



## DELHI HIGH COURT VACATES INTERIM PROTECTION GRANTED AMIDST LOCKDOWN

### I. Introduction

Through our news alert dated 1<sup>st</sup> May 2020, titled [Delhi High Court Grants Interim Protection Amidst Lockdown](#), we had *inter alia* analysed the ad-interim order dated 20<sup>th</sup> April 2020 passed by the Hon'ble Delhi High Court in the case of *M/s. Halliburton Offshore Services Inc. v. Vedanta Limited & Ors.* ("ad-interim order"). Vide the said ad-interim order, the Delhi High Court granted interim protection to the Petitioner and temporarily enjoined the Respondent from encashing the bank guarantees. In this regard, the Court observed that the situation caused by COVID-19 was in the nature of Force Majeure and thereby constituted a case of 'special equities' as the pandemic and the resultant lockdowns were unprecedented and could not have been predicted by the Petitioner or the Respondent. The Hon'ble Court also proceeded to clarify that the injunction was purely ad-interim and was being granted only in view of the completely unpredictable nature of the lockdown. Whether the same would be continued after the next date would depend on the pleadings and the oral arguments advanced. Pursuant thereto, the pleadings were completed, and the matter was heard at length.

After hearing the parties, the Delhi High Court passed an order dated 29<sup>th</sup> May 2020 vacating the interim stay granted to the Petitioner and disposing off the petition. Vide this order the Bench *inter alia* held that ***the outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself.***

### II. Summary of the Order of the Hon'ble Delhi High Court dated 29<sup>th</sup> May 2020

#### A. Facts of the case:

There existed a contract between the Petitioner and Respondent No. 1 for integrated development of the Mangala, Bhagyam and Aishwarya fields ("Project"), including the drilling of wells by the former for the latter in these fields. To this effect, the Petitioner had furnished various bank guarantees the potential invocation of eight of which was under question. The parties had agreed that the execution of the works would be completed by 31<sup>st</sup> March 2020. However, on 18<sup>th</sup> March 2020, the Petitioner invoked the force majeure clause in the contract and sought an extension in the time for completion of the Project. This was not acceptable to the Respondent. As per the terms of the contract, the Project awarded to the Petitioner was time-sensitive i.e. that time was of essence in the contract and the liquidated damages recoverable were pre-estimated and

prescribed in the contract itself.

The Respondent proposed to terminate the contract and threatened the invocation of the bank guarantees. This led to the filing of the petition under Section 9 of the Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”). The Petitioner sought to restrain Respondent No. 1 from invoking and encashing the bank guarantee until the expiry of one week from the date on which the lockdown is lifted by the Rajasthan government. At the time of filing the petition, all the relevant documents were not filed and the grounds in the petition were limited.

In view thereof, it was observed in the ad-interim order that the submissions of both parties involved questions of law and facts which necessitated the filing of detailed pleadings. These would be essential to arrive at a conclusion as to whether till the normalization of activities or relaxations of the restrictions imposed vide the lockdown, the Petitioner would be entitled to an injunction, against the Respondent, from invoking the 8 bank guarantees forming the subject matter of the Petition.

#### **B. Submissions made on behalf of the Petitioner**

From the contents of the order, it can be concluded that the following arguments were primarily advanced on behalf of the Petitioners:

- i. There was no need for the ad-interim order to be dissolved as the contract stood terminated and the arbitration clause had been invoked. Further, a majority of the Project stood executed and only 3-5% remained outstanding and therefore there was no valid justification for the Respondents to invoke the bank guarantees. Reliance was placed on letter dated 6<sup>th</sup> May 2020, issued by the Respondent with regard to the final timelines for execution. This evidenced the fact that the contract was still subsisting between the parties.
- ii. Force Majeure squarely applies in view of the outbreak of COVID-19 globally. The Respondent was aware that the kind of equipment that is to be installed requires personnel to travel from various foreign countries which is not possible due to lockdown. Thus, the Petitioner was entitled to an injunction.
- iii. A variation order dated 16<sup>th</sup> January 2020, signed and issued by Respondent No. 1, extended the date of expiry of the contract to 30<sup>th</sup> June 2020. This order was issued with a view to grant the Petitioner additional time to complete the unfinished work. In view thereof, the bank guarantees could not be invoked. Further, as the bank guarantees were valid till 2021, this granted adequate security to the Respondents. The Petitioner submitted that the invocation of the bank guarantees for

liquidated damages was subject to the outcome of arbitration of the dispute and did not arise at this juncture.

- iv. In view of the above, the Petitioner notified the Respondent vide letter dated 18<sup>th</sup> March 2020 that a milestone adjustment would be required. The Petitioner claims that this letter established the bona fides of the Petitioner as it informed the Respondent of the difficulties it was facing and the impact of the Force Majeure event in terms of clause 15.4 of the contract in advance. The Petitioner claimed that since the pandemic was beyond reasonable control of the parties it was covered within the meaning of clause 15.4 of the contract and was entitled to compensation in terms of the said clause. The Respondent vide letter dated 31<sup>st</sup> March 2020 categorically stated that it understood the situation and the impact of the pandemic, however the Respondent chose to put the Petitioner on notice that it will terminate the contract.
- v. The Court exercises discretionary jurisdiction under section 9 of the Arbitration Act. Though an injunction against the invocation of bank guarantees was sought, the Court was not prevented from passing interim orders to safeguard the Petitioner's interest. The manner in which the termination took place after filing of the Section 9 petition was *mala fide*. In view of the above and in view of the hardships caused by the pandemic the Petitioner ought to be granted protection.
- vi. It was also submitted that the contract was valid, a substantial portion of the work was completed, and the Petitioner was to be paid a large sum for works which have already been conducted. Under these circumstances, the Section 9 petition deserves to be allowed and the interim order already granted ought to be confirmed.

**C. Submissions made on behalf of the Respondent**

From the contents of the order, it can be concluded that the following arguments were primarily advanced on behalf of the Respondents:

- i. The Petitioner is guilty of grossly delaying the execution of the Project since its inception. The completion dates were well-known to the Petitioner who for one reason or the other continued to delay the execution of the project.
- ii. Under these circumstances when the Petitioner was already in breach, it chose to serve letter dated 18<sup>th</sup> March 2020 invoking the clause due to the outbreak of COVID-19. In fact vide this letter, the Petitioner failed to provide any concrete schedule for completing the Project. The Respondent then issued notice dated 31<sup>st</sup> March 2020 clearly intimating the Contractor that it would now take recourse under the contract and

get the balance activity completed through alternative sources.

- iii. There was a difference between impossibility of contract and Force Majeure clause. Since the Project was delayed prior to lockdown, the Petitioner could not be protected under the Force Majeure clause. Rightful invocation of such Force Majeure clause was a contractual dispute and beyond the scope of the present Section 9 petition. The question as to whether or not the Force Majeure clause would kick in would have to be decided in terms of the arbitration clause. Contractual conditions are not part of the letter of credit.
- iv. The subject Bank Guarantees were independent contracts and not subservient to the main contract. The invocation of bank guarantees is to be stated only in cases of fraud or special equities. The bank guarantees provided were unconditional and unconnected to the dispute of the underlying contract as they had been issued to secure advance payments and effective performance, therefore no restraint order ought to be granted.
- v. It was submitted that the Petitioner has failed to make out a case for egregious fraud and irretrievable justice and no ground for a stay on the invocation of the bank guarantee has been made out. Submissions were also advanced on the lines that simply because extensions were granted did not imply that the right to liquidated damages was waived or that bank guarantees could not be invoked for non-performance.
- vi. COVID-19 did not qualify as a case for 'special equity' and the legal precedent in this regard was very clear. Disputes regarding waiver, partial breach are arbitrable disputes. Force Majeure depends on the construct of the contract. However, as Bank Guarantees are unconditional and irrevocable the encashment of the same are independent of the merits of the matter.

**D. Outcome:**

The Hon'ble Delhi High Court noted the detailed submissions made by the Advocates for the Petitioner and Respondent. After a careful consideration, the Delhi High Court proceeded to vacate the ad-interim relief granted vide the ad-interim order and disposed off the petition. The Hon'ble Court noted that the observations made in the Order were limited to the Petition and all other disputes were to be placed before the arbitral tribunal. It was also pointed out that key documents had not been annexed by the Petitioner and came up for consideration only pursuant to the reply being filed. The key observations from the said order pertaining to Force Majeure are summarized hereinbelow:

- i. The milestones as provided in the contract shows that time was of essence in the contract and the liquidated damages recoverable were pre-

estimated and prescribed in the contract itself. Further, a perusal of the pleadings and the documents filed by the parties clearly revealed that the original contractually stipulated dates for completion had not been achieved. However, the Court would not go into which party caused the delay as both parties blamed each other.

- ii. The Petitioner invoked the Force Majeure clause as it covered pandemics and epidemics and in the present case experts from France could not travel to India due to COVID-19. On this ground the Petitioner claims that its non-performance is justified, and the invocation of Bank Guarantees is liable to be stayed. ***However, it was observed that there was nothing on record to show the steps taken by the Petitioner towards mitigation, which was necessary as per the Force Majeure clause.*** There is no doubt that COVID-19 is a Force Majeure event. However, ***every breach or non-performance cannot be justified or excused merely on the invocation of COVID-19 as a Force Majeure condition.*** The Court would have to assess the conduct of the parties prior to the outbreak, the deadlines that were imposed in the contract, the steps that were to be taken, the various compliances that were required to be made and only then assess as to whether, genuinely, a party was prevented or is able to justify its non-performance due to the epidemic/pandemic.
- iii. The position of law is well-settled ***that a Force Majeure clause is to be interpreted narrowly and not broadly. Parties ought to be compelled to adhere to contractual terms and conditions and excusing non-performance would be only in exceptional situations. It is also not the duty of Courts to provide a shelter for justifying non-performance.*** There must be a 'real reason' and a 'real justification' which the Court would consider, to invoke a Force Majeure clause. The Court also stated that ***express terms of a contract cannot be ignored on a vague plea of equity.*** In this regard, the Court relied upon the judgment of the Supreme Court of India in the case of ***Energy Watchdog v. Central Electricity Regulatory Commission ((2017) 14 SCC 80)***.
- iv. The past non-performance of the Petitioner could not be condoned due to the COVID-19 lockdown in March 2020 in India. The Petitioner was in breach since September 2019. Opportunities were given to the Petitioner to cure the same repeatedly. Despite the same, the Petitioner could not complete the Project. ***The outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself.*** Thus the Force Majeure clause does not afford any succour or shelter to the Petitioner at this stage, to seek restraint against encashment of the Bank Guarantees.
- v. With regard to the bank guarantees the Court held that no case is made

out for passing of any interim order staying the invocation or encashment thereof.

In conclusion the Court also stated that whether the *Force Majeure* clause itself would apply or justify non-performance in the facts of this case, would have to be determined finally in the arbitral proceedings and the observations of this Court are only prima facie in nature.

### III. Conclusion

Akin to the ad-interim Order, the Hon'ble Court has opined that COVID-19 is prima facie in the nature of a Force Majeure event. However, the Court has categorically upheld the cardinal principle governing commercial contracts being '*pacta sunt servanda*' i.e. agreements must be kept. Force Majeure cannot be seen as a shelter to avoid contractual obligations and it is *not in the domain of Courts to absolve parties from performing their part of the contract*.

A review of this case once again shows that much would depend on the nature of the contract, the obligations of the parties involved, the time period when the contract was entered into, the performance of their obligations prior to the pandemic and the steps taken to mitigate the loss. Parties desirous of invoking Force Majeure must assess their own conduct and actions with a fine-toothed comb in addition to reviewing the contractual clauses as the same would be strictly construed and viewed by the Court.

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