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About CRCLG...

Taking the legacy of standing distinct in the field of academic excellence in legal education, Army Institute of Law, Mohali, launched the Centre for Research in Corporate Law and Governance (CRCLG) in 2018 to provide to its scholars, a deep insight into the contours of corporate conundrums.

CRCLG, as a multi-faceted functional body, looks forward to conduct workshops, panel discussions, seminars, conferences, and guest lectures by the leading and eminent scholars from the legal field. It effectively deals with the discipline, balances and imbalances of corporate law exhaustively to provide to the readers a holistic understanding of the subject and matters connected and incidental thereto. It shall work promptly to promote and provide:

- comprehensive research; preparing the students with analytical skills to critically evaluate legal provisions of corporate law & governance.
- in-depth study of corporate law and governance interwoven with its economic, business and legal context with particular regard to how corporate law and governance mechanisms facilitate or inhibit economic activity.
- to provide a new way of thinking about the growing challenges in corporate law and how to respond to them.

Dealing with the traditional issues and the contemporary ones, the newsletter shall give the reader an opportunity to fathom into the corporate world.

FORCE MAJEURE: A FLEETING ANALYSIS

DIPSA PRASANTH & RITUPARNA RAY
(2nd Year)

INTRODUCTION

The world has come to an anomalous standstill with the unforeseen outbreak of corona virus, creating a paralysing effect on the global economy. One amongst the prompt sequels of the declining global and domestic market was on the contracts and agreements made. Contracts are the *sin qua non* of any commercial activity and Sec 37 of the Indian Contracts Act, 1872 (hereinafter referred to as the 'Act'), stresses on the obligation of the contracting parties to carry out their respective assurances. But, with the menacing global pandemic and countries resorting to strict lockdown, the parties are finding it hard to effectuate their obligations whereas for others the performance seems impossible in totality.

DOCTRINE OF FRUSTRATION

A contract enforces obligations recognized by law and these obligations may be affected by unforeseen or supervening events, which are in turn unexpected or incapable of being known beforehand by either of the contracting parties. [1]

This then relieves the parties of their contractual obligations. The Doctrine is codified under Section 56 of the Act, and even though it isn't defined specifically, it encapsulates the essence which states that 'an agreement to do an act impossible in itself is void'. [2]

IMPOSSIBILITY OF PERFORMANCE

Impossibility of performance is not just confined to physical impossibilities. In the case of *Satyabrata Ghose v. Mugneeram Bangurn*, it was pointed out that the term 'impossible' has not been used in Section 56 of the Act to mean physical or literal impossibility.

Performance might not be literally impossible but it may be impractical and useless. Furthermore, if a supervening event leads to a change of circumstances that totally disturbs the very foundation or principle upon which the parties rested their bargain, a conclusion can be drawn that the promisor finds it impossible to carry out the act that was promised.

Thus, if the object of the contract is lost, the contract is frustrated.

FORCE MAJEURE - CONCEPT AND INDIAN JURISPRUDENCE

Force majeure meaning, 'superior force' in French is a concept first propelled in the case of *Taylor vs. Caldwell* [3], relaxing contractual

obligation of parties in the occurrence of an unforeseen event.

Force majeure clause is defined by the Black's law dictionary as, "A contractual provision allocating the risk if performance becomes impossible or impracticable, esp. as a result of an event or effect that the parties could not have anticipated or controlled." [4]

This concept does not have a specific clause or definition in Indian law, but is partially covered through Sec 32 of ICA.

Essentials of force majeure are:

1. Occurrence of an unforeseen event, or
2. The parties to the contract did not anticipate the occurrence of such an event, or
3. The event made the performance of the obligation impossible, or
4. Burden of proof lies with the affected party claiming relief under force majeure.

CAN THE PANDEMIC OF CoVID-19 BE CONSIDERED AS A FORCE MAJEURE EVENT?

To ascertain whether the pandemic of CoVID-19 measures up to a force majeure event, the following issues need to be taken note of :

1. Whether or not a force majeure clause is included in a contract.
2. Whether the force majeure clause has taken events such as pandemic/epidemic into account in express terms.

3. Whether the outbreak of CoVID-19 directly affects the performance of the contract thus rendering it impossible.

4. Whether all the reasonable and prudent steps and precautions were taken to ensure the discharge of contractual obligations despite the occurrence of the supervening event.

If all the above issues stand applicable then the pandemic of CoVID-19 may be covered under a force majeure event subject to terms and conditions of the contract.

FORCE MAJEURE - A GUIDE

Due to the strict lockdown imposed by the government, activities involving manufacturing, supply, delivery, construction, etc (other than essential services) are considered illegal and thus any delay or reversion in executing the contractual obligations can be deemed as a 'force majeure' event.

A force majeure clause cannot be implied in a contract, but in case a contract does not include a force majeure clause, the parties can seek relief under Section 56 of the Act by proving that the execution of the contract would be impossible or illegal. The burden of proof to establish a force majeure event lies upon the party using it as a defence for not performing their contractual obligations.

If parties enter into a contract during the pandemic of CoVID-19, then they are well aware of the situation and the risks tied to it, thus in the event of any default, they cannot claim relief under Section 56 citing impossibility.

Obligations to make payment under the contract cannot be withheld or delayed as the banking system is effectually in service and the party that defaults in this regard shall be held liable to pay interest on the delayed payment and/or might face additional consequences.[5]

A force majeure event may trigger immediate termination of a contract, but the contracting parties may mutually decide to assign an additional amount of time for the execution of the contract, or to put the contract on hold until the supervening event is resolved. In case a party is facing difficulties in discharging their part of the contract due to the lockdown, the most essential step is to inform the other party of such delay by medium of a notice that would outline the nature of the supervening event and how it has hindered in the discharge of their contractual obligations; an estimated period of time by which the contractual obligations may be performed; and to apprise the other party of all the reasonable steps taken to ensure the performance of the contract.

CASE STUDY: INDIAN OIL CORPORATION (IOC)

Indian Oil Corporation, India's largest oil firm has declared Force Majeure, under the current pressing circumstances, on the purchase of crude oil from Saudi Arabia, Iraq, Kuwait and UAE, its major suppliers. Refinery run rates were cut down as there was sharp decline in the demand for fuel owing to the nationwide lockdown that was imposed. The industry saw sales dwindle 8 per cent, 16 per cent and 20 per cent in cases of petrol, diesel and aviation turbine fuel (ATF) respectively, in the month of March itself.[6] They've had to shut down at least one-fourth of processing at their refineries. Due to the drastic fall in demand of fuel, refineries cannot take any more crude and are at capacity.

Apart from IOC, force majeure has also been declared by various other companies in the industry such as, Hindustan Petroleum Corp. Ltd (HPCL) and Mangalore Refinery and Petrochemicals Ltd. (MRPL).

CONCLUSION

Visibly, the aforementioned considerations are inherently contract and fact specific.

Additionally, it is also essential to keep in mind and comprehend the commercial operations as well as the dealings of the company in the respective industry and sector, so as to grasp the extent and scope of the contractual clauses that lay out the impossibility of performance.

Furthermore, the judicial view on contracts dealing with issues involving supervening events is largely varied and diverse and depends heavily on the nature and language of the contract. The parties are thus advised to consult legal minds to run an exhaustive legal perusal of their contracts to shield themselves as well as to maintain the essence and sanctity of the contract. Keeping all the above in mind, the implications of CoVID-19 would ultimately have to be decided on a case to case basis.

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- [2]The Indian Contract Act, 1872, sec. 56.
- [3]All ER Rep 24 (1861-73).
- [4]HENRY CAMPBELL BLACK, Black's Law Dictionary 774 (1968).
- [5]Vinay Vaish, Partner, Vaish Associates Advocates, Satwinder Singh, Gaurav Varma, Sujoy Datta and Surekh Kant Baxy, India: Impact Of COVID-19 On Business Transactions Following Lockdown Frequently Asked Questions, Mondaq (Jul. 19, 2020, 10:30 am), <https://www.mondaq.com/india/litigation-on-contracts-and-force-majeure/920586/impact-of-covid-19-on-business-transactions-following-lockdown>.
- [6]IOC declares force majeure on oil purchases from Saudi, UAE, Iraq, Kuwait, The Economic Times, April 1, 2020.



DRONE REGULATIONS IN INDIA: COVID-19 RELIEF GETS A BOOST

DEEYA BARIK
(5th Year)

“Drones overall will be more impactful than I think people recognize, in positive ways to help society.”
-Bill Gates

INTRODUCTION

As the COVID-19 pandemic continues to impact India, there has been an increased need for social distancing along with the use of novel technologies that can support government entities during the national lockdown and enable them to gain an achievement over this pandemic.

Technological advancements have been following an exponential growth curve. From the internet to electric vehicles, we might be entering a golden age of technology advancement. The world of Drones is no exception. Drones can be termed as unmanned aircraft i.e. an aircraft without any human pilot on board. There are two major subsets of drones such as Unmanned Aircraft Vehicles (the “UAVs”) and Remotely Piloted Aircraft (the “RPAs”).

Drone Technology has the ability to decrease the requirement for the physical presence of individuals and remotely undertake conventional operations in such a manner that no human contact takes place.

REGULATIONS - THE KEY TO UNLOCKING THE FULL POTENTIAL OF DRONE-BASED RESULTS

The usage of drones can either be for commercial or military purposes. In India, the commercial usage of drones came into public knowledge when a Mumbai based Pizza store used drones to deliver pizza.[1] Earlier, drones were used by the only military, para-military, and government agencies. The commercial uses of drones persuaded the government to formulate guidelines for usage. Till the guidelines were in place, Directorate General of Civil Aviation (the “DGCA”) vide its October 2014 order banned the use of RPAs by civilians due to the threat of a terrorist attack using drones and threats to privacy. DGCA pursuant to the circular dated August 2018 introduced Civil Aviation Requirements (the “CAR 1.0”) for the civil operations of RPAs.

CAR 1.0 was introduced under the provisions of Rule 15A and 133A of the Aircraft Rules, 1937, which detailed the operational requirements for civil uses of RPAs, Unique Identification Number (the “UIN”), and Unmanned Aircraft Operator Permit (the “UAOP”). CAR 1.0 also introduced an all-digital process for registration, operation, and monitoring of drones known as the Digital-Sky Platform. The Drone Regulations appeared to have addressed the requirement for a comprehensive regulatory

framework with features like No Permission No Takeoff (NPMT) and the Digital-Sky Platform, however, the system lacked pragmatism in numerous aspects.

NPMT compliance had laid down some hardware and software needs for drones that ultimately caused problems for international manufacturers as they were reluctant to make hardware tweaks for a particular market. The restrictive nature of the regulations resulted in a lack of investments in the domestic drone market. It further proved to be a hurdle for local government authorities during the COVID-19 pandemic when a prior approval was required in spite of the emergency requirements.

GOVERNMENT AUTHORISATIONS FOR RELIEF USING DRONES (GARUD)

Finally, in May 2020[1], keeping the pandemic in mind, the Ministry of Civil Aviation (the “MoCA”) and the DGCA, launched the GARUD portal. This is a welcome move by the authorities, that fast tracks the process of granting exemptions to government agencies across India for conducting COVID-19 relief operations via RPAs. The government released an Exemption Notice, for granting conditional exemptions to government agencies from certain compliances for operating RPAs as applicable under the current drone laws.

ROLE OF AUTHORISED ENTITY

The union government, state government, district administration, or any other government institutions (“Authorised Entity”) are the only ones covered under the Exemption Notice. They will be entirely responsible for the safety, control, and overall supervision of the drone and its operations. Further, drone operations that can be undertaken are limited to photography, surveillance, and information dissemination. For grant of exemptions, the Authorised Entity can submit an online application as prescribed in Form A[2] on the GARUD portal along with all the vital declarations and documents (Form B). The Exemption Notice enables the Authorised Entity to not only operate its drone but also allows it to engage with a third-party drone service provider (“DSP”) for operating the drone for permitted uses. However, the capability assessment and security verification of the DSP shall be the sole responsibility of the Authorised Entity. Also, the details of every drone flight or any related incident or accident must be uploaded on the Digital Sky Platform within 7 days of flight undertaking.

CONDITIONS TO BE FOLLOWED

The Exemption Notice also detailed certain conditions that have to be followed by the Authorised Entities for the RPAs and its operation.

Some of the key issues being that the RPA must have a UIN issued by DGCA, shall not exceed a total weight of 25 Kgs and shall restrict to a height of 200 ft above the ground limit. It also prohibits the drone from picking, dropping, spraying, or discharging any substance, thereby ultimately limiting the use of tech from reaching its maximum potential and restricting numerous relief-based use cases that could have been fetched using drones. The drone being used for relief work must be mandatorily equipped with a return to home feature, which may be a difficulty considering many drones currently available for use in India may not have this feature by design.

CONCLUSION

Government authorities in India have extensively sought the help of drone service operators for numerous operations in their fight against COVID-19. Drone companies have played a vital role in offering their technology solutions to state authorities in order to expand the scope and coverage of their

operations within their respective jurisdictions. The COVID-19 crisis can be regarded as an opportune time for government authorities to test the activeness of the Indian drone industry. In order to give the industry a little boost, it is recommended that the Drone Manufacturing should also be classified under the essential goods manufacturing category.

Overall, it is a progressive step that will not only help in disaster management but will also offer an opportunity for private sector participation.

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IBC AMENDMENTS: THE COVID-19 IMPACT

MANNAT MEHTA
(5th Year)

The Global COVID-19 pandemic and its consequential lockdown has had a ripple effect on the economy and on the businesses of the Indian citizens and people from across the world. To mitigate the impact of the global pandemic, the Central Government has made several changes upon the Insolvency and Bankruptcy Code, 2016 and its adjudicatory processes which will have wide-ranging ramifications on the insolvency laws of India.

The Insolvency and Bankruptcy Code 2016, was enacted with the primary object of consolidating and amending laws on re-organization, insolvency resolution of companies in a time bound manner for maximization of value of assets, availability of credit and balance the interests of all the stakeholders. In wake of the global pandemic and its effect on businesses, the Central Government vide Notification dated March 24, 2020 increased the pecuniary jurisdiction for an insolvency petition under the Code from rupees one lakh to rupees one crore. Section 4 of the IBC specifies Rs 1 Lakh as the minimum default amount basis which a petition under the IBC may be filed. Subsequently, the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 dated June 5, 2020, was promulgated via

which sections 7, 9 and 10 were suspended of the Code. The primary object behind the Ordinance is first to protect the interest of the debtors who have experienced severe economic distress from being pushed into insolvency and secondly to exclude the defaults arising on account of these unprecedented circumstances. In light of the Ordinance, what constitutes an event of “default” also gained unparalleled prominence.

Accordingly, the Ordinance has been introduced by making amendments to the Insolvency and Bankruptcy Code, 2016. Section 10A has been inserted in the IBC, restricting filing of any application for initiation of the corporate insolvency resolution process (“CIRP”) of a corporate debtor (being a company or a limited liability partnership) for any default^[1] arising after March 25, 2020, for a period of six months or such further period, such further period being “Specified Period”^[2], not exceeding one year from March 25, 2020, as may be notified in this behalf. While the preamble of the Ordinance stipulates that the Ordinance has been introduced in light of business disruptions caused on account of Covid-19 and the consequent inability to find adequate number of resolution applicants to rescue corporate debtors, no rationale has been provided for this permanent prohibition. This approach, however, does take away the possibility of extended disputes on the cause of

default.

Furthermore, a proviso has also been inserted in section 10A which specifies that no application shall ever be filed for initiation of CIRP of a corporate debtor for the said default occurring during the Specified Period, meaning that, CIRP cannot be initiated on the basis of a default during the Specified Period, even if the default is continuing after having occurred during the Specified Period.

Apart from that, a non-obstante clause has also been inserted in to section 66 which deals with fraudulent trading or wrongful trading, to give protection to the directors of a corporate debtor. Accordingly, no application can be filed by a resolution professional under sub-section 66(2), in respect of such defaults against which initiation of CIRP is suspended under Section 10A of the IBC.[1]

Additionally, for computation of the time-limits for activities related to CIRP and liquidation, the period of lockdown has been excluded by inserting Regulation 40C to CIRP Regulations, 2016, and Regulation 47A to the Liquidation Regulations, 2016. The NCLT and NCLAT have introduced procedural reforms to mitigate the impact of the lockdown. Regulation 40C as inserted by IBBI reads as follows: “Special provision relating to time-line: Notwithstanding the time-lines contained in these regulations, but

subject to the provisions in the Code, the period of lockdown imposed by the Central Government in the wake of COVID19 outbreak shall not be counted for the purposes of the time-line for any activity that could not be completed due to such lockdown, in relation to a corporate insolvency resolution process.”

This amendment is likely to also help medium and small industries who have been hit the hardest by COVID-19. However, on the flip side, this amendment will adversely impact the ability of operational creditors to initiate CIRP, since the minimum default amount is now ten times higher than the previous minimum default limit. Once the economy sails through the slowdown caused by COVID-19, the government should ponder upon reducing the limit to a lower amount, so that IBC does not merely remain as a toothless tool at the hands of operational creditors.

REFERENCES

[1] “default” under the IBC means, “non-payment of debt when whole or any part or installment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be.”

[2] Section 2 of the Ordinance

[3] Section 3 of the Ordinance.

'LANDING' OF AVIATION INDUSTRY DURING COVID-19 CRISIS

OMVIR SINGH
(4th Year)

All industries have been severely impacted by the incumbent COVID-19 crisis, but the disruptions brought about by the crisis in the aviation industry are thought to be even more noteworthy than the consolidated crisis of 9/11 and the global financial crisis of 2008. Earlier, on March 23, 2020 the Government of India, which acts through DGCA, had decided to suspend the operations of all the domestic flights until May 25, 2020 and all scheduled international commercial passenger services until August 31, 2020. This has been done through various orders to all airline operators and a request dated March 23, 2020 under Section 88(1) of the Aircraft Act, 1934.

The cancellation of bookings is far exceeding the forward air travel bookings. Demand for air travel is drying up in unprecedented manners with no hope of returning to normalcy. Leave apart booming, Aviation industry was the one which was already suffering, and the COVID-19 crisis has only accelerated the bankruptcy filing process by certain big companies such as Air Mauritius and Virgin Australia.

The airline companies which have still decided to be in business have suffered huge misfortunes as well, owing to the coronavirus-constrained lockdowns keeping their fleets grounded. Many airlines like Air India, Indigo and Go Airlines have not only taken cost cutting measures such as pay cut, but have also sent the employees on leave without pay for uncertain duration.

It becomes important for the airline industry to concentrate on the horizon to effectively explore the challenges, primarily legal, financial and operational, which are in all likelihood going to surface once pandemic is over. Future flight plan for the aircrafts will be impacted by variable such as, avoiding nations that have been the focal points of the virus infection and analysing the government responses on the span and type of travel limitations and the conditions under which they may be relaxed. It is very possible that the governments around the globe may consider the imposition of certain specific restrictions (much like the security measures which were taken after increasing terrorist events in 1970's) for inbound and outbound passengers. These limitations may incorporate measures such as mandatory health screenings or certificates (form prescribed clinical practitioners) before the boarding.

Currently, the biggest concern with

respect to COVID-19 concerns the length of the crisis in the wake of government responses and the spread of the infection. For the aviation industry to come back to normalcy, unwinding the total ban of air travel both inside and outside India ought to be seriously considered. Anyways, the span of COVID-19 emergency is probably going to differ region and country-wise. International Air Transport Association, the global trade association of airlines, has recognized India amongst the priority nations that need to make a move for soothing the situation for the already battling airlines from the pressure caused because of the pandemic. There are a few businesses including Travel and Tourism which are greatly reliant on the aviation industry and jobs across numerous sectors will be affected if airlines are unable to survive the COVID-19 crisis.

Post COVID, megatrends like the sensational increase in remote working, government or association-forced impediments on air travel, increasingly prominent dependence on local-oriented supply chains and maintaining a strategic distance from unimportant ventures or non-essential travels will affect the recovery demand in the flight business and may prompt major overhaul in the administration and operation of the aviation industry. In order to sail(fly) safely through

this tempestuous time, it is of most extreme significance that the aviation companies launch a crisis management team or as its being begat by some in the business - "Plan Ahead Team". This Plan Ahead Team will be answerable for gathering forward looking insight/intelligence and give a Post COVID-19 flight plan to manage and quicken decision making.

Following are some of the challenges/contemplations which airlines companies in India may consider while planning their Post COVID-19 flight plan:

(i) Third party contractor agreements: Determination of the optimal size and measurements of their networks and fleet will hold the way in to the endurance of carrier organizations. These organizations may need to patch up their strategies vis-à-vis the air travel limitations forced by the governments to recognize routes that are destined to recover basis demand, administrative and market structure situations. The assurance of routes that are destined to recoup will figure out which fleet/route is to be recommissioned. For the courses that couldn't be recommissioned or are partially commissioned post COVID-19 and withdrawal of lockdown orders, the airline organizations may need to renegotiate/re-survey the legal risks that may emerge in accordance with

their agreements with third party contractors engaged for inter alia refueling; catering; runway construction and repair; aircraft maintenance and overhaul; crew training; and flight dispatch. Further, airline companies should likewise consider revisiting/re-negotiating their existing agreements for supporting the jet fuel prices. Most of the airlines are locked into contracts for hedging the jet fuel prices. There has been a precarious drop in the costs of jet fuel. Accordingly, the airlines companies should pay their higher supported sum for jet fuel, making hedging loses. In this specific circumstance, the current arrangements of these agreements become pertinent to decide the influence of conversations from a lawful rights point of view.

(ii) Financing Arrangements: Given that the airlines companies have suspended all their business, it would be imperative to figure out if defaults would get set off under the different financing understandings entered by the companies. Where an event of default is triggered only upon a 'deliberate' or 'voluntary' suspension of business, it might be contended that such transitory end of business because of the spread of virus is an immediate outcome of the government guidelines and consequently outside the scope of such arrangement. Further, it would be relevant to check if an occasion

of default is qualified by a necessity that a suspension of business has a 'material adverse effect' on the borrower's capacity to perform its contractual obligations. In the event that there is a significant effect on the borrower's capacity to pay, this will probably fulfil the test of 'material adverse effect'. Also, post-Covid-19 and lifting of the lockdown orders, for reasons including monetary and operational troubles, the airlines companies will be unable to commence operations in all the sectors or recommission their entire fleet. Further, it would be important for airlines companies to review the event of default provision regarding the 'cessation of business' in their financing understandings. Cessation of Business would normally incorporate events where an company 'threatens' to suspend or cease to carry on its business and subsequently, one may contend that such transitory terminations post COVID-19 and additionally lifting of lockdown orders, would comprise an 'cessation' of business. It would be reasonable for airlines companies to review their facility agreements while contemplating COVID-19 related measures and consider the effect of such measures on their financing agreements. These tests can be completed during the time of lockdown in such a manner that the provisions can be re-considered by the parties.

(iii) Airplane Lease Agreements: The

airlines companies might be required to review their aircraft lease agreements. The airline companies may consider approaching the lessors while looking for concessions corresponding to the lease obligations including 'rental holiday' by virtue of liquidity crunch subsequent to fall in ticket receipts post COVID-19. While the lessors might be entitled to reject requests for concessions on lease obligations, the commercial reality likely could be that lessors will have to assess whether supporting an airline may somehow improve their financial wellbeing in the aftermath of the crisis or whether this will just defer the end of a business that was struggling regardless. It might be advantageous to consider that the concessions which an airline company may seek from the lessors may incorporate inter alia halt for a concurred period with a concurred reimbursement schedule to recover the unpaid rents, abstinence on event of default at a cost.

(iv) Restructuring: Globally there are many airlines companies which have filed for bankruptcy. The Ministry of Finance ("MoF") had already demonstrated that it might consider suspending Section 7, 9 and 10 of the Insolvency and Bankruptcy Code, 2016 for a time of a half year to prevent companies from being forced into bankruptcy proceedings in such force majeure reasons for

default under the commercial agreements like lease agreements. Moreover, RBI has issued several circulars managing the measures to reduce the COVID-19 effect on corporate India. This might make the airlines companies to consider participating in dialogues with their creditors for preparing and executing recovery plans.

(v) Import Duties and Trade barriers: Government of India is already in process of imposing embargo on the import of goods from China. The airlines companies in India import certain parts including generator control units from China. The costs of these spare parts might be increased because of the ban forced by the Government of India. As COVID - 19 keeps on spreading over the globe, the difficulties set off by it are various and unprecedented. In order to effectively sail through this difficult and dubious condition, an thoroughly crafted and comprehensive flight plan will be crucial. Though, in these difficult times, it will be more worthwhile to be on the fastest trajectory rather than having a great plan that might quickly become obsolete. Therefore, after the pandemic is contained, government may need to give a relief package to the aviation industry along with travel and hospitality industry to help financial recovery and forestall collapse of the aviation industry.

LEGAL CONUNDRUM OF ENFORCEABILITY OF BANK GUARANTEES AND COVID-19

ZARISH ALI
(5th Year)

The outbreak of Covid 19 which is an unprecedented event has been declared as a pandemic by the World Health Organization as a result of which businesses are experiencing an enigma with regard to their commercial obligations. One of the pertinent issues which arose is whether the lockdown can be considered as a force majeure event in the context of granting injunction or invocation of bank guarantees/letter of credits.

A bank guarantee is a contract between the bank and its customer where the bank agrees to pay the monetary loss to the beneficiary of the guarantee if it is not paid by its customer in the performance of its contractual obligations. The Reserve Bank of India vide its circular issued concerning guarantees and co-acceptances entailed that "Where guarantees are invoked, payment should be made to the beneficiaries without delay and demur" and "Non-compliance of the instructions in regard to honouring commitments under invoked guarantees will be viewed by Reserve Bank very seriously and Reserve Bank will be constrained to take deterrent action against the banks." The circular further cites a judgment of the Hon'ble Supreme Court in the case

U.P. Co-operative Federation Private Ltd. versus Singh Consultants and Engineers Private Ltd "commitment of banks must be honoured free from interference by the courts and it is only in exceptional cases, that is, to say, in case of fraud or any case where irretrievable injustice would be done if bank guarantee is allowed to be encashed the court should interfere. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee."

On the other hand, a letter of credit, an instrument for promoting international trade, is an undertaking between the issuer (bank), at the request of the applicant, and in favour of the beneficiary to secure a certain amount of money in payment of goods or services.

RAMIFICATIONS OF COVID-19

Business slowdown due to Covid-19 has affected the party's ability to fulfil their contractual obligations by posing a challenge for them to timely fulfil commitments due to which there is a rise in the invocation of bank guarantees and letters of credits. The courts have certain well-settled principles for invocation of bank guarantees and do not interfere with the same so long as they confine with the terms of the bank guarantee as was reiterated in the recent Supreme Court case of Standard Chartered Bank Ltd v. Heavy Engineering

Corporation Ltd (2019 SC 1638). However, in the wake of Covid 19 pandemic and the lockdown imposed, the Courts across India have rather conflicting opinions for adjudication about whether the invocation of force majeure clause in the contract would result justifiable and grounds on which stay can be granted on the invocation of bank guarantee/letter of credits, depending on case to case basis. In a plethora of judgments, the Supreme Court has recognised and carved out two major exceptions, i.e. Fraud of an egregious character as to vitiate the purpose of the contract and irretrievable injustice to one of the parties to a contract, on account of which the courts can stay the invocation of such guarantees. However, in 1996, in Ansal Engineering Projects Ltd. vs. Tehri Hydro Development Corporation Ltd. and Anr, the Hon'ble Supreme Court adopted a third exception for invocation and added 'special equities' to include special circumstances in the list of exceptions and the same was recognised in the aforementioned 2019 case of Standard Chartered Bank. In recent times post the lockdown, special equity has been regarded as a ground for granting a stay on injunctions to a scenario causing irretrievable injustice to the parties. The Hon'ble Delhi High Court in the case of Halliburton offshore services v Vedanta Limited (April 2020 Delhi HC) allowed an

interim stay on the invocation of performance bond on the ground of 'special equity' citing exceptional circumstances, however in May 2020 the same was vacated allowing Vedanta to collect payment under various bank guarantees invoked. Thus, leaving two contrasting decisions of the Delhi High Court. Similarly, in another judgment of the Hon'ble Bombay High Court in the matter of Standard Retail Pvt Ltd. vs. M/s G.S. Global Corp & Ors. (April 2020) the court opined that Covid 19 will not constitute a force majeure event and thus, shall not be the ground to invoke Section 56, Indian Contract Act to escape a commitment in a contract by either of the parties. Standard Retail was denied relief by the court for encashment of letter of credit on their plea of the lockdown. The court held that lockdown can not be considered as a force majeure clause especially when the performance was not made impossible as distribution of steel was an essential service and there were no restrictions on its movements during the lockdown, hence would not come under the umbrella of 'force majeure'. Thus, recent pronouncements of the Hon'ble Supreme Court and the High Courts have made a paradigm shift in cases of Invocation which was otherwise constructed on well-settled principles due to the consequences of Covid-19. The cases are now adjudicated with reference to the

facts involved therein, with a more cautious route and with clear evidence of special equity, fraud or irretrievable injustice to settle different parameters for granting an injunction to the invocation of such guarantees or letter of credits. The courts have become more liberal in their approach keeping in mind the independent nature of bank guarantees and thus avoiding knee jerk reactions to their approach. Given the gravity of the pandemic and the impact on commercial performance, involvement of the Reserve bank of India clarifying the scope and extent of the discretion of banking and financial institutions can prove to be a silver bullet.



COVID-19 LOCKDOWN AND THE ISSUE OF RESIDENCE OF INDIVIDUAL W.R.T. INCOME TAX

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Section 6 of the Income-tax Act, 1961, lays down provisions relating to residential status of a person. The status of an individual as to whether he is resident in India or a non-resident or not ordinarily resident, is dependent, inter-alia, on the period for which the person stays in India during a year. Our financial year starts from 1st April and ends on 31st March. Since nation wise lockdown was imposed on 22nd March, 2020 in India, there were no international flights flying from India. Due to the suspension of the international flights, the stay got prolonged; the individuals did not even intended to do so and thus it affected the residential status of the individuals for the Assessment Year 2020-21. Section 6 of the Income-tax Act, 1961, lays down rules for the number of days of stay in India by which residential status is determined and correspondingly tax incidence arises. So, in the current situation due to this unforeseen pandemic, the individuals who got struck up due to

lockdown their status from a Non-resident can either be of shifted to ordinarily resident (ROR) or not ordinarily resident (NOR) and thus liable to pay tax as for all income that accrues or arises to him outside India & shall be so included in his total income. A resident is charged to tax in India on his income that is earned in India as well as income earned outside India. While calculating the residential status of an individual the physical stay of an individual is evaluated by their physical stay of the previous years. In the PY 2019-20, the stay of multiple individuals got prolonged due to the Covid-19 lockdown and suspension of International flights. In order to avoid genuine hardship in such cases, the CBDT has issued certain guidelines vide circular no 11 dated May 8, 2020, that for the purposes of determining the residential status under Section 6 of the Act during the previous year 2019-20 in respect of an individual who has come to India on a visit before 22nd March, 2020 and:

- (i) has been unable to leave India on or before 31st March 2020,
- (ii) his period of stay in India from 22nd March, 2020 to 31st March, 2020
- (iii) shall not be taken into account; or
- (iv) has been quarantined in India on account of novel Coronavirus (Covid-19) on or after 1st March, 2020 and has departed on an evacuation flight on or before 31st March, 2020 or,

(v) has been unable to leave India on or before 31st March, 2020, his period of stay from the beginning of his quarantine to his date of departure or 31st March, 2020, as the case may be, shall not be taken into account; or

(vi) has departed on an evacuation flight on or before 31st March, 2020, his period of stay in India from 22nd March, 2020 to his date of departure shall not be taken into account.

The circular also states that further, as the lockdown continues during the Financial Year 2020-21 and it is not yet clear as to when international flight operations would resume, a circular excluding the period of stay of these individuals up to the date of normalisation of international flight operations, for determination of the residential status for the previous year 2020-21 shall be issued after the said normalisation. The said guidelines issued by the Government are limited in nature as it is covering individuals who had come to India for a visit. The said clarification clears the position of such individuals who had come to India for a visit and whose unintended and prolonged stay is due to

lockdown and related travel restrictions, will be disregarded for determining tax residency status. Secondly, the normalisation of international flight operations is still not clear. So, it will certainly affect the residential status for AY 2021-22, the government has to work on this as well.

Thirdly and again importantly, that when companies hold virtual/online meetings and the officials of the companies attend these meetings via online mode, there is the concern that this could qualify as a place of effective management (POEM) for the company. Now "place of effective management" vide Explanation to Section 6(3) means a place where key management and commercial decisions that are necessary for the conduct of business of an entity as a whole are, in substance made. This will also require guidelines by the government and also comprehensive documentation by the companies.

REFERENCE:

[1] www.incometaxindia.gov.in/communications/circular/circular_no_11_2020.pdf

EVENTS

Special Events

- RGNUL Student Research Review (RSRR) in association with MISHI CHOUDHARY & ASSOCIATES invites submissions on the theme “ADDRESSING THE LEGAL CONCERNS OF AI: A CLARION CALL”
Submit by 26th August, 2020.
- EY- Young Tax Professional of the Year 2020. being conducted by Ernst & Young.

Sessions Taken by the CRCLG Team

- **Session 1:** 'Introduction to Corporate Law, CRCLG Society,' 'Importance of Research.'
Date: 5th September, 2019
Speakers: Mannat Mehta (5th Year) & Omvir Singh (4th Year)
- **Session 2:** Legal Research & its Imperatives- Part I
Date: February 03, 2020
Speaker: Mannat Mehta (5th Year) & Omvir Singh (4th Year)
- **Session 3:** Legal Research & its Imperatives- Part II
Date: February 04, 2020
Speaker: Omvir Singh (4th Year)
- **Session 4: Discussion on Financial Budget 2020-21- Part-I**
Date: February 17, 2020
Speakers: Omvir Singh (4th Year),
Nishant Tiwari (3rd Year), Sunidhi Singh (3rd Year)
- **Session 5: Discussion on Financial Budget 2020-21- Part-II**
Date: February 25, 2020
Speakers: Mannat Mehta (5th Year)

MEET THE TEAM



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