

ISSN: 2582-6433



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed 6th Edition

VOLUME 2 ISSUE 7

www.ijlra.com

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IMPACT OF COVID-19 ON CONSTRUCTION CONTRACTS AND ARBITRATION IN INDIA

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Abstract

The outbreak of COVID-19 has significantly impacted various industries negatively as government sanctions, travel restrictions, and geopolitical upheaval have heightened commercial volatility. The Construction industry across the world is not immune to this catastrophic phenomenon. This sector of the industry has always been considered heavily litigious as it is a hotbed of disagreements; the complicated construction processes with several moving parts and the enormous project cost amidst the low-profit margin taken by the parties make it prone to legal disputes. Most of these disputes depend on the terms of the Construction Contract agreed by the parties. In terms of contract standardisation in construction and engineering, FIDIC (Foreign Federation of Consulting Engineers) standard contracts are used in various international jurisdictions, including India. While numerous countries throughout the world have raised their concerns, and the situation as a result of COVID-19 is still not totally under control, there are a number of challenges stemming from these contractual responsibilities, especially the parties worrying about combating the impact of the pandemic through arbitration.

1. The Impact Of Covid-19 On Construction Sector

In India after agriculture, construction industry is the second largest employer with an industry size of INR 10.5 trillion.¹ The sector accounts for 8 per cent of the nation's GDP, employs 57.5 million people and comprises around 500 companies.²

The World Health Organization [“WHO”] declared the Coronavirus pandemic on March 11, 2020. The epidemic has created several unprecedented problems for different businesses throughout the world, and the building and infrastructure sectors were not immune to them. Despite efforts made by India to mitigate the negative impacts, by exempting construction activity or specific critical projects from otherwise applicable confinement restrictions, the pandemic's influence on the construction sector has been undeniably significant.

This paper analyses the measures taken by India and other countries in response to the pandemic to understand the consequences of it on infrastructure projects.

1.1. INDIA'S RESPONSE TO THE COVID-19 PANDEMIC

On March 24, 2020, the Modi administration in India enforced a three-week countrywide lockdown. The curfew was eventually extended until June 8, 2020.³ Construction work on critical construction projects restarted on April 20, 2020. Renewable energy initiatives, for example, were one such type of project.⁴ Non-essential building projects were also allowed to resume on June 8, 2020. All construction, on the other hand, has been subject to site-wide social distancing norms, required thermal scanning, and periodic sanitization.

¹ National Accounts Statistics, Ministry of Statistics and Program Implementation, Government of India, 2019-2020.

² CONSTRUCTION WORLD, <<https://www.constructionworld.in/>> accessed 22 September 2021.

³ Elizabeth Puranam, 'India Lifts Lockdown Measures Despite COVID-19 Surge' (Al Jazeera News, 9 June 2020) <<https://www.aljazeera.com/news/2020/06/india-reopens-state-outnumbers-china-coronavirus-cases-200608...>> accessed 22 September 2021.

⁴ Kanika Verma, 'Ministry of Home Affairs Releases List of Exempted Activities During Lockdown' (Invest India, 17 April 2020) <<https://www.investindia.gov.in/team-india-blogs/ministry-home-affairs-releases-list-exempted-activit...>> accessed 22 September 2021; see also The Economic Times, 'New Lockdown Guidelines: Here's a List of Economic Activities That Will Be Allowed after April 20' (Delhi, 20 April 2020); and Global Data, 'Government Allows Resumption of Some Construction Projects in India' (Design Build Network, 22 April 2020) <<https://www.designbuild-network.com/comment/construction-india-covid-19/>> accessed 22 September 2021.

Direct And Indirect Impact Of Covid 19 On Construction Projects

A full analysis of COVID-19 effects is unattainable due to the range and complexity of national building projects, as well as uncertainty regarding the pandemic's future course. It is apparent that the consequences have been or will be substantial for certain projects, and there is a significant danger that the impacts will continue to mount in the months or potentially years ahead.

- i. Mobilisation of Personnel: Construction work rely heavily on manual labour. Most of the construction workers in India are migrant worker who are from rural areas working in urban cities as seasonal labour.⁵ When the lockdown was imposed putting a halt on construction activities migrant workers returned to their place of origin.⁶ This caused a severe strain on the supply chain of manpower.
- ii. Procurement of Equipment, Materials and Plant: China is a prominent global supplier of raw and manufactured building materials, with the availability of Chinese commodities being particularly important for the Indian construction sector.⁷ As a result of the stringent lockdown measures enforced, several Chinese industries slowed or stopped down entirely in the first quarter of 2020, resulting in a major drop in building material manufacture and export.⁸
- iii. Operation Constraints at site: Those projects that were obliged to shut down completely during periods of lockdown suffered a sustained loss of progress. Even where projects have been permitted to proceed, development has been hampered by the necessity to adhere to tougher health and safety regulations on the job. These have included (i) temperature checks before entering the site; (ii) frequent cleanliness of materials, equipment, and working environments; and (iii) social distance standards, which have limited the number of people who may operate in a particular place at any one moment. Access to or within the site frequently necessitates the sharing of restricted areas (e.g., elevators, voids for heating, ventilation, and air conditioning, etc.).⁹
- iv. Impaired flow of cash: The majority of construction contracts tie contractor compensation to the completion of predetermined milestones or progress indicators. The negative effects of COVID-19-related policies in India and throughout the world on project development

⁵ Amitab Kundu, 'Urbanisation and migration: An analysis of trends, patterns and policies in Asia' 2009 New York: United Nations Development Programme, Human Development Report.

⁶ Smita & Panjiar, *Locked homes, empty schools: The impact of distress seasonal migration on the rural poor* (Zubaan 2006).

⁷ SURFACES REPORTER, <<https://www.surfacesreporter.com/articles/82415/2021-construction-and-building-material-industry-trends-in-india>> accessed 22 September 2021.

⁸ Carroll Joseph Hughes, 'Chinese Copper, Italian Marble: Coronavirus Shipping Delays Hurt Developers' (The New York Times, 20 March 2020) <<https://www.nytimes.com/2020/03/20/business/coronavirus-construction.html>> accessed on 24 September 2021.

⁹ Damini Nath, 'CPWD to observe guidelines at construction sites' The Hindu (New Delhi, 8 May 2020).

would, in most cases, result in a direct reduction of the contractors' cash flow. This, in turn, can have ramifications for suppliers and subcontractors' cash flows, especially with 'pay when paid' agreements in place.

2. Construction Contracts In The Post Covid-19 World

Although COVID-19 is an unusual and unique illness that necessitates the adoption of innovative containment measures, it is unlikely to cause a paradigm shift in the kind of disputes that normally emerge from building contracts. COVID-19, on the other hand, is bound to enhance or complicate the common forms of project conflicts.

Below, we look at some of the most common options available to contractors under contracts regulated by Indian law.

2.1. CHANGE IN LAW

One of the first options that is open to the contractor to recover the costs and losses through the contract as a result of Covid-19 is Change in Law. Standard forms of change in law provisions developed by the International Federation of Consulting Engineers ["FIDIC"], which expressly state that "a change in the laws of the country" that affects the contractor's performance of its obligations may entitle the contractor to both a price adjustment and a time extension.¹⁰ The term 'laws' is a broad term that encompasses a wide range of legislative and regulatory actions.¹¹ Within the Indian regime this would include actions of the State Government, Central Government and Union Territories to invoke Epidemic Diseases Act 1897, Disaster Management Act, 2005 and other such acts to issue regulations, ordinances and others thereunder may qualify as a 'Change in Law'.¹²

After the lockdown from March 2020, the home ministry issued revised rules for "Lockdown 2.0" under Section 10 of the Disaster Management Act 2005¹³ which stated that new construction work for highways, renewable energy and irrigation-related activity, and industrial projects outside municipal boundaries might begin after April 2020. However, it was up to the various district administrations or local authorities to decide whether or not these structures may be built.

The availability of employees on-site was one of the most important requirements for starting construction work (in-situ). As a result of this, the government imposed restrictions on the movement of construction workers between cities and states.

During the second wave, the national capital went into lockdown on the April 14, 2021 and it was only after May 31, 2021 that the construction activities were resumed.¹⁴ For instance, Andhra Pradesh after

¹⁰ Sub-Clause 13.7 of the 1999 Red Book, Yellow Book, Silver Book and Pink Book forms.

¹¹ Sub-Clause 1.1.43 of the 2017 Silver Book; Sub-Clause 1.1.6.5 of the 1999 Silver Book.

¹² Atul Sharma and Martin Harman, 'Managing the Impact of Covid-19 On the Infrastructure and Construction Sector' Mondaq (2 September 2020).

¹³ Disaster Management Act 2005, s. 10.

¹⁴ Surabhi Shaurya, 'Delhi Unlock To Begin May 31. Construction Work, Factory Ops to Resume, Says Kejriwal' *India.com* (New Delhi, 28 May 2021).

imposing a partial lockdown, issued a Standard Operating Procedure [“SOP”] allowing Industries under constructions to continue in a single shift.¹⁵

When it comes to restarting construction activities, the example of Karnataka can be considered. The SOP contained guidelines that the construction site needed to follow which included but were not limited to screening of workers with thermal scanners before entering, disinfections of bathrooms on a daily basis and routine checks.¹⁶

All the above instances constitute a relevant change in law depending upon the wordings of the contractual provisions and the nature and impact of the alleged change. For example, based on the standard wording in the FIDIC Silver Book forms, it will be necessary to consider whether the relevant change was to the laws of the ‘Country,’ which is defined as ‘the country in which the site (or the majority of it) is located, and where the Permanent Works are to be executed.’¹⁷ If the measures in question are lockdown or health and safety precautions that restrict or delay the continuation of activity on site, there appears to be no special problem in demonstrating a relevant change in the laws of the ‘Country.’ In contrast, if lockdown measures or travel restrictions in other Country/State have caused delays in key equipment and/or materials deliveries or prevented labour deployment in the Country/State where the project is located, it is possible that no relevant change of law has occurred, and thus no entitlement can be claimed.

2.2. FORCE MAJEURE

Black’s Law Dictionary defines ‘Force Majeure’ as “an event or effect that can be neither anticipated nor controlled, is unexpected and which prevents someone from doing or completing something that he or she had agreed or officially planned to do”.¹⁸ In contractual terminology, Force Majeure refers to an unexpected incident that prohibits the parties from fulfilling their obligations under the contract. A Force Majeure provision is required under Indian law and should be expressly provided in the contract in order to benefit from its protection. Parties cannot however, invoke an implicit Force Majeure clause.

In the construction sector, standard form contracts generally include force majeure sections that describe the particular circumstances that will qualify as force majeure and give a test to evaluate whether undefined occurrences will also qualify as force majeure.¹⁹ For example, force majeure occurrences are described in the FIDIC forms as events or situations that:

- (1) are outside the control of a party;
- (2) before entering into the contract, the party could not reasonably have provided against;

¹⁵ The Indian Express, ‘S.O.P for industries in Andhra Pradesh to run during COVID-induced curfew’ <<https://www.newindianexpress.com/states/andhra-pradesh/2021/may/07/sop-for-industries-in-andhra-pradesh-torun-during-covid-induced-curfew-2299550.html>> accessed on 25 September 2021.

¹⁶ Government of Karnataka, Standard Operating Procedure for Industrial, Commercial Establishments and private Offices during COVID-19 <https://covid19.karnataka.gov.in/storage/pdf-files/SOP-Ind-est.pdf>.

¹⁷ Sub-Clause 1.1.6.2 of the 1999 Silver Book.; Sub-Clause 1.1.18 of the 2017 Silver Book.

¹⁸ Bryan A Garner, *Black’s Law Dictionary* (10th edn, Thomson West 2014).

¹⁹ Clause 2.26.14 of the 2016 JCT Design and Build Contract form; Clause 18.1.1 of the 2016 JCT Major Project Construction Contract form; Clause 2.29.15 of the 2016 JCT Standard Form (with Quantities); Clause 2.29.14 of the 2016 JCT Standard Form (without Quantities).

(3) the party could not reasonably have avoided or overcome the situation that had developed; and

(4) Are not traceable in any way to the other party.²⁰

The specified force majeure occurrences in the FIDIC forms, which pertain to man-made calamities and/or natural disasters, do not include pandemics.²¹ However, a party wishing to include COVID-19 and related occurrences within the FIDIC force majeure provision must show that the four requirements listed above are met.²²

The Indian Contract Act of 1872 [the "Act"] contains two sections addressing Force Majeure and Acts of God. Section 32 of the Act addresses contingent contracts, stating that if a contract is based on the occurrence of a future event that becomes impossible, the contract is null and void. Contract frustration is addressed in Section 56 of the Act, which stipulates that a contract is invalid if it becomes impossible to perform after it is formed due to an occurrence that a promisor could not avoid.

The Supreme Court has held in a series of decisions ranging from *Satyabrata Ghosh v. Mugneeram Bangur*²³ to *Energy Watchdog v. CERC*²⁴ that when a force majeure event is related to an express or implied clause in a contract, it is governed by Section 32 of the Act, whereas when a force majeure event occurs outside the contract, it is governed by Section 56 of the Act.

Because the world has never seen an epidemic like COVID-19, it's unlikely that any contract would specifically refer to it as a Force Majeure event. Though the impact of COVID-19 is still being felt, there are several reasons why the Indian courts have deemed it a Force Majeure event. The different grounds for invoking the Force Majeure clause in response to the emergence of COVID-19 are summarised here:

- COVID-19 is a natural catastrophe, according to the Department of Expenditure (Ministry of Finance, Government of India), which said in an Office Memorandum dated February 19, 2020 that it is covered under the Force Majeure provision in the Manual for Procurement of Goods, 2017. The Memorandum further said that contracting parties may terminate their contractual duties / liabilities by using the Force Majeure provision in accordance with the contract's terms.
- Many times, a contract's Force Majeure provision specifically includes epidemic and/or pandemic sickness as one of the occurrences. In such situations, it becomes obvious that the COVID-19 will activate the parties' agreed-upon Force-Majeure provision.
- A common Force Majeure provision in a contract list "Governmental orders," "changes in legislation," and/or "acts of Government" as circumstances that might trigger the clause. With effect from March 25, 2020, the Government of India declared a state of lockdown at the national

²⁰ Sub-Clause 19.1 of the 1999 Red Book, Yellow Book, Silver Book and Pink Book forms.

²¹ Peter de Verneuil Smith QC, Adam Kramer & William Day, 'COVID-19: Force Majeure, Frustration and Illegality in English Law: A Detailed Guide', Thomson Reuters Practical Law (20 April 2021).

²² Sub-Clause 19.1 of the 1999 FIDIC forms and Sub-Clause 18.1 of the 2017 FIDIC.

²³ *Satyabrata Ghosh v. Mugneeram Bangur*, (1954) SCR 310.; *Alopi Parshad & Sons Ltd. v. Union of India*, (1960) 2 SCR 793.

²⁴ *Energy Watchdog v. CERC*, (2017) 14 SCC 80.

level for a period of 21 days, as per an order²⁵ dated March 24, 2020, read with the guidelines²⁶ and addendums²⁷. Except for a few necessary services, all commercial and private businesses including construction were forced to close. It is conceivable to effectively claim that the execution of contractual duties by parties in a contract has become not only impossible, but also illegal and contrary to government orders. Furthermore, the Madras High Court²⁸ recently recognised the lockdown as a Force Majeure event.

- In most contracts, a Force Majeure provision covers occurrences such as Acts of God that are beyond the control of any of the parties. COVID-19 was, without a doubt, beyond any reasonable control or expectation by any of the contracting
- Although Indian courts have not directly ruled on whether an epidemic/pandemic like Covid-19 is an "Act of God," an argument to that effect can be supported by the Supreme Court's decision in *The Divisional Controller, KSRTC v. Mahadava Shetty*²⁹, which holds that the term "Act of God" refers to natural forces acting without human intervention, with the caveat that every "Act of God" is different. The Madras High Court³⁰ and the Kerala High Court³¹ have both issued similar rulings.
- Many times, a contract's Force Majeure provision contains language like "and other similar events." COVID-19 may be considered a Force Majeure occurrence under the ejusdem generis rule in such situations.

The limitation period is the time limit set by law during which legal action can be brought or a right enforced. Part II of the Schedules of the Limitation Act of 1963 establishes the statute of limitations for contract-related lawsuits. The limitation period for particular contracts, such as suits for wages, suits against carriers, suits involving negotiable instruments, and so on, is set forth in Articles 6 to 53. According to Article 54, the statute of limitations for a claim involving particular performance of a contract is three years from the day set for performance or, if no such date is set, from the time the plaintiff receives notice that performance is denied. Similarly, Article 55 states that when a contract is broken or where there are successive breaches.

²⁵ Ministry of Home Affairs, Order No. 40-3/2020-DM-1(A), March 24, 2020, at https://www.mha.gov.in/sites/default/files/MHAorder%20copy_0.pdf.

²⁶ Ministry of Home Affairs, Order No. 40-3/2020-D, March 24, 2020, at https://www.mha.gov.in/sites/default/files/Guidelines_0.pdf.

²⁷ Ministry of Home Affairs, Order No. 40-3/2020-DM-I (A), March 25, 2020, At https://www.mha.gov.in/sites/default/files/MHA%20order%20with%20addendum%20to%20Guidelines%20Dated%2024.3.2020_0.pdf; read with Ministry of Home Affairs, Order No. 40-3/2020-DM-I (A), March 27, 2020, At https://www.mha.gov.in/sites/default/files/PR_SecondAddendum_27032020_0.pdf; & Ministry of Home Affairs, Order No. 40-3/2020-DM-I (A), April 2, 2020, At https://www.mha.gov.in/sites/default/files/3rd%20Addendum%20dated%202.4.2020%20to%20Lockdown%20measures_0.pdf.

²⁸ *R. Narayanan v. The Government of Tamil Nadu and Ors.* W.P. (MD) No. 19596 of 2020 and W.M.P. (MD) Nos. 16318 and 16320 of 2020

²⁹ *KSRTC v. Mahadava Shetty*, 2003 7 SCC 197; See also *Province of Madras v. I.S. and G Machado*, AIR 1955 Mad 519.

³⁰ *P.K. Kalasami Nadar v. Ponnuswami Mudaliar*, AIR 1962 Mad 44.

³¹ *R.R.N. Ramalinga Nadar v. V. Narayana Reddiar*, AIR 1971 Ker 197.; *Kerala Transport Co. v. Kunnath Textile*, 1983 KLT 480.

It is worth noting that the Honourable Supreme Court took cognizance of the request for a limitation period extension suo moto.³² The Hon'ble Supreme Court, in light of the situation created by the outbreak of COVID-19 and the resulting difficulties faced by litigants across the country in filing suits, has extended the period of limitation for filing suits with effect from March 15, 2020 until further orders, irrespective of any statute of limitations. All Indian courts, tribunals, and agencies are bound by the suo moto order.

The Honourable Supreme Court ruled on March 8, 2021, to revoke the extension on limitation from March 14, 2021, citing the restoration of normalcy and a decrease in the prevalence of the Covid-19 virus. Following that, in 2021, a second wave of the Covid-19 epidemic struck India, crippling the country. The Supreme Court Advocates on Record Association ["SCAORA"] intervened in the suo motu proceedings, requesting that the term of limitation be restored. In response to SCAORA's plea, the Apex Court issued a ruling on April 27, 2021, reinstating the term of limitation extension until further orders.

2.3. FRUSTRATION

Other concepts, such as frustration and impossibility, may exist to justify non-performance where force majeure cannot be used for example, under common law systems where there is no contractual force majeure clause or impracticability.

In most common law jurisdictions, proving frustration has always been quite difficult. A contract is frustrated in English law when: (i) a supervening event (ii) occurs after the formation of the contract, rendering (iii) a fundamental obligation in the contract physically or commercially impossible to perform, or (iv) renders a fundamental obligation radically different from that undertaken at the time of entering into the contract.³³ The simple fact that performance would cause great, perhaps fatal, hardship to the performing party is inadequate, and it is frequently assumed that performance must be truly impossible.³⁴

Courts and arbitral tribunals will be asked to evaluate the nature of the government limitations, their length, and their relevance to a party's alleged incapacity to execute its contract duties when applying frustration, impossibility, or impracticability. The application of these theories, like force majeure, will be evaluated on a case-by-case basis.

Frustration, impossibility, and impracticability excuse the parties from continuing to fulfil their contractual duties. As a result, one would expect that these doctrines would be used only in exceptional circumstances, such as when the employer or contractor, in addition to having a viable case of impossibility of performance, believes that terminating the relationship and/or the project is the most advantageous course of action.

³² Suo Moto Writ Petition Civil No. 3/2020.

³³ Hugh Beale, *Chitty on Contracts* (32 ed. 2017) ¶ 23-001.

³⁴ *Tennants (Lancashire) Ltd v. CS Wilson & Co.*, (1917) AC 495.

3. Impact Of Covid-19 On Resolution Of Construction

Disputes

In India, the construction industry received the 2nd highest FDI in the period 2000-2020. Under the NIP, India has a \$1.4 billion infrastructure investment budget, with 24 percent going to renewable energy, 19 percent going to roads and highways, 16 percent going to urban infrastructure, and 13 percent going to railways.³⁵ It is also forecasted that by 2025, India will lead the global construction market by being the third-largest in the world. The Indian construction industry is highly prone to litigation and disputes arising out of loopholes in contracts.³⁶

Construction disputes are complex in nature due to various components involved in them but mainly because the disputes arising are technical or factual or both. Disputes arising out of construction contracts are distinctly different when compared to other body of disputes.³⁷ Further, due to the nature of the project being time sensitive and involvement of multiple parties in these, contracts always ask for urgent resolution of it. These disputes can arise in any stage even in the beginning, from the formation of contracts to presence of valid contract. Interpretation of key provisions, inconsistent provisions coupled with shoddy drafting can lead to many disputes right from the inception.³⁸ The majority of this disputes arises while its performance and delay in completion of the project. Arbitration is becoming a favoured dispute resolution process in the infrastructure sector owing to the complexities of construction disputes.³⁹

COVID-19 is a prime example of an unanticipated danger encountered in the building sector. The epidemic has heightened many of the regular frictions in the building business while also highlighting new issues.⁴⁰ Project delays are the most visible repercussions of the lockdowns, social isolation, and

³⁵ AISHWARYA SRIRAM, INVEST INDIA, NATIONAL INVESTMENT PROMOTION & FACILITATION AGENCY, SECTOR: CONSTRUCTION <https://www.investindia.gov.in/sector/construction>.

³⁶ Sonya Mohan & Adhya Sarna, *Pushing FIDIC Contracts and Arbitration in India's Construction Industry*, Indian Journal of Projects, Infrastructure and Energy Laws Blog (Jul. 5, 2021) <https://ijpiel.com/index.php/2021/07/05/pushing-fidic-contracts-and-arbitration-in-indias-construction-industry/>.

³⁷ VYAPAK DESAI ET AL, NISHITH DESAI ASSOCIATES, CONSTRUCTION DISPUTES IN INDIA 2 (2020) https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Construction-disputes-in-india.pdf.

³⁸ Binsy Susan et al, *Construction Arbitration: India*, Global Arbitration Review (Jan. 28, 2021) <https://globalarbitrationreview.com/insight/know-how/construction-arbitration/report/india>.

³⁹ Achintya Rawal, *India: The Changing Landscape Of Construction Arbitration*, Mondaq (Nov. 5, 2019) <https://www.mondaq.com/india/arbitration-dispute-resolution/860526/the-changing-landscape-of-construction-arbitration>.

⁴⁰ Adrian Bell, *ICC Guest blog: Re-adjusting risks in international construction projects*, International Chamber of Commerce (Sept. 30, 2021) <https://iccwbo.org/media-wall/news-speeches/icc-guest-blog-re-adjusting-risks-in-international-construction-projects/>.

other restrictions imposed on states and administrations.⁴¹

Standard form contracts are currently not extensively used in Indian construction projects. Government authorities, such as the National Highways Authority of India (NHAI), employ their own customised contract form that represents their requirements, notably for public-private partnerships, while the FIDIC, ICE, NEC, JCT, and ACA forms are often used.⁴² The terms of contract between the parties define the course of arbitration process.

3.1. LIMITING CONTRACTUAL PROVISIONS TO CLAIM DAMAGES OR EXTENSION OF TIME

The existing Indian legal regime provides for provisions which help to secure the rights of the parties in case of delay in performance of agreement as delay can happen not just under unexpected extreme situations like COVID-19 but also in the general course of performance of a construction project. The construction contracts further contain provisions which clearly define the time period by which the defaulting party (including case of concurrent delay) or the aggrieved party can claim for extension or damages respectively. COVID-19 has caused many uncertainties in completion of performance of a contract project, one of which is when they should send a notice for non-completion and avail for extension of time. Determining permitted events of delay are fact-intensive inquiries, thus fully understanding the impact will take time.⁴³ Moreover, if an agreement is governed by the FIDIC clauses -Optional Termination, Payment and Release provides that *“If the execution of substantially all the works in progress is prevented for a continuous period of 84 days by reason of Force Majeure of which notice has been given under Sub-Clause 19.2 [Notice of Force Majeure], or for multiple periods which total more than 140 days due to the same notified Force Majeure, then either Party may give to the other Party a notice of termination of the Contract. In this event, the termination shall take effect 7 days after the notice is given”*⁴⁴

As stated above the presence of such clauses adds on to the uncertainty because during Covid-19 central government as well as state governments-imposed restrictions and lockdowns to control the widespread disease by analysing the situation of the country. Therefore, the impacts of these government restrictions ultimately caused delay and the same could not have been anticipated by the construction industry nor these conditions were under the control of the contractor/owner.

The occurrence of Exceptional Event is a must. Once it has occurred the affected party has to follow the contractual notice and follow the mitigation provisions. A party who is unable to perform any of its obligations shall notify the other party of the Exceptional Event, outlining the event's impact on

⁴¹ *Id.*

⁴² Dr Matthew Secomb & Aditya Singh, *Navigating through construction disputes in India*, White & Case (Jul 06, 2021) <https://www.whitecase.com/publications/insight/construction-arbitration/navigating-construction-disputes-india#> .

⁴³ R Thomas Dunn, *Contractors: It's Time to Send Your COVID-19 Notice*, X National Law Review 77 (2020) <https://www.natlawreview.com/article/contractors-its-time-to-send-your-covid-19-notice>.

⁴⁴ Sub-Clause 19.1 of the 1999 Red Book, Yellow Book, Silver Book and Pink Book forms.

performance.⁴⁵ States are generally left free to determine the nature of domestic challenge mechanisms, to enable alignment with existing national laws and legal systems.⁴⁶

Proceedings In Case Of Breach Of An Arbitration Agreement

According to the present Indian Law “the aggrieved party can make an application under section 8 (domestic) or section 45 (foreign) of the Arbitration Act, requesting that the court refer the parties to arbitration and decline to entertain the proceedings”⁴⁷. Arbitration is referred due to flexibility of the mechanism, efficiency combined with confidentiality. Covid-19 has disrupted the normal court functioning which consequently has compelled practitioners to look for alternative efficient methods to resolve disputes.⁴⁸ The Parties who have previously shown reluctance to arbitration are now mutually agreeing to resolve by opting for mediation / arbitration.

Issues With E-Arbitration

Covid-19 has pushed the disputing parties involved in arbitrations to move and carry proceedings remotely. However, advancement leads to new challenges. According to a survey conducted by Queen Mary University in collaboration with White & Case prior to Covid-19 in 2018, a primary concern regarding IT usage in international arbitrations may be a lack of familiarity with tech-based infrastructure (including the cost associated with it) that weighs in when opting for in-person proceedings.⁴⁹

Right to in-person hearing: - Earlier in India it was observed in *State of Maharashtra v. Praful B. Desai*⁵⁰, that the Supreme Court held that the parties have appeared through video conference are present and have recorded their evidence virtually through electronic means in the virtual presence of the accused. Therefore, it can be concluded that the right to in-person hearing is equivalent to oral hearing.

⁴⁵ Sub-clause 18.2, FIDIC Red Book.

⁴⁶ Jane Jenkins & Elizabeth Forster, *Bid Challenges: What Role Can Arbitration Play in Tender Disputes?*, Kluwer Arbitration Blog (Jan. 30, 2021) <http://arbitrationblog.kluwerarbitration.com/2021/01/30/bid-challenges-what-role-can-arbitration-play-in-tender-disputes/>

⁴⁷ Pradeep Nayak et al, *Arbitration procedures and practice in India: overview: Court proceedings in breach of an arbitration agreement*, Thomas Reuters Practical Law (Feb 1, 2021)

[https://uk.practicallaw.thomsonreuters.com/9-502-0625?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/9-502-0625?transitionType=Default&contextData=(sc.Default))

⁴⁸ Sonal Kumar Singh et al, AKS Partner, *Covid-19 And E-Arbitrations: An India Perspective*, Lexology <https://www.lexology.com/library/detail.aspx?g=40e5193a-22d0-411c-97e7-222dc434c285>.

⁴⁹ White & Case and Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration* (April 26, 2020) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---TheEvolution-of-International-Arbitration.PDF>.

⁵⁰ *State of Maharashtra v. Praful B. Desai*, (2003) 4 SCC 601, 19-20.

Compliance of Due process of Law as per Section 18 of the Act: - The impact of Covid-19 has compelled the judicial forums of India (including Supreme Court and High Courts) to use electronic means to hear pending matters.⁵¹ The Honourable Supreme Court of India has released guidelines with respect to the usage of video-conferencing for court functioning ["SC Guidelines"]⁵². Further by relying to the aforementioned judgement of the SC i.e., Praful Desai's case included recording of evidence in the virtual presence of the accused and on a video conference and thus was concluded to be evidence.

All high courts across India have been consistently using various e-platforms such as Zoom, WhatsApp, Cisco Webex, Vidyo and Skype amongst others to hear pending urgent cases. Therefore, an arbitration proceeding thus can be virtually conducted and will be considered to have been completed with due process of law.

Section 9 of the Arbitration Act, 1996 in Pre-Arbitral: In the recent case of *Mumbai International Airport Ltd. v. Airports Authority of India*⁵³ hereinafter referred to as MIAL and AAI respectively on 4th April 2016 executed an agreement of Operation, management and development agreement ["OMDA"]. The Chhatrapati Shivaji Maharaj International Airport ["CSI"] was leased by the AAI and MIAL for maintain good condition. Further, the terms of OMDA, provided that the MIAL have to pay an annual fee which is payable in twelve equal monthly instalments to AAI. They after Covid-19 invoked the force majeure clause and informed of the same to AAI for its suspension of monthly fee and instructed the same to its bank to not transfer any instalment from April 2021. Upon disagreement of extension of time MIAL approached the Court seeking arbitration under Section 9 of Arbitration Act, 1996. The Court decided in favour of MIAL holding that "OMDA provides for suspension of performance in case of a force majeure event. Under Section 9, the court is primarily concerned with the need to maintain the status quo in order to facilitate the arbitral process launched by the parties. As a result, the Court stated that it was also open to Section 9 courts to condition such grant by compelling the parties benefiting from it to start arbitral proceedings within a specific term while passing pre-arbitral interim measures of protection under Section 9."⁵⁴

⁵¹ Pradeep Nayak et al, *Arbitration procedures and practice in India: overview: Court proceedings in breach of an arbitration agreement*, Thomas Reuters Practical Law (Feb 1, 2021)

[https://uk.practicallaw.thomsonreuters.com/9-502-0625?transitionT ype=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/9-502-0625?transitionT ype=Default&contextData=(sc.Default)).

⁵² In Re: Guidelines for Court Functioning Through Video Conferencing During Covid-19 Pandemic, Suo Moto Writ (Civil) No. 5/2020 (Supreme Court 2020),

https://main.sci.gov.in/supremecourt/2020/10853/10853_2020_0_1_21588_Judgement_06-Apr-2020.pdf.

⁵³ *Mumbai International Airport Ltd. v. Airports Authority of India*, (2021) 278 DLT 75.

⁵⁴ Shalaka Patil and Rahul Mantri, *Recent Arbitration Judgments Involving Construction Disputes*, 2021 SCC OnLine Blog Exp 65.

Conclusion

The uncertainty brought by the COVID-19 has disrupted the course of contractual relationship in the Construction Industry. The tension between parties have led to increase in number of disputes especially those of non-performance due to delay. In India, the practice as stated above provides that these disputes are resolved by the full dispute resolution methods. The Arbitration Act, 1996 provides for courses like Arbitration and Conciliation has means to resolve this dispute and resume the construction which might have been short closed due to the said disputes. India does not have a special construction court like that of England however the law in India helps to constitute Commercial Court. Apart from the usual dispute resolution mechanism the India Arbitration law provides and facilitate the time-effective disposal of cases. The already existing Indian Arbitration regime is capable enough to take up e-arbitration in cases when COVID-19 created obstruction not just in completion of Construction projects but also the arbitral proceedings. Further, the Indian Contract Law and the existence of clauses such as force majeure and its effective use in the Arbitration Agreement as stated above can be concluded to be a fairly developed law which have been previously invoked by parties to suspend their obligations. However, the question has to whether this can be invoked in in cases of an extreme of uncertainty was not clear. The Indian Court have had granted the parties to invoke this clause and later this was concreated by the Government of India's Official Memorandum declaring COVID-19 as a force majeure.

Way Forward

As for the position of India relating to emergency arbitration is not clear therefore the best resolution for a party is to go for the traditional arbitration and inclusion of fast-track arbitration in case of emergency arbitration. One of the main reason why an emergency arbitration is initiated is that there is no arbitral tribunal and in time sensitive matters. It is concluded that emergency arbitration can be a way forward for cases requiring immediate attention especially where there is a dispute concerning the materials or valuation of the wages and salaries of employees etc. Further emergency arbitral tribunal can be effective as in the case of *Centrotrade Minerals v Hindustan Copper Limited*⁵⁵, the Supreme Court has recognised that separate arbitral tribunal can adjudicate different stages of dispute in hand. The Act also permits the invocation of Emergency Arbitration.

⁵⁵ *Centrotrade Minerals v Hindustan Copper Limited*, (2017) 2 SCC 228.