



'FORCE MAJEURE' HIRING OF LAWYERS POST COVID-19

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Introduction

The 2019 novel coronavirus (COVID-19) is attacking the health, financial welfare, social order and political stability of nations across the globe. In a very short duration, the coronavirus pandemic has sparked major changes in the legal industry. Owing to the dynamic situation that the pandemic has given rise to, we are witnessing corresponding reactions and response from business entities that are opting to recruit lawyers. It is predicted that there will be many areas of professional services that will suffer over the coming months. However, there is expected to be a steady workflow for lawyers because a lot of legal work is counter-cyclical or a business necessity for clients. Market difficulties, regulatory responses, stimulus programs, changes in employment, and other legislative obstacles provide potential sources of demand for legal services.

From advising employers on how to respond when an employee tests positive for coronavirus to counselling clients about their area of practice, lawyers are working around the clock to help clients navigate the uncharted territory of COVID-19. There is plenty of work heading towards law firms and the industry overall. This could include

assisting clients seeking to address supply chain disruptions or those who require guidance on an out-of-court debt restructuring amid financial challenges. The cancellation or postponement of major conferences, sporting leagues and other large events will also generate legal work that will extend beyond the timeline of the pandemic. A post-Covid world is bound to be packed with delays, payment defaults and a failure or refusal to perform contractual promises and stipulations. Long after this health crisis is over, courts will be grappling with an endless number of disputes ruling on whether parties are excused from the performance of their contractual obligations due to this health crisis. The litigation finance industry is gearing up for a steady stream of coronavirus-related activity.

Whatever might happen of COVID-19 and the declared nationwide lockdown, companies are going to have to face the harsh reality of receiving little to no revenue in the foreseeable future. They are going to have to make some bold and risky decisions regarding finances required to honour contracts with employees, vendors or third parties? Covid-19 has triggered a shortage of raw material, disturbed consumption behaviour and influenced the stipulated deadlines negatively. This has led to a situation where companies are now exploring a route to avoid their contractual obligations. The term that has recently assumed relevance in the contractual context nowadays is "Force Majeure".¹ How this term will be interpreted in a contract owing to the pandemic is circumstantial for individual contracts and

¹ *What is force majeure? The legal term everyone should know during COVID-19 crisis.* (2020, May 4). The Economic Times.

<https://economictimes.indiatimes.com/small-biz/legal/what-is-force-majeure-the-legal-term-everyone-should-know-during-covid-19-crisis/articleshow/75152196.cms?from=mdr>



cases. This clause in a contract might typically include an exhaustive list of events such as acts of God, war, terrorism, earthquakes, hurricanes, acts of government, explosions, fire, plagues or epidemics or a non-exhaustive list wherein the parties simply narrate what generally constitute force majeure events and thereafter add "and such other acts or events that are beyond the control of parties". It is usually found in various contracts such as power purchase agreements, supply contracts, manufacturing contracts, distribution agreements, project finance agreements, agreements between real estate developers and home buyers, etc. This provision is important for businesses as it relieves the parties from performing their respective obligations and consequential liabilities, during the period that force majeure event continues. All the types of dispute resolution & litigation will require parties, lawyers and ultimately courts to construe contracts to ascertain whether there is an exclusion clause that covers the consequences of an epidemic such as COVID-19.

Sectors That Will Engage Lawyers During And Post COVID-19

1. **Hospitality & Tourism:** While most sectors are facing challenges, some sectors directly affected by physical-distancing measures (such as airline, hotel and retail) are experiencing unprecedented declines in demand. Hotels & restaurants are hiring lawyers for reviewing their current insurance policies to ascertain the nature and extent of cover for business loss on account of the current pandemic and the lockdown. Most of the policies cover physical damage of the property on account of Act of God but do not cover a pandemic situation or government
- declared lockdown situation. Businesses are also looking to examine their liabilities in case any guest contracts COVID-19 within the hotel premises and makes a claim against them. Steps that can be taken to avoid them, for example, waiver/relinquishment forms for guests at the time of check-in and its legal implications are being considered. Other technicalities such as licenses of the hotels that require renegotiation also call for legal service demand.
2. **Commercial Real Estate & Lease Agreements:** It may be inappropriate to say that tenants must not pay rent at all, because they continue to use the premises by not completely vacating the premises. Neither party is benefiting from the premises in the manner that was agreed upon. Tenants are requesting for rebates and deferment while the owners want the contractual obligations to be carried out unhindered. The agreements are going through a phase of ongoing and unending renegotiations. Naturally, a huge amount of cases are going to proceed to litigation or get referred to an arbitrator. This will require hiring legal representatives for consultancy.
3. **Infrastructure:** The restrictions on construction activities, decreased workforce and supply chain disruptions will have a cascading impact on contractual obligations relating to infrastructure projects. Complex & implicating contractual arrangements with independent contractors are very common in the infrastructure sector in India. Lack of revenue & backup cash and no government relief in sight, it is difficult for the private sector to stay afloat. The central government has vaguely directed the employers in all the industries to pay their workers without any deduction during the period of lockdown.



States have issued their varied versions of this direction. All the legislative orders to the private sector are based on the colonial era Act- the Epidemic Diseases Act, 1987 or Disaster Management Act, 2005. Due to these perceived Catch-22 situations and ambiguous orders, businesses are dialing up lawyers to ascertain what decisions they can or cannot take relating to their workforce while being equally careful of the collateral damage & additional compensation. As large infrastructure contracts have multiple stakeholders, a developer needs to ensure that subcontracts have adequate back to back arrangements to mitigate the risks & to avoid prolongation costs.

4. **Healthcare:** As Indian healthcare professionals are fighting this health crisis, numerous disturbing incidents of violence against healthcare professionals have come to light. An immediate response to violence against healthcare professionals is usually prosecution under harsh laws which requires lawyers. Other concerning factors that have emerged are regarding access to ventilators and prohibitive costs in private hospitals. These correspond to identified reasons which include high cost of procedures, medication, and hospital stays, inconsistent quality of treatment based on patient's ability to pay, perceived corruption of the doctor-pharmaceutical company nexus, among others for which legal remedies are sought, especially nowadays when the entire country is relying on our healthcare ecosystem.

5. **Education:** Whether institutions can be held liable for students, faculty and staff members contracting COVID-19 on campus is one of the major factors hindering reopening plans, but that's not the only legal obstacle that they will have to duck. Colleges and universities

have to confront the fact that they too are employers. They're going to have to deal with similar employment issues as the rest of the employers. There are a plethora of legal issues that educational institutions might have to face post lockdown. Like students, faculty and staff too will be concerned about their safety on campus. There will be contract complications due to the continuous evolution of administrative methods and adaptation to the digital age. Lawsuits demanding partial refunds on fees are anticipated too. Most educational institutions will have to hire legal advisory teams to tackle these obstacles proactively.

Dispute That Will Require Lawyers Across All Sectors

Employment-related disputes related to rehiring, layoffs and furloughs are likely to spike in the near term. Reviewing contracts for Force Majeure provisions and property damage coverage in insurance policies are getting particular attention. Additionally, a nosedive by the economy might generate much more activity in the bankruptcy & insolvency space. Risk advisory consultants are also expected to be in demand across all spheres and sectors, especially around business impact assessments. They will be hired to measure the real and immediate impact of this crisis, as well as putting the right plans and strategies in place for the future. It is also natural to expect that litigation and restructuring practice areas will do well while transactional practices will suffer.

Renegotiation: However, in cases where the performance has become difficult but not impossible, parties could consider using this opportunity to renegotiate the



contract instead of suspending the contract altogether due to viability and feasibility. Some parties may also consider this as an opportunity to put an end to a bad bargain by assessing their options to terminate the contract.

Dispute Resolution: Ultimately, if a Party fails to agree on the event being a Force Majeure event, or fails to comply with the applicable provisions of the Agreement, parties will need to look into the contract and assess legal risk and remedies. That might lead to intervention by a mediator or arbitrator to settle the dispute arising out of such disagreement.

Supply Contracts: It is observed that a lot of supplier contracts are one-sided (the force majeure clause applies only to the supplier and not the buyer). The buyer's only obligation is to collect goods and pay. Therefore, the only party who can claim protection under force majeure is the supplier. It may turn very problematic if orders have been placed in anticipation of costly material, for instance, steel & cement by a real estate developer. The chances of buyers not showing up or renegeing on contracts are very high. This could result in a string of bankruptcies working backwards along the supply chain. Disputes in concession agreements with port or airport authorities are also likely to follow.

Conclusion

We are faced with a pandemic and the legal industry happens to be in the eye of the storm. Businesses, individuals and institutions are turning to their lawyers for

steering them through these testing times. Uncertainty is everywhere and we are all having to adapt to the change. Lawyers who have been slow to adapt to the use of technology must learn to embrace it. Once the dust begins to settle and the full economic impact is felt, there will be a wave of litigation that would create a great deal of work for law firms. Technology, such as video conferencing, will enable them to stay more connected to their clients until things return to normal. We are all suffering the consequences of the world's collective unpreparedness for the COVID-19 crisis. As writer and philosopher George Santayana wrote, "Those who cannot remember the past are condemned to repeat it."² Once this phase passes, lawyers and law firms must learn from the actions taken in response to this crisis to improve for the future. Business plans must be upgraded and battle-tested.

With growing disputes between contractual parties due to the pandemic, a rare opportunity will be available to legal practitioners for advising clients to arrive at an amicable resolution or litigation. It is needless to say that due to all the adversities brought about by Covid-19, prospective clients and potential litigants will be looking for legal counselling & conflict strategy making. Advice and guidance by those having specialized knowledge in dispute resolution may be looked at favorably for cost and time-saving. This will apply particularly for mediation, out of court settlement, negotiation, conciliation and even time-bound arbitration. At a time when millions are fighting to survive the illness, financial hardship, political upheaval, and

² *6 ways lawyers should adapt for their clients and themselves during the COVID-19 crisis.* (2020, March 25). Legaltech News.

<https://www.law.com/legaltechnews/2020/03/25/6-ways-lawyers-should-adapt-for-their-clients-and-themselves-during-the-covid-19-crisis/>



other existential threats, lawyers must take the role of mediators and counsellors to resolve issues with a spirit and not prolong the crisis unnecessarily.

