



In this article, we are attempting to lay down certain preliminary thoughts on the possible business and legal issues due to coronavirus on the real estate sector. The growth of human civilization has witnessed a rise in pandemics as well. But what is a pandemic? Answering this question which has been typed and searched on various search engines multiple times, one can simply say that a pandemic is an epidemic that spreads beyond a country's border. While outbreaks are almost constant even in this modern period, not every outbreak reaches the pandemic stage as the Novel coronavirus (COVID-19) has.

This situation has brought all countries into a crisis handling mode on the immediate healthcare threat. Beyond the obvious health repercussions, this global pandemic has presented major disruptions for global businesses. While on one hand, where we can see direct commercial impacts on specific sectors, with interruptions to supply chains, challenges in meeting contractual obligations and implications under funding arrangements, other impacts are universal.

Ranging from workplace health and safety obligations, the impact of travel restrictions and containment measures, increased record keeping, protecting sensitive personal data to business continuity planning, businesses throughout the world are grasping at straws. Corporations would need to assess the viability of any measure within their respective workplace and come up with solutions depending upon the nature of their business and interaction with the public.

Coronavirus has brought with it innumerable legal challenges faced by the real estate industry. These issues can be broadly classified as those covering Commercial Office Real Estate, Retail Commercial Real Estate and those affecting Real Estate linked businesses.

The spread of this deadly virus can prove to be the biggest black swan event for the real estate sector. Where all commercial real estate may see a decline, retail businesses may find that their regular flow of customers substantially reduced. Service businesses may face similar consequences like the other two. They may experience a reduction in their work hours because employees are quarantined or because customers do not want to come to a place where they have to physically interact with employees, such as

barbershops, restaurants, and beauty parlors. Commercial property values may decline, rent rates may decline, and the ability of tenants to make their lease

payments may increase loan default rates.

Real Estate Legal Issues Due to Coronavirus -

Force majeure and the law of frustration: Force majeure clauses allow for parties to get out of certain

obligations in the event of unforeseen or uncontrollable events, but just how the clauses are worded is critical. Leases generally don't contain force majeure clauses allowing parties to end the lease, unlike development agreements or construction contracts, which often do. Instead, if prevented from occupying their premises, tenants may look to the doctrine of frustration

provided under Section 56 of the Indian Contract Act, 1872 to see if that can help get them out of their lease obligations.

However, frustration is a high bar: a contract will

be frustrated if the circumstances are changed after the contract is made, that

renders it impossible to perform any obligation or the obligation is radically

different to that originally envisaged when the contract was made.

In the cases of *Dhruv Dev Chand v. Harmohinder*

*Singh*[1], and *Sushila Devi v.*

*Hari Singh*[2],

the Supreme Court has held that the doctrine of frustration can be applied to leases. In lieu of real estate, lease frustrations by a tenant are bound to be

reason with regard to coronavirus in India. This is because, during this period,

a tenant is unable to occupy and/or use the premises (which seems the likely scenario at the moment).

Suspension and/ or Withholding of rent: Most leases don't allow the tenant to suspend and/or withhold rent

regardless of the circumstances. In such situations, it would be prudent to communicate the concern with the lessor before such a decision is taken, in order to avoid future disputes.

In case of Suspension/ Withholding of rent, the

Lessor may require the Lessee to ensure the premises are closed and no operations are performed from the premises for the time duration when the suspension

and/ or withholding of rent is requested. The Lessee may request the Lessor to

permit limited operations, to ensure the good-will of the business is not hurt

and the Lessee can pay employee salaries from such revenues to avoid a default

of loan or complete closure of the store/ outlet due to surmounting losses.

Insurance: It's

unlikely that most tenants will have business interruption insurance that will

cover this scenario. Tenants may have procured business interruption

policies,

but this is usually linked to property damage. Non-damage business interruption

cover (which might cover the impact of an epidemic) is available in the insurance market, but not commonly bought. In India, the government has termed

coronavirus a “notified disaster”. Fulfilling the formal requirements of many insurance policies, it has provided a ray of hope to those who have business interruption cover. They may now be able to claim under it, depending on the specific terms of their policy.

Keep-open clauses in leases: Retail and other tenants with keep-open clauses in their leases will

need to consider the impact of closing their outlet if it becomes necessary. Depending on the provisions of the lease and the government’s official guidelines and rules at any given time, keep-open clauses can trigger conflicts

between landlord and tenant.

As above, most Indian commercial leases will

contain an obligation on the tenant to comply with the statute. Failing to comply with any clear health and safety direction issued by the government, such as the closing of premises, the tenant would be considered breaching the covenant. If, however, an occupier was forced to close its premises based on health and safety guidelines or emergency legislation, how would these measures

be reconciled with a keep-open clause?

In India, only in the most exceptional cases will

the courts enforce keep-open covenants by ordering specific performance.

Where

theoretically claiming the damage by landlords is hasslefree if a tenant breaches its keep-open covenant, it will be difficult for a landlord to substantiate its loss. It is particularly difficult if there are no turn-over rent provisions in the lease. For example, how do you value a drop in footfall?

The remedy available for a landlord is “specific performance”. This is a court

order obliging the tenant to re-open the premises and recommence trading.

We expect that a court would view the

compliance-with-statute clause as taking precedence over the keep-open provisions in the lease. This may, however, give rise to a further dispute as to whether a landlord should expect to continue to receive rental income under

the lease provisions as rent suspension clauses (not very common in regular leases) will normally apply only in the event of any material damage and destruction to the premises. It is likely that landlords will be able to enforce rental provisions: one could argue that the tenant’s business could continue to trade online, or it could implement agile working policies. But it

remains to be seen how courts would treat this should any tenant dispute the matter.

Landlord duties amidst Legal Issues Due to  
Coronavirus

Health and safety: Ranging from the assessment of risks regarding the health of employees or customers to taking effective protective and preventive measures, in almost all cases, it will be for the tenant to consider any threat to the health and safety of its employees. Tenants must ensure that they have access to competent health and safety advice. It is their duty to consult employees about their risks at work and current preventive and protective measures. Although, such duties are not limited to tenants only. Landlords who are employers will also have duties towards their staff and others regarding risks posed from infectious diseases. Landlords may also have responsibilities to the extent that they exercise relevant control over parts of premises (and their ability to implement measures). Failure to fulfil these criteria will result in serious consequences- for organisations and individuals alike.

However, as per the specific health and safety regulations, a landlord is not obliged to prevent or contain the spread of coronavirus COVID-19 on its premises. The hazardous substances regulations which provide a framework to control the risks from a range of hazardous substances under Pollution Control and Environment Health and Safety laws may be relevant, as the coronavirus is a biological agent. Whether such obligations towards tenants exist under the law largely depends on the level of control a landlord has over the property. This will be dictated both by the terms of the leases granted and the physical characteristics of the property. For example, if a landlord has granted a long lease of the whole building and has no ongoing maintenance or services obligations towards its tenant, then the landlord is unlikely to have any responsibility under the regulations. If, however, a landlord has granted a lease of just one floor in a multi-let office block, with shared air conditioning and other common services and areas, and it retains responsibility for maintaining and providing them, its obligations may be more extensive. Nevertheless, in a confirmed case of coronavirus COVID-19, measures will primarily be dictated by the government, and the best approach to comply with health and safety obligations will be to follow these dictations.

Occupier's liability amidst Legal Issues Due to Coronavirus: A landlord may be in control of whole or any part of the premise and so he automatically is liable to take the requisite measures concerning any person, be it invited/uninvited entering the premise. It is unlikely that any additional liabilities will result from such legislation. Landlord's ability to recover costs of enhanced cleaning and regulatory compliance

Commercial landlords responsible for common parts (Common Area Maintenance) are providing more frequent and thorough cleansing of those common parts, particularly frequently touched surfaces (e.g. door

handles, elevator buttons and toilets), although, there is no legal obligation

on them to provide such services to prevent the spread of the virus.

Supplying

these extra cleaning services will have cost implications, and commercial landlords should check the service-charge provisions in their leases to ensure

such charges are recoverable.

Most service-charge provisions contain a sweep-up provision allowing the landlord to recover reasonable costs incurred in line with the principles of good estate management. Some service-charge provisions will also allow costs incurred as a result of complying with “applicable laws” to be recovered – although whether a landlord can rely on this type of provision will depend on whether the government imposes prescriptive measures. In each case, the recoverability of a landlord’s costs for such enhanced cleaning measures would be subject to any tenant-negotiated service-charge cap or specific exclusions in the list of services contained in the lease.

This gives birth to many questions like whether the landlord is required to provide certain services or if the landlord has the discretion to carry out such services? whether such discretion is exercised per the contractual provisions? Interpretation of what constitutes reasonable costs is also a debatable issue. For example, if coronavirus COVID-19 becomes more widespread, would providing a hand sanitiser to every occupier that comes onto the premises be a cost that is recoverable as a service charge or otherwise?

Wider regulatory issues regarding any steps taken (such as cleaning or surface disinfection) by a commercial landlord or its managing agents should also be addressed. For example, municipal permission for commercial premises will often contain conditions that restrict or limit the hours within which such operations may take place. This could possibly catch enhanced or additional cleaning activities, for example, if additional rubbish clearance is required or additional traffic and noise is caused.

Municipal authorities have the power to take enforcement action if activities are carried out in breach of a planning condition, and often will if the disturbance is caused to neighbouring occupiers. Those responsible for building or premises management should, therefore, check for restrictions on servicing or access arrangements and ensure that, wherever possible, enhanced measures are carried out in compliance

with them. This may mean scheduling work at specific times and could require more detailed collaboration with tenants and occupiers.

The applicability of force majeure clauses in construction contracts

Coronavirus COVID-19 is already affecting

engineering, fabrication and procurement contracts that contemplate inputs of labour, services, and goods from affected regions.

Many international and domestic construction

contracts contain force majeure clauses to give relief in these circumstances.

The purpose of a force majeure clause is to avoid the legal and commercial uncertainty of events that would otherwise frustrate the performance of the

contract. The operation of the force majeure clause may differ in each case and specific legal advice should be sought.

What about contracts negotiated now? Force majeure clause may not be of benefit to the parties since the existence of coronavirus

COVID-19 is already known. A better approach would be to incorporate a provision wherein a specific relief with regard to coronavirus COVID 19 is duly

captured, whether this is a disruption to supply chains and labour resources or

the result of the government introducing any emergency powers. The exact relief

and provisions therein would depend on the precise nature and location of the project and therefore the legal experts would have to ensure mindful drafting and capturing of the relief.

Practical steps to be taken

For businesses likely to be affected by coronavirus COVID-19, the following steps could be beneficial:

- Be up to date with the latest guidelines issued by the WHO and the Indian government;
- Review any obligations in leases, construction contracts and other real estate contracts;
- Insert epidemic wording into any new real estate contracts;
- Provide adequate cleaning measures to frequently touched surfaces;
- Make suitable arrangements for laptops to be taken home on a pre-emptive basis for remote or homeworking for employees;
- Prepare IT systems for potential additional remote-access usage and capacity enhancement.

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[1] A.I.R. 1968 S.C. 1024

[2] (1971) 1 S. C.W.R. 697

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