

The Post COVID-19 normal – a legal and economic perspective

Rupanjana De, FCS, LL.M, M.A (App. Eco), EMLE
Practising Company Secretary, Kolkata
rupanjana.de@gmail.com

Introduction

The COVID19 pandemic that originated in China in December 2019 and by the next two months spread to many other countries, went on to paralyse the whole world. Its global impact has caused an alarming rate of extreme disruptions of all types of economic and social activities. Preventive measures were taken up by various governments to restrict the spread of the virus. The result was consequential lockdowns and passing of suspension orders for all sorts of commercial activities by various governments vide specific ordinances and orders.

Closed businesses, disrupted supply chains, reduced production, rescheduled timelines and cancelled contracts have resulted in a total breakdown in the organised sector resulting in unprecedented economic losses. In the unorganised sector, the impact of the pandemic has been even more catastrophic. While the former had some legal recourse, the latter did not. From an economic perspective, the full picture of the epidemic's consequences is yet to be seen. We can only have a bare idea of the entire picture now.

It is being said that in India, the infection curve will take some more time to flatten. But the good news is that the recovery rate has improved to a great extent and testing has also gone up. Even then, as I write this article today, the COVID-19 data of the country shows a total of 43,74,314 (out of 2,77,71,984 cases in the world) confirmed cases with active cases being more than 9 lakhs and close to 74,000 people already dead (out of 9,02,550 global deaths). India has moved to the second position in total cases (after the US) and the third position in number of deaths (after the US and Brazil). The vaccine, hopefully, is just round the corner.

Tackling the pandemic – the Legislative Umbrella

How well a country combats a pandemic situation largely depends on the existing laws and regulations of the land. The following is a glimpse of the extant Indian laws in this regard.

The Disaster Management Act of 2005 provides for effective management of disasters and for matters connected therewith or incidental thereto. Under the Act, the National Disaster Management Authority (NDMA) was set up under the leadership of the Prime Minister, and the National Executive Committee (NEA) was chaired by the Home Secretary. On 24th March 2020, the NDMA and NEA issued orders directing the Union Ministries, State governments and authorities to take effective measures to prevent the spread of COVID-19. They also issued guidelines laying down which establishments/services would be closed and which would continue during the lockdown period.

Another Act that gained importance under the situation was the Epidemic Diseases Act, 1897. Under this Act, special powers have been given to the State governments to take special measures and prescribe regulations when it considers necessary. Under this Act, the State governments in India issued further directions. In some parts of the country even Section 144 of the Criminal Procedure Code was invoked to prohibit gatherings in public places.

Despite the existence of the above two Acts, the question remains as to whether these were sufficiently equipped to handle a pandemic of this gigantic nature. While the Disaster Management

Act has allowed the Central Government to continuously direct the States, the almost a century and a quarter old extremely outdated Epidemic Diseases Act revealed its inadequacy to deal with a 21st century pandemic. There were many services and areas outside the ambit of this legislation, for which Central Government had to pass orders in piecemeal from time to time.

The section 188 of Indian Penal Code deals with disobedience with orders promulgated by a public servant. During the lockdown imposed by the government, there were many situations when people disobeyed such orders. But in order to take action in such cases against the defaulter, there has to be a private complaint by a public servant against him and not through a First Information Report (FIR) registered by the police. This largely frustrated the main objectives of the lockdown.

In sharp contrast to this, some countries have dealt with the pandemic by enacting laws. For example, the United Kingdom enacted the Coronavirus Act, 2020, a comprehensive legislation to deal with various issues related to COVID-19 like emergency registration of healthcare professionals, temporary closure of educational institutions, audio-visual facilities for criminal proceedings, powers to restrict gatherings, and last but not the least, financial assistance to industry. Singapore has similarly enacted the Infectious Diseases Regulations, 2020, providing for issuance of orders to send people at risk to government-specified accommodation facilities. These legislations set out legally binding obligations and strict penalty which included hefty fine and even imprisonment in some cases. Compared to these, the fine mentioned in Section 188 of the Indian Penal Code for similar violations is a meager amount resulting in violators ignoring many provisions.

In India, not only is there a lack of a COVID-19-specific legislation, the notifications and circulars in bits and pieces have also been very confusing and difficult to keep up with. Rule making has essentially been reactive and not pro-active. Some sectors and sections were extremely mismanaged, an example may be cited of the migrant workers and their plight in the absence of a proper rehabilitation and transportation plan for them after the lockdown was suddenly announced and their work places shut down without a notice leaving them without work and money. There has been extreme lack of co-ordination between the Union and State governments in this regard. However, thanks to some NGOs and individuals who came forward to help, after a lot of trouble, the migrant workers were able to return home. But the overall initiative of the government has still been meager. And as of now, there is no clarity about the roadmap to economic recovery post COVID.

What was ideally required from the government's side in such a catastrophic situation was promulgating ordinances to deal with the emergent situation. Such ordinances could have paved the way for centre-state cooperation to deal with the pandemic and to revive the economic, education and public health sectors. The legislative role of the government has been extremely discouraging in the situation.

Chronology of events

In order to take the discussion further, let us first have a look at the outbreak of the pandemic and the resultant steps taken by the government chronologically.

- Originating from Wuhan in China in December 2019 (and coming to public knowledge largely in January 2020), the coronavirus pandemic spread like a wild fire across the globe, soon surpassing the 2002/2003 SARS-crisis in magnitude and impact. It soon came to be compared with the Spanish Flu of 1918.
- While initially lockdowns were imposed only in some parts of the China, as the virus spread beyond the country's borders, the government of other countries too started imposing nationwide lockdown soon.

- To fight the COVID-19, the government of India initially imposed a countrywide lockdown for 21 days starting from March 25th, 2020 and ending on May 14th, 2020. The same were implemented through executive orders, and were accompanied by guidelines under the Disaster Management Act. Only essential services related to security, government utilities, food, medical supplies, municipal cleaning, hospitals, police etc. were permitted to continue operations, sometimes in lower capacity. Even transport was stopped and inter-state and district borders were sealed. All citizens, not engaged in the above 'allowed' activities, were strictly directed to stay at home and observe social distancing. Any violation amounted to a criminally offence.
- Testing facilities were started, strict quarantine rules implemented and contact tracing were employed to detect and prevent further transmission of the virus.
- The state governments also issued guidelines and implemented measures under the Epidemic Diseases Act of 1897 to further enforce the strict lockdown measures. These included measures for testing, quarantine, social isolation of affected persons, sealing of containment zones etc.
- The sudden lockdown, without a pre-planned and executed migration programme for migrant workers resulted in a big chaos. The lockdown resulted in sudden closure of all factories and transport. Migrant workers who depend on daily earnings for survival, were left with no work, no shelter in many cases and no money. Being away from their villages added to all the pain as they had no one to seek help from in the situation. Left with no other option, millions of migrant workers were forced to start their journey of hundreds of miles back home with their family including kids, on foot. Many met with accidents on the way and many others also died due to ill health and malnutrition. Many were put in temporary jails for violation of lockdown orders. Many others also faced the inhuman act of being sprayed with disinfectants at various state check posts.
- The central government finally issued an order dated 29th March 2020 under the Disaster Management Act, 2005 directing the state governments to provide food and shelter to the migrant workers. In reality however this was mainly done by NGOs and some individuals instead.
- A petition to pay minimum wages to the migrant workers was filed with the Supreme Court wherein the apex court directed the central government to take necessary steps to resolve the issues raised in the petition. Nothing was done in this regard as well.
- Under the Vande Bharat Mission the government arranged special flights to bring back to India many Indian tourists, businessmen, employees and students stranded abroad and all was done at the government's expense. This step of the government won accolades from many.
- There was no such special arrangement for the migrant workers unfortunately. In many places the revolts of migrant workers were quelled by police action. Finally, just before the lockdown was partially lifted, the government arranged for special trains for migrant workers to return home. Then again initially the workers were made to pay for the train fare; the issue was resolved later when the government declared that the expenses would be borne by it. Then came the next problem, many states cancelled the trains.
- All these led to a lot of debate on the violation of the constitutional right to equality, the right to life and to move freely throughout India of the migrant workers. A petition was filed at the Supreme Court to which the latter directed the government to make necessary directions.
- After the four lockdown phases during which more or less all commercial establishments and businesses were closed, the Unlock phases were introduced from 1st June. The Unlock phases represented the gradual opening of the economy with more and more relaxations being given at successive phases.
- The dates of the phase-wise lockdown in India were as follows: Phase I (25th March to 14th April 2020), Phase II (15th April to 3rd May 2020), Phase III (4th May to 17th May 2020) and

Phase IV (18th May to 31st May 2020). The dates of the Unlock phases are as follows: Unlock 1 (1st June to 30th June 2020), Unlock 2 (1st July to 31st July 2020), Unlock 3 (1st August to 31st August 2020) and Unlock 4 (1st September to 30th September 2020). And on the date of writing this article, the country is in Unlock phase 4.

Economic and Legal impact

The following is a detailed account of the economic and legal impact of the COVID-19 pandemic globally with special emphasis on the country:

- The impact of COVID-19 on domestic and international businesses has been severe. While most sectors have been negatively hit in some way or the other some sectors like transport, aviation, tourism, restaurants and hospitality, fashion and beauty products, sports and entertainment have been particularly the worst affected ones.
- A huge number of companies with production facilities in China closed their offices there. Many foreign companies procuring raw materials or parts from China have had to face disruption of supply chain thereby affecting the production in their home countries.
- Due to closure of factories and business the production and sales in first quarter of 2020-21 largely suffered across most industries globally.
- There were many legal issues arising from the pandemic like termination of employment, non-payment or short payment of salaries and wages, insurance coverage of loss in travel bookings due to the pandemic, losses due to disruption of supply chain, non-performance of contract and so on. As a result, the keywords, often included in agreements and contracts, 'Acts of God' and 'Force Majeure' gained all the more importance.
- The 'Force Majeure' clause or the term 'Act of God' included in contracts and supply agreements are meant to govern the cases of default in performance which are not intentional on the part of the party to the contract but is due to circumstances or events that are beyond the control of the contracting parties. Examples of such events are natural disasters like cyclones, earthquakes, volcanic eruptions etc. or political unrests, wars, terrorist attacks, strikes etc. Legal consequence of a 'Force Majeure' clause in a contract is that it gives the affected party a right to delay or suspend, or altogether cancel the performance of the contract which is beyond his capacity. Such clause also provide for obligations and requirements, which must be observed by the other contracting party not directly affected by the clause. Generally the other party is obliged to limit damages receivable by him due to non-performance or delayed performance of the contract.
- Now that we know what 'Act of God' or 'Force Majeure' clause means, the next question that arises under the current scenario is whether the COVID-19 pandemic can be regarded as a Force Majeure. This will largely depend upon the respective agreement and the exact scenario of implementation of the contract. Under the current situation not every type of performance of contract is impossible. The impossibility of the performance has to be judged with respect to the obligation of the parties and the circumstances where they are operating and whether the same is actually making the performance of the contract not possible or the same is getting delayed. Willful avoidance of performance must be ruled out before applying this clause.
- In a situation where there is no 'Force Majeure' clause included in the contract, the latter shall be subjected to the statutory provisions of the country in this regard like temporary impossibility, frustration of contract etc where the court will look into the facts of the case to decide whether the default on the part of one of the parties is willful or unintentional before granting relief.

- It is important to note that some countries like China have qualified COVID-19 pandemic as a Force Majeure and allowed contracting parties to use the same as a valid reason for non-performance etc. in court proceedings. Hence, for companies having plants and operations in China and now facing damage claims from the contracting partners, it is possible to claim that delay in performance or lack of performance is due to production disruptions attributable to the pandemic. Parties to the contract may opt for re-negotiation of price and terms of the contract.
- Now coming to the provisions of the Indian Contract Act, 1872, one may note that the word 'force majeure' is absent in the Act. However, Section 56 of the Act, allows for temporary discharge of obligations on grounds of impossibility of performance of the contract due to any event or circumstances totally outside the control of the parties to the agreement. The mandatory pre-conditions for invoking this clause are the following:

(i) existence of a valid contract between the parties;

(ii) the contract is yet to be performed;

(c) the contract was good when it was entered but later it became impossible to perform due to a fact or law.

Once the above conditions have been proved, if the period of force majeure continues for long, the court may allow the parties to terminate the contract also.

- In this context one may also note that the Ministry of Finance, Government of India vide its office memorandum dated 19th February 2020 has clarified in respect of the Manual for Procurement of Goods, 2017 that in the event of any disruption in the supply chains due to spread of coronavirus in China or any other country, such situation will be considered as a natural calamity and Force Majeure clause may be invoked. It may be noted that the Manual is issued by the Ministry of Finance for various Ministries or Departments which have been delegated powers to make their own arrangements for procurement of goods under the Delegation of Financial Power Rules, which have to be exercised in conformity with the 'Procurement Guidelines'.
- A similar office memorandum was issued by the Ministry of New & Renewable Energy with respect to 'solar project developers' on 20th March 2020. It declared that companies/parties missing contractual obligation deadlines due to COVID-19, may invoke the force majeure clause to avoid any financial penalties.
- Taking account of the current pandemic situation and the difficulties faced by litigants in filing petitions, appeals or applications for other legal remedies, the Supreme Court of India has invoked its plenary powers under Article 142 of the Constitution to extend the 'limitation period' in all these cases under the Limitation Act, 1963 by an indefinite time until further orders in this regard.
- The Ministry of Corporate Affairs has issued a number of notifications under the Companies Act, 2013, most of which seek to provide relaxations on timely compliances like holding of meetings, filing of returns etc. The holding of board meetings and general meetings via video-conferencing has been allowed and the time gap for ensuring compliances has also been increased. Additional fees required in case of late filing of forms and returns in many cases have been relaxed. Time limit for filing of certain important forms has also been increased.
- Similarly the Finance Ministry has issued many relaxations to people in respect of filing of returns, residency and other reliefs.

Legal challenges during COVID-19

There have been a number of legal hurdles and questions confronting the nation during the pandemic. The following are some of them:

- The introduction of Aarogya Setu for all persons employed in workplaces was largely debated. It was said to be a privacy invasive technology employed to create lists of persons suspected to be infected with COVID-19. Drones were also said to be deployed to monitor compliance by quarantined individuals. In this regard one may note that in the Puttaswamy (Privacy) judgment of 2017, it was held that to validly introduce an action that restricts privacy of the people the State had to show the presence of the following in a case: i) restrictions sanctioned by law; ii) restrictions made pursuant to a legitimate state aim; iii) there is a rational relationship between the purpose and the restriction; and iv) it is the least restrictive measure available to achieve the objective. Further, the Puttaswamy (Aadhar) judgment of 2018 had also mandated that there should be a data protection law. It was contended that all of these were absent in the Aarogya Setu App.
- In a petition filed with the Supreme Court regarding the lack of personal protective equipment (PPE) of health care workers (HCWs), the apex court directed the Government to provide PPEs to HCWs, but it did not provide for any compliance monitoring system for the same to check whether the orders were being complied with.
- Way back in 1989, the Supreme Court had ruled in the case of Parmanand Katara vs Union of India in a writ petition filed by him that a person should not be deprived of treatment merely because he does not have the means to pay for it. During the current pandemic a similar concern arose when private hospitals were refusing admission to COVID-19 patients. A writ petition was filed to this effect and the SC directed the private hospitals to admit COVID-19 patients. In addition under the Disaster Management Act, 2005 the SC also directed hospitals not to turn away patients just because they cannot pay for the treatment.

Long Term Impact in various sectors of the economy

The COVID 19 impact on the economy is not just temporary; many businesses will have a long term impact. Certain sectors of the economy will take a substantial time to rise up again to the pre-pandemic normal. While most of the impacts have been negative, some good things have also happened during the pandemic and going forward business houses are likely to incorporate these learnings in their strategy and be better prepared for a future mishap like this.

Many sectors have been extremely affected, and these include Tourism and Allied sector, Hospitality, Restaurants, Education, Media and Entertainment, Sports, Real Estate, Fashion and Accessories, Cosmetics, and so on. The service sector has also been badly hit. As of April 2020, 40 million people employed in the unorganized sector and those doing semi-skilled jobs have lost their employment as per an MRD report.

The businesses will have to adapt to the new normal and the same is bound to have profound impact on the way business is conducted and revenue is generated. Offices will probably not be operated at full capacity anytime soon and 'work from home' options will be more openly offered and accepted now, which again is a good option for those staying in remote places, working mothers, pregnant women, persons temporarily ill, differently-abled persons and senior citizens on re-employment.

Another positive side of the pandemic experience is that it will have a long-term impact on the drafting of contracts and agreements in future. Sales and revenue planning will also be done with these extraordinary situations in mind.

Post COVID-19

Having discussed the current scenario at length, we are in a position to draw some inferences about the new normal after the pandemic. However, saying anything conclusively will be very difficult at the moment as we all are still very much uncertain about the future course of the pandemic (as to how long it will stay, whether it will resurge or not, when will the vaccine be discovered and so on) and the government roadmap for economic revival is yet to be made public. However, the following are some of the basic assumptions that can be made about the near future as to the Post COVID life.

1. There has been a paradigm shift towards digitalization and the same is here to stay. Many businesses have discovered that surviving on e-platform is not that difficult after all. Examples are consulting businesses, professionals like lawyers, educational institutes, performers and so on.
2. 'Normal' is now of two different types, the old normal and the new normal. The old normal is the 'normal' normal, to which none of us can probably ever return. The new normal will incorporate the elements of extreme precautions and health concerns.
3. Shops, offices, schools, malls, hotels, restaurants and parlours will gradually open their doors (some already have) and each of them put a lot of efforts to ensure that they survive and get back their old clients.
4. Restaurants will bring in the concept of cloud kitchens.
5. E-concerts and other e-events will be the 'in thing', at least for a while, and there will be innovative ways to make them popular. Live performances may be replaced by the performer live streaming on YouTube or Instagram. This has happened during the period of lockdown and Unlock phases, and has been liked to a large extent by people. Hence, this system is probably here to stay.
6. Gathering at the movie theatres for the first day first show may as well be a thing of the past as well as all types of movies will probably be released on streaming platforms like Netflix, Amazon Prime, Disney+ Hotstar etc. as people will be apprehensive about going to movie theatres. Film producers will find a new way of earning revenues from movies.
7. Business in physical mode is a thing of the past. Apps of every kind will be the new mantra for the new world.
8. There will be increased reliance and emphasis on automation going forward.
9. Transport will remain a major challenge but two-wheelers will be back in demand.
10. A lot of jobs will be lost as digitization becomes the rule of the day.
11. Gatherings will no longer be looked forward to. Live events and event management business are going to be very badly hit in the days to come as regulations will not permit large gatherings.
12. Big sporting events may be played in empty stadiums and live-streamed to TV and mobile audience. It is not difficult to imagine the spectator galleries being replaced by huge screens showing fans and viewers watching the game sitting on their couches at home.
13. Supply chains will need to be re-established, restored and repaired.
14. Contracts would require renegotiation at all levels considering the economic disruption caused by the pandemic.
15. Labourers will probably try to find employment within the state now. This will result in a shortage of labourers in many industries.
16. There will be more surveillance system in place along with strict mobility tracking of people.

17. A lot of innovation including but not limited to less-touch and less-interface will be required for the travel and tourism industry in order to bring it close to the pre-COVID-19 normal.
18. Board Meetings, Committee Meetings and other conferences will probably continue to be organized via video-conferencing. Businesses as well as people have learnt to appreciate the fact that video conferencing saves a lot of cost.
19. Pre-COVID the structure of offices were people in the front end and machines in the back end. In the post-COVID era, the opposite is going to happen with machines in the front end and people in the back end.
20. More and more zero-touch interfaces will be developed by businesses going forward.

Conclusion

The impact of the pandemic is here to stay for some time, so is the knowledge acquired during this time. We are still in the middle of the pandemic and it is difficult to say yet as to when things will start getting back to normal. But at least, it is important for us to stay positive, focused on revival strategies and keep doing the best in our respective areas of work. Once the COVID-19 pandemic is over, things will gradually return to equilibrium after some time. Probably like a nightmare we are going to forget this dark period of modern history soon enough thereafter. But the need of the hour, as of now, is a COVID-19 vaccine, to start with, and then fail-proof strategies for economic revival of the country. This should be accompanied by stringent legal directions that on the one hand make people abide by the law for the sake of health and safety, and on the other hand encourage business organizations to carry on their operations hassle-free, without worrying about compliances that could not be made due to the extraordinary situations and not intentionally avoided. Businesses that can come up with innovative solutions to survive now, will remain in operation. For products and brands it is important to stay focused and continue to maintain its visual presence in front of its customers through social messages, innovations, charity etc.

Going forward, staying in touch would ideally come with pre-conditions of 'social distancing' and human touch would probably lose its sheen forever. The challenge is to survive this paradigm shift.