IICCI
THE INDO-ITALIAN CHAMBER OF COMMERCE AND INDUSTRY

AD IDEM
The Dispute Resolution Center of the Indo-Italian Chamber

COVID-19 and the FORCE MAJEURE CLAUSE

Discussion Note

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The mission of the IICCI - Indo Italian Chamber of Commerce and Industry is to facilitate the bilateral trade and investments between India and Italy. To this end, it decided to establish AD IDEM – The Dispute Resolution Center of the Indo-Italian Chamber, the first Bilateral Arbitration Centre in the world. The overall purpose of AD IDEM is to provide companies with efficient, neutral, objective, and fair dispute resolution services.
AD IDEM is a Latin expression commonly used in the legal language. It means "**in agreement**" (e.g. the parties were at idem). We decided to use an Italic word to identify an innovative service aiming at reducing the barriers to bilateral trades and investments between Italy and India.

The rules governing AD IDEM and its dispute resolution services have been outlined referring to the most important international guidance for Arbitration (UNCITRAL), the Italian law and the Indian law including the latest Indian Arbitration and Conciliation (Amendment) act dated August 2019.

AD IDEM will offer two main services to achieve the goal of "dispute resolution":

- Mediation: process of resolving disputes wherein an independent third party, assist the parties involved in arriving at agreeable solution
- Arbitration: a substitute of public trial, with no need of going court, wherein an independent third party analyses the entire situation

Considering that the Parties have freely decided to accept and introduced in their contracts the reference to AD IDEM, the final decision will be binding on the parties and immediately enforceable.

The benefit provided to the Indian and Italian companies by AD IDEM are the following:

- Impartiality: no bias or potential conflict of interest.
- Competence - Mediators/Arbitrators are accredited for their deep knowledge of both the Italian and Indian regulatory framework and practice.
- Flexibility - The Parties are free to choose Mediators/Arbitrators among those included in the AD IDEM register, the seat of the arbitration, the language of the proceedings
- Confidentiality - confidentiality of every document delivered by each Party to AD IDEM General Secretariat.
- Faster resolution time – the procedures ensure that the final resolution of each dispute is achieved in reasonable and predictable time.
- Reduced legal costs - All fees charged for resolving a dispute are fixed and publicly available. No hidden costs.

AD IDEM will help Italian and Indian companies, particularly SMEs, in gaining confidence in the possibility of reducing costs, time and unpredictability of disputes and litigation. This will create the right context to grow bilateral commercial and industrial partnerships.

Cesare Saccani
AD IDEM - Chairman

WHEREAS

1. The spread of COVID-19 has occasioned serious implications for the global economy. It has also affected, in particular, party obligations under contracts. In this light, AD IDEM[1] presents this discussion note providing a broad overview of the principle of *force majeure* and the doctrine of frustration under Indian law and the Italian law.
2. Both in Italy and India the Government issued several measures to contain the epidemiological emergency.
3. In Italy particular relevance shall be given to Presidential Decree 22 March 2020 introducing "*further measures concerning the containment and control of the epidemiological emergency caused by COVID-19, applicable throughout the national territory*" (the DPCM 22 March 2020) and following integrations and postponements (jointly, and together with the measures that may be further adopted, the Containment Measures).
4. As a consequence of the Containment Measures, all industrial and commercial production activities have been suspended - with some exceptions relating to so-called "*essential*" activities involving the supply of essential goods.
5. It is therefore likely that, as a result of the health emergency and, more specifically, the Containment Measures:
   a) companies may no longer be able to meet the contractual deadlines or, in the most serious cases, to fulfil in full their obligations under them; and/or
   b) the contractual counterparties/parties intended to receive the services (whether companies or natural persons):
   i) may no longer be able to use them; or
   ii) may invoke a lack of interest in receiving them.
6. Force majeure literally means a 'superior force'. "Force Majeure" may be defined as "an event or an effect that can neither be anticipated nor controlled"[2] or "events outside the control of the parties and which prevent one or both parties from performing their contractual obligations."[3] Ordinary instances of such events include war, natural calamities, civil unrest. These events can also be understood as a 'supervening impossibility'.

[1] AD IDEM is the bilateral Dispute Resolution centre promoted by the Indo Italian Chamber of Commerce
[2] Black's Law Dictionary, 11th Edition; Page 788.
[3] P Ramanatha Aiyar's Advanced Law Lexicon, 5th Edition; Page 2077.

INDIAN LAW[4]

7. Under Indian law, there are three types of provisions that deal with such 'supervening impossibility'. The first, found in Section 32 of the Indian Contract Act, deals contractually agreed *force majeure* provisions. The second, found in Section 56 of the same legislation, deals with circumstances of frustration of a contract. The third is found in Section 108 of the Transfer of Property Act. Conceptually, the following broad distinction can help navigate these provisions:
   a. *Force majeure* (Section 32) deals with cases where contractual provisions have been made by the parties to deal with a supervening impossibility;
   b. Frustration (Section 56) is a rule of positive law, applicable irrespective of the absence of contractual provisions, to deal with a supervening impossibility; and
   c. In respect of lease contracts, the Transfer of Property Act (Section 108) is of relevance.
8. The intention of a "Force Majeure" clause is to save the performing party from consequences of something over which it has no control. "Force Majeure" is an exception to what would otherwise amount to a breach of contract. Indian courts have generally recognized this concept and have enforced it where appropriate.
9. Given that it permits parties to escape their contractual obligations, strict rules are applicable upon frustration of contracts. For instance, a simple difficulty in performance, or reduced commercial viability, does not constitute frustration. As a rule of thumb, where alternative methods of performance are possible, or the fundamental basis of the parties' agreement has not been eroded, frustration will be difficult to sustain. On the other hand, since *force majeure* deals with contractual clauses, such stipulations are more likely to be enforced on their own terms.
10. Consequently, it would not be wise to pre-determine whether a defense of frustration or *force majeure* can apply in all circumstances. On the other hand, the contract between the parties will need to be reviewed to identify (a) whether provisions have been made for *force majeure* events; or (b) whether, in the circumstances, the requirements of frustration have otherwise been met.
11. As noted above, in contrast to contractual *force majeure,* the principles underlying frustration do not emanate from contractual stipulations. It is therefore instructive to analyze judicial decisions to cull out the applicable standards to plead frustration. The leading judicial authority on this issue is the case of *Satybrata Ghose* v *Mugneeram Bangur and Company and Ors*.[5] Here, the Supreme Court explained the concept of frustration in the following terms:

    "… The performance of an act may not be literally impossible but it may be impracticable and unless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances *totally upsets the very foundation upon which the parties rested their bargain*, it can very well be said that the promisor finds it impossible to do the act which he promised to do." (Emphasis supplied)
12. More recently, in the case of *Energy Watchdog* v *CERC*,[6] while dealing with a force majeure clause in a Power Purchase Agreement (*PPA*), the Supreme Court placed reliance upon the principles enunciated in the case of *Satybrata Ghose* case, as being the "seminal decision" on the issue.
13. In this light, it would be advisable for parties to review their contractual documentation to ascertain if any *force majeure* related provisions are available. Should that be the case, contractual stipulations may

[4] This note is intended only for the purposes of discussion; it does not constitute legal advice.

[5] 1954 SCR 310.

[6] (2017) 14 SCC 80.

guide the parties' rights and obligations.

14. On the other hand, if no *force majeure* provisions are available, the parties may need to rely upon the doctrine of frustration of contract to avoid obligations. The applicability of this doctrine, and the parties' remedies in this regard, would depend significantly on the fundamental commercial bargain, including the nature and purpose of the contract. These would be reviewed in light of the nature of the impossibility, i.e. the relevant COVID-19 related inability, if any.
15. Furthermore, the consequences of invoking such a clause, how long it can be invoked and upon whom the risks and losses lie would be determined by a review of particular contracts. Therefore, we advise that entire business community be cautious and take appropriate steps to safeguard their business interests in view of the COVID-19 outbreak so that unforeseen liabilities can be avoided.
16. A possible solution for parties looking for early visibility on account of COVID-19 is to agree to a fresh set of contractual stipulations to deal with the present exigencies. This could include limited or complete suspension of obligations during the affected period, extension of time under the contract, or other commercially viable solutions. In every case, it would be advisable to agree to any such fresh stipulations strictly in light of the existing contractual agreements, including any limitations contained in the existing agreements.
17. We note that COVID-19 has also had implications upon *inter alia* the functioning of various industrial establishments across India, and the movement of people from within and outside India. Various advisories have been released by the Central and State Governments to deal with issues such as payments of wages to workmen and operational permissions for continuation of essential services. Different courts and tribunals across the country have also limited their functioning to urgent cases, or by the process of videoconferencing.
18. It is important for all industrial establishments and associated persons to remain aware of the updated advisories relevant to their sphere of activity or concerns.
19. In the event that individuals wish to seek legal advice, the Indo-Italian Chamber of Commerce and Industry is happy to provide details of different Indian legal counsels. This information is appended.

ITALIAN LAW

20. This section summarizes briefly legal consequences that the current health emergency and the Containment Measures may have on pending contractual relationships regulated by **Italian law**, being understood that a thorough analysis of the case is crucial to determine the precise impact that the Containment Measures may have had, on a case-by-case basis.

21. The prohibition of carrying out their business imposed to almost all companies operating on Italian territory by means of the Containment Measures , will likely affect, at least temporarily and/or partially, the capacity of the parties to perform and/or receive the services under all those contracts - not already fully and/or correctly performed - entered into before the spread of the health emergency by COVID-19 and, consequently, before the adoption of the Containment Measures (together, the **Occurred Circumstances**).

22. If the contract contains a Force Majeure Clause it will be necessary to carefully verify its scope of application (i.e. if the Occurred Circumstances can be considered included/covered). In addition, one should also verify the actions required for its enforceability, the remedies and the expected consequences, using the main criteria of interpretation (*i.e.* literal meaning and link between the various contractual clauses) and, on a subordinate basis, to subsidiary interpretative criteria.

23. In interpreting Force Majeure Clauses, it is useful to differentiate between "closed" and "open" Clauses:
    a) the first type of clauses are those where the parties have provided for by a precise and exhaustive list of events which they consider to be "force majeure events", excluding, more or less expressly, extensive interpretations of such clauses (or the inclusion of similar events). Therefore, the occurrence of circumstances not expressly mentioned, although exceptional, unforeseeable and unavoidable, will not automatically release the debtor from the performance of his obligations. In this case, it will be necessary to evaluate, in the light of the entire contractual framework, whether or not the debtor has assumed the risk of performing the contract even if an exceptional, unforeseeable and unavoidable event, not included in the Force Majeure Clause, occurred; and
    b) the second type of clauses are those where the parties have not provided for a precise and punctual list of events which they consider to be "force majeure events", but they have merely provided for an exemplary (and not exhaustive) list of circumstances which may constitute an event of force majeure. In these cases, one may argue that the contractual list (having merely an exemplary nature) does not limit the situations where force majeure may be invoked. The obliged party wishing to invoke the clause shall bear the burden to prove that the event shall be included in the scope of application of the clause.

24. If the contract does not contain a Force Majeure Clause, it will be necessary to take into consideration the remedies provided for by general principles of Italian law. No specific definition of force majeure can be found within the Italian legal system: in fact, there is no provision, which explicitly regulates such situation. However, it is possible to find out its main elements thanks to the different positions adopted by the Case Law on such matter. In this regard, sentence no. 965 of the Criminal Court of Cassation of 28 February 1997 states, *inter alia*, that the essential constitutive element of the so-called force majeure is **a** particular impediment to perform a specific action, such as to render all the agent's efforts useless, in consideration of its absolute nature (*i.e.* it cannot be won or overcome in any way). Therefore, it can never be considered as force majeure such situation which, with common or qualified diligence (depending on the contractual relationship), could have been otherwise overcome. Specifically, within these impediments it is possible to include, among others and always after a specific evaluation of the concrete case in order to assess the characteristics of absoluteness with respect to the conduct of the agent, (extreme) natural events, diseases (epidemics and pandemics) and geopolitical events (wars and

rebellions).

25. Based on the above definition, it could be argued that, in principle, the Covid-19 outbreak could fall within the definition of Force Majeure, provided that its impact on specific activities and related contractual obligations is verified on a case-by-case basis. Such conclusion could be based, among other things, on:
    a) article 91 of Law Decree no. 18 of 17 March 2020 (the so-called "Cura Italia" Decree), which provides, *inter alia*, that "*the compliance with the containment measures under this decree* (ed. Decree Law no. 6 of 23 February 2020) *shall always be considered for the exclusion, pursuant to and for the purposes of articles 1218 and 1223 of the Italian Civil Code, of the debtor's liability, also with regard to the application of any forfeiture or penalties connected with delayed or omitted performance*"; as well as
    b) article 56 of the same, which provides, *inter alia*, that "*For the purposes of this article, the outbreak of COVID-19 is formally recognized as an exceptional event and a serious disturbance of the economy, pursuant to Article 107 of the Treaty on the Functioning of the European Union*".

Therefore, it seems reasonable to consider the Coronavirus[7] as a force majeure event, *per se* - and, therefore, also independently from the urgent measures adopted to contain its spread (*i.e.* the Containment Measures), **to the extent that it makes**

(i) objectively impossible or excessive onerous to perform a contractual obligation, or

(ii) objectively impossible to benefit from it (as already said, all these circumstances shall be verified in practice).

26. As to the means to provide evidence of such impossibility/excessive onerousness, please bear in mind that:
    a) Italian companies may apply before the competent Chamber of Commerce for the issuance of a certificate drafted in English, which certifies the epidemiological emergency status due to COVID-19 throughout the Italian territory and the restrictions imposed for its containment. With the aforesaid certification, the Chambers of Commerce may declare that they have received from the applying company a statement through which, with reference to the restrictions imposed by the Government Authorities and the current emergency status, the company itself affirms that it was unable to fulfil in time the contractual obligations previously assumed for unforeseeable reasons beyond the company's control and capacity; and
    b) the China Council for the Promotion of International Trade (*i.e.* the equivalent of the Chambers of Commerce in Italy) also issues certificates certifying the existence of "*force majeure cause arising out from COVID -19*".
27. As of today, it is difficult to establish with certainty the value of those certificates in the event of international disputes concerning the compliance of contracts and the terms for the fulfilment of the relevant obligations.
28. Besides the force Majeure remedy, please note that the Occurred Circumstances could give rise to other factual situations that might be relevant under Italian contract law, such as:
    a) supervening permanent impossibility to carry out the performance;
    b) supervening temporary impossibility to carry out the performance;
    c) supervening excessive onerousness;
    d) supervening impossibility to receive the performance; and/or
    e) supervening lack of interest to receive the performance.

[7] Which was defined on 11 March 2020 by the World Health Organization as a **global pandemic.**

29. The **total supervening impossibility of the performance** is a situation that makes impossible for the debtor to perform its obligations and that the debtor itself is unable to overcome or prevent with the required due diligence. The total impossibility to perform an obligation may be:
    a) definitive (article 1256, paragraph 1, of the Italian Civil Code), when the impediment is irreversible or it is ignored whether it can be removed; or
    b) temporary (article 1256, paragraph 2, of the Italian Civil Code), when the impediment results from a foreseeably transitory cause[8].
30. The definitive or temporary nature of the impossibility must be assessed on a case-by-case basis (and not in absolute terms) in relation to the nature and the object of the contract as well as the interests of the parties.
31. Therefore, the supervening impossibility of the performance:
    a) causes the termination of the contract, if it is definitive; and
    b) exempts the debtor from the delay in its performance (but does not automatically gives the right to terminate the contract), if it is temporary. In fact, the delay in the performance constitutes a cause of termination of the contract only if such delay exceeds the limits of the creditor's interest in receiving such performance or if the debtor can no longer be considered obliged to perform its obligations.
32. The partial supervening impossibility of the performance is a partial impeding situation that the debtor is unable to overcome or prevent with the common required due diligence. In such a case:
    a) the creditor may act to obtain, alternatively:
        i) the reduction of its counter-performance; or
        ii) the withdrawal of the contract, if it is no longer interested to receive a partial performance;
    b) to the extent that the partial performance is possible, the debtor shall remain obliged to carry out such partial performance.

In consideration of the Containment Measures and, specifically, of the government measures that provided for the closure of many commercial activities, a particular case of temporary and partial impossibility to carry out the performance (or rather to use it) could be identified in relation to the commercial lease agreements affected by the restrictive measures.

33. With regard to the **excessive onerousness** remedy, Article 1467 of the Italian Civil Code expressly states as follows: "*In contracts with continuous, periodic or deferred performance, if the performance of one of the parties has become excessively onerous due to the occurrence of extraordinary and unforeseeable events, the party required to carry out owing such performance may request termination of the contract*". Therefore, the excessive onerousness:
    a) shall arise from an intervening and unforeseeable imbalance between the performance and the counter-performance;
    b) shall be attributable to extraordinary and unforeseeable events;
    c) shall not fall within the normal *alea* (risk) of the contract;
    d) shall not be attributable to the debtor.

Contrary to the supervening impossibility, the supervening excessive onerousness does not automatically produce any termination effect, but must be ascertained, and the relevant termination declared, by a Court. The party that is not claiming for the termination may avoid it by offering to modify the terms of the contract in an equitable manner so to bring back the relationship between the reciprocal performances within the limits of the normal *alea* (risk) of the contract.

[8] According to article 1256 of the Italian Civil Code, the debtor is not liable for damages suffered by the counterparty due to a delay in the performance of the obligations due to an objective temporary impossibility.

