

COVID-19: HOW DOES IT IMPACT YOUR COMMERCIAL LEASES?

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Given the disruption caused by Covid-19 pandemic, the performances under many contracts will be delayed, interrupted or even suspended.

Many of the corporate tenants in commercial lease may seek to delay and/or waive the commercial rentals for the duration especially during the 21 days lockdown. This unprecedented Covid-19 has legitimately prevented them from carrying out their business.

With the outbreak of Covid-19 and government lockdown, commercial property landlords and corporate tenants should carefully review the following sections of their leases in particular to identify the impact of Covid-19 and help mitigate risk:

***a. “Force Majeure” Provisions Effect on Rent Payment:** Force majeure refers to a legal doctrine under which a party may be relieved from liability for non-performance if circumstances beyond the party’s control prevent the party from fulfilling its obligations under a contract. Force majeure provisions are standard in retail & commercial leases but can vary greatly depending on how they were drafted by the parties. While most force majeure provisions are unlikely to list disease, epidemics, or quarantine specifically, many include general provisions covering such things as natural disasters, “acts of God,” acts of government, or “other circumstances beyond the parties’ control.” The Covid-19 presents a somewhat unique situation in that it includes both a naturally occurring component (the virus itself) and a government action component (including the quarantines and other measures put in place in response to the outbreak).*

Commercial landlords and corporate tenants should carefully review the force majeure provisions in their leases to determine whether they apply. Many commercial leases expressly exempt “payment of rent” from the force majeure clause. That means many corporate tenants may be required to continue to pay rent even if they otherwise would have had a valid force majeure claim.

***b.** If the force majeure clause does not cover an event such as the COVID-19 outbreak (or there is no force majeure clause at all), consider the question of whether the contract has been frustrated. A contract will terminate automatically when a frustrating event occurs, i.e., one which is: (1) unexpected; (2) beyond the parties’ control; and (3) makes performance impossible or radically different from that which the parties contemplated at the time of entering into the contract.*

If a claim of force majeure will not lie, the next consideration is whether any of the following established grounds to founding a successful claim of frustration apply:

- i. Temporary unavailability – e.g., a person or object that is essential for performance of the contract is temporarily unavailable.*
- ii. Method of performance impossible – e.g., 21 days lockdown by the government makes it impossible to enter into the premises of the property. However, a contract will not be frustrated where performance is possible by a different method, and the difference between the two methods of performance is not sufficiently fundamental.*
- iii. Failure of a specific source – e.g., to conduct business during 21 days of lockdown is government restriction.*
- iv. Illegality – e.g., a contract for airline services that are now subject to a flight ban. Consider also whether the illegality clause of the contract is invoked.*

If successful, the effect of frustration is automatic termination of the contract. Parties can recover amounts paid under the contract before it was frustrated (less the other party's expenses).

***c. Payment of Rent as an Independent Covenant:** Many retail & commercial leases expressly provide that the corporate tenant's obligation to pay rent is independent from any of landlord's covenants or obligations under the lease. That means that even if a landlord is clearly in breach of the lease due to Covid-19 outbreak, the corporate tenant may be required to continue to pay rent. Tenants should carefully review their retail leases to see if they contain this provision.*

***d. Covenant of Quiet Enjoyment:** Most retail leases contain an express covenant of quiet enjoyment where the landlord represents and warrants that the corporate tenant will have quiet and peaceful enjoyment of the commercial leased premises for the permitted use. Corporate tenants may be able to claim that the Covid-19 impacts violate the covenant, in particular in the case of closing of the premises. Depending on how the covenant is drafted, it may be expressly limited by force majeure events.*



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With the ongoing Covid-19, which may result in disruption of the business, the parties may look for remedies based upon the terms and covenants of their leases:

- a. Immediate termination of the lease, as Covid-9 is the force majeure event;*
- b. To put the rentals and other obligations to be waived off or temporarily suspended till Covid-19 and government lockdown is over and to restart once business commence as normal;*
- c. If the lease may provide for limitations time after which either party, landlord or corporate tenant may terminate the lease with written notice to the other party, since the performance and continuance of the lease is not possible any further.*

In summary, it is important for the commercial lease industry, both landlords and corporate tenants, to carefully review their leases now in order to mitigate their risk of suffering negative impacts from the Covid-19 and government lockdown.

To know further details, clarifications or any advice on commercial lease, please connect with us at admin@equicorplegal.com / +91 8448824659

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