

April, 2020



Pandemic Legal intelligence

Infrastructure & Energy Projects



Legal intelligence Series - COVID | XII

AHMEDABAD | BENGALURU | NEW DELHI | KOLKATA | MUMBAI

Impact on Infrastructure

1. What is the impact of the pandemic Covid-19 and the 21 day lockdown on the Infrastructure Sector in India?

Answer: Due to the pandemic Covid-19, the Infrastructure Sector and the projects have been stopped until further orders and have been on a standstill in lieu of the directions of the Central Government for a nationwide lockdown till 15.04.2020 vide Ministry of Home Affairs' notification no. 40-3/2020-DM-I(A) dated 24.03.2020.

In the same notification, the Government has specified certain essential services which would be allowed to continue.

Rest everything, including all infrastructure projects, were ordered to be stopped until further orders.



Ongoing Infrastructure & Energy Projects

2. What will happen to the ongoing Infrastructure projects such as EPC Projects, Energy Sector Projects, Turnkey Projects, Highway projects, etc.?

Answer: Owing to the Notification by the Government dated 24.03.2020, every infrastructure project has been put on hold until further orders.

However, an exception to this are the Renewable Energy Generation Stations (REGS) including Solar Power Plants, Wind Power Plants, Solar-Wind Hybrid Power Plants, etc. which requested the Government to consider them as an “Essential Service” vide D.O. No. 283/18/2020-GRID SOLAR dated 26.03.2020 by the Ministry of New & Renewable Energy (MNRE).

This would mean that all these stations and projects would be exempt from the conditions of lockdown and would be allowed to function smoothly albeit being in compliance with the social distancing and sanitary norms issued by the Government from time to time.

These RE Projects have also been given relief in receiving payments from state DISCOMs, i.e., the DISCOMs have been directed to make regular payments to them as was being before lockdown.

This clarification was issued vide MNRE Office Memorandum no. 283/20/2020 – GRID SOLAR(ii) dated 01.04.2020.

One needs to have detailed legal analysis regarding the Renewable Energy (RE) Projects allowed by the Government under the lockdown period.

Effect on Supply Chain

3. Is there any effect on the supply chain or the workforce because of the lockdown in view of the pandemic Covid-19?

Answer: There have been massive supply chain disruptions for the projects and the workforce has also been affected due to the COVID – 19 pandemic. All over the country, only essential commodities are allowed to be supplied.

Keeping this situation in mind, the Ministry of New & Renewable Energy through a Press Release dated 26.3.2020 has provided an extension of time to the Renewable Projects citing reasons of slow or no supply of necessary goods and services and the lack of workforce.

However, the risk assessments and implications of stoppage of such infrastructure projects requires a meticulous deliberation.



SUPPLY CHAIN

EPC Projects and Contracts

4. How does the current pandemic situation affect the obligations of the EPC contractors who have entered into separate agreements with the contractors, vendors, sub-contractors, sub-vendors and so on?

(Sub questions:

- a. Does your Contract provide for a situation like this?
- b. Does your contract qualify the current scenario as a Force Majeure situation?
- c. Would there be any penalties or financial obligations due to lockdown and operations coming to a grinding halt or at sub-optimal level in the current scenario?)

Answer: The language as used in most contracts varies and, therefore, it is important to review each contract and its corollary of documents holistically and carefully before initiating any actions /decisions.

It is important to refer the Force Majeure, Termination, Notice, Dispute Resolution Clauses as well as the rights and obligations mentioned in the contracts for each party.

Speak to legal experts to get a detailed analysis of the legal obligations specifically pertaining to your EPC Contract as well as the supplementary contracts there under with separate vendors, contractors, sub-contractors, etc.



5. Does the termination of an EPC Contract lead to an automatic termination of all associated contracts therewith? If not, how can I protect my company's interest in such a scenario?

Answer: Generally termination of EPC contracts does not auto-terminate its secondary or associated contracts, unless agreed to the contrary.

More importantly, a **termination Notice** is required to be served towards the specific days which will depend on the contractual terms between the parties. **The wording of the Force Majeure clause will also play an important role in the overall strategy.**

In the interest of business and to protect the parties' interests, the contracts, its terms and ancillary documents need proper techno-legal review to understand potential impact in this current scenario.



Force Majeure Clause

6. Can parties involved in Infrastructure projects or Energy Projects take the defense of Force Majeure?

Answer: Due to the major outbreak of Covid 19 in China, certain measures were taken by the Government of India to ensure the safety of its citizens and the individuals involved in different sectors.

In view of the same, the Department of Expenditure, Ministry of Finance, through Office Memorandum No. F. 18/4/2020-PPD dated 19.02.2020 declared Covid -19 as a Natural Calamity and notified that Force Majeure Clause can be invoked in the **Government's purchase contracts.**

However, the invocation of Force Majeure clause solely depends on the terms and conditions of the contracts between the parties.

In cases where the contract between the parties does not have a Force Majeure Clause, there can still be a remedy available to the aggrieved party in terms of the legal provisions as contained under the Indian Contract Act, 1872.

The Ministry of New and Renewable Energy (MNRE) has also issued an Office Memorandum No. 283/18/2020-GRID SOLAR dated 20.03.2020 to give extension in the commissioning of the RE Projects due to the effect on various factors because of the Pandemic Covid 19 and considering it as a Force Majeure Event.

It is advised to take a well informed decision pertaining to contracts where Force Majeure Clause is not available to be invoked in the Infrastructure Projects and also if there are any limitations on the invocation of the Force Majeure Clause.

Force Majeure Clause

7. Is the COVID19 Pandemic scenario a Force Majeure situation for contractual obligations? If yes, does the ongoing COVID19 scenario suo-motu invoke the Force Majeure Clause in a contract or do I have to pro-actively invoke the said clause?

Answer: The current scenario has exposed the stakeholders of the economy to an unprecedented situation wherein it is impossible to provide a straight-jacket formula for determining the enforcement of obligations under varied contracts.

Usually, the invocation of a Force Majeure situation requires a pro-active notification process, however this may not be applicable to all contracts since every contract is unique to itself.

Recognising the force majeure event, invoking it timely and taking corrective or damage control decisions can change the fate of business for many coming years.



Force Majeure Clause

8. Can a Force Majeure notice be sent via email? Can it be mentioned in the body of the email or has to be invoked in a duly signed attachment to the email?

Answer: A contract may or may not have a clause determining the procedure for sending a notice under the contract, by either party.

Hence, whether or not an email can be considered as a valid notice to invoke Force Majeure depends on the specifications in the contract itself.

In case such a procedure is not mentioned in the contract, invoking it in the body of the email or as a separate attachment, both would work.

9. What If the contract does not have a force majeure clause?

Answer: Non-existence of a Force Majeure contract does not and cannot render an aggrieved party remediless in a peculiar situation such as the current pandemic.

Certain measures at the right time and in correct manner may be resorted to by the aggrieved parties to safeguard their interest.

However, that will also vary from contract to contract and no straight jacket formula can be provided without intricate study of the specific contract.



Force Majeure Clause

10. Can A Force Majeure Clause Be Implied Under The Contract?

Answer: **A force majeure clause cannot be implied under Indian law.** It must be expressly provided for under the contract and protection afforded will depend on the language of the clause.

In the event of a dispute as to the scope of the clause, the Courts are likely to apply the usual principles of contractual interpretation.

11. Who Has The Burden Of Proof To Establish A Force Majeure Event?

Answer: As a general practice, the party that has been unable to perform the contract due to Force Majeure has the onus to prove it.

However, it may vary in exceptional circumstances.

A proactive due diligence is advisable in building a checklist and repository of all supporting evidence to discharge this burden of proof.

EVENTS



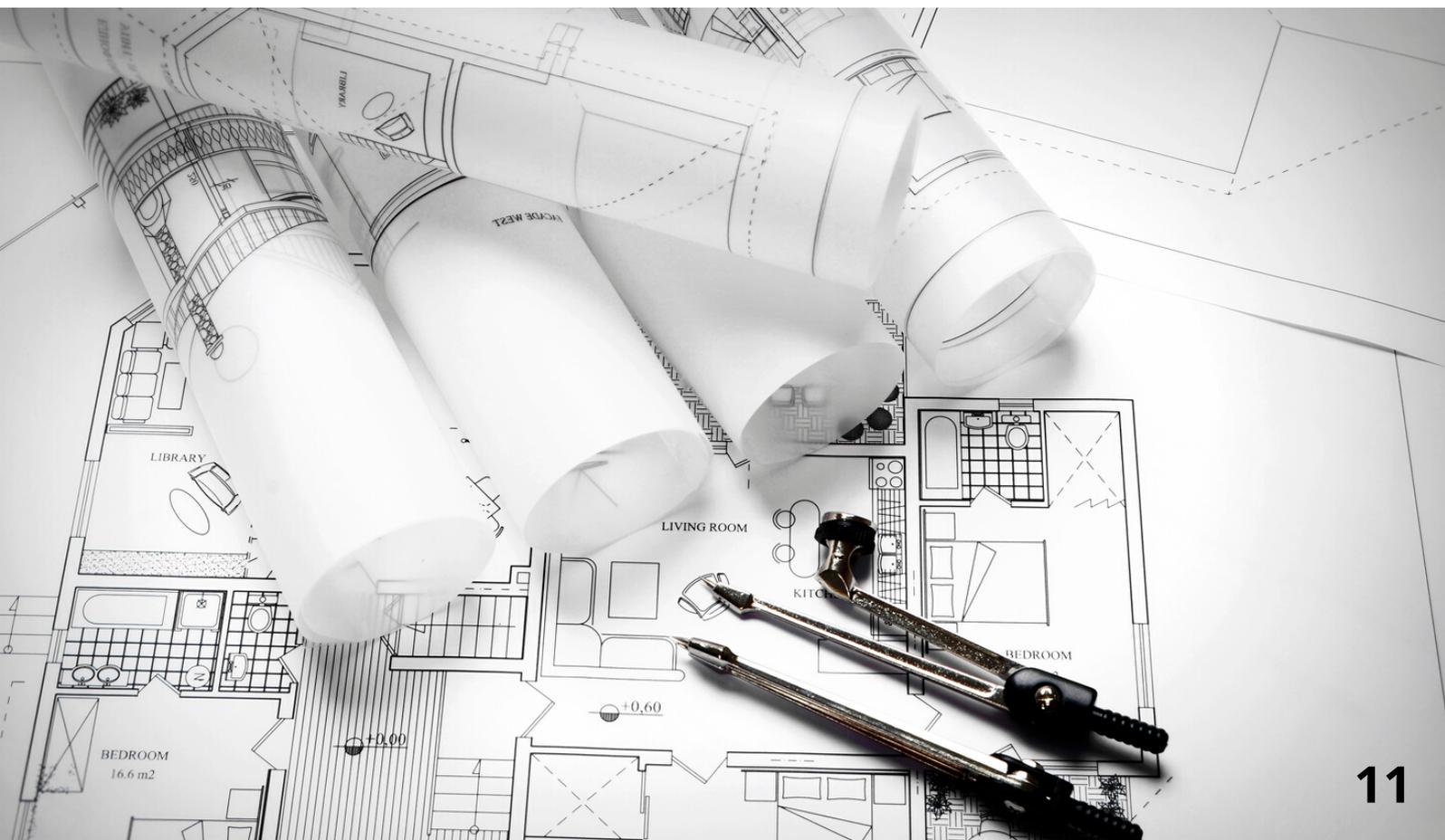
Tenders in Projects

12. How would the current scenario affect the tenders acquired by businesses? Will the legal obligations to provide the goods and/or services under the tender suo-motu be brought to a halt or the concerned parties shall have to pro-actively notify each other or take steps to minimize and/or avoid financial losses or in some cases, terminate the tender contract?

Answer: All the tenders and contracts (except for those dealing in essential commodities subject to renewed conditions if any) would come to suo-motu halt in the current circumstances. **The verbiage used in the Force Majeure and the Termination Clause would be very important to determine the impact, rights, obligations, and liabilities of the respective parties.**

It is strongly advised to put in writing and communicate properly the invocation of the Force Majeure clause or the termination of the contract by following the process as enshrined under those respective clauses.

However, for opinion on specific queries regarding your contract, please get in touch with a legal expert to avoid unforeseen liabilities.



Impact on Toll Booths

13. What would be the impact of the current Pandemic situation on Toll Booths and Toll Collection?

Answer: The Road Transport and Highways Ministry has directed the National Highways Authority of India (NHAI) to suspend toll collections across the country during the lockdown period of 21 days till 14th April.

For concessions given to the Toll Booth operators, the period of the concession would be extended by a period equal in length to the period during which the Concessionaire is unable to collect tolls.

Maintenance of roads and availability of emergency services at toll plazas have asked to be continued to have a proactive approach in any emergency situation.



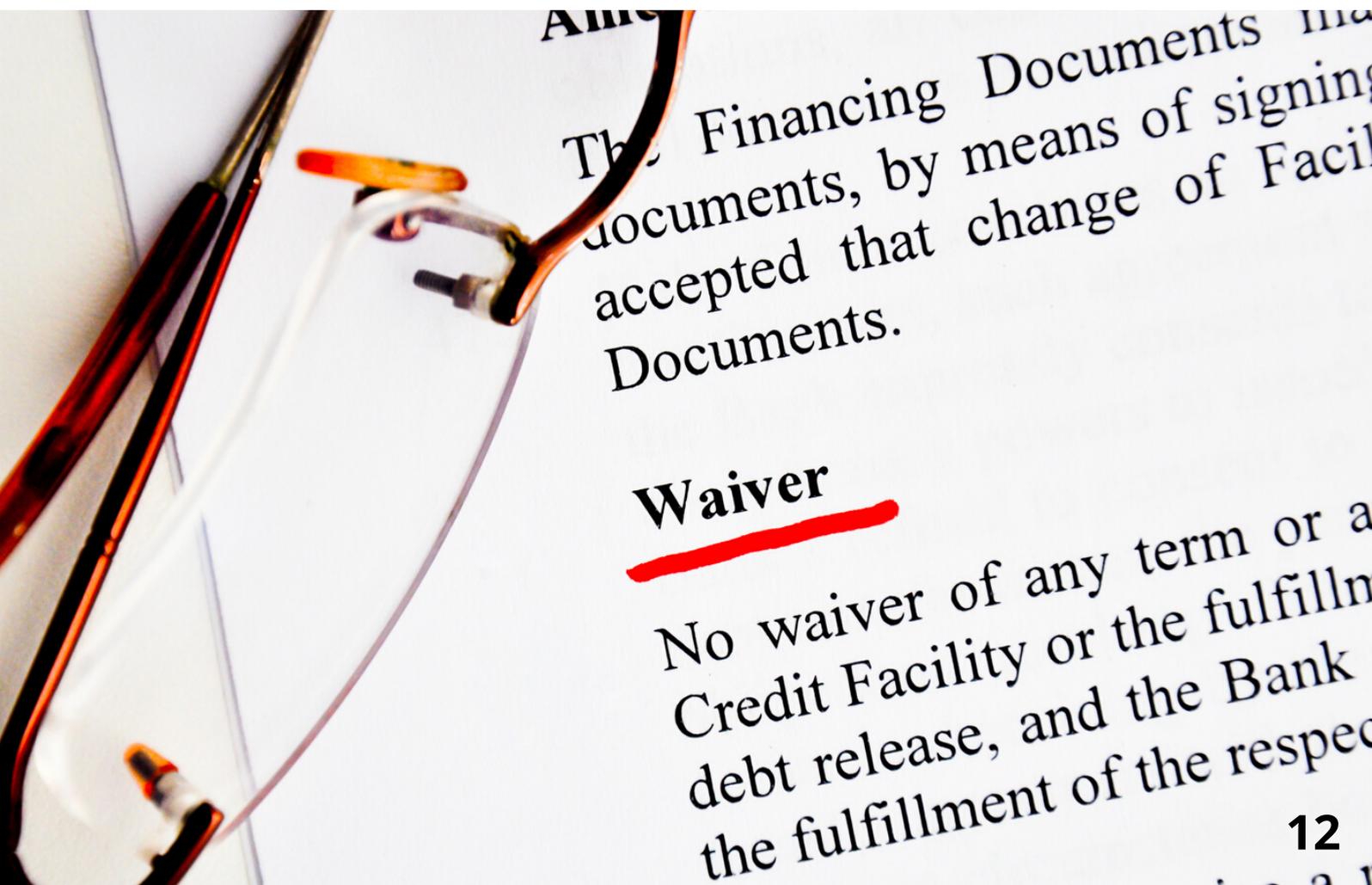
Relaxations/Waivers

14. Are there any circulars/notifications pertaining to the relaxation or the waiver of terms and conditions with regard to payback of loans and interest thereon to banks and financial institutions?

What would happen to Performance Bank Guarantees and the interest thereon?

Answer: Recently, RBI has in its notification DOR.No.BP.BC.47/21.04.048/2019-20 on March 27, 2020 addressed certain regulatory measures that were announced to mitigate the burden of debt servicing brought about by disruptions on account of COVID-19 pandemic.

There is nothing specific on Performance Bank Guarantee known till the date of release of this white paper.



Dispute Resolution Clause

15. What would happen to the dispute resolution clause of the Contract in the current contract?

Can the Force Majeure event be a matter of dispute to be adjudicated under the Dispute Resolution Clause?

Answer: Key contracts should be analysed to assess the parties' rights and obligations, including with respect to termination, force majeure, governing law and dispute resolution.

If the Force Majeure clause of the contract is subject to interpretation, it can be brought under the ambit of dispute resolution clause to reach the right conclusion.

We at AMLEGALS anticipate that the disputes which will crop up in this pandemic business cycle will be different than dispute arising during normal business cycle. Hence, very cautious approach is needed and any negligent approach can be suicidal for business.



Wgaes/Salary

16. Whether Companies are allowed to deduct salaries of their workers working in these infrastructure projects?

Answer: The Ministry of Home Affairs vide Order no. 40-3/2020-DM-I(A) dated 29.03.2020 has directed all the employers, be it in the industry or in the shops and commercial establishments, to make payment of wages of their workers, on the due date at their work places, without any deductions, for the period of lockdown.

The Government has also declared many reliefs for such labour's working on these projects.



ABOUT US

AMLEGALS is a multi-specialised law firm. We would love to hear your views, queries, feedback and comments on covid19@amlegals.com or rohit.lalwani@amlegals.com.

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