

# THE HORIZON

Jan - March 2020



## COVID-19: Banking Default - Is There A Wayout?

On 11.03.2020, the novel Coronavirus (COVID), which originated from the city of Wuhan, China and rapidly spread worldwide was declared as a global “pandemic” by the World Health Organization (WHO).

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# COVID-19: Banking Default - Is There A Wayout?

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On 11.03.2020, the novel Coronavirus (COVID), which originated from the city of Wuhan, China and rapidly spread worldwide was declared as a global “pandemic” by the World Health Organization (WHO). Pandemic, as defined, is an “epidemic that has spread over several countries or continents, usually affecting a large number of people.” The severity of the outbreak has caused an international health emergency, resulting in a severe impact on business and international business across the countries and various sectors.

The sudden disruption of international trade and commerce has a direct bearing on the operations of the Banking Sector which has customers be it individuals or corporate entities. In the wake of the current scenario of social/economic lockdown, the recession has plagued the world at large creating a situation wherein there have been raw material shortages, cancellation of export orders, manufacturing units getting closed, breakdown of logistical services, etc. On account of the directives of various Governments of avoiding social gatherings as well as the issuance of advisory towards the same, majority workplaces including factories, establishments, institutions, etc. are being closed and people working therein are being encouraged to work from home. All this is leading to disruption of cash flows of business and it is highly likely that the performance of contractual obligations as regards the Banking Contracts are likely to be impacted across various categories of customers.



Taking a cue of the above, various Banks of England, U.S.A, Australia, Italy, and Slovakia have been taking initiative to introduce a large-scale moratorium on debt repayments, including mortgages to help families and businesses cope with the outbreak. The Banks, as part of their move, are set to offer a three month repayment holidays on mortgages and loans and emergency loans as part of relief measures. It appears that the International Banks are taking cognizance of this unprecedented health emergency across the globe by engaging and/or proposing payment holidays, debt restructuring, deferring repayments and fee waivers for 90 days, rescheduling loan repayments, rearranging loans without establishment fees along with additional benefits. The immediate relief is provided by the Banks of the countries which have been affected by the COVID establishes that the outbreak has a direct nexus/bearing on the business/economy through the three channels, namely: production, supply chain, market



disruption and financial impact on firms and financial markets. The falling economy and the slow business can only be protected by the protracted steps undertaken by the Banks, regulatory bodies and the Government of the respective country to curb any further menace.

When we talk about Banking Contracts typically there are three parties to such a contract i.e. the Lender, the Borrower/Co-Borrower and the Guarantor. Now all these three parties can be of the same jurisdiction and/or multiple jurisdictions. In our country, we may be dealing with all the parties which fall under Indian jurisdiction or some of the parties falling in Indian jurisdiction. The contracts as entered by the borrowers with the lenders are typically standard forms of contracts. Such contracts with the Lenders in all likely hood have a Force Majeure clause which deals with failure or delays in performance on account of fire, flood, earthquake or similar elements of nature, or act of God, etc beyond the control of the non-performing party. In case such a clause is sought to be triggered the non-performing party is required to promptly notify the other party in writing. Further, if the Force Majeure event continues for more than 30 days, the same also entitles the party to terminate the Agreement. In case there is no Force Majeure clause the parties may rely on provisions of the Indian Contract Act, 1872 to determine their respective rights and obligations in

terms of the contract as entered with the Lender. Accordingly, each contract wherein a default or breach occurs is required to be reviewed on a case to case basis.

Looking at the present position, it is inevitable that borrowers, as well as guarantors across various sectors as well as individuals, are likely to end up committing default of their obligation towards debt servicing since the outbreak has impacted the economic position particularly the liquidity status of borrowers in general. In this scenario, the Central Government, the regulator of our Banking system, i.e. RBI along with the Banks of the country are the only institutions, which can provide the necessary respite to the people in the form of coordinated fiscal action and monetary stimulus. The think tank of the Government and the related Ministries along with the Banking Regulator need to come out with bold steps to inspire confidence in the people. Since several regulators around the world are coming with measures such as rate cut and providing schemes and mechanisms for deferment of mortgage, loan, interest, the Indian Banking/ Financial system at the earliest needs to protect its people to ensure sustenance of its people during the present turbulent time.

The RBI as the Regulator and watchdog of the Indian Economy has time and again issued Master Circular to deal with the

peculiar situations plaguing the country which are beyond the control of an individual and have severely affected the sustenance of the economy as a whole. The closest initiative of the RBI which can be said to be made applicable to the present COVID issue is the Guidelines issued for relief measure by Bank in areas affected by Natural Calamities. The RBI vide its said guidelines to the Scheduled Commercial Banks had directed and encouraged them to provide reliefs in the form of rescheduling of existing loans and sanctioning of fresh loans. Such guidelines are of utmost requirement at this stage, where due to the outbreak of COVID, business is severely getting affected and there is a growing fear concerning the steps which will be taken on account of breach of contractual obligations. Thereby, the Banking system of our Country is presently at a threshold where there is a dire need for reformative measures to protect the parties from any breach of their obligations.

It's a matter of public knowledge that the Government has been issuing various directions and steps since the outbreak of COVID. One such instance is the office Memorandum which has been issued by the Ministry of Finance on 19.02.2020, wherein while explaining the meaning of the term Force Majeure, i.e. extraordinary events or circumstances beyond human control, disruption suffered on account of COVID to supply has been termed as a Force Majeure event. Accordingly, it can be said that the Central Government along with the public machinery is already in the process of adopting a measure to minimize the risk caused due to the pandemic COVID. The Office Memorandum can be termed as an act of the Government to provide a certain degree of economic and legal protection to parties, which stands affected due to the supply disruption. However, in what manner will the relief be given depends on various factors such as the status of the borrower i.e. whether an individual or an entity, the sector to which the borrower, the quantum of debt, amount of default, etc.

As the situation stands today, it is quite likely that performances under various contracts particularly Banking Contracts will be delayed, interrupted, or even cancelled as the parties have been legitimately prevented from performing their contractual obligations. The parties in the said background will try to take advantage of the doctrine of force majeure, wherever applicable.

Now, what is the meaning of the term Force Majeure? Force Majeure has been derived from the French law which stipulates an event that is beyond the control of either party entering into a contract. However, the said Force Majeure clause cannot be applied in a blanket manner as it has to be proved that the parties have been "ready, willing and able" to perform the contract but due to events which were beyond their control, they have failed to complete their obligation. What exactly constitutes Force Majeure is required to be looked in from a legal angle, in which case reference as made in the matter of *Seadrill Ghana Offshore v Tullow* [2018] EWHC 1640 (Comm)<sup>1</sup>, shall come into play which stated that for a party to rely on an event of force majeure, it must be the sole operative cause of the inability to perform. Now, what is this "sole operative cause" shall be required to be made applicable on case to case basis and cannot be put into a straight jacket formula. Whether the restrictions imposed by the Government and various advisories being issued, are itself sufficient to invoke the doctrine of Force Majeure is something which will be required to be considered sooner or later.

In India, the doctrine of frustration has been laid down in Section 56 of the Indian Contract Act, 1872 (Act). The principle of 'frustration' may be relevant when a significant change of circumstances renders the performance of a contract radically different from the obligations originally undertaken. Such a change in circumstances must be due to an external event or change of situation that occurs



through no fault of the affected party. A contract will be deemed “frustrated” or “impracticable” where certain situations arise which make the accomplishment of the contract impossible in the way contemplated. The supervening event should render the performance of the contract so different from what was contemplated at its conclusion that it would not be reasonable to hold the parties bound by. In the matter of *Sushila Devi vs Hari Singh*, 1971 AIR 1756 it was held that Impossibility under Section 56 of the Contract Act should not be restricted to humanely possible scenarios. The Hon’ble Supreme Court further in the matter of *Satyabrata Ghose v Mugneeram Bangur and Company & Anr* 1954 SCR 310 held that change in circumstances should mean which completely upsets the very foundation upon which the parties rested their bargain.

Thereby, wherein agreements, there does not lie any clause of Force Majure, the parties must look beyond the same and invoke the clause of frustration, by establishing that the COVID has changed the circumstances in such a manner that it is difficult to perform and accomplish what was initially contemplated between the parties. However, it is to be noted that establishing the principle of Frustration is more difficult than proving the applicability of the Doctrine of Force Majure.

In this background, whether the Government or Financial Regulator i.e. RBI and our

Banking Sector can accommodate the concern of individuals and various stakeholders at all levels by taking a cue of Banks operating in other jurisdictions is something which is required to be favourably considered.

As due to this disruption in productions and falling exposed due to global shut down, the GDP growth would fall and may cause the loss of jobs. The Central Government in the said scenario should look at providing tax reliefs to troubled sectors, spend more money on the implementation of Government projects to create more employment, set up adequate infrastructure and funds for meeting the healthcare requirements, direct employers to safeguards the right of the employees in this troubled hour by proposing a certain mechanism for sharing of the cost of resources inter se the Government and the Employers. Besides, RBI as the regulator of our financial sector should also come out with fiscal policies envisaging reduction in the interest rates, relaxation in asset classification norms, reschedulement of principal payment, waiver of interest for a certain period, etc.

At this hour, it is required that the Central Government, Regulatory body of our Country along with our Banking entities step up to the occasion and address the concerns of the people at large to provide them the much-needed respite, albeit with necessary checks and balances.



# NEWS UPDATE

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## **Bankruptcy Law Needs a Boost for Coronavirus - WSJ**

<https://www.wsj.com/articles/bankruptcy-law-needs-a-boost-for-coronavirus-11585608800>

## **COVID 19 : Functioning Of Supreme Will Be Restricted To Hear Only Urgent Matters**

<https://www.livelaw.in/top-stories/breaking-covid-19-functioning-of-supreme-will-be-restricted-to-hear-only-urgent-matters-read-notification-153797>

## **Wary buyers keen to stay fit may trip IBC process**

[https://economictimes.indiatimes.com/markets/stocks/news/wary-buyers-keen-to-stay-fit-may-trip-ibc-process/articleshow/75399174.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/markets/stocks/news/wary-buyers-keen-to-stay-fit-may-trip-ibc-process/articleshow/75399174.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

## **Huge provisioning at NBFCs likely for Jan-Feb bad loans**

[https://economictimes.indiatimes.com/industry/banking/finance/huge-provisioning-at-nbfc-likely-for-jan-feb-bad-loans/articleshow/75395671.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/industry/banking/finance/huge-provisioning-at-nbfc-likely-for-jan-feb-bad-loans/articleshow/75395671.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

## **What are the legal liabilities of a loan guarantor?**

[https://economictimes.indiatimes.com/wealth/borrow/what-are-the-legal-liabilities-of-a-loan-guarantor/articleshow/75372019.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/wealth/borrow/what-are-the-legal-liabilities-of-a-loan-guarantor/articleshow/75372019.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

## **Lockdown Impact: IBBI Eases Insolvency Resolution Process Timelines**

<https://www.bloomberquint.com/insolvency/lockdown-impact-ibbi-eases-insolvency-resolution-process-timelines>

## **Covid-19: Lockdown period not to be counted for certain corporate insolvency timelines**

<https://www.thehindubusinessline.com/economy/policy/covid-19-lockdown-period-not-to-be-counted-for-certain-corporate-insolvency-timelines/article31207840.ece>

## **IBC Threshold Raised As INR One Crore; Govt May Consider Suspending Sections 7, 9 & 10**

<https://www.livelaw.in/top-stories/ibc-threshold-of-rs-one-lakh-raised-rs-one-crore-consider-suspending-sections-7-9-10-154276>

## **RBI's EMI moratorium: Will my installment be deducted, are credit card bills suspended and other questions answered**

<https://www.cnbctv18.com/economy/are-credit-card-bills-suspended-and-other-questions-on-rbi-moratorium-answered-5571531.htm>

# THE FIRM IN HEADLINES

## THE ECONOMIC TIMES

### Lockdown period won't be counted in IBC timelines

**31st March, 2020** - Ashish Pyasi, Associate Partner, shares his views on how the lockdown will not be counted in IBC timeline. Ashish Pyasi, partner at law firm Dhir & Dhir, said the IBBI move deals with only a part of the issue because it does not consider the outer timelines of 270 and 330 days provided in the IBC. "This regulation is subject to the provisions of the code, so the timelines for various activities in the process will be extended, but what about the outer limits?" he said. [Read more The Economic Times](#)

## THE ECONOMIC TIMES

### How coronavirus may cause legal wrangles

**26th March, 2020** - "Inevitably, all contracts will be put to litmus test... Very few contracts in India includes pandemic as a force majeure event as such events are never anticipated. This will affect many. Some impacted by the lock-down may also be affected as acts of government may not be under the terms of force majeure. It all depends on terms between the parties," said Ashish Pyasi, Associate Partner, Dhir and Dhir Associates. [Read more The Economic Times](#)

## Business Standard

### An Opportunity in Default Threat

**23rd March, 2020** - Experts note banking-related contractual obligations primarily pertain to lending agreements. "Such agreements describe the manner of repayment of the loan, along with the applicable rate of interest. In case the term of banking related contractual obligations aren't met, the default clause is triggered", says Varsha Banerjee, Partner, Dhir & Dhir Associates. [Read more Business Standard](#)

## THE ECONOMIC TIMES

### Mumbai High Court asks Finance Ministry to enhance DRT infrastructure

**13th February, 2020** - According to Ashish Pyasi, Associate Partner, Dhir & Dhir Associates, in recent years, the DRTs are barely able to function because of lack of infrastructure. "Such is the state of affairs that several lawyers practising in DRTs are also taking to new practice areas," Pyasi said. [Read more The Economic Times](#)

### AGR Burden on ISPs

**22nd January, 2020** - KPS Kohli, Partner, Dhir & Dhir Associates, speaking in the show 'India Development Debate' in ET now Channel, a leading business and finance news channel in India, on AGR burden on ISPs.



# THE PODIUM



Ms. Maneesha Dhir, Partner, **Dhir & Dhir Associates** shares dias with other esteemed speakers while Charing the Session at a Seminar on International Women's Day organized by **Insolvency And Bankruptcy** Board Of India on 8th March, 2020.

**Dhir & Dhir Associates** is delighted to share this moment of pride with Ms. Maneesha Dhir, Partner, **Dhir & Dhir Associates** & Co-Chair, **IWIRC India** being conferred with the prestigious 'Woman Lawyer of the Year 2020' Award by Mr. **Shashi Tharoor**, Hon'ble Member of Parliament, India, and Chairman of the Parliamentary Committee for External Affairs on 4th March, 2020. The award ceremony was organized by Public Diplomacy Forum - an organization that promotes knowledge, literary festivals and not-for-profit events.







In continuation to the firm's efforts towards giving back to the community, Mr. **Amir Bavani**, Principal Associate, **Dhir & Dhir Associates** shares his thoughts with the student executives at St. Joseph's Degree and PG College, Hyderabad during a guest lecture on the aspects of "IBC and Winding Up" on 7th March, 2020



Ms. **Namrta Sudan**, Partner, **Dhir & Dhir Associates** during her panel discussions with other esteemed speakers at a general counsel legal best practices summit series organized by **Lex Witness - India's 1st Magazine on Legal & Corporate Affairs** on 27th February, 2020 in Bengaluru



Mr. **KPS Kohli**, Partner, **Dhir & Dhir Associates** during his panel discussions at the tri-city general counsel legal best practices summit series organized by **Lex Witness - India's 1st Magazine on Legal & Corporate Affairs** on 27th February, 2020 in Bengaluru



Mr. **Alok Dhir**, Managing Partner, **Dhir & Dhir Associates** during his special address on "Demystifying the **hashtag#IBC** Maze for General Counsel" during his sessions in the tri-city general counsel legal best practices summit series organized by **Lex Witness - India's 1st Magazine on Legal & Corporate Affairs** on 27th February, 2020 in Bengaluru





Ms. **Namrta Sudan**, Partner, **Dhir & Dhir Associates** during her panel discussions with other esteemed speakers at a general counsel legal best practices summit series organized by **Lex Witness - India's 1st Magazine on Legal & Corporate Affairs** on 6th February, 2020 in Bengaluru



The firm is delighted to share glimpses of a bespoke address delivered by **Amir Bavani**, Principal Associate, **Dhir & Dhir Associates** to a mighty audience gathering at **The Institute of Chartered Accountants of India** in IBC Journey so far & Important Judgements on 20th Jan, 20

# ACCOLADES



## Ranked Individuals

Alok Dhir - Band 2

## Recognized Practitioner

Maneesha Dhir - Technology, Media, Telecoms (TMT)

## Ranked Practice Areas

Dispute Resolution - Band 4  
Projects, Infrastructure & Energy - Band 4  
Restructuring/Insolvency - Band 3



## Leading individuals

Alok Dhir

## Ranked Practice Areas

Banking and Finance - Tier 2  
Capital Markets - Tier 2  
Dispute Resolution - Tier 2  
Dispute Resolution - Arbitration - Tier 2  
Restructuring and Insolvency - Tier 2  
Corporate and M&A - Tier 3  
Projects and Energy - Tier 3  
Real Estate and Construction - Tier 3  
TMT - Tier 3

## asialaw PROFILES

### Highly Recommended

Capital Markets  
Restructuring & Insolvency

### Recommended

Energy  
Infrastructure  
Banking & Finance  
Dispute Resolution  
Private Equity

### Other Notable Firms

Technology & Telecommunications  
Corporate/M&A  
Labour & Employment  
Regulatory

## IFLR1000

### Tier 2

Restructuring and Insolvency  
Project Development - Oil and Gas, Power, Transport

### Tier 3

Capital Markets - Debt, Equity  
Private Equity  
Project Development - Infrastructure, Telecommunications Networks  
Project Finance

### Tier 4

Banking  
M&A



### Highly Regarded

#### Alok Dhir

Restructuring and Insolvency

#### Maneesha Dhir

Restructuring and Insolvency, M&A  
Banking, Technology and Telecommunications

#### Sachin Gupta

Restructuring and Insolvency

#### Girish Rawat

Capital Markets - Debt  
Industry Sector - Energy

#### Guranpreet Singh Sarna

Project Development  
Rising Star

#### Antik Senapati

Capital Markets  
Rising Star

### Alok Dhir - Litigation Star

Insolvency - Tier 1

#### Tier 3

Commercial and Transactions  
Government and Regulatory  
International Arbitration  
Construction



Dhir & Dhir Associates is a leading full-service law firm in India serving as a single-window legal and regulatory advisor globally. It has offices in New Delhi, Mumbai, Hyderabad and a representative office in Japan. The firm's areas of practice include Restructuring and Insolvency, Corporate/Commercial Advisory and M&A, Real Estate, Banking and Finance, Dispute Resolution, Capital Markets, Infrastructure & Energy, IPR, TMT and Employment Law.

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