

CONTRACTS – PREDICAMENT AND PERFORMANCE AMIDST PANDEMIC



COVID-19



United Nations

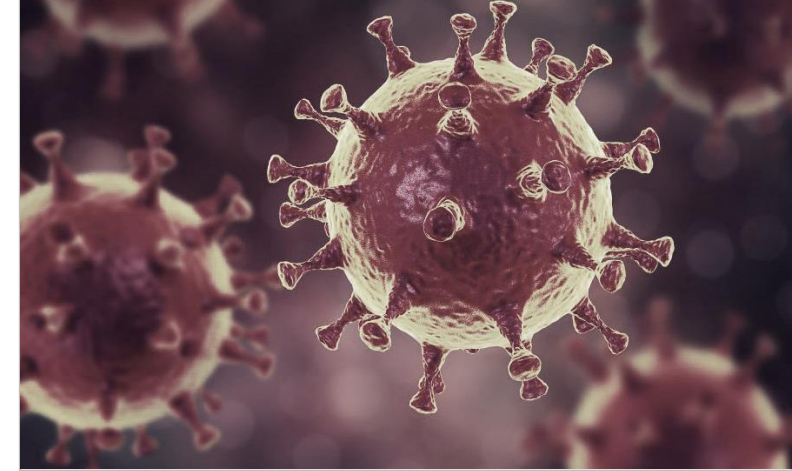
**The worst crisis humanity
has faced since World War
II – United Nations**



**A global health crisis
without precedent in living
memory - OECD**

Other Crises that World Faced

- The Black Death (1347-1351)
- Cholera Pandemic (1817-1824; 1826-1837 and 1846-1860)
- Spanish Flu (1918- 1920)
- The Great Depression (1929-1930)
- WORLD WAR II (1939-1945)
- SARS (2002-2003)
- Swine Flu (2009-10)
- Ebola (2014-2016)



COVID-19

1

Unfolding into the most severe economic recession in nearly a century.

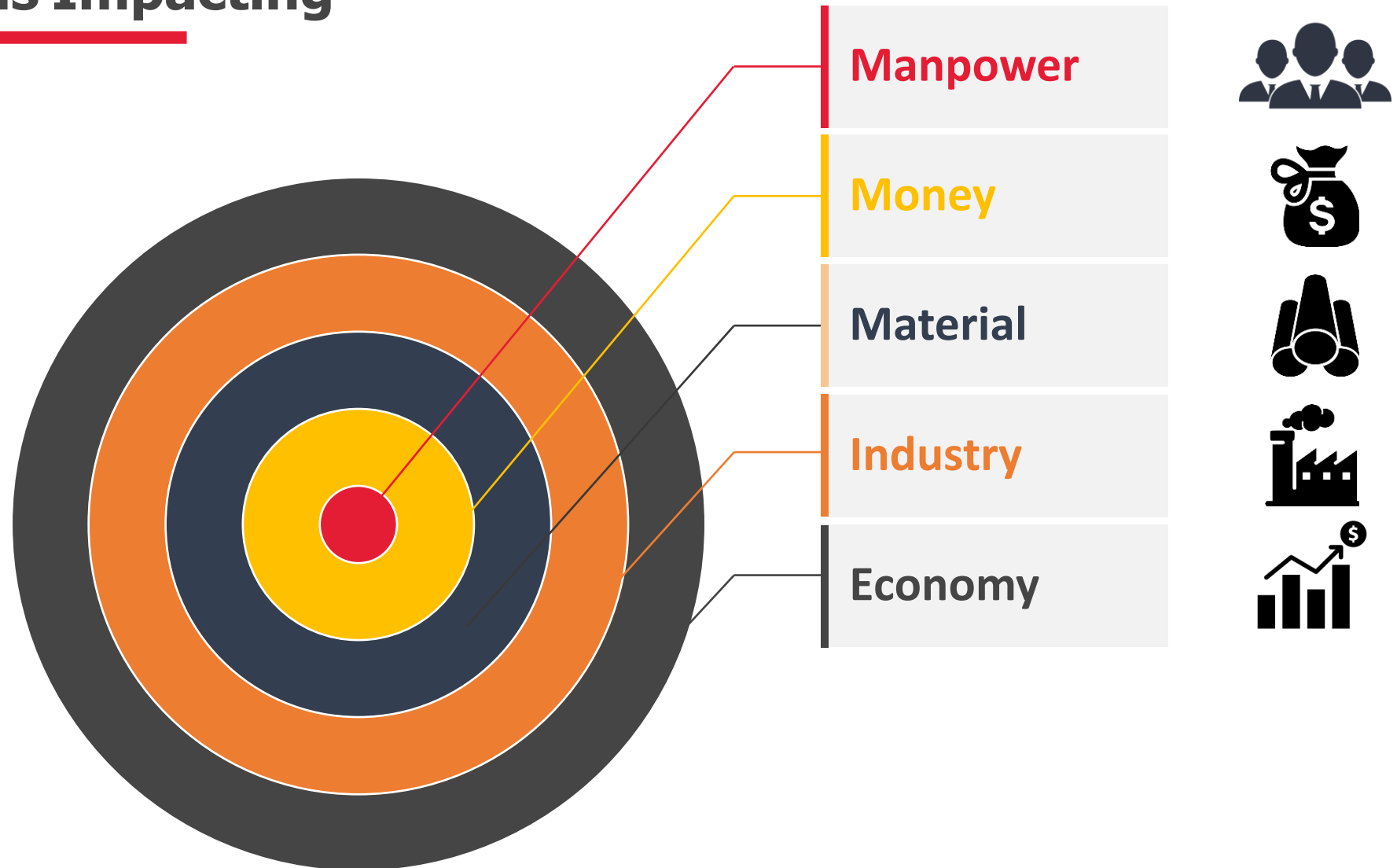
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Plummeting economic activities and stressing Businesses Globally.

3

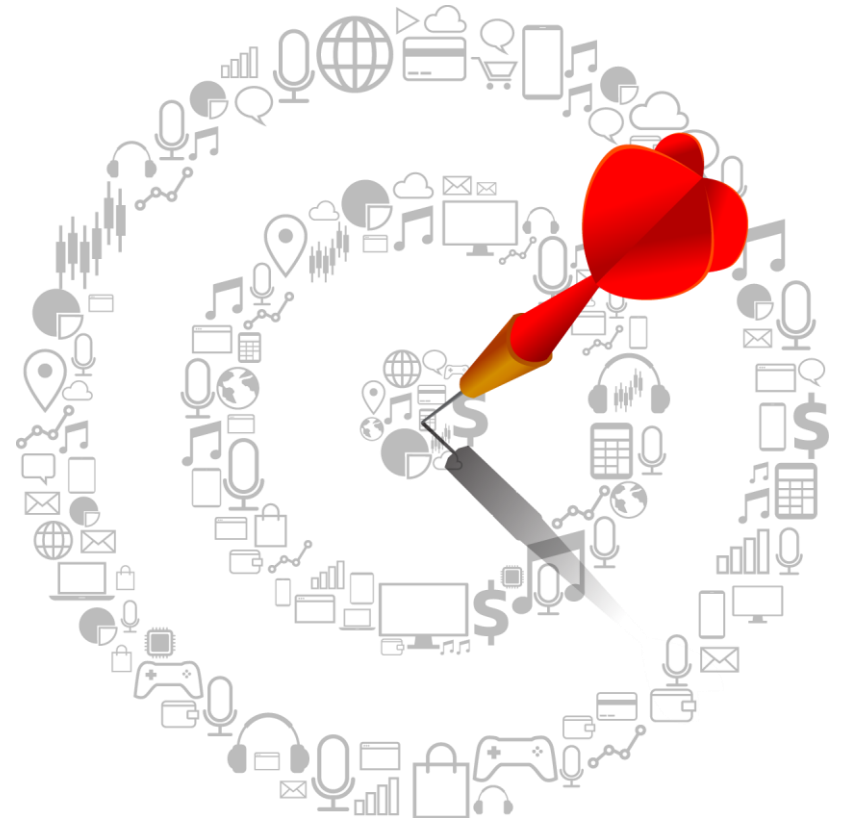
Causing enormous damage to people's health, jobs and well-being.

Pandemic is Impacting



The Effect

- Government Interventions are resulting in restrictions
- Indian Economy was in troubled waters. Pandemic added to the furor.
- Economic recovery remains uncertain and would take longer;
- Due to Uncertainty and vulnerability businesses are resorting to cost cutting;
- Benefitting Parties would aggressively enforce their rights.
- Misuse of the situation to evade contractual obligations.



Type of contractual issues/disputes that will arise

Contracts	Default or Dispute	Dispute Between
Manufacturing Contracts	Default or Delay in manufacturing based on the orders received.	Vendor Vs. Contract Manufacturer
	Default in providing minimum guaranteed order for manufacturing	Contract Manufacturer Vs. Vendor
Operation and Maintenance Contracts	Default in providing maintenance and operating services.	<ol style="list-style-type: none"> 1. Government Vs. Business Houses 2. Business Houses Vs. Small contractors 3. Consumer Vs. Businesses
Construction Contracts	Default and Delays in constructing real estate Projects	Homebuyers VS. Builders
Sale Contracts	Default or Failure to Sale the Services or Goods	Ordering Party Vs. Suppliers or Seller
Supply Contracts	Failure or Delay in Supplying the Material/Goods	
Travel or Transportation Contracts	Failure or delay in providing Transit services to People or Cargo	Consumer /Businesses Vs. Airlines or Shipping Companies
Hospitality Contracts	Cancellation/Suspension of Minimum Guarantee Contracts	Business Vs. Hotels

Type of contractual issues/disputes that will arise

Contracts	Default or Dispute	Dispute Between
Employment Contracts	Failure to provide wages or bonus or incentive or on Salary Cuts or Deferrals	Employee Vs Employer
	Failure to be present at Duty or absenteeism or violation of social distancing norm at workplace	Employer Vs. Employer
Investment/Funding Agreements	Failure to infuse the committed capital contribution, either Debt or Equity.	Investee Company Vs Investor/Fund Provider
Loan Contracts	Banks declaring Borrowers NPA based on Past default or demanding interest or reducing pre-approved limits of borrowing.	Banks Vs. Borrowers
	Borrowers demanding for waiver of interests or late fee/charges	Borrowers Vs. Banks
Bank Guarantee Contracts	Encashing Bank guarantee in event of default by Applicant	Beneficiary Vs. Applicant
	Seeking revocation of Bank Guarantees in event of default by beneficiary	Applicant Vs. Beneficiary

Type of contractual issues/disputes that will arise

Contracts	Default or Dispute	Dispute Between
Rent/Lease Agreement	Failure or delay in payment of rent	Landlord Vs. Tenant
	Dispute on action of Eviction initiated by Landlord	Tenant Vs Landlord
Mortgage Contracts	Failure or delay in replenishing the decline in value of Security i.e. Mortgaged Asset	Mortgagee/Lender Vs. Mortgagor or Borrower
Insurance Contracts	Failure or delay in processing or passing Insurance claims	Insured Vs. Insurer
	Fraudulent claims from insurance companies	Insurer Vs. Insured
Human Resource Supply Contracts	Failure to supply Human Resource	Beneficiary Vs. Supplier
Sponsorship Contracts	Claiming refund of the Sponsored Amount on account of delay or non-happening of an event	Sponsors Vs. Hosts

How to strategically tackle the situation?

- Review the Terms of Contract
- Identify Safety Nets
- Prepare for Eventualities
- Honor contracts, as far as possible and practicable.
- Renegotiate the Terms early and amicably.
- Resolve dispute through ADR.

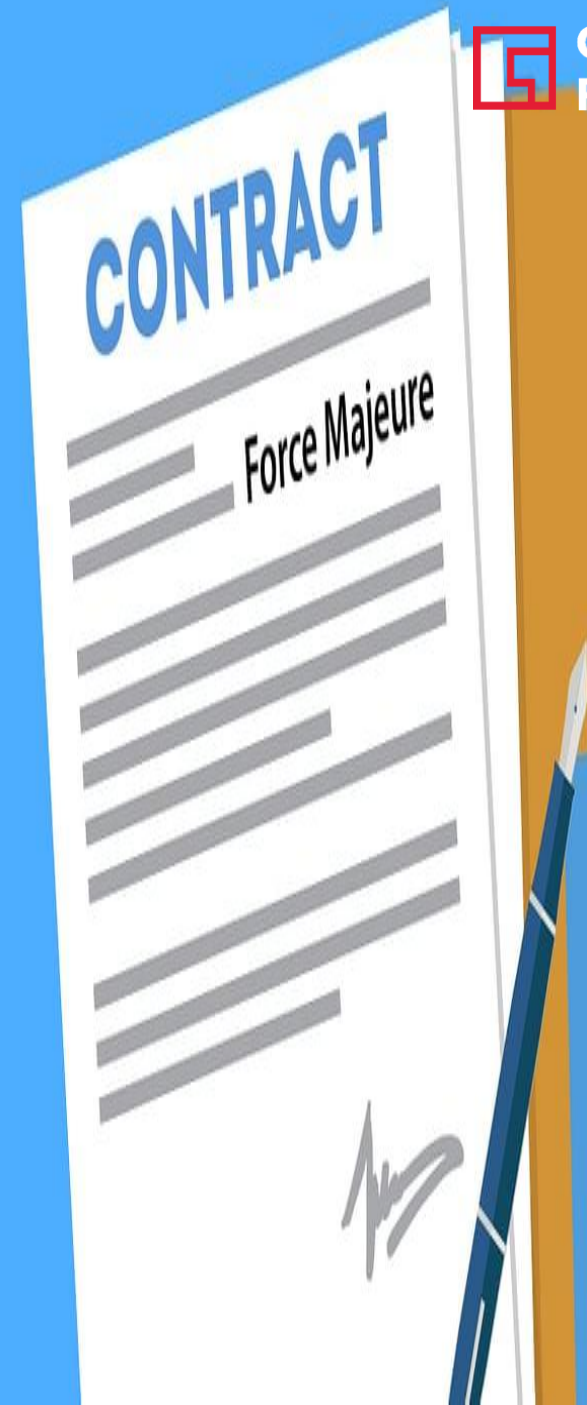


“COVID-19 AND ENFORCEMENT OF CONTRACTS”

A DISCUSSION ON FORCE MAJEURE CLAUSES & COMBATTING THE EFFECTS OF COVID-19 ON CONTRACTS



**Corporate
Professionals**





FORCE
MAJEURE

MEANING OF THE TERM “FORCE MAJEURE”

Derived from French language, meaning “a superior force”.

Defined as an “*event or effect that can be neither anticipated nor controlled; esp. an unexpected event that prevents someone from doing or completing something that he or she had agreed or officially planned to do*”.

Unanticipated

Uncontrollable

Unexpected

Unforeseeable

EXAMPLES OF FORCE MAJEURE EVENTS

- War,
- Riots,
- Fire,
- Flood,
- Pandemic,
- Epidemic;
- Hurricane,
- Typhoon,
- Earthquake,
- Lightning,
- Explosion,
- Strikes,
- Lockouts,
- Slowdowns,
- Prolonged shortage of energy supplies, and
- Acts of state or governmental action prohibiting or impeding any party from performing its respective obligations under the contract.



OR SUCH OTHER ACT BEYOND CONTROL

SIGNIFICANCE OF FORCE MAJEURE CLAUSES

PURPOSE OF FORCE MAJEURE CLAUSE

- Safeguard from future contingency.
- It allocates risk.

BENEFITS OF FORCE MAJEURE CLAUSE

- Limit or waive the liability for non-performance.
- Provide additional time period for performance or to put the time on hold.

WHAT CAN YOU SEEK?

- Temporarily suspension of performance of the obligations.
- Termination of the contract, or
- Renegotiation of the terms of the contract.

FORCE MAJEURE CLAUSES- SOME SAMPLES

1

GENERAL CLAUSE

"Either Party shall be excused from performance and shall not be in default in respect of any obligation hereunder to the extent that the failure to perform such obligation is due to a Natural Force Majeure Event"

2

SUSPENSION

Any prevention, delay or stoppage due to a "Force Majeure", notwithstanding anything to the contrary contained in this Lease, shall excuse the performance of such party for a period equal to any such prevention, delay or stoppage.

3

EXTENSION OF TIME

"....., any failure to perform its obligations under this Agreement as a result of a "Force Majeure" Event The time for performance required of the affected party shall be extended for a period equal to the time lost by reason of such delay."

4

TERMINATION

"A Party may terminate this Agreement upon providing written notice to the other Party if the other Party is affected by a Force Majeure event which cannot be removed, overcome or abated within [***] continuous months from the initial date of such Force Majeure event."

COVID-19 AS “FORCE MAJEURE”- RECENT GOVERNMENT NOTIFICATIONS

01

- Ministry of Finance, Notification dated 19.02.2020
- Meaning of Force Majeure shall include COVID-19 pandemic as a case of Natural Calamity;
- Thus Force Majeure Clause maybe invoked wherever considered appropriate.

02

- Ministry of New & Renewable Energy's Office Memorandum dated 20.03.2020

03

- The Ministry of Shipping's order dated 20.03.2020 and letter dated 24.03.2020



WHETHER YOUR CONTRACT HAS A “FORCE MAJEURE” CLAUSE ?

Whether or not COVID-19 will be construed as a “Force Majeure” event under your contract will entirely depend on how the Force Majeure clause has been drafted in the Contract and its language.

IF YOUR CONTRACT HAS A FORCE MAJEURE CLAUSE?

THERE CAN BE TWO POSSIBLE SCENARIOS

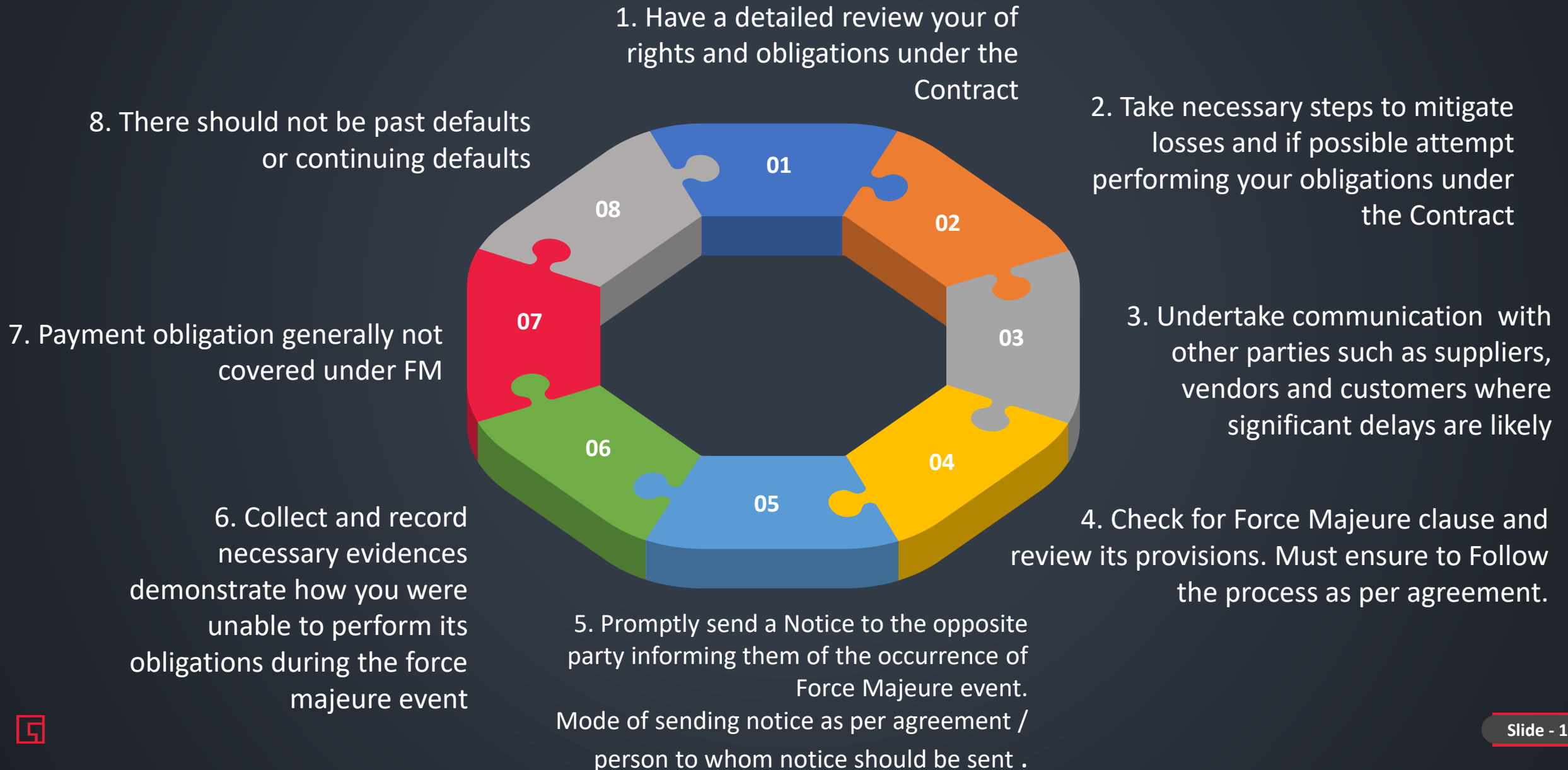


The Force Majeure Clause explicitly lays down various Force Majeure events and contains the terms “pandemic” or “epidemic” or “Government order”.



If the force majeure clause covers extraordinary events or circumstances beyond the reasonable control of the parties, which materially affect the performance of obligations under the Contract.

THINGS TO ENSURE BEFORE INVOKING FORCE MAJEURE CLAUSE



IF YOU ARE A COUNTER PARTY HOW YOU CAN RESIST INVOCATION OF FORCE MAJEURE CLAUSE?

Examine the Contract and identify list of events that qualify as force majeure

Assess if there is an actual link between the non-performance and the claimed force majeure event

Ask the opposite party to demonstrate how the performance of its obligations has been rendered physically or legally impossible due to the outbreak of COVID-19

Check for past defaults or continuing defaults of the party.

Ask them to provide regular updates regarding its efforts to resume performance and/or mitigate the impact of non-performance

Consider negotiating a written amendment to the contract to reflect a commercially sensible resolution.

Determine if performance is possible through alternatives available

WHAT HAPPENS IF YOUR CONTRACT DOES NOT HAVE A FORCE MAJEURE CLAUSE?



- In cases where contracts/agreements do not contain “Force Majeure Clause”, the common law - ‘Doctrine of Frustration’ comes to the forefront.
- It is explicitly provided under Section 56 of the Indian Contract Act, 1872.

STATUTORY PROVISIONS IN INDIAN CONTEXT

Section 56 of the Indian Contract Act, 1872

“An agreement to do an act impossible in itself is void.

Contract to do an act afterwards becoming impossible or unlawful.—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

In a landmark judgement titled Energy watchdog Vs. Central Electricity Regulatory Commission, SC held that:

If there is an express or implied clause in a contract stipulating 'Force Majeure' events, it is governed by Chapter III dealing with the contingent contracts, and more particularly, Section 32 - i.e., a term or provision which is enforceable upon happening of an uncertain future (contingent) event and provides for its consequences.

If a Force Majeure event occurs *dehors (outside)* the contract, it is dealt with by a rule of positive law under Section 56 of the Contract Act - which provides that an agreement to do an act impossible in itself is void; and that a contract which, after entering, becomes impossible or unlawful to perform due to an intervening event, becomes void in law.

APPLICABILITY OF DOCTRINE OF FRUSTRATION

Impossibility must be permanent in nature;

Impossibility may be in law or in fact;

Contracting party must not be in default;

Impossibility must be due to reasons beyond control

Impossibility must be unforeseeable

Commercial Impossibility & unprofitability not Frustration

Refusal by a third party cannot be applied to invoke frustration.

WHETHER COVID-19 WILL ATTRACT THE PROVISIONS OF SECTION 56?

- Since the outbreak of the Pandemic is temporary in nature, the Courts might be reluctant to accept the Frustration/ Impossibility of Contract as per Section 56.
- However, whether or not Section 56 will be applicable will depend on case to case basis.
- E.g.— In case of perishable goods, it maybe considered applicable.
- Payment of Rent/ repayment of loans, frustration/impossibility of contract cannot be claimed.

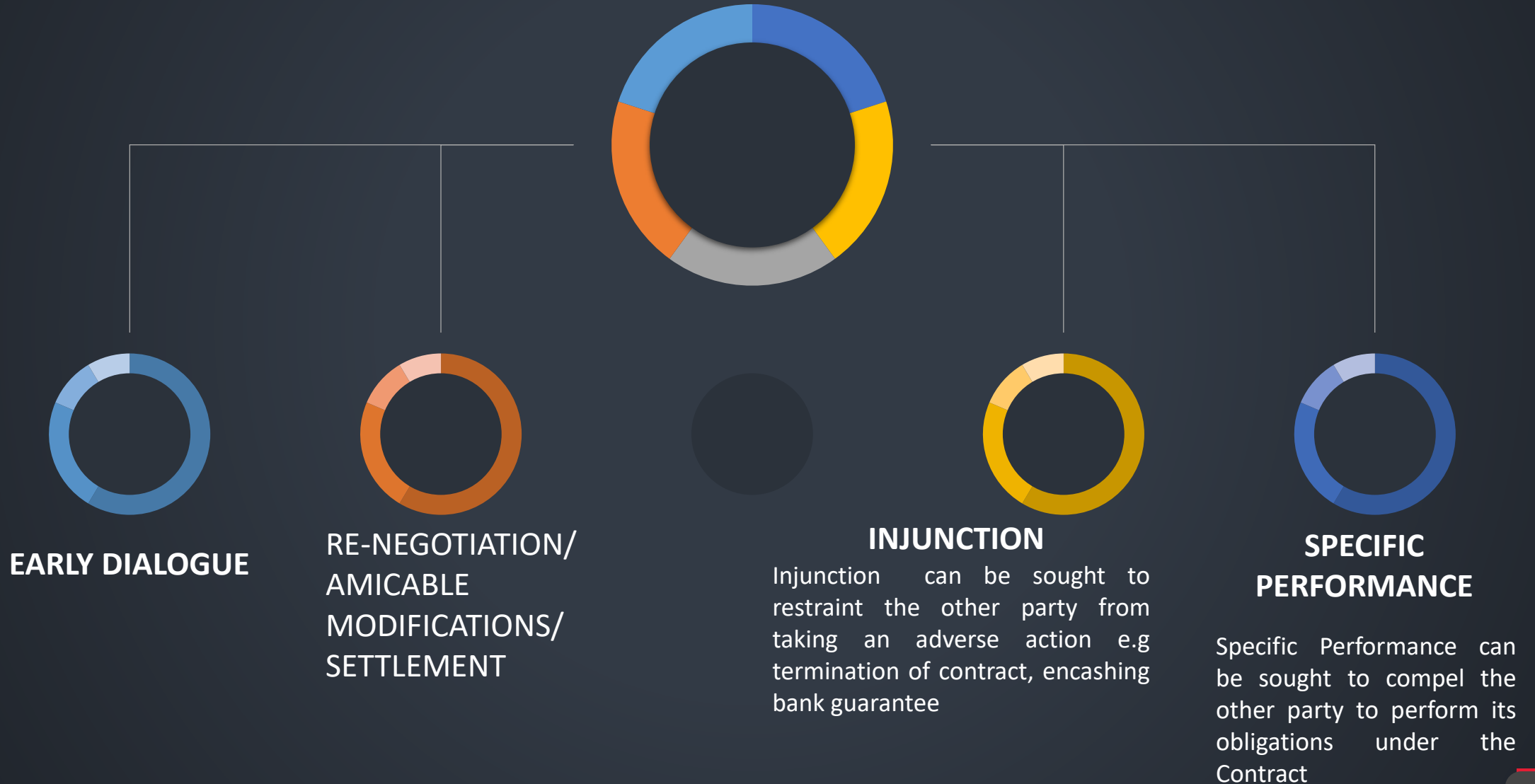
CONTINGENT CONTRACTS & IMPOSSIBLE CONTRACTS- THE DIFFERENCE

Section 32 of the Indian Contract Act, 1872

“ Enforcement of Contracts contingent on an event happening - Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void.”

- The difference between the applicability of Section 32 and Section 56 was noted by the Supreme Court in the recent case of NAFED vs Alimenta S.A.
- In this case the, Court held that the Contract had been rendered unenforceable under Section 32 of the Contract Act because of the happening of the Contingency/Event which had already been agreed upon by the Parties under Clause 14 of the Agreement.
- It was observed that Section 56 i.e. Frustration of Contract could not be claimed wherein a future impossibility can be foreseen. In the present agreement, the future exigency was already provided.

OTHER REMEDIES IF YOU ARE FACING CHALLENGES IN EXECUTION OF YOUR CONTRACT





RECENT JUDGMENTS W.R.TO COVID-19 AND EXECUTION OF CONTRACTS

NO RELIEF IN PAYMENT OBLIGATIONS ON ACCOUNT OF LOCKDOWN

Standard Retail Pvt. Ltd. & Ors. Vs. M/s. G. S. Global Corp & Ors

- Petitioner had sought directions from Bombay High Court restraining the Respondent–Bank from negotiating/ encashing the Letters of Credit on account of frustration, impossibility and impracticability due to COVID-19.
- It was held that:
“The lockdown declared in the Nation would be for a limited period and the lockdown cannot come to the rescue of the Petitioners so as to relieve them from contractual obligations of making payments”.

CONDITIONS OF LOCKDOWN – IN NATURE OF FORCE MAJEURE

M/s Halliburton Offshore Services Inc. v/s Vedanta Limited & Anr.

- Petitioner had sought interim protection, by way of restraint, against Respondent from invoking /encashing Bank Guarantee.
- Petitioner was unable to perform contractual obligations
- The Delhi High Court held that :
“Special equities do exists and the interests of justice would justify an ad interim injunction, restraining invocation or encashment of the bank guarantees, till the expiry of exactly one week from 3rd May, 2020”.
- Hon'ble High Court also observed that the conditions of lockdown are prima facie in the nature of force majeure.
- Subsequently in its final order, the High Court reversed its Interim Order observing that a Force Majeure Event (COVID-19) does not excuse contractor's non-performance “for which the deadline were much before the outbreak itself”.

NO RELIEF IN PAYMENT OF RENT

Ramanand & Ors vs. Dr. Girish Soni & Anr

The Delhi High Court rejected a plea by a Khan Market tenant, seeking suspension of rent on account of force majeure due to COVID-19 lockdown.

- The Court said that in circumstances such as the outbreak of a pandemic, the grounds on which the tenants/lessees could seek waiver or non-payment of the monthly amounts, under contracts which have a force majeure clause, was governed by Section 32 of the Indian Contract Act, 1872 (ICA).
- Section 56 ICA, which deals with the impossibility of performance, would apply in cases where a force majeure event occurred outside the contract and the same did not apply to lease agreements
- The Court further stated that the force majeure clause could be differently worded in different contracts and could also be in the form of a contingency under Section 32 which may allow the tenant to claim that the contract has become void and surrender the premises.
- The Court held that *“However, if the tenant wishes to retain the premises and there is no clause giving any respite to the tenant, the rent or the monthly charges would be payable.”*

TEMPORARY INJUNCTION FROM PLEDGE INVOCATION

Future Group Wholesale Limited & Anr. v. IDBI Trusteeship Services Limited & Ors.

- In this case, when the shares, were pledged, they were listed at close to INR 350 per share and fell to below INR 100 thereby severely breaching the security cover agreed with the lender causing the lender to invoke and sell the pledged shares.
- The Court, however held that considering the present situation of market and COVID-19, ad-interim protection should be granted to the Plaintiffs till next date of hearing and restrained the Lenders from selling the FRL Shares or the Pledged shares.

THANK YOU

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