

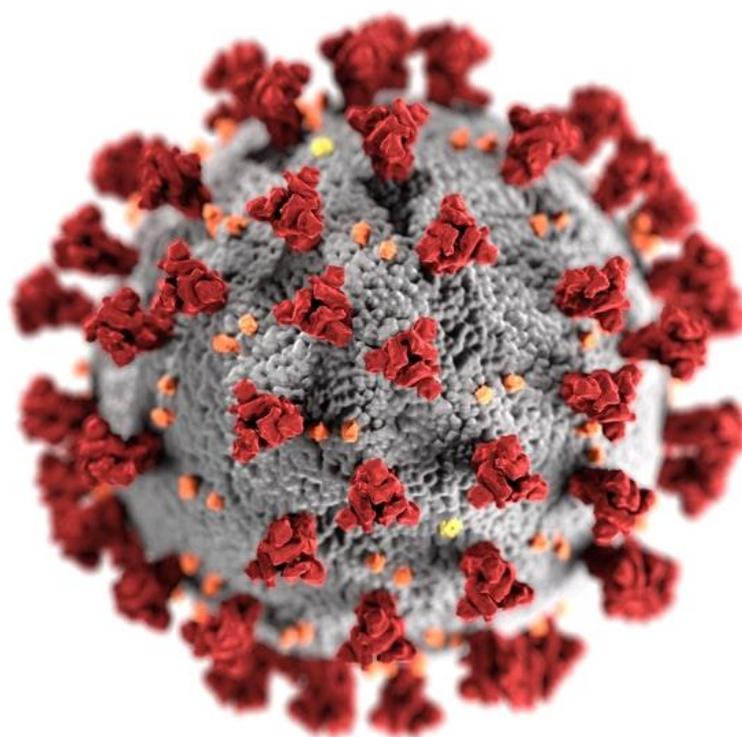
# COVID -19 LEGAL FAQ SERIES

FOX MANDAL & ASSOCIATES



## COVID-19 GLOBAL PANDEMIC

The sudden outbreak of the pandemic and the nation-wide lock-down has put a heavy constraint on individuals as well as the economy. To minimise the impact of the pandemic on the general public as well as business establishments and ensure minimum disruption in the supply chain, many amendments, advisories and announcements have been introduced which would ideally subsist during the containment period but could have long-term implications. Understanding the ramifications of these developments is essential for the smooth operation of enterprises. We decode the queries that have surfaced appurtenant to the multitudinous notifications that attorneys across our diverse practice domains have responded to.



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## *Will COVID-19 pandemic qualify as a 'Force Majeure' event in Real Estate Transactions?*

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'Force Majeure' is a French term which literally means "*superior force*" and the term is defined in the [Collins English Dictionary](#) as an "*irresistible force or compulsion such as will excuse a party from performing his or her part of a contract*". It commonly refers to a provision in commercial contracts to mitigate accountability for unforeseen natural and uncontrollable calamities that disrupt the usual flow of events and impede the parties from fulfilling contractual obligations. Whether the COVID-19 pandemic and the subsequent 21 days lock-down imposed by the Government of India on March 24, 2020, as a preventive measure would constitute a force majeure event will largely depend upon the language of the contract and differ on a case to case basis. Below are few national-level legislations and a ministry circular which contain certain implied force majeure provisions:

### **Indian Contract Act, 1872**

Though the Indian Contract Act, 1872 does not expressly define 'Force Majeure', however, its essence is captured under Section 56 applicable to general contracts. Section 56 which embodies the principle of "doctrine of frustration" and states that "*an agreement to do an act impossible in itself is void*". It further states that "*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 the absence of a force majeure clause, to seek protection under Section 56 it will have to be determined whether the performance of the contractual obligation was "impossible" as a result of the COVID-19 pandemic and the subsequent lock-down. Hence, say for example, if performance of the contract entails any action which is in violation of the 21 days lock-down e.g. venturing outdoors for any "non-essential" undertaking, then the party invoking the provisions of force majeure can contend that the performance would be "impossible" and maybe even "unlawful" in terms of Section 56 and be relieved of its contractual obligations in case of non-performance.

In the landmark judgement in the case of *Energy Watchdog vs. Central Electricity Regulatory Commission & Ors.* [(2017) 14 SCC 80], the Supreme Court has relied on the seminal verdict in the case of *Satyabrata Ghose vs. Mugneeram Bangur & Co.* [AIR 1954 SC 44] and has held that "*when*

*a contract contains a force majeure clause which on construction by the Court is held attracted to the facts of the case, Section 56 can have no application".* Further, the Supreme Court in the case of *Industrial Finance Corporation of India vs. Cannanore Spinning & Weaving Mills Ltd.*, [(2002) 5 SCC 54] has stated that for an event to constitute a force majeure event, it should be beyond the control of the parties which could neither be foreseen at the time of entering into the contract nor can the effect of the supervening event be avoided or overcome. It should be noted that the onus of proving the force majeure event is on the party who has invoked such clause and such party should also be seen as having taken all reasonable efforts to avoid or mitigate the force majeure event. Hence, for the COVID-19 and the subsequent lock-down to be included within the purview of force majeure event, the above points will most likely be considered by the courts. For a detailed discussion on Force Majeure and other contractual obligations in the wake of the pandemic, [Click Here](#).

### **The Transfer of Property Act, 1882**

Section 108(e) of The Transfer of Property Act, 1882 states that *"if by fire, tempest or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void"*. However, even if COVID-19 can be argued to fall within the parameters of "irresistible force", it is unlikely that it would render the leased premises to be "permanently unfit" for use. Due to lack of sufficient judicial precedents in cases similar to COVID-19, the application of Section 108(e) would largely depend on the interpretation of the courts and protection should be sought by the lessee under the provisions of Section 108(e) only in the absence of a specific force majeure clause in the lease deed.

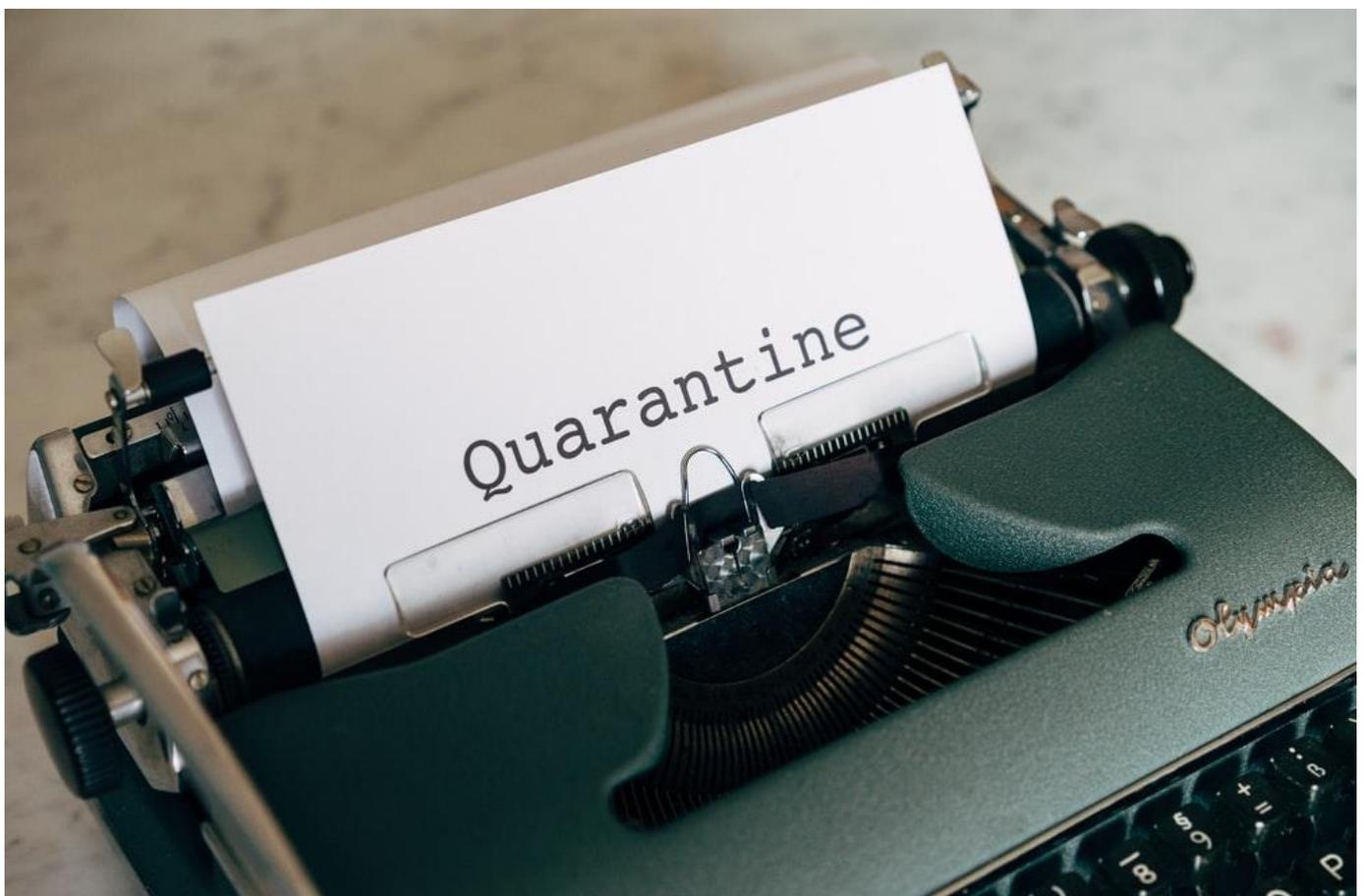
### **Real Estate (Regulation and Development) Act, 2016**

Section 6 of the Real Estate (Regulation and Development) Act, 2016 states that the registration granted for the real estate projects by the Real Estate Regulatory Authority (RER Authority) may be extended on an application made by the promoter due to force majeure. The section further states the expression 'Force Majeure' shall mean a case of war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature affecting the regular development of the real estate project. Hence, COVID-19 could be construed to fall within "any other calamity caused by nature" in terms of the provisions of the Act, and hence be covered within the definition of force majeure. This would of course be subject to eventual stand taken by the respective state-wise RER

Authorities in this matter. The order of the Maharashtra Real Estate Regulatory Authority or MahaRERA in this regard is detailed in the ensuing paragraphs of this FAQ.

### Ministry of Finance

The Ministry of Finance vide its [Office Memorandum number 18/4/2020-PPD](#) dated February 19, 2020 has referred to para 9.7.7 of the “Manual for Procurement of Goods 2017” wherein it is *inter alia* stated that force majeure “means extraordinary events or circumstance beyond human control such as an event described as an Act of God (like a natural calamity) clarifying that spread of corona virus should be considered as a natural calamity and Force Majeure clause may be invoked...” and in this regard the memorandum has clarified that disruption to supply chains due to COVID-19 should be considered as a case of natural calamity and hence, force majeure clause may be invoked. However, it should be noted that the aforesaid memorandum pertains to force majeure clauses *vis-à-vis* “disruptions to supply chains” and not to real estate transactions, and the reference here is given only as indicative of the Indian government’s stance on force majeure clauses.



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*In case of commercial lease deeds, can the parties suspend obligations under the lease deed on account of force majeure?*

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The national mandatory lock-down order implemented due to the COVID-19 has adversely impacted all businesses including their ability to operate out of their leased premises. During this extraordinary time both lessors and lessees will expect concessions in some form from each other - lessors in the form of waiver of some of the covenants, obligations or amenities to be provided and the lessees in the form of rent suspension.

At the outset, it is essential to clarify that The Supreme Court in the case of *Raja Dhruv Dev Chand vs. Raja Harmohinder* [AIR 1968 SC 1024] and *Sushila Devi vs. Hari Singh* [(1971) 2 SCC 288], has expounded that the lease in itself is incapable of being frustrated under Section 56 of the Indian Contract Act, 1872. Hence, we can infer that the rule of force majeure enshrined under the Indian Contract Act, 1872 would not apply to leases.

Apart from the aforementioned Section 108(e) of The Transfer of Property Act, 1882, there is no implied relief for leases under Indian law in case of force majeure event and it is up to the parties to the lease to include an express force majeure clause in the lease deed. Conventional force majeure clauses in commercial lease deeds state that neither the lessor nor lessee would be responsible for any delay or non-performance under the lease deed which would be due to any force majeure event. Further, in case the lessee is unable to continue its normal business or if the leased premises is rendered unfit for occupation for a certain defined continuous period, then the lessee can opt to terminate such a lease deed. Most force majeure clauses also stipulate that the party which claims occurrence of a force majeure event, should promptly and in a time-bound manner notify the other party of such occurrence along with the requisite factual details.

Whether the COVID-19 pandemic or the subsequent lock-down by the Indian government would qualify to be a force majeure event would depend on the content of the force majeure clause itself. In case if the force majeure clause includes terms like “endemic”, “pandemic”, “epidemic”, “disease” etc. then the COVID-19 pandemic would constitute a force majeure event. Likewise, if the lease premises is shut-down involuntarily pursuant to the government-imposed lock-down and if the force majeure clause includes terms like “lock-down”, “governmental action” or similarly worded phrases then the

subsequent lock-down by the Indian government would constitute a force majeure event. Interestingly, PVR Cinemas, India's largest multiplex chain has [informed](#) mall owners that it would be invoking the force majeure clause of the respective leases for suspension of payment of lease rental for the entire period of the lock-down.

It should be noted that even in case the COVID-19 and subsequent lock-down does not specifically trigger a force majeure event in the language of the force majeure clause, the parties can look to the other standard clauses of the lease for relief e.g. the lessor would be unable to provide free and unhindered access to the lessee during this period and similarly the lessee would also be precluded from using and occupying the leased premises as per applicable law since the law itself restricts the same as per the lock-down restrictions. However, there are always exceptions to this case such as the lessor pointing out that the mere fact the lessee has stored its furniture, goods and supplies in the leased premises would imply usage and occupation and also in case if the business of the lessee falls under 'essential services' implying that usage and occupation would be permitted by applicable laws during this period.



Irrespective of the specific language of the lease and strict interpretation of the law, it will eventually be the courts who will ultimately decide on these issues which would create judicial precedent which will

of course not be “one size fits all” and would differ on a case to case basis. From a practical viewpoint, both the lessor and lessees should adopt a solution-oriented approach and look at ways to minimize losses on either side to avoid protracted litigation.

Needless to state that the above relates only to commercial leases since usage and occupation of residential leased premises would remain largely unaffected (if not augmented) during this period.

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*Are there any specific reliefs provided by the government and other regulatory authorities vis-à-vis real estate transactions?*

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Though there are various extensions and relaxations granted by the major judicial bodies such as Supreme Court, High Courts and National Company Law Tribunals / National Company Law Appellate Tribunals as well as most government ministries such as the Ministry of Corporate Affairs, Ministry of Finance and Ministry of Commerce and Industry, the following are the notable reliefs granted by governmental and regulatory authorities specific to real estate transactions:

**Reserve Bank of India (RBI)**

The RBI vide its [Circular dated March 27, 2020](#) has *inter alia* permitted all lending institutions, including banks and housing finance companies to grant a moratorium of 3 months on payment of all instalments falling due between March 1, 2020 and May 31, 2020 in respect of all term loans (including housing loans).

**Maharashtra Real Estate Regulatory Authority (MahaRERA)**

MahaRERA, in order to aid government efforts in controlling the damage of COVID-19 and to ensure that completion of MahaRERA registered projects are not adversely affected, has vide its [Order dated April 2, 2020](#) decided that:

- For all MahaRERA registered projects where completion date, revised completion date or extended completion date expires on or after March 15, 2020, the period of validity for registration of such projects shall be extended by 3 months. MahaRERA would accordingly issue project registration certificates, with revised timelines for such projects, at the earliest.

- Further, the time limits of all statutory compliances in accordance with the RERA and the rules and regulations made thereunder, which were due in March / April / May, 2020 would stand extended to June 30, 2020.

### Securities and Exchange Board of India (SEBI)

SEBI, vide its [Circular dated March 23, 2020](#), has granted temporary relaxations in compliance requirements for Real Estate Investment Trusts and Infrastructure Investment Trusts by extending their due date for regulatory filings and compliances for the period ending March 31, 2020 by 1 month over and above the prescribed timelines under SEBI (Real Estate Investment Trusts) Regulations, 2014, SEBI (Infrastructure Investment Trusts) Regulations, 2014 and circulars issued thereunder.

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