



KINGS & ALLIANCE LLP
LAW FIRM

COVID-19 & ITS BATTLE WITH COMMERCIAL LEASE AGREEMENTS

An Overview

13, 1st Floor, Ring Road, Lajpat Nagar-IV, New Delhi-110024

Phone: 011-26441313, 011-26441414, 011-41038038

Website: knallp.com | For inquiries: info@knallp.com

INTRODUCTION OF COVID-19 IN THE COUNTRY

The initial rise of COVID-19, or as commonly known as Coronavirus, in the world began in January 2020 which was quickly recognized by the Government of India (“GoI”) and pro-actively acted upon by implementing quick and early safety measures to combat this fast spreading virus in mid-February 2020 itself. Before invocation of ‘Epidemic Disease Act, 1897’ and ‘Disaster Management Act, 2005’ on 11.03.2020¹, the Department of Expenditure Procurement Policy Division, Ministry of Finance, Government of India vide its Office Memorandum No. F.18/4/2020-PPD dated 19.02.2020 identified COVID-19² as a natural calamity and also a force majeure event for supply chain arrangements. After the World Health Organization (WHO) declared COVID-19 as a “pandemic” on 11.03.2020, a nation-wide lockdown for a period of 21 days was ordered vide Order No. 40-3/2020-DM-I(A)³ along with ‘Guidelines to contain COVID-19’⁴ both dated 24.03.2020 issued by the Ministry of Home Affairs, Government of India after observing ‘Janata Curfew Day’ on 22.03.2020.

Force Majeure, literally translating to *superior force* from French, means any event beyond human control like an act of god or superior force. In business circles, "force majeure" describes such unforeseen events which are beyond the control of the parties (such as war, labor stoppages, or extreme weather) and which make it difficult or impossible to carry out the conditions of the contract or even any normal business activity.

The ripple effect of this virus as well as the swift and sweeping action from government agencies has been the most on the economy of the country. This nation-wide lockdown, even though imposed for the curtailment of the virus, has resulted in creating substantial hardship for businesses and virtually all commerce in the country where in the present market situation, both Central and State Governments have repeatedly requested businessmen to refrain from reducing or deducting salaries of employees and staff members, at a time when no business operations are being carried out and there is no generation of revenues at all and payment of all expenses and charges is also necessary. From large companies to small business owners, all of them are facing some common problems ever since COVID-19 hit India but one major question that is being asked is whether COVID-19 is deemed to be a force majeure event for the purposes of commercial lease deeds? If yes, whether it could possibly yield any benefit to them.

APPLICABILITY OF FORCE MAJEURE

The objective of entering into commercial lease deeds between a lessor and a lessee is to lease out a commercial premise for an amount of consideration usually payable at a monthly interval, which is called the rental value for the premises. However, it is not necessary that all commercial lease agreement include force majeure clause, which gives rise to two situations and the same are as follows—

¹<https://www.mohfw.gov.in/pdf/disastermanagmentact.pdf>

²<https://doe.gov.in/sites/default/files/Force%20Majeure%20Clause%20-FMC.pdf>

³ <https://mha.gov.in/sites/default/files/MHAorder%20copy.pdf>

⁴ <https://mha.gov.in/sites/default/files/Guidelines.pdf>

IN PRESENCE OF FORCE MAJEURE CLAUSE	IN ABSENCE OF FORCE MAJEURE CLAUSE
<p>The most important factor in a lease containing the clause is the construction of the clause therein as that will only decide the future of litigation outcome in court.</p> <p>A force majeure clause contains broadly four parts—</p> <ul style="list-style-type: none"> (i) identification of who is excluded from the performance, (ii) a list of qualifying events, (iii) the obligations of the party impacted; and (iv) remedies for the other party. <p>It is important to note that nearly every force majeure clause is drafted so as to not apply to a party's monetary obligations.</p> <p>In such a case, a clause which specifies clearly about suspension of rent in a certain likelihood shall give relief to the tenant.</p> <p>In case of a specific clause, parties to lease deed can deviate from the applicability of Section 108 of the Transfer of property act, 1882 and the dispute governing payment of rent shall be governed by the specific clause in the lease deed.</p> <p>A clear and specific clause shall yield maximum and most optimum results for not only the lessee but the lessor as well. It is also important to note that existence of force majeure is a fact-</p>	<p>In certain commercial lease agreements where the force majeure clause is not present, the only possible remedy that might be available to the Lessee is as follows—</p> <p>Section 108 (e) of the Transfer of Property Act, 1882⁵ : In order to be able to obtain any relief, the following criteria must be fulfilled—</p> <ul style="list-style-type: none"> (i) Existence of irresistible force, (ii) property becomes substantially and permanently unfit and; (iii) the lessee must inform lessor of his decision to render the lease void. <p>It could be argued that the implementation of National Disaster Management order dated 24.03.2020⁶ which provides for mandatory lockdown fulfills the first criteria of being an 'irresistible force' as there is existence of supervening events due to which lease holders are prevented from accessing the premises as well as the enforcement of Section 3 of the Epidemic Diseases Act, 1897⁷ and Section 6(2)(i) of the Disaster Management Act, 2005⁸ whereby social distancing has been directed by NDMA vide their Order date 24.03.2020, it has become impossible for people to physically access the premises.</p> <p>It is, however, true that the lessee continues to remain in occupation of the leased out premises and therefore, cannot be exempted from</p>

⁵ Section 108 (e) {Rights & Liabilities of Lessee}: if by fire, tempest or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void: Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision;

⁶ <https://ndma.gov.in/images/covid/ndmaorder240320.pdf>

⁷ Section 3. Penalty.—Any person disobeying any regulation or order made under this Act shall be deemed to have committed an offence punishable under section 188 of the Indian Penal Code (45 of 1860).

⁸ Section 6 (2) (i). Powers and functions of National Authority. — Without prejudice to generality of the provisions contained in sub-section (1), the National Authority may— xx (i) take such other measures for the prevention of disaster, or the mitigation, or preparedness and capacity building for dealing with the threatening disaster situation or disaster as it may consider necessary;

finding exercise and the burden of proof lies on the person claiming relief under the said clause. Therefore, the clause has to be unambiguous and shall clearly state that the lessee shall not be liable to pay rent if the premises could not be used.

However, in the circumstances that a force majeure clause fails to talk about the aspect of rent, again it's the language of the clause that shall come into play.

CONCLUSION: The liability to pay rent for the lockdown period will differ from case to case and will depend upon the force majeure clause in the agreement.

payment of rent but considering that it is absolutely necessary to smooth implementation of the Order dated 24.03.2020 issued by the NDMA , it could be contended that the present situation is an 'irresistible force', thus, making the property substantially and permanently unfit for use due to restrains on accessing the same due to supervening events. However, this has yet to be decided by the courts and is a matter of facts and circumstances of each case.

It is necessary to note here that, Section 108 only gives one right and that is to render the lease deed void subject to the fact that the aforementioned conditions are fulfilled and that option shall be available to lease holders only in the cases where they act promptly and bring to the notice of the other party that such a decision is communicated to the other party otherwise no benefit could be extracted from Section 108. It is a settled law if the lessee fails to give notice to under section 108 (e) of the TPA, the lease is deemed to be unaffected and the lessee is liable to pay the rent. The same was held in *Shankar Prasad and Ors. v. State of M.P. and Ors.*⁹. In *Shaha Ratansi Khimji v. Kumbhar Sons Hotel Pvt. Ltd.*¹⁰ held that merely because the leased premises are destroyed, does not mean that the tenancy stands automatically terminated. It is pertinent to bear in mind that the said section only gives the option to lessee to treat the lease as void and if the said option is not exercised then, the lease shall subsist and the lessee becomes liable to pay the rent.

CONCLUSION: In absence of the force majeure clause the liability of the lessee to pay the rent remains absolute and they would be governed by section 108 (e) of the Transfer of Property Act, 1882.

⁹ (ILR [2013] MP 2146)

¹⁰AIR 2014 SC 2895

DEBUNKING MYTHS

Effect of Section 56 of the Indian Contract Act, 1872 or the ‘Doctrine of Frustration’

The first and the foremost controversy pertaining to the remedies available to any party under the law while COVID-19 is under operation is the applicability of Section 56 of the Indian Contract Act, 1872¹¹ or the ‘Doctrine of Frustration’ to the agreements. What is most important to understand that though, Section 56 may come to the rescue of other contracts or agreements, but not in the cases of a commercial lease deed and the same question has already been settled by the Hon’ble Supreme Court of India in the case of *Raja Dhruv Dev Chand v. Raja Harmohinder Singh*¹² wherein a three-judge bench categorically held that Section 56 of the Indian Contract Act, 1872 has no application to leases but applies only to contracts. The primary reason for the same is that in order for Section 56 to be applicable to contracts, three conditions are required to be fulfilled, viz. —

- (a) A valid and subsisting contract.
- (b) There must be some part of the contract yet to be performed.
- (c) The contract, after it is entered, becomes impossible to be performed.

Considering that a lease is more than a mere contract as an interest in an estate is created by virtue of the same, is not applicable when the rights and obligations of the parties arise under a transfer of property under a lease. The Supreme Court held that completed transfers are outside the scope of Section 56. The Supreme Court laid down a clear distinction between a completed conveyance and an executory contract, and events which discharge a contract, do not invalidate a concluded transfer. By its express terms, Section 56 of the Contract Act does not apply to cases in which there is a completed transfer as in the case of concluded lease. It brings into existence the respective covenants of the lessor and the lessee; including the consideration, and it constitutes an agreement enforceable at law which happen to be contracts which have to be performed, until lease comes to an end. There is nothing to be done after the lessee is put in possession and therefore, condition (b) would not be fulfilled. Thus, there is a clear distinction between a completed conveyance and an executory contract, and the events and the same has been reiterated by Hon’ble High Court of Delhi in the case of *Airports Authority of India vs. Hotel Leelaventure Ltd.*¹³

¹¹ Section 56. Agreement to do impossible act.—An agreement to do an act impossible in itself is void. Contract to do an act afterwards becoming impossible or unlawful.—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. Compensation for loss through non-performance of act known to be impossible or unlawful.—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

¹² 1968 AIR SC 1024

¹³ 231(2016)DLT457

Effect of Epidemic Diseases Act, 1897 and the Disaster Management Act, 2005

The second most popular controversy is that the Lessee is exempted from paying rent to the Lessor by virtue of Section 4¹⁴ of the Epidemic Diseases act and Section 73¹⁵ of the Disaster Management Act.

In some instances, the Lessees have sought to justify that they are not liable to pay rent by taking resort of Section 4 of the Epidemic Diseases Act which states that “No suit or other legal proceeding shall lie against any person for anything done or in good faith”, it is also a clearly settled law that any provision has to be read harmoniously with the rest of the Act. When the Epidemic Diseases Act is read on a whole, it clearly stipulates that the protection under Section 4 is available only to such persons who are required by law to implement the provisions of the act and would therefore, include the government officials and not the any lease holders or persons claiming benefit of the lockdown. This question also stands settled vide a judgment¹⁶ passed by the Calcutta High Court which discussed the ambit of protection available to a public servant acting as per the provisions of the Epidemic Diseases Act in good faith.

Further, Section 73 of the Disaster Management Act, 2005¹⁷ only fortifies the above position of law because the section provides protection to only the central government, national authority, state government, local government and their officers. Thus, no such protection is available to the Lessee under the abovementioned provisions in case they choose not to make due payments of their rent.

MEASURES TAKEN ACROSS THE GLOBE

The lockdown even though seeming as an extreme step was adopted by countries across the world. The idea of social distancing and isolation seems to be the best solution to our problems as of today. However, considering the fast spreading nature of this virus, gradually countries have adopted the measure of imposing a lockdown over their nations and the data below reflects the same.

Several countries have started adopting the strictest measures possible and have started forming legislations as well. Some examples have been listed below –

¹⁴ Section 4 Protection to persons acting under Act.—No suit or other legal proceeding shall lie against any person for anything done or in good faith intended to be done under this Act.

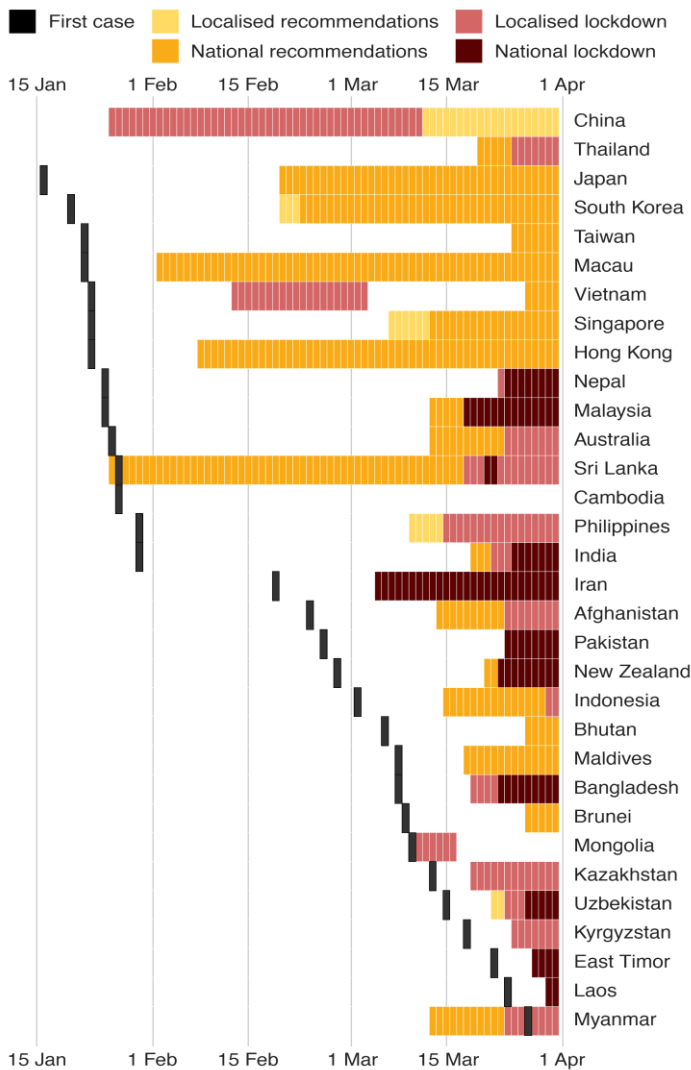
¹⁵ Section 73 Action taken in good faith—No suit or prosecution or other proceeding shall lie in any court against the Central Government or the National Authority or the State Government or the State Authority or the District Authority or local authority or any officer or employee of the Central Government or the National Authority or the State Government or the State Authority or the District Authority or local authority or any person working for on behalf of such Government or authority in respect of any work done or purported to have been done or intended to be done in good faith by such authority or Government or such officer or employee or such person under the provisions of this Act or the rules or regulations made thereunder.

¹⁶ Ram Lall Mistry v R.T. Greer (1904) ILR 31 Cal 829

¹⁷ Section 73. Action taken in good faith.—No suit or prosecution or other proceeding shall lie in any court against the Central Government or the National Authority or the State Government or the State Authority or the District Authority or local authority or any officer or employee of the Central Government or the National Authority or the State Government or the State Authority or the District Authority or local authority or any person working for on behalf of such Government or authority in respect of any work done or purported to have been done or intended to be done in good faith by such authority or Government or such officer or employee or such person under the provisions of this Act or the rules or regulations made thereunder.

Asia, Australia and New Zealand in lockdown

Dates and severity of restricted internal movement by country



Note: China and Thailand confirmed their first cases prior to 15 January 2020

Source: Oxford COVID-19 Government Response Tracker, BBC Research



1. United States of America

As of now in the United States, a number of States and local municipalities have stopped all eviction proceedings and many courts are currently closed. Despite the constant up rise of COVID-19 cases in the USA, there is still not a centralized legislation on the subject.

However, on 29.03.2020 a Bill, namely, New York State Senate Bill S8125A ¹⁸ was introduced in the New York State Senate which aims at suspending all rent payments for certain residential tenants and small business commercial tenants if such tenant has lost employment or was forced to close their place of business as a result of government ordered restrictions in response to the outbreak of coronavirus disease (COVID-19) and certain mortgage payments for landlords of such tenants shall stay suspended for a period of 90 days following the effective date of this Act.

2. United Kingdom

The Coronavirus Act 2020¹⁹, has been enacted to on 25th March 2020 handle the situation created by the corona outbreak. Sections 81-83 of this Act give protection from eviction to the tenants of both residential and commercial premises by forfeiting the rights of the landlords for the time being, in cases where a tenant is not able to pay their rent. Section 82 and 83, which is most relevant here, grant protection from forfeiture of business tenancies in England and Wales and Northern Ireland respectively. These provisions provide “A right of re-entry or forfeiture, under a relevant business tenancy, for non-payment of rent may not be enforced, by action or otherwise, during the relevant period”. The

¹⁸ <https://www.nysenate.gov/legislation/bills/2019/s8125>

¹⁹ <http://www.legislation.gov.uk/ukpga/2020/7/contents/enacted>

measures which became effective from 26th March 2020 mean that no tenant can be evicted from the premises, if they miss a payment in the next three months i.e. 30th June 2020. It is also important to note if the situation does not get better then the cut-off date can be extended.

3. Australia

The regulations made under the COVID-19 Legislation Amendment (Emergency Measures) Act 2020²⁰, prohibits landlords from recovering possession of the property and terminating the agreement. The said regulations shall expire after 6 months from the date of commencement.

4. Singapore

The Covid-19 (Temporary Measures) Bill²¹ was introduced in Singapore on 07.04.2020 which shall be in place for six months and may also be extended accordingly. This Bill allows the following temporary relief measures to the leaseholders in this time of distress –

- If a party is unable to perform a scheduled contract after 01.02.2020, the other party to the contract may not terminate the schedule contract where subject inability is non-payment of rent;
- If a party is unable to perform a scheduled contract after 01.02.2020, the other party to the contract may not exercise the right of re-entry or forfeiture under a scheduled contract or exercise a right with a similar outcome.

Even if the aforesaid actions are taken, in contravention of the said Bill, the same are deemed to be invalid by virtue of Section 8(5) of the Bill. Further, in case a party has forfeited or seized any goods of the other party due to subject inability, the same shall have to be duly returned. For the purposes of this Bill, a lease or license of a non-residential immovable property is a scheduled contract.

PRACTICAL PROBLEMS AND POSSIBLE SOLUTIONS

It is no hidden fact that COVID-19 has deeply hit the global economy and the nation-wide lockdown which even though has protected the health of the people, it has not helped the commercial sector at all as almost all business have been shut down leading to close to no generation of revenues thereby, taking away possibly their only source of livelihood. Barring a few essential ones, rest of the people are not able to even access or visit their places of business which is posing to be a huge problem as the expenses are on a rise with no way to generate any income. Thus, at this time of need, all which can be expected is a little co-operation and support to cross this time of duress so that shutting down of businesses can be avoided.

²⁰ <https://legislation.nsw.gov.au/acts/2020-1.pdf>

²¹ [https://www.parliament.gov.sg/docs/default-source/default-document-library/covid-19-\(temporary-measures\)-bill-19-2020.pdf](https://www.parliament.gov.sg/docs/default-source/default-document-library/covid-19-(temporary-measures)-bill-19-2020.pdf)

The most practical and immediate solution to the problem is for the parties to understand that the present situation is unprecedented and these are testing times wherein every reasonable request must be allowed and taken care of. Therefore, the parties must come together to negotiate and settle all and any disputes inasmuch as contracts are nothing without the consent of the parties. The parties may enter into a temporary arrangement to deal with the present crisis which is both suitable and beneficial for both the parties. Thus, the requests of Lessees to suspend/waive off/defer payment of rent must be looked into in an empathetic manner. An example of this the Lodha Group of Mumbai which has waived off the rent over the commercial properties they have leased²². It is pertinent to mention here that such actions shall help in keeping the economy afloat. Similarly, the Chinese cuisine chain named Big Wong has also asked the landlords to waive off rents for now and aim at recalibrating the future as rent of restaurants/showrooms of malls is equivalent to 15-20% of revenue generated²³.

However, at the same time it must be clarified that such suspension/waiver/deferment of payment of rent is not a matter of right as the Lessee still continues to legally occupy the premises and imposition of lockdown or exception of force majeure is not always available to the Lessee. In a very recent judgment²⁴, Hon'ble High Court of Bombay has categorically held that as the lockdown would only be for a limited period, it cannot come to the rescue of the party to resile from its contractual obligations of making payments. Further, it also stated that the fact that a party would not be able to perform its contract and/or it would suffer damages could not be held as a factor to make non-payment of amount as acceptable.

Thus, the Lessee may request the Lessor for suspension/waiver/deferment of payment of rent and even such request should be considered favourably by the Lessor. But such a request is only temporary in nature and the Lessee shall still be liable to pay their rent in full amount to the Lessor. In fact, all it can guarantee is buying more time in order to completely fulfill their duties and responsibilities that too if the Lessor agrees to such a request and not otherwise. In cases where such requests are denied by the Lessor, the Lessee always has the option to take the legal recourse and approach the court of law, in which case, the courts shall have discretion and decide depending upon the facts and circumstances of each case.

Apart from the aforesaid, the GoI must also come up with enactment of such a legislation which shall take care of such practical problems which are being faced by the general public on a daily basis and

²²<https://economictimes.indiatimes.com/industry/services/property/-cstruction/coronavirus-crisis-lodha-group-waives-retail-lease-rentals/articleshow/74829281.cms?from=mdr>

²³ <https://economictimes.indiatimes.com/industry/services/retail/lockdown-effect-restaurants-cinemas-retailers-at-malls-seek-zero-rentals-till-may/articleshow/74956239.cms>

²⁴ *Standard Retail Pvt. Ltd. v. M/s G. S. Global Corp. & Ors. Comm. Arb. Pet. (L) No. 404 of 2020*

special provisions for people belonging to the commerce section in a manner similar to the other countries as mentioned hereinabove.

CONCLUSION

Thus, what is clear from the above analysis is that prevention from accessing the premises or inability to generate revenues or financial hardship caused due to the supervening events, none of the aforesaid factors discharges the Lessee from their liability of making payment of rent as such factors qualify in the nature of business risk. The present legal framework is not one which comes to the aid of the Lessee either. Therefore, the government must pass a comprehensive legislation/ ordinance to make the situation more transparent. It is important to note that the present lockdown is not an ordinary lockdown due to an emergency declared by the government rather it has been initiated to save the lives of people. Further, till the time any such direction/legislation comes to the rescue of the Lessees, the best approach in such a circumstance shall be one of mutual understanding and support at least till the time the safety measures adopted for public health are withdrawn.

This paper has been written by Ms. Srishti Gupta (Associate) and Mr. Paras Mithal (Associate) with invaluable inputs from our Managing Partner Mr. Mohit Chaudhary.

AUTHORS



MR. MOHIT CHAUDHARY

Managing Partner

Email: mohitchaudhary2020@gmail.com



MS. SRISHTI GUPTA

Associate

Email: srishti.0994@gmail.com



MR. PARAS MITHAL

Associate

Email: mithal.paras297@gmail.com

Contact us for any queries or further information.



KINGS & ALLIANCE LLP
LAW FIRM

DISCLAIMER

This document is merely intended as an update and is merely for informational purposes. This document should not be construed as a legal opinion. No person should rely on the contents of this document without first obtaining advice from a qualified professional person. This document is contributed on the understanding that the Firm, its employees and consultants are not responsible for the results of any actions taken on the basis of information in this document, or for any error in or omission from this document. Further, the Firm, its employees and consultants, expressly disclaim all and any liability and responsibility to any person who reads this document in respect of anything, and of the consequences of anything, done or omitted to be done by such person in reliance, whether wholly or partially, upon the whole or any part of the content of this document. Without limiting the generality of the above, no author, consultant or the Firm shall have any responsibility for any act or omission of any other author, consultant or the Firm. This document does not and is not intended to constitute solicitation, invitation, advertisement or inducement of any sort whatsoever from us or any of our members to solicit any work, in any manner, whether directly or indirectly.

You can send us your comments at: info@knallp.com