is not sufficient to trigger a force majeure claim
- Illustration
  - Contract FM includes pandemic, government action/order
  - Govt. order (24 Mar 2020) exempts essential goods and services
  - **Can A claim force majeure ?.**

# FM – Definition / Exclusions

A 'Force Majeure' means any event or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:

i. Natural Force Majeure Events act of God, including, but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred (100) years

Force Majeure shall not include (i) any event or circumstance which is within the reasonable control of the Parties and (ii) the following conditions, except to the extent that they are consequences of an event of Force Majeure:

a. Unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts, Fuel or consumables for the Power Station;

b. Delay in the performance of any contractor, sub-contractor or their agents excluding the conditions as mentioned in Article 9.2;

c. Non-performance resulting from normal wear and tear typically experienced in power generation materials and equipment



# FM – Clause applicable only to One Party

## Illustration

- The seller will not be obliged to perform his obligations under this contract if her performance is prevented or prohibited by any force majeure event including any act of god or other event beyond her reasonable control and not attributable to her.”
- Can Buyer affected by pandemic or government order invoke FM clause?
  - If not – can Contract Act s.56 be invoked

## Supreme Court view

- When a contract contains FM clause which on construction by Court is held attracted to facts of the case, s.56 is inapplicable [Energy Watchdog v CERC & Ors., 2017 14 SCC 80 – Paragraph 47]
- It is therefore arguable that in the instant case, FM clause is not attracted in so far as buyer is concerned:
  - Accordingly s.56 may apply if high threshold test met
  - Remains to be seen how Courts interpret such a clause

# Invoking FM – Follow Good Practice



- Follow procedure laid down in the contract
- Be specific, avoid vague and ambiguous notices.
- Issue notice as soon as possible:
  - if there is a “notice” clause in Contract, follow the terms strictly.
  - Ensure the notice is received.
- If counter party refutes, please examine grounds:
  - Continue corresponding till matter resolved
- Statement in notice/correspondence is material
  - Exercise caution and seek legal advice when drafting notices and letters

# Contracts without FM clause (s.56)

## s. 56 of the Contract Act 1872

- Applicable in case of Contracts without FM clause [only lease excluded] :
  - Contract to do impossible act in itself is void
  - Contract to do an act which post-contract becomes impossible or unlawful becomes void when the act becomes impossible or unlawful
  - Threshold higher than FM – strict construction

## Supreme Court view

- In order to succeed, a party should demonstrate that the Contract performance is:
  - *"impracticable and useless from the point of view of the object and purpose which the parties had in view at the time of entering into the contract"* - Satyabrata Ghose v. Mugneeram Bangur & Co., AIR 1954 SC 44



# FM/Frustration Invocation – Court View

## Empirical Background

- Narrow view taken historically:
  - prefer interpretation which gives effect to parties' bargain
- Current situation unprecedented:
  - Ministries (Finance, New & Renewable Energy, Shipping) have issued advisories and memorandums clarifying pandemic as FM
  - While these are applicable only to contracts, sectors and subject matter covered under the memos, they are a reflection of societal perception
- Unprecedented Supreme Court order:
  - Order of 23 Mar 2020 extends period of limitation for filing legal proceedings

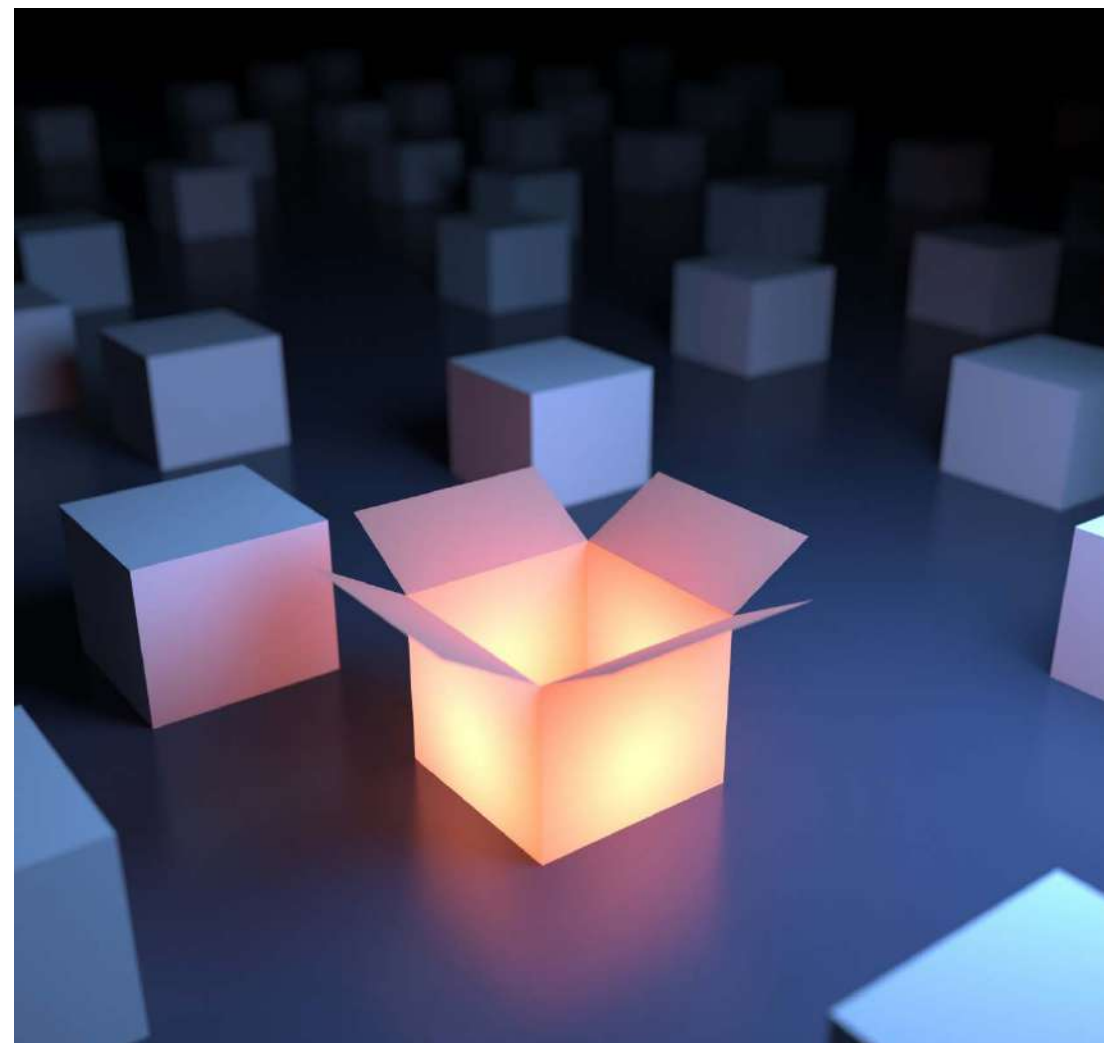
## Other material Consideration in Dispute Resolution

- Governing Law | Common law v. Civil Law
- Force Majeure Notice | When did FM event occur?
- Interpretation of FM Clauses | Burden of Proof
- Reliefs | termination, suspension, time extension, price negotiation, etc.
- Mediation, Conciliation, Arbitration, Litigation



# FM in Energy & Infrastructure Contracts

- FM Clause Scope & Ambit: Careful Review
- Some contracts provide for “epidemic” as Natural FM Event, others mention “natural calamity”
  - MOF office memorandum (19 Feb 2020) provides COVID-19 as natural calamity
- Economic/commercial hardship excluded: Delay in Resumption after Lockdown – Scaled Down Operations
- Essential Services Exemption & Views of Court
- Minimum Offtake Guarantees Enforceable
- Supply Chain Disruption
- Liquidated Damages
- Duty to Mitigate
- Compliance of Procedural Requirements
- Suspension, EOT or Termination
- Prolongation Costs
- Early Engagement with Counterparty to Minimize Cost
- Frustration?





# Roundtable Discussion & Q&A