

# COVID-19 and force majeure: A Bangladeshi perspective

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THE outbreak of COVID-19 in Wuhan, China was first reported to the World Health Organisation (WHO) Country Office in China, on 31 December 2019. Within three months, COVID-19 has affected more than 100 countries and been characterised as a pandemic by the WHO. As the virus spreads, it is believed that it will have a far-reaching impact on the global economy and international trade. Companies will need to be prepared for the pandemic and circumstances where the outbreak brings an adverse impact on business generally and, more importantly, on the performance of commercial contracts. In particular, companies should consider whether they are entitled to invoke *force majeure* under the contracts, and thereby defer the performance of their contractual obligations without penalty.

A *force majeure* event means an extraordinary event which is beyond the control of the contracting parties. Examples include, *inter alia*, acts of God (like a natural calamity) or events such as a war, strike, riots etc. In simple terms, a successful invocation of a *force majeure* clause generally relieves the

parties from their respective contractual obligation and/or liability.

Under English Common Law, the applicability of *force majeure* is purely contractual. It is understood that a generalised doctrine of *force majeure* does not exist and it is up to the parties to define the events as to what constitutes *force majeure* events. In Bangladesh, the position is similar as there is no direct statute that directly governs the doctrine of *force majeure* or gives effect to it in express terms. Since the doctrine of *force majeure* does not have any direct statutory basis under the laws of Bangladesh, its reliance is based primarily on the parties' agreement and the respective terms of the contract entered into between the contracting parties.

However, not all commercial contracts may contain a *force majeure* clause and, in today's situation of COVID-19, parties may be in an uncertain position as to whether they can perform their respective obligations under the contract in a timely manner or, if at all. It is therefore essential to understand whether parties in Bangladesh can successfully claim a *force majeure* event or be relieved from their respective responsibilities due

to COVID-19 under the existing legal framework in Bangladesh. All contracts, which are governed by Bangladeshi law, are regulated by the Contract Act 1872 (the "Act of 1872"). The doctrine of frustration is enshrined in Section 56 of the Act of 1872 which provides that a contract becomes void when, *inter alia*, it becomes impossible to perform. So, if the contract becomes impossible to perform for any reason whatsoever, it shall be treated as void under the laws of Bangladesh, provided that the defaulting party did not know or could not have known that the contract would be so frustrated. The effect of a void contract is that it cannot be enforced by law.

**"In the absence of an appropriately worded force majeure clause in a contract, the parties in Bangladesh may have the option of relying on the existing provisions of Bangladeshi law."**

and the parties are relieved from their respective obligations.

It is clear that, to attract the doctrine of frustration, the performance of the contract must become absolutely impossible due to the happening of some unforeseen event. This was clearly held by the Supreme Court of Bangladesh where it stated that to attract the doctrine of frustration of contract, the performance of the contract must become absolutely impossible due to the event (subsequent to the making of the agreement) which are not in contemplation of the parties and which could not be foreseen with reasonable

diligence. The position is similar in India as well where the Indian Supreme Court has articulated that *force majeure* events are governed by similar provisions of the Indian Contract Act 1872.

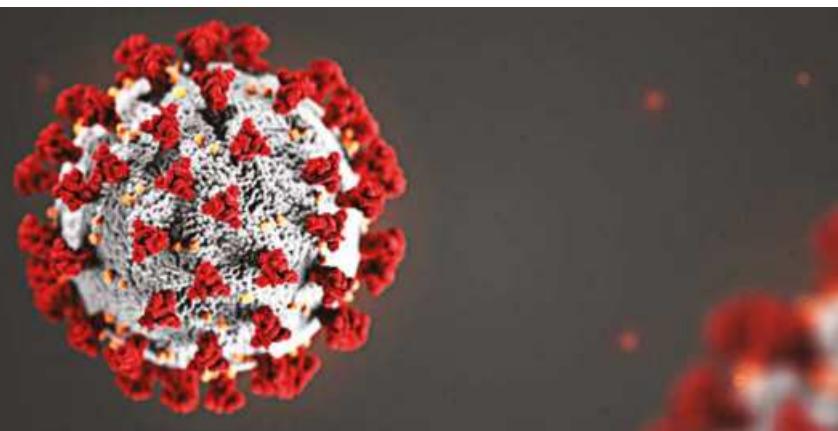
Therefore, in the absence of an appropriately worded *force majeure* clause in a contract, the parties in Bangladesh may have the option of relying on the existing provisions of Bangladeshi law - in particular, Section 56 of the Act of 1872 - in order to excuse itself from the timely performance of their respective obligations under the contract. However, in order to avoid unscrupulous parties from taking advantage of COVID-19 as a *force majeure* event, it must be remembered that a valid claim under a *force majeure* clause due to COVID-19 is likely to depend on strict considerations and the contracting party should be prepared with clear evidence to support its claim. There has to be a clear nexus between the *force majeure* event and the non-performance of the contractual obligation. The burden of proof is on the party seeking to rely upon the *force majeure* provisions, and the provisions are usually construed narrowly against that party. In particular, the Courts have been reluctant to interpret such provisions so as to excuse non-performance where there is evidence of negligence or a breach of duty by the party affected. Even if it is established that there is a causal link between the *force majeure* event and delay, parties are likely to have to show that they have taken all reasonable endeavours to circumvent the *force majeure* event. For example, if the delay in delivery of materials has caused a delay in performance of the contract, it will have to be shown that reasonable efforts have been adopted to avoid the *force majeure* event, for example,

obtaining materials from alternative suppliers.

It follows that, when considering claims for *force majeure* events, parties should diligently review and consider the precise wording of the relevant *force majeure* clauses of each contract and check the time limits and/or notification obligations of the same. The parties should ensure strict compliance with the notice provisions of such a clause and monitor closely the development of the COVID-19 situation and how it has affected the performance of the contract. The affected party should also formulate any emergency plans to mitigate the effect of such a *force majeure* event, and gather evidence to demonstrate that they have acted reasonably in the circumstances.

Lastly, it is important to mention that, in order to avoid any ambiguity on the subject, the Governments of different countries have already issued circulars clearly stating that COVID-19 is to be treated as a *force majeure* event. For example, the Government of India has issued a notice on 19 February 2020 that COVID-19 "should be considered as a case of natural calamity" meaning that *force majeure* clauses in contracts can be invoked for such events. On the other hand, the China Council for the Promotion of International Trade, a quasi-Governmental body, announced on 26 February 2020 that it had issued more than 1600 *force majeure* certificates covering contracts worth tens of billions of yuan. It is also advisable that our Government of Bangladesh should consider the current situation and also take appropriate steps in defining this pandemic as a *force majeure* event, where applicable.

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## YOUR ADVOCATE

## Quarantine and its legal enforcement



This week Your Advocate is Barrister Omar Khan Joy, Advocate, Supreme Court of Bangladesh. He is the head of the chambers of a renowned law firm, namely, 'Legal Counsel', which has expertise mainly in commercial law, corporate law, family law, employment and labor law, land law, banking law, constitutional law, criminal law, IPR and in conducting litigations before courts of different hierarchies. Our civil and criminal law experts from reputed law chambers will provide the legal summary advice.

## Query

In this highly alarming situation of Coronavirus we have observed that people do not stay in quarantine and they are still attending public gatherings and exposing themselves to the risk of being infected with it. How do we legally enforce the order of quarantine and stop public gathering?

## Response

Corona Virus Disease (COVID-19) has been declared as an internal public health emergency by the World Health Organisation (WHO) which has infected millions of people worldwide. In Bangladesh, laws such as the Contagious Diseases (Prevention, Control and Eradication) Act 2018 (CDA 2018) have been enacted with the view to preventing, curing and eradicating contagious diseases. Under CDA 2018, the Directorate General for Health Services (DGHS) is responsible for taking appropriate measures regarding contagious diseases, including, but not limited to, purifying/destroying products of infected persons, putting an infected person in quarantine, etc. CDA 2018 further provides penalties for persons spreading contagious diseases advertently, obstructing the DG or other personnel in discharging their duties, etc. Moreover, Sections 269 to 271 of the Penal Code, 1860 can also be invoked

to punish the people, who may risk the spreading of the novel coronavirus and/or violate the order of quarantine. In addition to that, the Hon'ble High Court Division has also given an oral direction for the checking of foreign nationals while entering Bangladesh, preparatory measures to be taken by public and private hospitals and the Government to import emergency equipment, if needed. However, it is clearly visible that there is a lack of seriousness to the entire issue of COVID-19. Although the Government has adopted a few measures, such as production of masks, introducing COVID-19 helpline, briefing IEDCR, closing down schools, colleges, etc., it is still insufficient if we come to analyse the catastrophic effect COVID-19 may bring to our country. Proper implementation of the law and rigorous measures seem to be missing.

If we come to think of the measures taken by other countries, we can clearly see that almost all the countries are in a lockdown and

people are abiding by the directions given by the Officials of their countries. Unfortunately, our country people are unaware of how deadly COVID-19 can get and the catastrophic consequences associated thereto.

In such a situation where people are not abiding by the order of quarantine, an order under section 144 of the Code of Criminal Procedure 1898 (or similar provisions for the metropolitan areas) may be imposed against such persons. An order under s. 144 of CrPC 1898 can be issued by a District Magistrate or any other Magistrate specially empowered by the Government or the District Magistrate to act under s. 144, where they consider that such direction is likely to prevent obstruction, annoyance, injury, danger to human life, health or safety, etc. Historically, during most of the military regimes, we have seen the use of this section, mostly for arbitrary purposes. However, we can make use of this order in a positive manner at this moment of crisis and solely for the purpose of public welfare, health & safety. It has been reported that orders under section 144 of Indian CrPC have been imposed in Noida, Chattisgarh, Maharashtra as a precautionary measure from COVID-19. Moreover, section 144 has also been imposed in the Punjab Province of Pakistan after cases of COVID-19 have been reported in the country.

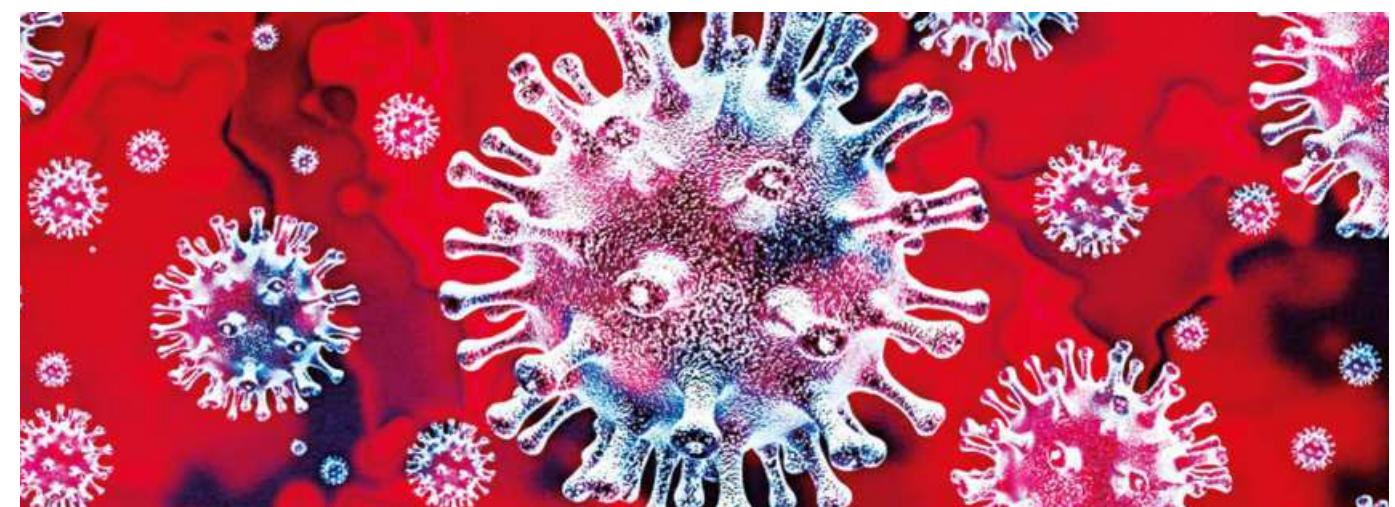
Likewise, the Italian Prime Minister has signed a decree, ordering people to stay at home, banning all sorts of public gatherings. Most of the Italians have followed decree, however, there have also been people who have been found in breach of it. It is worth mentioning that Italy has put charges on more than 40,000 people who have been found in violation of the lockdown. In a similar manner, a decree of State of Alarm has been approved by the Government of Spain and hundreds of people have been arrested across Spain for violating the said decree.

Therefore, at the moment where the people of our country are knowingly or unknowingly failing to fathom the seriousness of the situation and the intensity of the deadly COVID-19, making ill-use of the quarantine and attending public gatherings, imposition of section 144 seems to be the only way through which they can be compelled to stay indoors and avoid all sorts of public gatherings.



## LAW ANALYSIS

## The laws relating to communicable diseases



In light of the current pandemic caused by COVID-19, it is important to review the existing legal provisions that outline the powers and duties of the Government to mitigate and prevent further spread of infectious diseases. The Penal Code, 1860 and the Communicable Diseases (Prevention, Control and Elimination) Act, 2018 are relevant in this regard.

The Penal Code, 1860 contains provisions on the negligent and malignant spread of infectious diseases and criminalises disobedience of quarantine rule. With the unprecedented degree of transmission of the novel Coronavirus, any negligent conduct resulting in spreading is bound to have dire consequences. Sections 269 and 270 of the Code apply to negligent and malignant conduct respectively, of which the former is more relevant in the present context. Section 269 states that a person shall be imprisoned for a term up to six months or be liable to fine or both, if they commit any act which they know or have reason to believe is 'likely to spread' the infection of a disease dangerous to life. Even without conclusive evidence on the fatality rate of the COVID-19, it is abundantly clear that the virus can have deadly consequences. Arguably, the terms 'likely to spread' and 'has reason to believe' entail a wide scope of application, particularly against the backdrop of growing national and international pleas aimed at confinement of the virus.

Section 271 imposes a punishment of imprisonment up to six months and/or fine for disobeying any rule of putting vessels into quarantine or regulating the intercourse between places where an infectious disease prevails and other places.

While the Penal Code imposes criminal liability on individuals, the 2018 Act holistically addresses the prevention, control and elimination of infectious diseases. It is aimed at tackling public health emergencies, mitigating danger to public health and creating awareness. Section 4 of the 2018 Act contains a list of diseases that fall within the ambit of the Act, but the list is not exhaustive. The Government may, through an official gazette, declare an emerging or reemerging disease to be an infectious disease within the meaning of the Act. In fact, the High Court Division on March 18, 2020 directed the Government to issue a gazette declaring the novel coronavirus as a contagious disease under the 2018 Act.

Under the 2018 Act, the Directorate of Health is authorised to inspect and take necessary actions with regard to any place, clinic, hospital and diagnostic lab that provides healthcare for contagious diseases. It can also direct any person in possession of information regarding the disease to provide the same to the Directorate. Furthermore, to contain the spread of the disease, the Directorate can impose quarantine or isolation measures on any person suspected to be affected at any hospital, temporary hospital, establishment or their homes. Movements within the country as well as the arrival of flights, sea-vessels, bus, train or other vehicles can also be prohibited under this Act.

If it is evident to the Director of Health or any empowered official that the disease in any particular area cannot be contained or removed, it may declare the area as infected and prohibit entry under Section 11 of the Act. And if there are reasons to believe that the disease may be transmitted from an infected individual,

the Director or any empowered official may direct for that person to be isolated or transferred to a different location. As per Section 20, any individual who has expired due to a contagious disease, has to be buried or disposed off as per the directions of empowered officials.

The Act also imposes responsibility upon the concerned health practitioners and respective owners and managers of hotels, boarding(s) or residential places to notify the Civil Surgeon regarding any instances of contamination under Section 10. Under Section 18, if the concerned officials have reasons to believe that the transport is contaminated with the disease, they may direct the owner or caretaker of the transport to take necessary measures for disinfection.

Sections 25 and 26 of the Act contain penal provisions. Under Section 25, obstructing any Director General, Civil Surgeon or other empowered officials from performing their lawful duties, or refusing to follow any directions of the same is punishable with up to three months of imprisonment and/or fine up to BDT 50,000. On the other hand, Section 26 penalises the furnishing of false information. Any person who provides false or incorrect information regarding any contagious disease despite possessing the correct information can be sentenced to maximum two months of imprisonment and/or a fine of BDT 25,000.

To sum it up, it is evident that prompt and effective actions are crucial to tackle the COVID-19 pandemic. The Government should heed the urgency of the matter and implement the relevant laws.