

INDIA FIGHTS COVID-19

Given these uncertain times during the COVID-19 pandemic across the globe, we can understand that the entire business community is anxious with this pending uncertainty.

As the pandemic causes havoc to global financial markets and balance sheets alike, even the Indian Government has introduced a slew of measures to try and contain the irreversible damage. The Government's measures include easing of company secretarial and tax related compliances as well as benefits in the form of disbursements of cash and food grains to the marginalised. The Indian central bank – Reserve Bank of India ("RBI") also stepped in with monetary policy announcements, including a reduction in the repo rate as well as a three-month moratorium on term loan payments, aimed at battling the impact of economic slowdown.

Businesses too are looking at solutions to either delay or terminate obligations that may have cash flow implications. We trust this update will provide a clearer perspective of the general economy and policies in place from an Indian perspective.

TAX

➤ Direct Tax

- Due date for filing income-tax return for the financial year 2018-19 (1 April 2018 to 31 March 2019) has been extended from 31 March 2020 to 30 June 2020.
- Deadline for paying taxes under the settlement scheme for income-tax disputes, without paying an additional 10% amount, has been extended from 31 March 2020 to 30 June 2020.
- Due dates for various actions under direct tax laws (income-tax, wealth-tax, income-tax dispute settlement law, etc.) which are expiring in the period 20 March 2020 to 29 June 2020 have been extended to 30 June 2020. This would include due dates for issue of notice, intimation, notification, approval order, sanction order, filing of appeal, furnishing of return, statements, applications, reports, any other documents and also time limit for completion of proceedings by the authority and any compliance by the taxpayer including investment in saving instruments or investments for roll over benefit of capital gains.
- Penal interest applicable on delayed payment of direct taxes (withholding taxes, advance taxes, self-assessment taxes, etc.) during the period 20 March 2020 to 30 June 2020 will be computed at 0.75% p.m. instead of 1% p.m. or 1.5% p.m., as otherwise applicable. Late fee and penalty shall not be charged for delay relating to this period.
- The above measures have been currently announced through a press release and will be suitably incorporated in the law through issue of legal circulars and legislative amendments in due course.

➤ Indirect Tax

- Due date for filing GST annual return for the financial year 2018-19 has been extended from 31 March 2020 to 30 June 2020.
- Various tax returns under the Goods and Services Tax (GST) law falling due in the months of March, April and May 2020 would be permitted to be filed by 30 June 2020 without payment of late fees and penalty. In such cases, no interest would be charged for small dealers with aggregate annual turnover less than INR 50mn. For others, penal interest would be charged at 9% p.a. instead of the rate of 18% p.a. otherwise applicable under law.
- Deadline for making payment under settlement scheme for indirect-tax disputes has been extended till 30 June 2020 without charging any additional interest.
- Due dates for various actions under GST law which are expiring in the period 20 March 2020 to 29 June 2020 have been extended to 30 June 2020. This would include due dates for issue of notice, notification, approval order, sanction order, filing of appeal, furnishing of return, statements, applications, reports, any other documents.

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CONTRACTS

➤ **Force Majeure**

- Such clauses generally suspend or terminate a contract if a breach in performance occurs, due to events “outside the control” of the relevant contracting party.
- Indian Courts, following common law principles, have set out the following key rules for triggering a Force Majeure (FM) clause:
 - Clause needs to be strictly interpreted.
 - Mere inconvenience or adverse financial implications is not sufficient.
 - Serious hindrance to performance is required.
 - Strict compliance on notice and other provisions is required.
 - Words used on the clause are to be interpreted *sui generis*.
- Following the lead of the Chinese government, the Indian government has declared a blanket FM in regards to public procurement contracts. Such notification does not impact private contracts; however, we think subject to other criteria being met (please see above), this could be used to argue in favour of a FM even in private contracts.
- It is possible that continuance of FM may result in frustration of a contract. This is dealt with in greater detail below.

➤ **Doctrine of Frustration**

- If a contract becomes impossible to perform due to the lock down/travel restrictions declared by various governments the contract becomes void.
- The consequence of the same is that any party that received any benefit under the contract is bound to restore the benefit.
- As example of such a contract will be the supply of good or services at a particular place and time (time being essence) requiring transportation/travel of goods or people and the same is impossible due to the lock down.
- Indian courts have held the doctrine of frustration to apply when it is clear that the intervening circumstances are such that it goes to the very route of the contract.
- Due to the requirement of returning all benefits on the contract becoming void, parties generally will seek to renegotiate rather than declare the contract void.

➤ **Material Adverse Change (MAC)**

- MAC clauses are standard in the M&A world.
- An adverse impact on cash flow or financial health of the company will generally be covered in a properly drafted MAC clause.
- Generally, one will find language that says that investment/contract is contingent upon no MAC occurring.
- Given that the pandemic is likely to permanently damage earning capacity and financial health of a number of businesses, a MAC clause can be relied on to not make the agreed investment.

INSURANCE

- We recommend a comprehensive review of all credit risk policies and its potential interface with declaration of force majeure event under a contract.
- Indian all risk policies generally do not cover business disruption. It is, however, worth looking at the policies to check on coverage.
- Remote working enhances cyber risk. Keeping your organisation’s cyber insurance policy under review is advised.
- Under all circumstances, businesses must ensure proper notifications to the insurers to avoid any complications at the time of payment of claims.

REGULATORY INTERFACE & LITIGATION

- The Supreme Court extending limitation for filing claims will give relief to parties unable to commence proceedings due to the lock down.
- Today the government has also declared a two-quarter moratorium on late filing fee for all delayed filings on the website of Ministry of Corporate Affairs and several reliefs from potential company law violations.
- The threshold of default for corporate insolvency has been increased from INR 1 lakh to INR 1 crore. Accordingly, even if the current situation will lead to a default there has been some relief given to business, though in our view not sufficient.
- The government will also consider suspension of access to the Insolvency and Bankruptcy Code, 2016 for corporate insolvency, if the situation does not improve post April 30, 2020.

EMPLOYMENT

- The Union Government and several state governments have issued advisories asking employers to allow employees to work from home.
- In several cities it will not be possible for commercial establishments (offices and shops/retail outlets) to keep all employees gainfully employed at all times.
- It will be necessary that the employers assess their exposure in relation to:
 - Payment obligations to employees during the lockdown/shutdown
 - Risks arising from confidentiality, data protection, data breach/integrity arising due to work from home directives.
 - Downsizing (retrenchment and/or lay-offs) or closure depending upon the extent of economic loss or prospect of recovery
 - Relook at disaster protocols to deal with pandemic like situation in future.

GLOBAL MOBILITY

➤ Visas

- E-visa facilities currently suspended to several nationalities.
- Consular visa processing is also suspended across several Indian Consulates / Missions across the world, unless there is an urgent / emergency requirement for travel.
- Expatriates planning assignments / business visits to India have no option but to wait until the Indian Government announces further directives.

➤ International Travel to and from India

- The Government of India recently announced an international travel restriction (passenger commercial aircrafts) in India from 22nd March 2020 to 29th March 2020 whereby no international passenger commercial flights will be permitted to take off or land in India. **This restriction has now been extended until 14th April 2020 for any incoming international flights.** Expatriates that were planning to exit India will be unable to do so until this ban is lifted or otherwise notified by the Government.

➤ Domestic Travel within India

- The Ministry of Civil Aviation, Government of India has also announced that the operations of domestic schedule commercial airlines will also cease operations with effect from midnight 23:59 hours IST on 24th March 2020 until 31st March 2020. Further directives on this will also be announced at the end of the month.

➤ Expatriates currently in India

- For those expatriates that are currently in India on assignment and require to extend their visas, they will be permitted to do so via the online Government portal. As the FRRO/FRO offices are currently functioning at reduced capacity, it is highly recommended that all expatriates to commence their renewal processes well in advance in order to avoid any untimely delays.

- Unless requested by the authorities and by prior appointment only, foreign nationals are restricted from visiting the FRRO/FRO offices until further notice.

We anticipate any further updates on travel restrictions to and from India will be announced towards the end of the month.

We anticipate that there may be frequent updates from the Government over the next few weeks and we shall be sharing these updates as they come in.

If at all there are other issues that you or your businesses are dealing with that have not been considered in our update, please feel free to reach out to us. We are available to support you and be your partner in navigating these unprecedented times to ensure you are protected to the fullest and are able to dedicate your attention to more pressing matters.

Stay healthy and stay safe!!!

If you require any further information on this update, please do not hesitate to contact Sakate Khaitan, Senior Partner at sakate.khaitan@khaitanlegal.com.

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