

16.20 FORCE MAJEURE/PUBLIC EMERGENCY

- 16.20.1 The COVID-19 Pandemic has adversely affected economies worldwide causing a sudden and significant contraction in global output coupled with a steep increase in unemployment. The uniqueness of this health and economic crisis has prompted governments to take drastic and unprecedented measures which consisted, among others, in limiting/restricting/prohibiting transactions as well as movement of people within and beyond boundaries. As a result, these measures in some cases impacted on business operations in the form of non-execution of an obligation under a contract or the impossibility of executing an obligation.
- 16.20.2 This state of affairs which has put public budgets under strain, triggered the adoption of various strategies with a view to achieving the difficult balance between fiscal consolidation, protection of lives and livelihoods, service delivery and job restoration. In this context, governments around the world have embarked on strategies which attempt at generating sufficient savings to finance private transfers through a cut in public spending, including bringing down the public sector wage bill to a reasonable level. Hence, austerity packages were introduced, comprising, among others, employment cutbacks by stopping new hirings; cut in nominal public sector wages ranging from 4% to 50%; cuts in old age pension, with a higher rate for working pensioners; pay freeze for civil servants for the coming three years; reduced bonus in respect of earners of higher salaries; reduced working hours coupled with unpaid leave; and reduction of overtime pay.
- 16.20.3 It is worth mentioning that in addition to the adoption of austerity packages, furlough schemes came into force, which in some jurisdictions, also cover public sector employees as a measure to support employers who were severely affected by the pandemic. "Furlough" normally refers to temporary leave of absence from work owing to economic conditions affecting one company or matters affecting the whole country. Under such scheme, employees may either cease working completely or work for reduced hours. Government in turn provides its support by paying part of the furloughed employees' salaries, at times to the tune of 80%.
- 16.20.4 The Mauritian economy has also not been spared by the negative impact of this crisis, in terms of a drastic worsening of its financial state, which was exacerbated by the lockdowns. As a result, government took some measures to reduce public sector spending through: non-filling of vacant posts, except in a few cases deemed highly justified; high officials contributing a percentage of their salary to a solidarity fund; deferring certain recommendations of the Pay Research Bureau regarding a few benefits, namely refund of unutilised sick leave, payment of passage benefits; accrual of vacation leave; and limiting payment of overtime.

- 16.20.5 Against such a background, a few governments have declared COVID-19 as a *force majeure/public emergency* in case of non-execution of contractual obligations. Under English Law, *force majeure* refers to “when performance is hindered or prevented by strikes, lockout, riot, war, act of God, insurrection, civil disturbance, fire, interference by any government authority, or other cause beyond the reasonable control of the party affected”. According to the Code Civil Mauricien, there are three constituent elements of an event of *force majeure*, namely: it must be (i) *extérieur or étranger à la chose* (the event was external to/beyond the reasonable control of the party invoking the *force majeure*), (ii) *imprévisible* (a party to a contract could not have anticipated it at the time of concluding the contract) and (iii) *irrésistible* (its effects could not have been prevented by reasonable means). *Force majeure/public emergency* clauses are incorporated in contracts to provide **temporary** reprieve to a party from performing its obligations in the event performance becomes impracticable, particularly resulting from an event that the parties could not have anticipated or controlled.
- 16.20.6 In the above circumstances, the Bureau after consultations with Government holds that the doctrine of *force majeure/public emergency* may be invoked in the public sector where and when extraordinary circumstances occur as a result of which Government is unable to sustain any one or all of the agreed contractual terms or execute an obligation as per contractual terms (as per PRB recommendations), owing to an unforeseen event that has placed heavy pressure on public finance.
- 16.20.7 As a general rule, when invoking the doctrine of *force majeure/public emergency* government should be able to demonstrate that the event was unusual and beyond its control and that it has taken all reasonable steps and precautions to overcome or mitigate the event and its consequences and that the changed circumstances have caused difficulties/hardship to perform obligations which have become excessively onerous.

Recommendation 1

- 16.20.8 **We recommend that in case of *force majeure/public emergency*, except for the payment of the monthly salary, Government may, after consultation with the representatives of Federations, temporarily and exceptionally reconsider certain terms and conditions of service (for example, passage benefit, travelling, leave etc.) for employees concerned drawing a basic salary of Rs 25000 and above, for such periods deemed reasonable.**
- 16.20.9 **For the purpose of implementation of the above recommendation, an event of *force majeure/public emergency* is deemed to mean an unforeseen and unavoidable event beyond the reasonable control and contemplation of Government such as natural disasters, acts of God, pandemics or other extraordinary circumstances of the like.**
