



KAY LEGAL & ASSOCIATES LLP



**IMPACT OF COVID-19 PANDEMIC
ON COMMERCIAL REAL ESTATE IN INDIA**



COVID-19 has posed unprecedented challenges and in many cases business continuity plans are being tested for the very first time. The macabre of the virus has consumed the entire country and is a global pandemic. The commercial real estate sector was already reeling under an economic slowdown and now with the pandemic COVID-19, the proportion of loss uncertain.

As COVID-19 continues to spread across India and the world, tenants and landlords, as well as buyers and sellers of real estate will encounter challenges in meeting contractual obligations due to the fluid nature of the outbreak and governments' continued and ever-evolving attempts to contain it. Landlords and tenants are actively analyzing the impact on supply chain reductions and decreased retail traffic due to “social distancing” and “lockdown” mandates.

In each case, it depends on the terms of the individual contract, however, here are some general answers to 'Frequently Asked Questions' on commercial leases and leave and licenses that may help navigate your way in the current climate:

FOR LANDLORDS:

1. Does the Landlord have to offer the tenant a rent concession?

It is entirely within your discretion whether you agree to the tenant paying reduced rent, waiving off rent completely for a particular period or paying monthly. Generally, the tenant has to continue to pay rent under the lease deed and rent is not suspended due to COVID-19. It is the decision of the landlord as to how they shall act during these unprecedented times. These circumstances may call for making difficult decisions which may incur a loss to the landlord.

This situation should be assessed on case to case basis. A tenant may seek waiver/reduction in the rent if the contract indicates that force majeure shall apply in the event the tenant is unable to utilize the premises. Also one has to see whether the force majeure event has resulted in the tenant from fully utilizing or partly utilizing the premises.

The parties have to arrive at a consensus. It must be prudent to advise that concessions may be considered by the landlord, as it may be difficult to find suitable (prospective) lessees once the force majeure event comes to an end.

In the event the landlords are willing to offer a rent concession/wavier, both parties should document any such arrangement in writing which sets out the changes and the time period for this arrangement. One can also consider extending the contracts for the period of this event.



2. Can the force majeure clause be invoked and the lease be suspended?

Both parties will need to go back to the contract and interpret the clause accordingly. Generally, most lease deeds do not contain provisions allowing suspension or termination due to 'force majeure' circumstances. Force Majeure clauses generally address events, beyond the reasonable control of either party that may prevent the parties from performing their obligations under a contract. The typical force majeure event is a natural disaster, such as a floods, earthquakes, or a government prohibition that causes the performing party to be unable to perform their obligations under the contract. Force majeure provisions excuse the performing party from defaulting under the contract due to the performing party's inability or delayed performance due to such event.

The answer to whether the advent of COVID-19 upsets the very foundation upon which the parties entered their agreement, appears to be negative. While the classification of the outbreak shall differ depending on the nature, structure and terms of a contract, it appears that in most cases, at first glance, the outbreak may be construed as a hardship – merely creating difficult circumstances for performance of contractual obligations and therefore, failing to qualify the high threshold accorded to a *force majeure* event in law. In these cases, contracts will continue and the parties must continue to carry out the obligations contained in them. The parties must document the arrangement alongwith the time period via a side letter.

3. Do I have to keep a commercial building open for tenants?

To contain the spread of this pandemic, the government had issued an order for a complete lockdown in the country wherein every citizen shall be home bound unless they provide essential services. This means that every commercial building has to remain shut unless they provide essential services.

In the event there has been a case of COVID-19 in the building, we advise that all necessary steps be taken to restrict access to the commercial building and that the concerned civic authorities be informed so that necessary sanitization exercise can be carried out.



FOR TENANTS

1. Does a tenant have to continue to pay rent if the building is closed?

Yes, generally the tenants will need to carry on paying rent even if the building is closed. The government has passed an order for a lockdown and closure of all buildings and commercial spaces unless they provide essential services. In this case due to government orders, the landlord has to act diligently and close the building and the tenant will have to continue to pay rent even though the building is closed. The tenant may request the landlord for a rent waiver, a rent concession or pay monthly.

If the landlord agrees to a rent concession both the parties must document the arrangement in writing along with the time period.

2. Can the tenant terminate the deed?

Lease deeds and leave and license have specific and detailed termination clauses and the same can be terminated only under the provisions of those specific understandings.

In the event there is no lock-in period or the lock-in period has expired, the deed may be terminated by issuing a written notice of termination as per the terms of the contract. If the lock-in period has not expired, then the tenant is contractually obligated to continue performing his/ her/ its obligation as prescribed in the contract. However, basis the residual period left, prior to elapse of the lock-in period, a tenant may consider terminating the contract subject to being ready to bear the damages such as losing the entire or part of security deposit (as the case may be) or a pre-determined cost. This needs to be examined on a case to case basis, considering factors such as commercial viability of carrying on with the lease arrangement.

3. Can I re-negotiate the terms of the deed?

With the real estate market being at the brink of collapse, landlords may be open to re-negotiating the terms. To avoid going to courts and mitigate risks and losses, both parties can come to consensus which may be rent concession or suspension of rent for a certain time period. Such arrangements should however be set in writing, duly stamped and executed by the parties.



4. Can I extend the Deed during the ongoing lockdown?

In most cases, landlords are supportive wherein the landlords have virtually agreed to extend the lease agreement for a certain time period, or a combination of no rent for two months but escalated rent post the lockdown.

In this extraordinary situation, it is impossible for tenants to vacate and for landlords to get new tenants. In these circumstances, the parties are virtually agreeing to extend the tenure and registering the deed post the lockdown.

If you are currently negotiating a contract and would like to specifically address COVID-19 considerations in your deeds/contracts, please contact us @ info@kaylegal.in



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