

COVID-19: Coping with the Pandemic and the Changing Regulatory Regime in India

The outbreak of the coronavirus disease 2019 (COVID-19) pandemic has caused widespread disruption of businesses and daily life. As governments across the world struggle to contain the pandemic, a number of measures are being implemented aimed at minimizing its spread. In India, such measures are increasingly taking the form of mandatory social distancing through the imposition of a series of restrictions. As the situation evolves, the requirement for further restrictions is being constantly evaluated by governments and new measures are being implemented.

The pandemic and the resulting measures raise a host of legal issues and concerns for businesses. In general, the pandemic could affect companies' ability to comply with their contractual obligations, or adversely affect their operations potentially allowing termination of contracts, including financing arrangements by lenders. The specific measures imposed by the Government to combat the outbreak also raise questions of compliance, particularly in the areas of labor laws and regulatory requirements.

In the above context, set forth below is a brief update on certain key legal issues that may arise for businesses on account of COVID-19.

CONTRACTS

Financing Agreements

It is typical for financing agreements to include material adverse change or effect ("**MAC**") clauses. If there is a material deterioration in the business, financial conditions or operations of the borrower, the MAC clause can trigger a default under its financing documents. Companies should monitor whether the anticipated downturn in business conditions due to COVID-19 could trigger such MAC clauses, which is typically a basis for lenders to declare an event of default.

Financing agreements ordinarily also include various representations regarding the

condition of the business. Borrowers' ability to drawdown under credit facilities is customarily subject to all representations and warranties being true and correct until, and at the time of, each drawdown. Borrowers should also assess whether they can continue to provide such representations and warranties on a going forward basis.

Financing agreements also require a borrower to comply with certain financial covenants, which might pose a challenge in the current environment.

M&A Agreements

In M&A agreements, heavily negotiated MAC clauses often specify that a material adverse effect on the business, operations and financial condition of the target would enable the acquirer to walk away from the transaction. It is important to review the precise wording of the MAC clauses on a case-by-case basis and assess any potential risks due to COVID-19.

Day-to-Day Business Contracts

Under the Indian Contract Act, 1872 (the "**Contract Act**"), if a contract becomes impossible or impracticable to perform, parties can avoid contractual obligations either (i) on grounds of force majeure ("**FM**") under Section 32 of the Contract Act read with the FM clause in the relevant contract, or (ii) on grounds of frustration of the contract under Section 56 of the Contract Act. These two remedies are mutually exclusive: where the contract has already provided for FM events, parties cannot rely on an FM event to frustrate the contract under Section 56 of the Contract Act.

Typically, FM clauses excuse one (or both) parties to a contract from performance of their obligations, in whole or in part, following the occurrence of unexpected or unforeseen events outside of that party's control. While some contracts may expressly list "epidemic" or a synonymous term as an FM event, other contracts may have more generic references to 'acts of god' or 'events beyond the control of the parties' as FM events. Counterparties could argue that COVID-19 constitutes an FM event excusing them from their obligations under the contract. In this context, an office memorandum dated February 19, 2020 issued by the Procurement Policy Division, Department of Expenditure, Ministry of Finance has expressly clarified that the disruption of supply chains due to the spread of COVID-19 in China or any other country should be considered a natural calamity and that the FM clause may be invoked with respect to the Manual for Procurement of Goods, 2017.

While COVID-19 could be considered as an FM event, it is important to remember that the party claiming an FM event would also need to establish that it prevented or hindered such party from discharging its obligations under the contract. Courts apply a high threshold in such matters, and have held that a contract will not be discharged merely because it has become more onerous, or expensive, for one party.

The COVID-19 outbreak also poses additional risks in the form of financial distress or

potential insolvency of counterparties, which may allow for automatic termination of business contracts.

Execution of Documents and Stamp Duty

Businesses in India may need to execute documents in the ordinary course requiring payment of stamp duty. In India, stamp duty is typically required to be paid before or at the time of execution of a document. Therefore, businesses should procure sufficient stamp papers for documents to be executed in the ordinary course of business. E-stamping facility is available only in certain states.

Further, under the Information Technology Act, 2000, documents may be executed by affixing digital signatures. Accordingly, digital signatures could be used for execution of documents, with the consent of the counterparty. Alternatively, a provision for execution of the document in counterparts electronically with original pages being provided at a later stage could be considered.

WORKPLACE OPERATIONS

Several state governments have notified their own state specific COVID-19 regulations with wide powers to take appropriate measures for controlling the pandemic. As a result, orders, regulations and advisories have been issued regulating the conditions of workplaces in various states to prevent transmission of the virus. Employers are expected to adopt a proactive approach in educating and securing their employees by apprising them of preventive measures, while also ensuring that strict hygiene related protocols are installed at the workplace.

Certain states have sought to achieve social distancing by encouraging offices to allow employees to work from home. In certain states such as Maharashtra, the government has mandated a complete shut down of private sector organizations until further notice. However, no elaborate governmental guidance has been issued in relation to implementation of work from home measures. Further, there is minimal guidance for organizations which lack the optimal infrastructure to effectively enforce work from home measures. While we witness companies reducing wages or imposing leave without pay during this period, certain state governments have encouraged prevention of such reduction or non-payment of wages. Karnataka requires employers to provide 28 days of mandatory paid sick leave to employees infected with COVID-19.

REGULATORY COMPLIANCES

Indian regulators have issued notifications relaxing certain regulatory obligations on companies. The Securities and Exchanges Board of India has extended the timeline for filing of certain returns for the quarter/year ending March 31, 2020. Further, the requirement of a maximum time period of 120 days between two board or audit committee

meetings held or proposed to be held between December 31, 2019 and June 30, 2020 has also been relaxed.

The Ministry of Corporate Affairs (the “**MCA**”) has exempted the holding of board meetings with the physical presence of directors until June 30, 2020. The Employees State Insurance Corporation has also extended the timeline for contributions to be made by employers. It is expected that further extensions on timelines for regulatory compliances will be introduced by various governmental departments.

Note that the MCA is also slated to introduce a form, “Company Affirmation of Readiness towards COVID-19” on March 23, 2020, which would have to be completed and filed by companies/LLPs immediately. Further details on the form are yet to be provided.

REGULATORY APPROVALS

The work from home policies and staggered timings implemented for the staff of governmental departments are likely to impact the processing time of any applications or filings made by businesses with regulatory authorities, including for regulatory approvals and licenses to conduct operations.

From an M&A perspective, such slow-down in processing time could affect any closing timelines where conditions to closing include receipt of various regulatory approvals.

LITIGATION

Courts and tribunals in India have issued notifications restricting their functioning only to urgent matters. While most notifications do not provide a definition of “urgent”, hearing of applications requiring urgent stays or injunctions would likely be allowed. On the criminal side, bail applications are likely to qualify as urgent matters and continue to be heard. In one instance, the High Court of Bombay imposed costs on a plaintiff for seeking urgent listing of an application for ad-interim relief on the ground that it evidently lacked urgency. Other courts may also follow a similar approach.

Certain courts have also limited the number of functioning benches and number of advocates and litigants permitted in the courtroom. Physical filing windows have also been shut in certain forums, such as, the National Company Law Tribunal (“**NCLT**”) and the National Company Law Appellate Tribunal, although the state High Courts and the Supreme Court appear to largely permit such filings so far.

In relation to the statute of limitation, the notification issued by the Delhi High Court keeping filing facilities open clearly states that the period of limitation would continue to run. However, there is no clear indication whether the time period during which filing facilities are not available would be excluded from the period of limitation. As a general rule, unless expressly exempted by legislation, when the period of limitation has once

begun to run, no subsequent disability or inability to institute a suit or make an application stops / extends the period of limitation.

The NCLT expressly allows for online filings (in states where it is available) or through an e-mail to the registrar in cases where the limitation period is nearing expiry. In the event filing windows are shut without any express provision for online filings, parties should nonetheless attempt the filing by e-mailing or couriering the registrar to ensure that their claim does not become barred by limitation.

CONCLUSION

As the COVID-19 situation rapidly evolves, organizations should: (i) closely track regulatory and legislative developments, (ii) implement measures to ensure compliance with the various notifications, orders, regulations and advisories being issued from time to time, and (iii) assess the risks to their key business contracts. Note that an Invest India Business Immunity Platform has also been introduced for investors and the business community to access all relevant information on COVID-19, including the latest information and government announcements.

It is quite likely that normalcy in operations will not be restored in the near future. Accordingly, all stakeholders should develop contingency plans for contract execution, regulatory filings and compliances, and litigation matters.

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