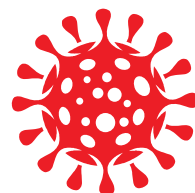
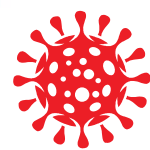




# COVID-19 POSES LEGAL CHALLENGES FOR HOSPITALITY

We bring you extracts from the FHRAI webinar with the law firm Wadia Ghandy & Co on legal challenges faced by the hospitality industry due to COVID-19.

 Kanchan Nath



Over 1000 + members actively participated in the very fruitful webinar, which allowed them to post questions through the Q&A section at the bottom of the page and most of the same were covered through the discussion. FHRAI partnered with Wadia Ghandy & Co, one of the oldest and finest law firms of India, to discuss issues arising due to the pandemic and lockdown.

The webinar was moderated by **Pradeep Shetty**, Joint Honorary Secretary, FHRAI. Speakers included **Bindi Dave**, Senior Partner – Litigation, Wadia Ghandy & Co; **Ashish Ahuja**, Senior Partner – Corporate & Banking, Wadia Ghandy & Co; **Sameer Pandit**, Partner – Litigation, Wadia Ghandy & Co; **Aarish Dhunjibhoy**, Partner – General Corporate, Competition, Pharma and Labour Law Practice, Wadia Ghandy & Co; The facilitator was **Nirav Gandhi**, EC Member, FHRAI. The vote of thanks was given by **Gurbaxish Singh Kohli**, Vice President, FHRAI. The administrator of the webinar was **Himanshu Talwar**, Assistant Secretary General, FHRAI.


Staring the discussion, **Pradeep Shetty** said, “FHRAI members have come together at a critical time, when the hospitality industry has been hardest hit due to COVID-19. In wake of this unprecedented event, there are many queries and members are looking for answers, therefore the webinar will deal with the following pertinent issues.

- Force majeure as a saviour – myth or reality: Concepts, legal position and litigation strategies on force majeure and frustration of contracts.
- Labour and employment issues: Salaries, wages, and termination and issues pertaining to obligations towards employees from the point of view of various advisories that have come in from the different states and also the NHA order at the Centre, and
- Finance and banking related matters.

**Bindi Dave** stated that often one gets confused and thinks that force majeure clause and frustration are used interchangeably, however they mean very different things. On strategy of litigation, she said, “One needs to examine the contract in each case, and also the circumstances prevailing around it, to be able to strategise. Running to courts is not the first thing I would advise. If there is some scope of sitting and negotiating, that is the first thing that should be explored. If you have all the rights in your contract, you have a better chance, but it does not mean you will succeed. In court also the matter takes a long time, as you are aware of the kind of backlog we have. It is not a quick fix solution and there is also a cost to it, irrespective of whether you are winning or losing.”

Giving a short disclaimer, **Sameer Pandit**, stated, “We will be sharing a brief overview of the legal aspects which cover force majeure, employment, among other finance-based issues, however many of such matters are fact



**Dave:** Running to courts is not the first thing I would advise. It is not a quick fix solution and there is also a cost to it 

specific and explicitly depend on the agreement that you may have. So, the discussion must be taken as a general guide but specific queries on specific factual situations would need to be analysed separately.”

He further added, “There are a lot of queries from hoteliers like what happens to your relationship with your landlord, including rent, contracts, what happens if you have a minimum revenue arrangement? Do you still get the minimum revenue that has been promised to you as hotels have been shut down. What happens after lockdown? So, most of these queries are often previewed under force majeure or frustration of contracts.”

If a party’s ability to perform its contractual obligations has been compromised on account of COVID-19 and the ensuing lockdown, the law recognises two methods by which a party can be exempted from the rigours of its contract: Invocation of the force majeure clause in the agreement; and, treating the contract as ‘frustrated’. Both the remedies, while often spoken of together, are different concepts and have distinct legal consequences.

#### UNDERSTANDING FORCE MAJEURE

**Sameer Pandit** added, “As far as force majeure clause is concerned it needs to be in the agreement as far as Indian law is concerned. You need to have an express force majeure clause in your agreement, for the concept to become relevant. If you do not have a force majeure clause, the force majeure argument cannot be used. In such a scenario you can use the frustration clause.”

A force majeure argument can be raised only if the contract contains a force majeure clause. Such clauses are negotiated between parties at the time of drafting the



**Pradeep Shetty**



**Bindi Dave**



**Ashish Ahuja**





Sameer Pandit

agreement and may differ on a case-by-case basis. While some clauses may expressly cover epidemics, pandemics, governmental action and embargoes, others may only refer to more generic terms such as acts of god and natural calamities/disasters. Typically, in order to successfully invoke a standard force majeure clause, a party will have to prove the following: COVID-19 and/or the lockdown prevented or unavoidably delayed performance of the contract; the delay or non-performance could not have been avoided despite reasonable efforts; and COVID-19 and/or the lockdown can be classified as a force majeure event under the terms of the contract.



Nirav Gandhi

### LOOPHOLES IN INDIAN CONTRACTS?

He also added, "Most contracts made in India do not use the terms like 'cover epidemics, pandemics, governmental action and embargoes', they only refer to more generic terms such as acts of god and natural calamities/disasters. In such a scenario you need to make an argument to show that COVID-19 and lockdown does amount to an 'Act of God.'"

### IMPORTANCE OF INVOCATION

In addition to satisfying the above conditions, he added that it is important that the party will also have to strictly follow the invocation process set out in the agreement. This will usually require the affected party to issue a written notice at the earliest opportunity informing the other party of invocation of force majeure.

### CONSEQUENCES OF FORCE MAJEURE: CONTRACT TERMINATION?

He confirmed, "In most standard clauses what you have is that if there is a force majeure event and a party is aggregable to perform its contract, or if there has been a delay in performance, such delay or non-performance will not amount to breach of the contract. This means for a short duration you will not be held to be in breach of the contract. It is important to note that a force majeure clause may often only provide temporary relief."

"There are also other aspects of invoking force majeure. Some aspects can also help you get out of force majeure; many parties have re-agreement or a contract may provide for a change of price. Invoking a force majeure clause is a right to terminate and this is quite important to understand. You will not get a blanket relaxation or moratorium from performance forever. Some clauses will set out a time limit for the period that you get the relaxation. Typically, that time limit is for 30 to 90 days. After that period the other party may have the right to



terminate that contract without giving any compensation. So, it is critical to consider this aspect before invoking force majeure, especially if you wish to preserve the contract," Pandit elucidated.

### DOCTRINE OF FRUSTRATION

On frustration, Pandit added, "Frustration is a concept covered by Section 56 of the Indian Contract Act, 1872. This section provides that if the Act to be performed under a contract becomes 'impossible' or 'illegal/unlawful', then the contract is treated as void. The key distinction between force majeure and frustration is that while force majeure grants a temporary relief to the affected party, frustration brings the contract to an immediate end. Pandit stated, "So, if you don't have a force majeure clause in your agreement and you decide to employ the doctrine of frustration, then you cannot expect the contractual relationship to continue, it comes to an immediate end." So, a party invoking the defense of frustration cannot simultaneously continue to seek the benefits of the contract. For instance, a tenant/licensee cannot avoid paying the rent/license fee and still hope to retain the premises under the doctrine of frustration.

### JUDICIAL TREATMENT AND POSSIBLE SOLUTIONS

The views of Indian courts on force majeure and frustration have traditionally been conservative. "Almost all the cases we have had in the Supreme Court and high courts have said that the concept of frustration has to be looked at narrowly. It is not enough if there has been a financial burden or if a party finds it difficult or onerous to perform. The contract must ideally be 'impossible' to perform or the situation must have been so difficult, that the contract itself has become useless from the point of view of the object of the contract. So do keep in mind that economic downturn is not a ground for invoking force majeure and frustration."

Answering the query whether force majeure or frustration of contract continue only for the lockdown or for the



entire duration when the economic impact of COVID-19 continues, Pandit responded, "During the lockdown period you have a good case for calling force majeure or frustration of contract, arguing the contract stands frustrated. Going forward, once the lockdown opens, economic impact of coronavirus continues for a period much longer than the lockdown, is not a ground for invoking concept of force majeure or doctrine of frustration."

He added, "Going forward, we feel that the courts have veered away from their traditional approach. There have been unprecedented moves from the Supreme Court and various high courts, where they have called for extending the period of limitation, extending interim orders which have been passed. All of these points indicate that the judiciary is taking a more relaxed view, especially when a lot of litigation, arising out of COVID-19 will go to court."

The Supreme Court has issued a universal order extending the limitation period for all legal proceedings in India with effect from March 15, 2020 till further orders. Similarly, several high courts have suo moto extended all interim orders passed by them and courts/tribunals under their supervision. In a few cases, courts have departed from settled commercial principles and granted relief to defaulting borrowers against invocation of pledges and classification of their accounts as non-performing assets keeping in mind the impact of the outbreak. Such moves indicate the judiciary's view that the outbreak is indeed an unprecedented event and requires extraordinary solutions. This could trigger a departure from previous precedents. There is a real possibility that force majeure cases arising out of the COVID-19 outbreak may receive a more lenient treatment from courts.

Broadly in case you are not getting revenue, you still need to pay the landlord, in case you want to keep using the premises, unless some kind of relief measures are there in the tailored agreements/contracts. In case of vendors, you may be able to defer the same, negotiate, however, if you have already received those goods or

**Pandit:** Do keep in mind that economic downturn is not a ground for invoking force majeure and frustration

taken those services, you will have to pay. On the query from Shetty, can you really force an industry to pay if there is zero revenue, as per MHA order? The industry on one hand has been disabled from doing business and on the other hand they are expected to pay employees. What does MHA entail? **Aarish Dhunjibhoy** said, "We are a country and a judiciary, which has since time immemorial, always been pro employee, keeping the humanitarian grounds in mind. Violation of the disaster management Act as well as pandemic acts can lead to criminal prosecution for employers in case of non-compliance."



Gurbaxish Singh Kohli

**Ashish Ahuja** said, "On reliefs that have come though GST, TDS is almost like providing some Working Capital to the country on a nine per cent interest instead of 18 per cent. It's basically asking people to come back and that they can pay TDS and GST to the government a little later. On RBI, he said that they have allowed postponement of your EMI and installments, installments include the interest for a period of three months. So, this will allow you to keep some cash in



Himanshu Talwar

**Dhunjibhoy:** We are a country and a judiciary, which has since time immemorial, always been pro employee

hand at the moment. The downside is the interest continues to accrue, so it would be advisable to pay these installments mid-way. A lot needs to be done by the government and RBI and it requires numerous representations to be made to them."

**Pandit:** If the force majeure event continues for longer than specified time, the other party is entitled to terminate