

Covid-19's impact on businesses in Pakistan: key legal considerations

5 April 2020



In order to curb the spread of the Novel Coronavirus, governments around the world have implemented measures to enforce social distancing in order to avoid burdening healthcare systems. Such measures have also been enforced in Pakistan. In order to alleviate the unavoidable economic fallout of these measures, the Federal Government has announced a wide-ranging stimulus package of Rs. 1.2 trillion, the State Bank of Pakistan (SBP), the central bank, has reduced the benchmark interest rate and announced policies to allow restructuring of debt obligations and increase the pool of banks' loanable funds. Various provincial governments have notified provisions applicable to employers with the objective of protecting workers.

RIAA Barker Gillette is constantly monitoring developments in Pakistan in this ever-changing environment brought about by the global pandemic in order to keep you informed as to their impact on organizations and businesses. This document summarizes the restrictions in place, the relief measures announced for businesses and some of the key legal considerations arising from the prevailing crisis.

I. Restrictions

• The 'lockdown'

The Federal Ministry of National Health Services, Regulations & Coordination published a [National Action Plan for COVID-19](#) (updated on 7 March 2020), a policy document laying down principles for outbreak preparedness, containment and mitigation. On 22-23 March 2020, all provincial governments issued notifications that have imposed restrictions on movement and gathering of people. Key amongst the exemptions

from such restrictions are personnel and operations of industries engaged in essential services, including food, healthcare, electricity generation, distribution and transmission, gas utilities, agriculture, sanitation, telecoms, banks, capital markets, goods transport, distribution, storage, printing and packaging in respect of essential services. However, even with essential services, only bare minimum/technical personnel are be exempted from the restrictions. On 1 April 2020, the National Coordination Committee on COVID-19, comprising members of the Federal Cabinet, Chief Ministers of the Provinces and senior members of the armed forces, decided to extend the country wide lockdown until 14 April 2020. When announcing the Special Incentive Package for the Construction Industry on 3 April 2020, the Prime Minister stated that the construction industry would resume activity from 14 April 2020.

• Courts

A [meeting](#) of National Judicial (Policy Making) Committee (NJPMC) was held on 19 March 2020 under the chairmanship of the Chief Justice of Pakistan, deciding that, due to the prevailing situation courts will remain open but the judicial work load will be reduced.

The Sindh High Court and the Lahore High Court have issued notifications stating that they shall remain closed for all ordinary civil business till further orders and only urgent matters of criminal or civil nature shall proceed.

The [Balochistan](#) and Peshawar High Court issued notifications that they and all subordinate courts shall remain closed until 28 March 2020 for ordinary business and shall only hear urgent cases. They have not resumed ordinary business till date. It is expected that notifications

extending the previous directions shall be issued by the High Courts.

The Islamabad High Court in its circular dated 16 March 2020 directed that only urgent matters shall be heard until 5 April 2020.

The Appellate Tribunal Inland Revenue in its circular dated 25 March 2020 directed that only stay applications etc. will be heard and decided by the respective benches at different cities. Further, the main appeals of urgent matters will be fixed and heard by the concerned benches on appropriate application till further orders.

The Federal Board of Revenue (FBR) issued a memorandum stating that no adverse inference may be drawn for non-attendance in hearings and directed that cases may be adjourned in the absence of a request until 24 April 2020.

II. Relief to businesses

• The Federal Government's Fiscal Stimulus Package

The Economic Coordination Committee (ECC) of the Cabinet in its meeting on 30 March 2020 approved a fiscal stimulus package with an outlay of Rs. 1.2 trillion. The main components for businesses are (i) Rs 75 billion to enable the FBR to make payment against claims from the last 10 years for sales tax and income tax refunds and duty drawback; (ii) Rs 30 billion to pay duty drawback claims to textile exporters in the current financial year and (iii) exemption of advance tax on import of pulses and additional customs duty on soya bean, palm, canola and sun flower oil and seeds. In addition to the aforesaid, which were mentioned in the press [release](#) issued by the Ministry of Finance, the Prime Minister announced Rs 100 billion allocation towards deferred payment of loans by the agriculture sector and SMEs. He also announced that the SBP shall direct banks to provide 'easy' loans to businesses that do not lay off employees in the midst of this crisis.

On 3 April 2020, the Advisor to the Prime Minister on Finance stated that Rs. 200 billion had been allocated for those who have become unemployed or require income support due to the restrictions imposed to combat the outbreak of the Novel Coronavirus.

• Special Incentive Package for Construction Industry

On 3 April 2020, the Prime Minister announced a "Special Incentive Package for the Construction Industry," which

envisages a tax amnesty for investment made in the construction sector, fixed income tax regime for the industry, reduction in sales tax on construction material and reduction in provincial sales tax on construction services. Most significantly, the source of income of any investment construction shall not have to be explained, enabling previously untaxed and undeclared funds to be so invested without any adverse consequences. Furthermore, a fixed income tax rate will mean that fixed tax will be charged on a per square foot or per square yard basis, which will effectively reduce tax liability on builders and developers and reduce compliance costs. Any builders or developers carrying out construction in the Naya Pakistan Housing Scheme shall have to pay only 10% of such fixed tax. The holding period for the purpose of capital gains tax on constructed property shall be reduced from 4 years to 3 years. Withholding tax on purchase of goods and services for construction industry (except steel and cement) will be reduced to zero. Federal legislation on the aforesaid package is yet to be promulgated.

• Measures announced by the State Bank of Pakistan

In the wake of the crisis, in two meetings on 17 and 24 March 2020, of the [Monetary Policy Committee](#) of the SBP announced a cumulative reduction of 2.25% in the benchmark interest rate.

Furthermore, the SBP in its [notification](#) dated 20 March 2020 announced the following policies and measures:

- i. SBP will provide refinancing opportunities to support banks in providing cheap credit at interest rates between 3 and 6% to exporters for working capital or new projects.
- ii. The matching amount for exporters has been reduced. As per the new performance requirements, export must be 1.5 times the amount of the borrowed funds. Furthermore, the date to meet the performance requirement has been moved from end June 2020 to end December 2020.
- iii. Exporters must now ship their goods within 12 months (previously 6 months) of availing subsidized credit schemes between January and June 2020.
- iv. Exporters will be able to avail credit under the Long Term Financing Facility between 1 January and 20 September 2020 if the exports amount to 40% of

the total sales of USD 4 million; a decrease of 10% or USD 1 million from the previous requirements. Additionally, the new projected exports performance measurement time period has also been increased to 5 years.

- v. SBP has increased the time period for the realization of export proceeds from 180 days to 270 days and this provision will be granted on a case by case basis. Additionally, the time period for imported goods against advanced payment has also been increased from 120 to 210 days.

In a [notification](#) issued on 26 March 2020, SBP, in collaboration with Pakistan Banks Association (PBA), announced a relief package aimed at households and businesses. Relevant aspects of the announcement are highlighted below:

- i. The Capital Conservation Buffer applicable to commercial banks has been reduced from 2.5% to 1.5%, increasing the loanable pool funds by Rs 800 billion.
- ii. The regulatory retail limit of Rs 125 million per SME has been increased to Rs 180 million to encourage banks to provide additional loans to SMEs.
- iii. Payments of principal loan obligations may be deferred by one year upon a written request submitted by the borrower before 30 June 2020. This deferment will not be classified as a restructure/reschedule and will not affect borrowers' credit history.
- iv. Until 31 March 2021, loans that are rescheduled/restructured within 180 days from the due date will not be treated as defaults and banks will not be required to suspend the unrealized mark-up on these loans. Additionally, the timeline for classification of trade bills has also been increased from 180 days to 365 days.
- v. To increase the borrowing ability, the margin call requirement of 30% against listed shares has been reduced to 10% and banks have been allowed to take exposure against the shares of their group of companies.

The dictates of social distancing have spurred digitization. The SBP has also launched an electronic Regulatory Approval System which will allow banks to submit and receive decisions of cases related to foreign exchange policy and operations. Although this system will cover cases submitted to the Exchange Policy Department (EPD), Foreign Exchange Operations Department

(FEOD), and SBP-BSC, the manual submission of cases will also continue.

• Tax

The FBR issued a notification dated 20 March 2020 exempting custom duty, income tax and sales tax on all diagnostic support items including medical equipment for three months, which is stated to be extendable.

The FBR has also granted an extension for submission of sales tax and federal excise returns for the tax period of January and February 2020 till 15 April 2020 and an extension in date of payment for the tax period of February 2020 till 12 April 2020. An extension in time limit for filing of goods declaration has also been granted. The filing of goods declaration for Import General Manifest filed between 17 March and 7 April 2020 has been extended to 25 days.

Sindh Board of Revenue has granted extension to registered persons, including the withholding agents covered by the provisions of Sindh Sales Tax Special (Procedure) Withholding Rules, 2014, for E-Deposit of Sindh Sales Tax till 31 March 2020 and for E-filing of Tax Return till 10 April 2020 for the tax period of February, 2020. Other provincial tax collection authorities have also notified extensions. In addition to this, Sindh Infrastructure Cess on imports of testing kits and other medical devices required to treat Covid-19 has been waived.

The Government of Punjab has announced a tax relief package of Rs 18 billion comprising reduction to zero of rates of sales tax on construction services, services of doctors, private hospitals, marriage halls, catering, laundry, beauty salons, gyms, embroidery services, human resource development and online platforms, a "deferring" of property tax and development cess on urban immovable property and reduction of Capital Value Tax and stamp duty on property transactions to 2%.

III. Legal Considerations

• Impact on contractual obligations

Force Majeure

The widespread governmental restrictions imposed on travel and movement in the wake of the spread of the novel coronavirus since declared a pandemic, may impact on parties' ability to perform contractual

obligations due to cancellations and other resultant logistical factors.

A *force majeure* is an event whose occurrence is outside the reasonable control of a party and which prevents that party from performing its obligations under a contract. Express force majeure clauses in contracts are recognized by courts in Pakistan. Such provisions are not ordinarily implied into contracts governed by Pakistan law.

The question of whether such clauses may be invoked will depend on a variety of factors, including:

- the terms of the contract and the force majeure provision in particular;
- whether such provision lists epidemic or pandemic as a force majeure event or whether it otherwise falls within any general 'catch-all' language in the provision;
- whether a party has been disabled from performing its obligations under such contract because of the force majeure event;
- whether such party had any alternate method of performing;
- whether the event was foreseeable; and
- whether the party took any steps to mitigate the impact of the force majeure event.

Such provisions typically require compliance with notice provisions, which must be adhered to in order to avoid an inadvertent breach of contract.

A party affected by an event of force majeure will typically be relieved from performing the obligation affected for the duration and to the extent affected and, in some cases, may also be entitled to terminate the contract and/or claim compensation.

In the wake of the COVID-19 crisis, RIAA Barker Gillette has advised on the application of force majeure clauses in complex commercial contracts, including power purchase agreements, supply contracts and construction contracts.

The law governing the performance of contracts in Pakistan is the Contract Act, 1872; courts in Pakistan, while interpreting the provisions of the Act have also placed reliance on judgements of constitutional courts in foreign jurisdictions where the Act is also applicable. Such judgements, though not binding, are persuasive in their content.

Applicability of the force majeure clause

A party affected by an event of force majeure will typically be relieved from performing the obligation affected for the duration and to the extent affected and, in some cases, may also be entitled to terminate the contract and / or claim compensation. In '**Lebeaupin v R Crispin & Co [1920] 2 KB 714**', it was held: "*The term "force majeure" is used with reference to all circumstances independent of the will of man, and which, it is not in his power to control, and such force majeure is sufficient to justify the non-execution of a contract. Thus, war, inundation and epidemics are cases of force majeure.*"

Material Adverse Change or Material Adverse Effect

Agreements for M&A transactions, financing, sale of goods and other commercial contracts may contain a clause typically allowing for termination or adjustment of parties' obligations due to an event (a material adverse effect ("MAE") or material adverse change ("MAC")) that negatively impacts the nature or value of a product, company or business. MAE / MAC is typically defined in a contract as any development, event, condition, state of facts that have or would reasonably be expected to have a material adverse effect on the business, assets, financial condition or operations of a party. Common exclusions from MAE / MAC definitions are effects related to general market conditions, epidemics or other acts of God, often to the extent that such effects do not disproportionately affect the party in question relative to others in the industry. Usually there is no express exhaustive definition of the nature of events that may constitute a MAE / MAC and of the quantitative value of the loss that would have to be caused in order to qualify as a MAE / MAC. There is no standard analysis of whether the effects of the outbreak of COVID-19 on a business would qualify as a MAE / MAC in any particular case. Even if the outbreak is a MAE / MAC in a particular case, the effects of the outbreak may constitute an exception to the definition provided in the contract. Determining whether the outbreak is a MAE / MAC will require a review of the contractual terms, surrounding facts and the impact of the outbreak on the claiming party.

Doctrine of frustration of contract

In the absence of a force majeure clause or MAC / MAE clause, a non-performing party may seek to rely on the common law doctrine of frustration, as stated in Section 56 of the Contract Act, 1872, on grounds of supervening impossibility or illegality of performing its obligations due to measures taken in response to the spread of the novel coronavirus. This applies when an unforeseen event makes it impossible or illegal – through no fault of a party – to perform the contract. The unforeseen event must be so fundamental as to strike at the root of the contract.

Given that the current pandemic is unprecedented in its scope and spread, an omission of the specific mention of a pandemic in a force majeure clause may be countered by the argument that notwithstanding the omission, performance of obligations is impossible.¹ In **'Pakistan Industrial Credit and Investment Corp V. Habib Enterprises'**, 1989 CLC 2070, the Sindh High Court held: *"The doctrine of frustration of contract comes into play on account of unfolding of events, subsequent to contract, under section 56 of the Contract Act, 1872, which subsequent turn of events were not in contemplation of parties."*

The legal effect of a finding that a contract is frustrated is that all parties are discharged from their obligations thereunder. In order to successfully plead frustration, it is not enough to show that performance of a contract has become more expensive or onerous. In fact, in order to attract the doctrine of frustration, the party alleging frustration has to discharge the burden upon it to prove that the performance thereof is wholly impossible and not simply inconvenient or capable of being mitigated.² The invocation of the doctrine as a defence therefore, can be countered by proof of fault the burden of which is upon the party alleging the fault.³

One of the core principles of the doctrine is that the frustrating event must be one that is not in control of either party; as held by a 5-Member Bench of the Supreme Court of Pakistan in **'M/s Mansukhdas Bodram V. Hussain Brothers Ltd.'**, PLD 1980 Supreme Court 122: *"It is to be remembered that doctrine of frustration is not really an exception to the rule that a man must pay damages if he breaks the contract for there can be no, default in not doing that which the law prohibits. It may be stated 'frustration of a contract is a developing concept like negligence; its categories are never closed but are as wide as the categories of human conduct. Its effect is immediate and automatic. It guillotines the contract without the action of either party.'"*

Conclusion

In conclusion therefore, in the current landscape of COVID-19 novel coronavirus having been declared a pandemic, invocation of force majeure clauses and reliance on the doctrine of frustration will depend on the terms of each contract. In general, courts will look to whether the event is specifically included in the

contractual force majeure clause and even if so included, whether the party invoking the clause could have mitigated the damage and that performance is truly impossible. Courts may apply liberal standards of impossibility when judging the invocation of the clauses or doctrine given the unprecedented nature, scope and spread of the pandemic. It is, in any event, advisable for businesses to take all possible steps to mitigate damage as the situation unfolds and document the ways in which performance of contractual obligations is rendered wholly impossible.

• Insurance

The losses caused to businesses due to measures put in place to control the outbreak of the Novel Coronavirus have also given rise to questions as to the extent which such losses are covered under insurance policies. Various forms of insurance policy may provide coverage for such losses. Ultimately a successful claim will depend on the scope of coverage and compliance with notice requirements under a policy. Many businesses have business interruption policies, however in certain cases such policies cover only losses arising out of physical loss or damage to insured property. Supply chain interruption policies, on the other hand, provide broad coverage against losses caused by disruption to supply chain and usually do not require physical loss to have taken place. However, such policies may exclude coverage for losses caused due to pandemics. Businesses may also have force majeure insurance – the terms of such policies and, in particular, the scope of the exclusions, shall determine coverage. It will be imperative for insured businesses to comply with claim and other notice requirements under policies so as to ensure claims are not denied on the basis of technical non-compliances.

We have advised a multitude of insured businesses, insurers and reinsurers and represented them in disputes on complex claims.

• Bails of Under-Trial Prisoners

On 24 March 2020, the Islamabad High Court granted bail to prisoners under trial for minor offences to prevent the spread of the coronavirus in prisons. Other

¹ In **'Energy Watchdog v Central Electricity Regulatory Commission'**, 2017 SCC OnLine SC 378, the Indian Supreme Court held that: *"Many contracts expressly provide for performance to be excused, if rendered impossible by unavoidable cause such as force majeure, vis major, acts of God, or the enemy. When a force majeure event is relatable to an express or implied clause in a contract, it is governed by section 32 and if the event occurs de hors the contract, it is dealt with by a rule of positive law under section 56."*

² Supreme Court of Pakistan in **'M/s Haji M. Mohammad Zakaria & Co. vs. Province of West Pakistan'**, 1969 SCMR 428

³ See **Halsbury' Laws of England (Third Edition), Volume 8, page 187**: *"The doctrine of frustration is in all cases subject to the important limitation that the frustration circumstances must arise without fault of either party. The defence of frustration can therefore be defeated by proof of fault, and the burden of proving fault lies upon the party alleging it."*

provincial High Courts and subordinate court had also been entertaining bail applications of prisoners on grounds of the virus. On 30 March 2020, in an appeal against such order of the IHC granting bail, the Supreme Court of Pakistan restrained the grant of any bails on such grounds by the High Courts and Provincial Governments. Furthermore, the Supreme Court ordered that any bail orders issued but not implemented shall not be acted upon until further orders from the Supreme Court. On 1 April 2020, the Supreme Court ordered *status quo* to be maintained and directed the Inspectors General of Prisons across the country to furnish a report in respect of prison populations and capacity, categories of prisoners: women/elderly, nature of offences and whether convicted or under trial. Interestingly, even though this has no direct nexus with the issue of grant of bail to prisoners, in its order of 1 April 2020, the Supreme Court directed the Federal Government, Provincial Governments, Government of Gilgit Baltistan and the administration of Islamabad Capital Territory to furnish a report on the expected threat of the further spread of the Novel Coronavirus, measures adopted by them to deal with the outbreak and the state of readiness of hospitals.

• COVID-19's Impact on Company Meetings and Compliances

The Companies Act, 2017 allows members, shareholders and directors of a company to hold meetings through video-link. Section 134(4) of the Act, which is in respect of meetings of members (annual and extraordinary) provides that members may participate in a meeting personally or by video-link. In the context of meetings of directors, section 176 of the Act provides that directors of a listed company attending a meeting by video conferencing or by other audio-visual means shall be counted for purposes of quorum. In the case of private limited and unlisted public companies, the provisions of the articles of association shall determine whether directors so attending shall count for the purposes of quorum.

In the [press release](#) issued on 11 March, 2020, the Securities and Exchange Commission of Pakistan (SECP) in the light of the threat posed by Covid-19, advised all companies to modify their usual planning for annual general meetings. Meeting of the Board of Director may also be held through tele / video conferencing.

By means of [Circular 6 of 2020](#) dated 22 March 2020 the SECP stated that in exercise of powers under section 510 of the Companies Act, 2017 relaxed compliance requirements, allowing companies required to hold annual general meetings (AGM) for year ending 31

December 2019 to do so on or before 29 May 2020, extending time by a period of 30 days. Furthermore, companies required to conduct elections of directors on or before the said AGM may file impediment reports with the concerned registrar under section 158(2) of the Act citing the reasons for delay in holding elections. Any statutory return required to be filed on or after 24 March 2020 may be filed with a delay of 30 days without any additional filing fee and no penal action shall be taken for late filing.

Thereafter by means of [Circular 10 of 2020](#) dated 1 April 2020, the SECP provided further regulatory relief. The extension given under Circular 6 of 2020 on holding of AGMs to companies whose financial year ended 31 December 2019 has been extended to listed companies under section 232(2) of the Act, which requires companies to lay financial statements before their members within a period of four months following the close of the financial year. The Circular recognizes that the Act does not allow for relaxation in timeline for filing of quarterly financial statements of listed companies other than for the first quarter. Nevertheless, the SECP has advised companies to prioritize public safety, while ensuring corporate compliance and assured that it shall give due consideration to all underlying circumstances while enforcing regulatory compliance. Referring to the requirement of section 176 of the Act that directors of a public company meet at least once in each quarter of the year, the Circular encourages companies' directors to pass resolutions by circulation. It may however be noted that certain powers of the board as listed in section 183(2) of the Act may only be passed at a meeting of the directors. Such meetings may be attended electronically in case of listed companies and for other companies, if the articles of association so authorize. Finally, the Circular encourages companies to use technology and related applications to enable employees to work from home to meet regulatory compliances.

• Workers, Labour & Employment

The Government of Sindh issued a notification dated 23 March 2020 under section 3(3) of the Sindh Epidemic Diseases Act, 2014, in furtherance of notification dated 22 March 2020, stating that during the period mentioned (15 days commencing from 23 March 2020) no workers shall be laid off and all workers shall be paid salaries in full by their respective employers. In pursuance of the notification dated 23 March 2020, an order was issued by the Secretary, Labour & Human Resources Department, Government of Sindh, stating that "*all employers/owners/occupiers of establishments and responsible persons under section 3 of the Sindh*

Payment of Wages Act, 2015 are advised to disburse salaries on 31st March, 2020". A worker is defined under Sindh Payment of Wages Act, 2015 as "any person employed in any factory or industrial establishment or commercial establishment or a mine or Railway to do any skilled or unskilled, manual or clerical work for hire or reward and includes permanent, probationers, budli, temporary, apprentice and contract workers, but does not include Occupier and Managing having the hiring and firing authority."

The Director General, Labour Welfare, Government of Balochistan issued a notification on 23 March 2020 directing that all private sector entities in Balochistan shall pay "at least minimum wage" of Rs. 17,500 "on regular basis without deduction." The notification states that Deputy Commissioners shall take action in case of non-compliance. It may be noted that such notification does not purport to be issued pursuant to any statutory authority.

RIAA Barker Gillette published an insight article on Labour Laws in Pakistan in 2016, which may be accessed [here](#).

• Limitation & Litigation

The Supreme Court of Pakistan issued a [notification](#) dated 26 March 2020 stating that for the purposes of Section 4 of the Limitation Act 1908, the courts shall be deemed to be closed from 22 March 2020 till 21 April 2020, since various litigants are unable to approach the court due to the lockdown. The Sindh High Court has issued a notification to the same effect, however the period is from 22 March 2020 till 15 April 2020.

The Peshawar High Court and the Balochistan High Court have not issued notifications specifically dealing with limitation. However, since the Peshawar High Court notified that it, and all subordinate courts, shall be closed and the Balochistan High Court has declared the days of closure as public holidays for itself and for subordinate courts, the provisions of section 4 of the Limitation Act, 1908, shall apply.

Note: This bulletin is not intended to provide legal advice and no legal or business decision should be based on its content. It is intended to provide information of general interest about current legal issues.

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In keeping with Government guidance on COVID-19, we're working remotely until further notice. We are able to access all systems as if we were in the office and to continue to offer you the same high-quality service you've come to expect from us.