



TALK TO EXPERTS -15

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While discussing the causes for the highway projects that remain incomplete, we saw last week delay in payment as the third more popular reason. This week we will move on to the next cause: force majeure.

This is a French word, meaning greater or superior force. This generally refers to natural calamities that come unexpected and inflict untold damage, causing misery to the people. Earth quake, huge floods, and torrential non-stop rains—these are the very popular natural calamities. But, under this force majeure, political and economic uncertainties are also included. Usually, this term is used in contracts involving construction and supply. And the contractors are advised to insure against such

unexpected calamities so that there will not be irksome cost overruns which are left unconsidered during contractual agreement.

This term is used in the contract to remove liability for these catastrophes and to protect the parties under contract. There are three important points of consideration to validate the claims under force majeure. First, the calamities must be unforeseeable; in other words, they cannot be predicted under any circumstances. Just, they occur. Second, they must be external to the parties of the contract. And last, they must be unavoidable. Of course, these points are explained and applied in different situations by different jurisdictions. Contracts are to be spelt out as clearly as possible. For example, to satisfy the element of unforeseeableness, the location and the events that are popularly associated with it must be taken into account. In a border region of a country, war can be expected though one cannot be sure of its actual happening. It means in that area, war cannot be an unforeseeable incident or accident.

The greater force, force majeure is beyond the control of both the Authority who awards the project and the Operator who executes the product. They have no power over it to check or to stop it. Rains and floods cannot be commanded and the rioters will not listen to words of any authority. Under such circumstances, if any part of the contract is not fulfilled, the Operator cannot be sued for any breach of contract. Not only that he is freed from the possibility of legal claim against him; but, whatever additional cost is incurred due to unexpected calamities, he is entitled to it but here, the additional cost must not have any profit component.

Apart from the finance part of it, the delay resulting from such calamities must be excused in the sense that extension of time in proportion to the delay caused by the force majeure must be given to the operator.

If the period of uncertainty continues for more than 180 days, a period of six months, then, the Authority can exercise his right and terminate the contract in accordance with the contract.

Delay, be it because of 'greater force ' or even, so to say, 'lesser force', is always additional cost to the project and the cost, ultimately, devolves upon the shoulders of the tax-payers.