

NOVEL CORONAVIRUS – EFFECT ON EXISTING AGREEMENTS AND THEIR PERFORMANCE

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The impact of COVID-19 is being felt worldwide and has affected almost every business sector. Companies are facing losses and trying to cut any further loss. But where an obligation under an agreement that is part performed or yet to be performed while the consideration has been exchanged, it has become virtually impossible to perform any obligation in the current scenario. In such cases, parties privy to an agreement are trying to

trigger Force Majeure clause in an attempt to save themselves from any further obligation or cost.

Force Majeure clause gets triggered only when the events that are defined in the clause occur. However, there may be certain events that are not defined in the clause but can affect the performance of the obligations. In such cases whether Force Majeure clause gets triggered or not is a question of fact rather than law.

Force Majeure can be viewed as a saving clause where the clause protects the parties' interests even when the obligations cannot be performed. However, in order to trigger Force Majeure, there are certain conditions that have to be satisfied. An impetuous claim can lead to breach of contract as well as damages.

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INTELLECTUAL PROPERTY RIGHTS

Madras High Court refuse mandate to Prasar Bharati to stream sports broadcasts over the internet:

The Madras High Court, in its judgement in *Adithya Modi v Union of India and Ors.*, has refused to mandate Prasar Bharati to stream sports broadcasts shared under the Sports Broadcasting Signals (Mandatory Sharing With

Prasar Bharati) Act, 2007 over the internet. Instead, the Court has directed the Ministry of Information, Ministry of Sports and Prasar Bharati to consider the matter and make appropriate policy recommendations. Under the Act, any entity broadcasting signals of sporting events of national importance are obliged to share the signal with Prasar Bharati for retransmitting through their

own terrestrial networks and direct-to-home (DD FreeDish) networks.

Prasar Bharati filed petitions seeking to expand the scope of mandatory sharing of sports broadcasts in light of the increase in the mobile internet usage and the shift from terrestrial broadcasting to online streaming of sports. The Court, however, held that there is no right to demand

Bombay High Court orders YouTuber to pull down online review:

In *Marico Limited vs Abhijeet Bhansali*, a Single Judge of the Bombay High Court held that right to free expression does not include the right to disparage others. The judgement is against a vlogger, Abhijeet Bhansali, who criticized Parachute coconut oil and asked people to not buy the product. The Court observed that commercial speech is a part of fundamental rights guaranteed under Article 19(1)(a) of the Constitution but it is not absolute and social media influencers must exercise this right cautiously and ensure that their message does not harm anyone's

reputation. The nature of the social media influencers' relationship with marketers and followers/subscribers had an impact on the Court's judgment. The Court passed an interim order to take down the video. On February 14, however, vide a Division Bench judgement, the injunction was lifted and Bhansali (aka 'Bearded Chokra') was permitted to post the video subject to replacement of one line in the video and deletion of several others.

Extension of Limitation by the Indian Patent & Trademarks Office:

In light of the recent nationwide lockdown by the

Government of India, the Controller General of Patents, Designs & Trade Marks has issued several public notices extending all time-lines prescribed under various Intellectual Property Rights Acts and Rules with respect to completion of any filing of reply / document, payment of fees. Vide an earlier notice dated 16th March 2020, all hearings relating to trademarks matters scheduled between 17/03/2020 to 15/04/2020 were also adjourned, dates of which would be rescheduled in due course of time.

INSOLVENCY & BANKRUPTCY

NCLT permits inclusion of foreign subsidiaries of Videocon in the ongoing insolvency proceeding:

In Videocon Industries insolvency case, the National Company Law Tribunal (NCLT) Mumbai's bench, on February 13, 2020, ordered for inclusion of overseas subsidiary of Videocon's Oil businesses in Indonesia and Brazil as part insolvency proceedings in India. This is first time that NCLT ordered inclusion of overseas assets of a defaulter company in local insolvency proceedings. Videocon was in the first list of the 12 largest accounts that the Reserve Bank of India referred for bankruptcy in late 2016. The diversified group owes collectively over Rs 1 lakh crore to lenders. Venugopal

Dhoot, the founder and chairman of Videocon, had moved NCLT after State Bank of India invited bids in August 2019 for the group's overseas assets, which were offered as collateral for loans to Videocon entities. Dhoot opposed the sale on the grounds that they belonged to Videocon Industries' overseas arms, which were set up as special purpose vehicles to act as trustee and hold the assets on behalf of the parent company.

NCLT orders CCI to re-open investigation on Flipkart:

In *All India Online Vendors Association v Competition Commission of India*, the NCLAT has ordered CCI to reopen its investigation on Walmart-owned Flipkart

for alleged unfair business practices through misuse of its dominant position. The All India Online Vendors Association (AIOVA) had approached the CCI in May 2018, alleging abuse of market dominance by ecommerce marketplace Flipkart Internet Pvt Ltd and Flipkart India Pvt Ltd, which is engaged in the wholesale trading and distribution of books, mobiles, computers and related accessories for which CCI had provided clean chit to Flipkart in November 2018.

Insolvency & Bankruptcy Code (Amendment) Bill, 2020 passed by the Parliament:

The said amendment Bill, which was passed by the Parliament this month, seeks

to repeal the earlier Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 passed by the Government in December, 2019 amending the IBC Code. All the amendments made prior in the Ordinance have been captured as it is in the Amendment Bill. Following are some of the key highlights:

Commencement Date of Insolvency – As per the amendment, the commencement of insolvency shall be deemed from the date of filing of the application for initiating Corporate Insolvency Resolution Process (CIRP), as opposed to the existing provision whereby commencement is deemed from the date of appointment of an IRP by the adjudicating authority.

Minimum Limit for initiating IRP Process – The Bill prescribes a minimum limit of Rupees One Lakhs (default by debtor) for initiating IRP process by certain financial creditors.

Application for IRP by Financial Creditors – The Bill provides that a certain class of financial creditors such as – real estate allottees and security / deposit holders represented by a trust or an agent can only file the application for IRP provided it is filed jointly by at least 100 of them or 10% of the total creditors, whichever is less.

Prior Offences – The Bill provides security / protection to a Corporate Debtor from any attachment, seizure or confiscation of property in relation to any offences

committed prior to the commencement of CIRP.

Corona leads way for increased threshold of default for initiation of insolvency proceedings to Rs 1 Crore:

Vide Gazette Notification dated 24th March, 2020, the Central Government has raised the limit of default for initiation of insolvency proceedings under the Insolvency and Bankruptcy Code, 2016 from Rs One Lakh to Rs One Crore. This has been introduced considering the recent lockdown situation following the spread of Novel Coronavirus outbreak and to prevent bounty of litigation against medium and small-scale enterprises.

CORPORATE

Delhi HC Sets Aside Order Restraining E-Commerce Platforms from Selling Goods of Direct Selling Companies:

In July 2019, *Amway India Enterprises Pvt. Ltd. v. 1Mg Technologies Pvt. Ltd. & Anr.*, the Delhi High Court (SJ) passed an interim order putting restrain on e-commerce majors like Amazon, Flipkart and Snapdeal from selling products of Direct Selling Entities (DSE) of Amway, Modicare and Oriflame without their consent. It was observed that the goods of the DSEs being sold by the e-commerce giants had inflated MRPs and were tampered with, and that expired products were being given

new manufacturing dates and were therefore a violation of the contract with the DSEs.

The Division Bench of the Delhi High Court set aside the above order citing various reasons such as non-framing of issues, relief being far beyond the pleadings in the suit and taking into account submission on behalf of the Union of India when it was not even a party to the suits. The court also held that the direct selling guidelines (DSGs) were not meant to be treated as law and the guidelines are only as advisory in nature.

Extension of Limitation by Supreme Court:

The Hon'ble Supreme Court took *suo moto* cognizance of the issues that

lawyers are facing while filing petitions, applications, appeals before courts/tribunals due to the restrictions and lock down in place owing to the spread of Novel Coronavirus, while at the same time many of these petitions and appeals would become time barred due to the lock down if not filed within the time period. Hence, the Hon'ble Supreme Court has decided to extend the limitation period in all the proceedings across all court and tribunals in India with effect from 15.03.2020 until further orders.

Companies (Second Amendment) Bill, 2019 approved by the Cabinet:

The Union Cabinet, this month, granted approval to

amend the Companies Act, 2013 vide the Companies (Second Amendment) Bill, 2019. The Bill, which was introduced in the Lok Sabha on 17th March 2020, has been passed pursuant to the recent recommendations of the Company Law Committee which proposed decriminalisation of several compoundable offences under the Companies Act, 2013, particularly those lacking any feature of fraud or which do not involve any larger public interest.

All litigation pertaining to procedural lapses including non-filing of annual returns or financial statements are proposed to be transferred to an internal adjudicating mechanism, which is based on ensuring compliance by companies by granting

incentives. This is aimed at reducing the burden on special and commercial courts and even on the National Company Law Tribunal while simultaneously providing for an efficacious disposal of such procedural disputes. The proposed amendment also enables foreign listings on stock exchanges for Indian companies, which may boost competitiveness. However, the regulatory framework for the same is yet to be finalised by the Ministry of Finance.

Calcutta High Court on Look Out Circulars:

In a recent judgement dated 21st February, 2020, in *Mritunjay Singh v Union Of India & Ors*, the Calcutta High Court held that, "Look

Out Circulars" which are used to check whether a travelling person is wanted by the police and places restrictions on the movement of such person cannot be issued in cases of individual defaults in connection with commercial transactions as such defaults are not a threat to the economy. Therefore, the Court suggested that such circulars should not be used rampantly as a substitute of execution proceedings as it can be misused to hinder personal liberty of citizens merely on the ground of commercial loans being defaulted. The Court, directed the Immigration Authorities not to restrain the writ petitioner from leaving the country on the basis of the LOC in question.

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