

# COVID-19: PRESSURE POINTS: THE IMPACT ON OUTSOURCING OPERATIONS IN INDIA (GLOBAL/INDIA)

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Legal Briefings

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Like its impact on most sectors of the economy, the spread of COVID-19 continues to have a significant impact on India's US\$180 billion IT outsourcing industry which provides back office operations for many of the world's largest companies.

On 24 March 2020, the Government of India ordered a pan-India lockdown until 14 April 2020 in light of the COVID-19 outbreak: only economic activities in connection with "essential services" were permitted to operate in this period. On 15 April 2020, this pan-India lockdown was extended until 3 May 2020.

Some states such as Maharashtra and Karnataka, where outsourcing hubs Pune and Bangalore are respectively based, have declared certain segments of the outsourcing industry as "essential services" (e.g. maintenance of data centres containing confidential information). Moreover, in the revised guidelines issued by the Government of India on 15 April 2020, subject to certain restrictions, IT establishments have been permitted to operate with only 50% of their employees from 20 April 2020.

Various businesses have already taken steps to mitigate the disruption caused by the pan-India lockdown and the related restrictions – some of these steps are set out below. At the same time, it is inevitable that outsourcing services providers and their clients will be exposed to disruption, increased costs, and increased legal risk in connection with the upheavals in their business model.

In particular, and in common with many business sectors, contracting parties may seek to delay and/or avoid performance (or liability for non-performance) of their contractual obligations and/or terminate contracts. Indeed, in a letter to its members, NASSCOM (the trade association for India's IT outsourcing industry) advised businesses to explore the applicability of force majeure clauses in client contracts.

## **IS FORCE MAJEURE APPLICABLE?**

The application of force majeure to contractual obligations will always depend on the governing law of the contract and the terms of the contract itself. For a general description of the position under English law in relation to frustration, force majeure and other consequences for contracts (e.g. termination) and for businesses, please see our briefing [here](#).

Whether a party may be justified in invoking a force majeure clause will depend on the impact of COVID-19 (and the pan-India lockdown) on the performance of the contractual obligations, and the specific wording of the force majeure clause (e.g. as to whether the relevant force majeure event must "prevent" performance or meet the lower standard of "hinder" or "delay"). It is important to note that a change in economic or market circumstances which makes the contract less profitable or performance more onerous is not generally sufficient to trigger a force majeure clause.

However, some common issues do arise as to the applicability of force majeure provisions in the context of the outsourcing industry and the pan-India lockdown:

- Given that back office operations are conducive to remote working arrangements, would the pan-India lockdown prevent / hinder the performance of contractual obligations? As set out below, various companies are taking steps to facilitate remote working and to ensure (as much as possible) "business as usual".
- Where existing infrastructure is not sufficient to provide "business as usual" in the context of remote working, what are the obligations (if any) on companies to take positive steps in order to avoid the impact of COVID-19 and the pan-India lockdown? Some contracts require the party affected by the force majeure event to use best endeavours / all reasonable endeavours to avoid or mitigate the impact of the force majeure event.
- What opportunities or obligations (if any) lie with companies to lobby the Government of India / states / union territories / district administrations to obtain the relevant exemptions etc. in order to continue operations?
- Given the revised guidelines issued on 15 April 2020 which allow IT companies to operate with 50% of their employees from 20 April 2020, would the relevant contractual threshold of triggering the force majeure clause be met (e.g. would IT companies be prevented from performing the contract)? As set out above, more onerous performance

is not generally regarded as sufficient to trigger a force majeure clause, but what if the permitted performance will not allow a service provider to achieve contractual milestones?

Depending on how it is drafted, successful reliance on a force majeure clause may have some or all of the following consequences:

- entitlement to suspend performance while the force majeure event continues;
- removing liability for the non-performance or delay in performance while the force majeure event continues;
- extending deadlines under the contract while the event continues;
- a right to terminate the contract if the force majeure event continues for a specified period.

## **ADAPTING TO THIS NEW REALITY: WHAT STEPS ARE BUSINESSES TAKING?**

We have already seen businesses take various steps to mitigate the disruption caused by the COVID-19 situation and the pan-India lockdown.

- Some clients of the industry have indicated an intention to reduce their dependence on outsourcing. For example, Virgin Media has announced that it will recruit 500 employees in the UK to provide back office operations.
- IT companies in India (e.g. Tata Consultancy Services and Infosys) have put networks in place for their employees to be able to work from home. This has included, for example: moving desktops to employees' homes, installing high-speed internet connections at employees' homes, and configuring software to operate in slower bandwidth etc.
- Contracting parties are also working together to address privacy concerns arising in connection with remote working arrangements; e.g. requiring their employees to sign specific non-disclosure agreements covering their home-working arrangements for an additional layer of protection. At the same time, IT companies are also requesting their clients to relax privacy rules so that employees can remotely work on their projects.
- NASSCOM (the industry group) is lobbying various government bodies to obtain exemptions for the IT companies. As set out above, it has been successful in obtaining

limited exemptions (e.g. declaration of certain segments as “essential services”, permitting operations with 50% of employees etc.).

Like many business sectors, IT outsourcers and their customers are having to plan for an emergence from lockdown that is far from a return to ‘business as usual’. The risks, rights, and obligations of operating in the ‘new normal’ will require a careful reconsideration of the established outsourcing model. Part of this reconsideration will also need to be a recognition that the need to adjust to the challenges of the pandemic and governments’ responses is not over.

## **WHAT SHOULD COMPANIES DO?**

The steps that a company should take will very much depend on its circumstances and how the situation is affecting each of its contracts. In general:

- **Contract audit and review:** Being fully aware of the provisions contained in the relevant contracts is critical, not least because force majeure is a contractual concept. If companies have not conducted an audit of their contracts, they should do it now and with a focus on the issues outlined above.
- **Preparation:** Companies should consider the estimates of predicted performance over the next 12-24 months, and what steps they can take (both now and over the next 12-24 months) to increase the resilience of their operations and implement work-arounds to address current restrictions and restrictions which may be imposed in the future. In doing so, companies should analyse likely areas of under-performance as well as any potential for over-performance. It would also be worth considering potential for government support (generic or specific) including potential lobbying to obtain appropriate exemptions or other support.
- **Collaboration:** Companies should consider pressure points from the perspective of all contracting parties. Depending on the circumstances, including the nature of the commercial relationship among parties, it may be useful to explore taking a collaborative approach to addressing the situation and finding alternative ways of performing the contract and/or mitigating the under-performance.
- **Documenting steps taken:** It is important to document what steps are being considered and, if they are dismissed, why – as well as the steps taken. This is typically key to demonstrating that a party has taken the necessary steps to avoid a force majeure event, or mitigate its impact.
- **Remedies:** Companies who are considering invoking force majeure-related provisions or who are receiving claims for force majeure relief should carefully analyse them in light of the above considerations. It is also important to review the dispute resolution clauses now so that companies are able to put themselves in the best position in the case of a

dispute and enforce their rights effectively.

[More on COVID-19](#)

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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