

CLIENT UPDATE

April 2020

EXECUTIVE SUMMARY

JUDICIAL VIEWS ON THE IMPACT OF COVID - 19

The Ministry of Home Affairs (“MHA”) took note of the COVID – 19 pandemic and issued an order dated March 24, 2020 under Section 10(2)(l) of the Disaster Management Act, by means of which a lockdown had been prescribed for containment of COVID – 19 epidemic in the country for a period of 21 days with effect from March 25, 2020. Subsequent to this, the MHA extended the lockdown to remain in force up to May 03, 2020 by virtue of the Order dated April 14, 2020.

The Indian Judiciary too has taken an active role by issuing orders pertaining to commercial contracts, auction of properties, moratorium period on NPA, extension of interim orders, extension of limitation period and extension of time to conduct Arbitral Proceedings among others in light of COVID-19 and the lockdown placed in India. The same are discussed herein:

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Commercial Contracts

The Bombay High Court in the case of *Standard Retail Pvt. Ltd v. M/s G. S. Global Corp & Ors*¹ has refused to grant *Force Majeure* exemption to a set of steel importers, who had sought to restrain the encashment of their Letters of Credit by Korea based exporters on the ground that the lockdown had rendered the performance of contract impossible with Hyundai Corp and GS Global.

The Bombay High Court firstly noted that the Letters of Credit are an independent transaction with the Bank and the Bank is not concerned with underlying dispute. The Court also ruled that distribution of steel has been declared as an essential service and therefore there is no restriction on its movement. Further, the Court held that since the lockdown would be for a limited period, it could not come to the rescue of a steel importer so as to enable it to withdraw from its contractual obligations to make payment. The Court in its Order also incorporated that losses cannot be a factor to invoke *force majeure*. The relevant extract is provided below:

“The fact that the Petitioners would not be able to perform its obligations so far as its own purchasers are concerned and/or it would suffer damages, was not a factor which could be considered and held against the sellers.” [emphasis supplied]

However, the Delhi High Court in the case of *M/s Halliburton Offshore Services Inc v. Vedanta Limited & Anr.*², held that the COVID – 19 lockdown is in the nature of *force majeure*, thereby restraining Vedanta Ltd. from invoking eight bank guarantees extended by Halliburton Offshore Services in connection with a development contract for certain blocks in Rajasthan. The relevant extract of the order is produced below:

“The countrywide lockdown, which came into place on 24th March, 2020 was, in my opinion, prima facie in the nature of force majeure. Such a lockdown is unprecedented, and was incapable of having been predicted either by the respondent or by the petitioner...”

“...Prima facie, in my view, special equities do exist, as would justify grant of the prayer, of the petitioner, to injunct the respondent from invoking the bank guarantees of the petitioner, forming subject matter of these proceedings, till the expiry of a period of one week from 3rd May, 2020, till which date the lockdown has been imposed.” [emphasis supplied]

The Bombay High Court in the case of *Rural Fairprice Wholesale Limited & Anr. v. IDBI Trusteeship Services Limited & Ors.*³, restrained IDBI Bank and others from selling the pledged shares of Future Retail Ltd in view of the prevailing market situation due to the COVID-19 pandemic. The Court held that:

¹ Commercial Arbitration Petition (L) No. 404 Of 2020

² O.M.P. (I) (COMM) & I.A. 3697/2020

³ INTERIM APPLICATION NO. 1 OF 2020 IN COMMERCIAL SUIT NO. (L) 307 OF 2020

“Considering the present situation of market and COVID-19, I am of the opinion that plaintiffs are required ad-interim protection till next date.” [emphasis supplied]

The Supreme Court in UBS AG London Branch Rural Enterprise Wholsale Limited & Ors.⁴ refused to interfere with the aforesaid Order of the Bombay High Court and dismissed the Special Leave Petition.

Moratorium on NPA

The Bombay High Court in the case of *Transcon Skycity Pvt Ltd & Ors v. ICICI Bank & Ors*⁵ has extended the ad-interim relief to the Petitioners and *prima facie* ruled that the period of lockdown will be excluded while calculating the 90-day period for declaration of an account as a non-performing asset.

The RBI had issued a Circular and a Press Note dated March 27, 2020 stating that that there would be a three-month moratorium in regard to the repayments and classifications as NPAs, starting March 1. The question which arose was whether the moratorium period ordered by RBI was excluded in the computation of the 90-day period for amounts that fell due prior to March 1, 2020 and which remain unpaid or in default. The Court *prima facie* ordered that the period of the moratorium during which there is a lockdown will not be reckoned by ICICI Bank for the purposes of computation of the 90-day NPA declaration period. The Court further held that if the lockdown extends beyond May 31, 2020 then these days will be deferred accordingly, irrespective of whether the moratorium itself is extended beyond May 31, 2020, the Court stated.

Similarly, the Delhi HC in the case of *Shakuntala Welfare & Educational Society v. Punjab & Sindh Bank*⁶ restrained Punjab & Sindh Bank from declaring NPA. The Court noted as follows:

“Any classification of the petitioner’s accounts as NPA would certainly amount to altering the position as existing on 01.03.2020 and, therefore, grave and irreparable loss will be caused to the petitioner, in case, its accounts are declared as NPA, only on account of its failure to pay the instalments, which were admittedly payable on or before 31.03.2020.” [emphasis supplied]

The Delhi High Court in the case of *Indiabulls Housing Finance vs SEBI*⁷ has directed for maintenance of status quo with respect to the repayment to be made by Indiabulls Housing Finance to its Non-Convertible Debenture holders as the Petitioner pleaded that in view of the RBI circular dated March 27, 2020, it was impossible for the Petitioner to effect recoveries of debts owed to it by various institutions. The relevant extract of the same is produced below:

⁴ SPECIAL LEAVE PETITION (CIVIL) Diary No(s). 10943/2020

⁵ WRIT PETITION LD-VC NO. 28 OF 2020

⁶ W.P.(C)2959/2020

⁷ W.P.(C) 2963/2020 & CM APPLs. 10281-85/2020

“Given the peculiar facts of this case and the present lockdown, till the next date of hearing, there shall be an ad interim order, in terms of prayer (a) in CM Appl. No. 10281/2020, till the next date of hearing.” [emphasis supplied]

Auction of Properties

The Karnataka High Court in the case of *Muddaiah Amarayya Hiremath v. The Managing Director*⁸ passed an order dated March 24, 2020 staying the auction of properties by banks till lockdown orders are revoked as the Court held that those activities which are not included in the exceptions provided by the State Government in its order imposing the lockdown will constitute a violation of the order. The relevant extract of the same is produced below:

“Prima facie, this Court was of the opinion that any activity by any of the Departments beyond the exceptions provided under the Government Order dated 23.03.2020, including the holding of auctions by Banks, would constitute a violation of the Government Order entailing prosecution.”

Extension of Interim Orders

The Telangana High Court in view of the lockdown and limited functioning of Courts have extended the period of interim orders till June 07, 2020 and orders of Executing Courts to be kept in abeyance. The Court has stated that, in all matters pending before this Court, and Courts subordinate to this Court, wherein interim orders were subsisting as on March 20, 2020 and expired, or will expire thereafter, the same shall stand automatically extended till June 07, 2020.⁹

The Delhi High Court has extended till May 15, 2020 all the interim orders, which were to expire on or after March 16, 2020, in cases before it and those cases which are before the district courts, as litigants would not be able to appear in such matters due to the restrictions imposed in the wake of COVID – 19.¹⁰

The Kerala High Court on March 25, 2020, also extended all interim orders passed by all courts in Kerala by a period of ***one month***.¹¹ It is expected that the Court will give a further extension, as the MHA has extended the Lockdown period till May 03, 2020. The Court in its order stated:

“... in exercise of the powers conferred under Articles 226 and 227 of the Constitution of India, all the interim orders passed by all the Courts/Tribunals upon which High Court exercises supervisory jurisdiction under Article 227, which are due to expire during the lock down period of 21 days, are extended by this Court by one month from today.”

⁸ WP 6632/2020

⁹ In Re: Extension of Interim Orders and Abeyance of Execution Orders, WP No. Urgent 1/2020, decided on 27-03-2020

¹⁰ W.P. URGENT2 /2020, decided on March 25, 2020; Copy of order available at https://www.livelaw.in/pdf_upload/pdf_upload-371711.pdf

¹¹ W.P. (C) No.9400 OF 2020 (Suo Motu)

Extension of Limitation Period

The Supreme Court of India after taking suo motu cognizance of the situation arising out of the challenge faced by the country on account of COVID-19, invoked its power under Article 142 read with Article 141 of the Constitution of India and extended limitation period of appeals from High Courts or Tribunals on account of COVID – 19 pandemic.¹²

In order to ensure that lawyers/litigants do not have to come physically to file petitions/applications/suits/ appeals/all other proceedings in respective Courts/Tribunals across the country including this Court, the Court directed:

“a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f. 15th March 2020 till further order/s to be passed by this Court in present proceedings.”

Extension of time for completion of Arbitration Proceedings

In a plea moved under Section 29A (5) of the Arbitration and Conciliation Act, the Delhi High Court has allowed extension of time for concluding the arbitration proceedings and passing of the award, in light of the COVID – 19 pandemic. The court extended the time for completion of Arbitral Proceedings and passing of award by a period of 6 (six) months from 14th April 2020.¹³

¹² In Re: Cognizance For Extension Of Limitation, 2020 SCC OnLine SC 343, order dated 23.03.2020

¹³ O.M.P. (MISC.) (COMM.) 106/2020 and I.A. 3695/2020