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EBULLITION OF COVID-19: CORONA VIRUS & FORCE MAJEURE

THE INTERPOLATION

Researchers first isolated a corona virus in 1937. They found a corona virus responsible for an infectious bronchitis virus in birds that had the ability to devastate poultry stocks. Scientists first found evidence of human corona viruses (HCoV) in the 1960s in the noses of people with the common cold. Two human corona viruses are responsible for a large proportion of common colds: OC43 and 229E. The name “corona virus” comes from the crown-like projections on their surfaces. “Corona” in Latin means “halo” or “crown.” Among humans, corona virus infections most often occur during the winter months and early spring. People regularly become ill with a cold due to a corona virus and may catch the same one about 4 months later. This is because corona virus antibodies do not last for a long time. Also, the antibodies for one strain of corona virus may be ineffective against another one.

Covid-19

In 2019, the Centers for Disease Control and Prevention (CDC) started monitoring the outbreak of a new corona virus, SARS-CoV-2, which causes the respiratory illness now known as Covid-19. Authorities first identified the virus in Wuhan, China. The World Health Organization (WHO) has declared a public health emergency relating to COVID-19. The first people with COVID-19 had links to an animal and seafood market. This fact suggested that animals initially transmitted the virus to humans. However, people with a more recent diagnosis had no connections with or exposure to the market, confirming that humans can pass the virus to each other. Information on the virus is scarce at present. In the past, respiratory conditions that develop from corona viruses, such as SARS and MERS, had spread through close contacts.

Corona Virus & Force Majeure

An unforeseeable circumstance, such as the recent outbreak of the corona virus, which prevents a party from fulfilling its contractual obligations, may fall within the definition of “Force Majeure”

in certain contracts. Force majeure clauses are specific to each contract and operate as a risk allocation mechanism in order to govern situations which are beyond the control of the parties, such as the outbreak of war, or natural disasters. Whether the COVID-19 outbreak constitutes a force majeure event depends on the specific wording and scope of the provision in each contract.

For example, if the force majeure clause:

- expressly specifies epidemics, diseases or public health emergencies, then COVID-19 likely qualifies as a force majeure event;
- covers “acts of government,” then travel bans may be covered.

The party seeking to invoke force majeure usually must show a causal connection between the event, i.e., the outbreak of COVID-19, which made it effectively impossible to perform its contractual duties. The clause may also operate to excuse or suspend performance of a particular contractual duty.

Historically, courts have read force majeure provisions narrowly. For example, in 2015, a U.S. Court of Appeals held that the Chinese government’s decision to flood the market with cheap solar panels was insufficient to trigger a force majeure provision in a take-or-pay supply contract. The effect of that decision was a multibillion-dollar liability to the plaintiff. Courts have also rejected the application of force majeure provisions to unexpected business interruption caused by the September 11 terrorist attacks, sudden changes in market conditions, union strikes and unseasonable weather. The possibility of the virus triggering a Force Majeure event increases as the Corona virus continues to spread. Depending on the status of the transaction, parties should be aware of the following to ensure that they are comfortable with the terms of their contracts should Corona virus trigger a Force Majeure event.

Non-Executed Contracts

If you are in the midst of negotiating a contract, all parties will want to safeguard their exposure to schedule delays and cost increases. In the event that Force Majeure is triggered, a party may want to include a cap for cost overruns or limit relief to scheduling changes. If parties agree to limit relief to a scheduling change, they may need to take into account other deliverables that could have a “waterfall effect” to make certain that all agreements are acting cohesively. Additionally, if you are not the party responsible for procuring materials or constructing the project, you will want to ensure the other party is required to exercise reasonable diligence to avoid, prevent, or minimize the impacts to Force Majeure.

Executed Contracts

If a contract has been executed, parties should review the Force Majeure language to see if and when an event could be triggered. In terms of public health emergencies, some contracts may allow for Force Majeure to trigger when the project is merely impacted, while others may require a

formal declaration from a governmental body. It is important for parties to understand the circumstances under which they can declare a Force Majeure event, so they can negotiate the best terms possible going forward. Additionally, parties should review notification processes and deadlines to ensure that they are not missing important milestones that could preclude their ability to claim Force Majeure. Exercising reasonable diligence and being proactive during these events can help minimize the impact on your project. While it is easy to gloss over Force Majeure as merely “boilerplate” provisions for extremely rare occurrences, Corona virus is a reminder that such Force Majeure events do happen, and are one more factor to consider while negotiating contracts. In the commercial contract setting, this can be contained with proactive, thoughtful actions, and by thoroughly understanding your agreements.

THE CONJECTURE

“Desperate Times Call For Desperate Measures”

At least 80 cities in India have decided to impose some form of lockdown until March 31st. These cities have agreed to suspend public transportation like trains, metros and bus services. Most states have shut down malls, movie halls and non-essential establishments. Only essential services like gas stations, pharmacies, police stations will be allowed to operate during the lockdown. Can a single day of "encouraged" social distancing save a country of 1.3 billion people from the corona virus? That is at least what the Hon'ble Prime Minister of India Shri. Narendra Modi saw as the first step in combating the virus in India.

On Sunday, 22nd March 2020, millions across India self-quarantined themselves in their homes after PM Modi appealed to citizens to observe March 22 as “*JANTA CURFEW*” or a voluntary "public curfew" day, to demonstrate support both for social distancing and the nation's medical community. Social media was flooded with posts of Indians coming on to their balconies on Sunday to express gratitude for doctors, nurses and operators of essential services.

At this juncture all we can do is take precautions and self-quarantine ourselves and focus on our health, because as there is no cure available for this disease at this point of time. As they say “*Aap Swasth, To Desh Swasth*”. The very thing pertaining to contracts and other dealings can be dealt on with later when we our successful in annihilating this pandemic, because ultimately, “**HEALTH IS WEALTH**”.

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