



COVID-19 IMPLICATIONS ON POTENTIAL CLAIMS AND DISPUTES

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The COVID-19 pandemic has disrupted business continuity in an unprecedented manner and interrupted the global supply chain like never before. Over the last four months, the world witnessed the largest ever lockdown, impacting operations and businesses in almost all sectors and countries. Some of the biggest questions concerning the business community at this point would be on combatting the situation during and immediately after the lockdown, and what further awaits them.

Impact of the disruption and lockdown on businesses

The immediate impact experienced by businesses has been either a halt or a slowdown in production, resulting in idle capacity being built-up and operational losses. There has been mounting pressure on all stakeholders to adhere to social distancing norms at the workplace, and to uphold health and safety concerns above all. The far-cascading impact has led to a disrupted supply chain and placed an added strain on relationships with business partners. These are likely to bring further commercial complications such as difficulty in the recovery of invoices, unwarranted claims, and unsolicited disputes. The implications for businesses will be multifaceted, leading to a combination of administrative, commercial, legal, and relationship concerns, along with a challenge to survive the new norms of business.

After the lockdown period is lifted, businesses will have to realign their operating models and strategies amidst a new set of competitors and supply chain partners. These may be at renegotiated terms at every stage of the business while simultaneously grappling with the new and improved health policies and standards (including social distancing) to comply with.

Priorities for Business: What Needs to Be Done Now?

Business relations are cast in contracts. Any discomfort in relationships or disagreements with vendors and other partners will have businesses revisit what was agreed in the initial contract and the respite measures suggested under such an unprecedented scenario, if at all covered. The only definite outcome of the pandemic and the resultant lockdown has been a loss of production and revenue for companies. The immediate step for companies will be to assess any ways and means to safeguard their business interests and minimize losses. A prominent measure here is the Force Majeure clause, which in all likelihood may have been a part of the contract, irrespective of how carefully it is detailed and drafted. There may be other umbrella clauses as well, which may have covered the scenario.

In the current scenario, businesses need to carefully study and perhaps (re)interpret contractual obligations using the Force Majeure clause in line with their business interests or to save them from

performing any unwanted obligations. Otherwise, they may have to crawl back under the protection of their insurance cover(s) to check how and to what extent their losses are covered. Despite the scenario, businesses will need to continue performing their obligations to derive any legal or commercial benefit when the lockdown eases. This would be in an effort to highlight an increased level of confidence with business partners or evidence to prove mitigation measures and losses if a dispute scenario arises in the future.

Unlock India: Focusing on Safeguarding Your Business

India's nation-wide lockdown being lifted immediately was unlikely to happen. The unlocking process will be a prolonged ordeal—a phased approach led by government directives and it will depend on the gravity of the COVID-19 impact in different regions. Businesses may strategize to commence production and plan logistics activities in a manner to benefit from areas unlocked first. Issues related to the availability of a trained workforce will be an area that will require focus and planning. Another herculean task for companies will be the retraining of employees to work in compliance with new norms and guidelines for the foreseeable future, while parallelly enhancing productivity to compensate for production shortfalls during the initial lockdown phase.

Addressing Business Concerns Post the Lockdown


As the lockdown eases and is lifted gradually across the country, businesses will be able to resume their operations in full swing. The imminent focus will be on growth, recovery, and redemption to make up for lost ground over the last four months. On one side, companies will be reconstructing the supply chain, rebuilding relationships with third parties and other vendors, and renegotiating and redrafting contracts. On the other side, being faced with cash shortages will lead them to engage heavily in recovering costs incurred during the lockdown period through contractual remedies such as claims from business partners as well as insurance covers. The recovery and claim may take a legal route, resulting in disputes. In such a scenario, businesses need to exercise caution during the data gathering process and when conducting technology assisted reviews to identify and collate useful information. They also need to be careful when computing an

estimated loss and recoverable claims from the business partners, if it becomes inevitable.

Conclusion

The COVID-19 pandemic has thrown novel challenges in the path of businesses that were probably never considered in their annual plans. However, tiding over the crisis and devising the future course for a business to regain its momentum in terms of planning, production, and profitability lies in staying ahead of the curve. The key is to assess what could impact the business, to what extent and understanding how the crisis may be mitigated in the short term as well as in the long term. A ready reckoner of detailed scenario-based analysis of the potential impact vis-à-vis rescue plans in terms of the immediate and a long term timeframe may hold the key to business success.

Author Biographies

 **Arpinder Singh** is Partner and Head - India and Emerging Markets, Forensic & Integrity Services, Ernst & Young LLP. He has significant experience spanning over 25 years in multi-jurisdiction investigations, forensic accounting, and dispute advisory in India, the US, and other regions. His key areas of specialization include ABAC, fraud risk management, regulatory compliance, AML, corporate governance, and training. He has advised clients in a wide range of disputes and has frequently provided expert assessment of damages related to breach of contractual obligations, post-acquisition transactions, joint ventures, private equity, expropriation, cost recovery claims, breach of intellectual property rights, and bilateral investment treaties. He is identified as one of the foremost legal practitioners in business law in the "Who's Who Legal" 2015, 2016, and 2017.

 **Yogen Vaidya** is Partner, Forensic & Integrity Services, Ernst & Young LLP. He has gathered around 19 years of professional experience, out of which more than nine years includes experience in providing businesses with fraud and investigative services. His area of focus includes dispute advisory and litigation support related services. He has led engagements on fraud risk management, fraud investigations, financial statement fraud, anti-bribery compliance, and dispute resolution.