

Force Majeure: Impact on Leave and License Agreements

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The on-going COVID-19 pandemic which has resulted in the lockdown of all the states and its machinery has given rise to the recognition of the event as a 'force majeure' event. Even the Government of India has recognized it as being covered under the term 'Natural Calamity' as provided in Force Majeure clause incorporated in its Manual for Procurement of Goods, 2017 and thus it is irrevocable.

One of the worst affected sectors is the Real Estate sector specifically in context with the leave and licenses agreement (**LLA**) for both residential and commercial. A lot of licensees are either people working in white and blue-collar jobs (being affected to the extent that they are being asked to take a full pay cut or no salary or furloughed or terminated or benched) or are start-up business/business running into losses (on account of statutory restriction put on by Government of India or State Government, as the case may be). This has in turn drastically effected the capacity to pay rent/licensee fees/compensation etc in such a situation. Many individuals or companies who have entered into a LLA are now finding it difficult to pay the rent/licensee fees/compensation. Through this article, we shall talk about the impact of Force Majeure clauses in a Leave and License Agreement.

A license is a personal right granted to a person to do something upon immovable property of the grantor i.e. the Licensor does not amount to the creation of interest in the property itself. It is purely a permissive right to use and occupy the immovable property and is personal to the grantee i. e the Licensee. It creates no duties and obligations upon the persons making the grant and is, therefore, revocable except in certain circumstances expressly provided. Further, the rights and duties are determined by the terms and conditions of the contract entered by parties, unlike a lease which is governed by the Transfer of Property Act, 1882. The license, when granted has no other effect than to confer liberty upon the licensee to go upon the land, which would otherwise be unlawful.

Most property rental agreements contain such 'force majeure' clauses. Residential, Hotel & Restaurant and retail businesses that pay the highest rentals tend to incorporate force majeure clauses in their contracts which would suspend rent payment should any force majeure event occur. However, in the absence of a force majeure clause, the parties may still claim termination of a contract, as an agreement to do an act which becomes impossible after the contract is made, is void. This principle is known as 'Doctrine of Frustration'.

A license is deemed to be revoked where the property is destroyed or by superior force so permanently altered that the licensee can no longer exercise his right. This provision is similar to the provision set out in Section 108(B)(e) of Transfer of Property Act, 1882 (which governs Lease Deeds) the common ingredients being 'the property should be destroyed or permanently altered or rendered unfit'. Thus, even a licensee may find it challenging to take recourse to Section 62(d) of the Act, as the present lockdown or pandemic would not result in the destruction or permanent alteration of the property, but only stop it for using or occupying the said property, giving rise to the invocation of Force Majeure Clause r/w Section 32 of ICA, 1872 (if the clause exists) or Doctrine of Frustration r/w Section 56 of ICA, 1872.

The application of the term force majeure depends completely on how the parties choose or agree to define it in their contract. When the event occurred and where the parties are in dispute as to the interpretation of the force majeure clause, the Court would give weightage and focus to what has been agreed exclusively by the parties in the contract and not allow a party to protect itself from a liability arising out of an event, which was not intended in the contract.

However, if the force majeure clauses in leave and license agreements do not contemplate natural calamity or Government directions such as relating to the present lockdown or pandemic itself, then the licensees may find it challenging to claim suspension of their obligations, under Section 32 of ICA, 1872 as the main ingredient for invocation of the said section are (a) Description of the event in a

force majeure clause; (b) There is the default in performance of the obligation of the contract, due to occurrence of the event. (c) The default is due to the event being beyond the control of the party invoking the clause and not due to his shortcomings. (d) The parties are required to see whether there is complete impossibility of performing the obligation or if there is only a temporary change in circumstance, which can be cured by an alternative, which may have been stipulated in the agreement. (e) The force majeure clause may not be automatically triggered at the happening of an event but can be invoked only after a point, where the parties have no other alternative to mitigate the loss despite having made all the efforts to allocate the risk, depending on the terms and conditions of the agreement.

Licensees may also face challenges to take recourse to Section 56 of the Indian Contract Act i.e. the Doctrine of Frustration, as the present impossibility caused through the lockdown or pandemic is not permanent and shall not frustrate the entire contract or absolve parties obligations but merely give a time extension to perform the agreement. However, the parties may attempt to show the frustration of contract under Section 56 of the Act by taking a plea that the lockdown prevents them from making use of the licensed premises to run their business, for which purpose the license has been obtained. Since the premises cannot be used for the purpose for which the contract was entered into, it may be argued that the contract stands frustrated. Hence, a licensee, in particular, may seek termination of the agreement based on Doctrine of Frustration” except in case the licensee continues to store its goods in the premises or is residing in the premises and during such period the licensor is not free to make any use or benefit of the premises, as per his volition.

The pandemic has created a severe financial burden on the country and its citizens. The inability to pay the licensee fee/lease rent by a licensee/lessee is a very possible reality, thereby rendering them not able to fulfill the conditions of the Agreement/Deed that they are legally bound to. This will in turn lead to a high amount of litigations in the courts. It is pertinent to note that even if the force majeure clause includes Acts of God or natural calamity then, it needs to be tested if the courts would consider the Pandemic as an Act of God/natural calamity and allow lessees/licensees to suspend their obligations. While interpreting the contracts, the courts are free to take a view based on equity and exercise their inherent powers, as the law which has evolved through various judgments, including the judgments mentioned herein, have never dealt with an unprecedented situation, similar to the present pandemic/ lockdown.

The best way to approach this situation would be for both the parties to the Agreement to sit across the table and come to a workable solution to tackle this unprecedented situation, by (a) deferring of payment of license fee for a few months until the lockdown is lifted, (b) reduction of the amount of license fee for a few months by adjusting the same in the future payable license fee, (c) payment of the suspended license fee by way of feasible installments in the forthcoming months, (d) adjustment of license fee from the security deposit with further understanding to repay the security deposit at a later stage, etc. may help to ease off the burden of the licensees, while, ensuring inflow of income to the licensors.