

## **Force Majeure and The Impact of Covid-19 on RERA Registered Projects**

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### **Abstract**

Researcher had finished his data collection and interviewing of domain experts by the first week of March 2021 and had put together the entire paper, the nationwide lock-down due to COVID-19 meant that the final submission/release of this paper was pushed forward by three to four months. Hence, this paper mainly covers the pre-lock-down and post scenario. It took a considerable amount of time to check State-wise details (for all States), rules, loopholes, issues and to find out best practices and key initiatives rolled out across States. There are a few significant developments that took place after 21 March 2020 when the lock-down was announced and till March 2021. COVID-19 should be declared as a Force Majeure event for all construction contracts, Architectural & engineering design contracts under implementation or under service. With the recent increase in the number of COVID-19 cases in India, the likelihood of the lockdown being extended is high. This would only prolong the misery of the already bleeding real estate sector and potentially expose the promoters to a vast number of claims and complaints. On the extension of timelines for delivery of possession, whilst the principles of law will be considered in terms of force majeure clauses in the Agreements and the specific facts of the case, considering the gravity of the present situation, impact of lockdown and the detrimental effect on the economy, we would expect the relevant RERA Authority/ Courts to adopt a more balanced approach and direct resolutions to any disputes in this regard factoring equities.

**Keywords:** Force Majeure, Covid-19, RERA, RERA Registered Projects and RERA Act 2016

### **1. Introduction**

Housing sector is sub sector of real estate. Growth prospective of the sector is promising like contributing 11% till 2020, which is now just 5%. Government has taken many initiatives as a roadmap for bigger dream for our country as housing for all by 2022. Many stones need to be turning in coming future for better sectorial growth, which lead to better life for all Indians with all basic need as food, clothes, and shelters.

Amid COVID-19 crisis government is adopting citizen centric approach however the economic slowdown and recession in immediate future is inevitable, hence government should also consider the dwindling financial growth of corporate specially in housing and urban development which is one of the highest employment generating sector in the country, to allow flexibility on case to case basis on restructuring compensation of the employees and its payment over the period of time. The Real Estate Regulatory Authority in certain States have acknowledged the severe impact that COVID-19 has had on real estate projects.

### **RERA Registered Projects**

RERA has given power to the buyers and gave protection to them against the problem, which was common before the RERA implementation. Problem like Costing on sellable area before and carpet area use to be different, uniformity of rate of interest, reduce risk on builder's bankruptcy, against false promise, not charging more than 10% on advance payment, defect post purchasing, delay possession, defect in title of project, right to information reinforcement and grievance readdressed. This time bound incentive will help people to buy earlier to avail the full benefit and buy ready inventory to get more benefit. The Government should provide liquidity in the hands of buyers so that already finished inventory is cleared as soon as possible<sup>3</sup>.

Businesses Transactions/projects closed down due to lockdown will requires not only infrastructure support, but additional working capital to restart pending inflow<sup>4</sup>. Government may propose more Robust policy to address the

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<sup>3</sup>D. SANTHOSH KUMAR and Ramesh Kumar Miryala, 'Impact Of RERA On Home Loan Borrowers In India' (2020) 1 International Journal of Indian Culture and Business Management.

<sup>4</sup>MohammedShakil S. Malek, SaiyedFarhanaMohibali and DhirajBachwani, 'Identification, Evaluation, And Allotment Of Critical Risk Factors (Crfs) In Real Estate Projects: India As A Case Study' [2021] Journal of Project Management.

pay-cut of employees keeping Economic Slowdown and troubled Industrial financial status. Amid COVID-19 crisis government is adopting citizen centric approach however the economic slowdown and recession in immediate future is inevitable, hence government should also consider the dwindling financial growth of corporate specially in housing and urban development which is one of the highest employment generating sector in the country, to allow flexibility on case to case basis on restructuring compensation of the employees and its payment over the period of time. Central Advisory to RERA to extend timeline for the projects due to COVID-19 disruption for 06 months to 01 Year.

## **2. Force Majeure in view of Covid-19 pandemic**

MoHUA has issued order allowing till date, 23 States' Real Estate Regulatory Authorities have extended registration of projects by six months and one by nine months in view of the situation created by COVID-19.

COVID-19 should be declared as a Force Majeure event for all construction contracts, Architectural & engineering design contracts under implementation or under service (DLP, concession, O&M etc)<sup>5</sup>.

The Government agencies/ departments should support by immediate release of all certified bills overdue and at least 75% of uncertified invoices submitted within 7-10 days. All projects should be given an immediate Extension of Time (EOT) of six months and compensation of overheads upfront.

Compensation should be given to all Construction companies towards reimbursement of wages paid to labour/ workers, salaries paid to employees. To boost and ensure continued cash flows, it is suggested to dispense with the recovery of the Retention Money from the Monthly payments for a year, release retention monies already recovered and waive interest on mobilization advance provided, for the next twelve months<sup>6</sup>.

Where Construction firms have arbitration awards (including accrued interest) in their favor, the following may be approved by Government without seeking any Bank Guarantees:

- i. Immediate release of 50% of the amount due where the award is challenged under S/34
- ii. Where Section 34 Application is disposed of by Court, pay 75% of the amount due
- iii. Where Section 37 Appeal is disposed of, pay the total amounts due
- iv. Notwithstanding the above, Government Agencies may offer 75% of Arbitration Award monies as full and final settlement, irrespective of their stage of challenge

Banks should provide additional working capital to each company, irrespective of account status, else credit and working capital will only be available to select larger companies with superior credit ratings<sup>7</sup>.

Enhancement of threshold limit of Rs 1 Lakh to Rs 1 Crore for IBC against MSME companies (as declared by Hon'ble Finance Minister) should also be extended to Construction industry also.

Finance Ministry of Government of India, acknowledging the above extraordinary crisis, has declared via its circular dated 19th February, 2020 that Covid-19 would come under the category of 'force majeure' for specified financial purposes. Accordingly, in order to revive the economy, it has granted several concessions to the industry.

The Central Advisory Council, established under the section 41 of the RERA Act 2016 by the Ministry of Housing and Urban Development, Government of India, consisting of representatives of Developers as well as Allottees and Regulators has also echoed the same sentiment in its meeting dated 25th April, 2020 and has recommended relaxations to the sector, including a six-month extension in registration for projects having a valid registration<sup>8</sup>.

Various associations of real estate developers, including the CREDAI and NAREDCO have made representations to the Authority.

The force majeure Impact of the Covid-19, insofar as registration and project completion period is concerned, shall stand modified, limited to: For all registered projects the registration of which has lapsed prior to 15th March 2020 and in which application for extension has not yet been made. This general order on extension will also apply to all buyer-seller agreements entered into prior to 15th March, 2020 for which the completion date is on or after 15th

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<sup>5</sup>Treat Covid-19 As 'Force Majeure' Under RERA: Finance Ministry - ET Real Estate' (*ETRealty.com*, 2021)

<<https://realty.economictimes.indiatimes.com/news/industry/treat-covid-19-as-force-majeure-under-rera-finance-ministry/75718131>> accessed 19 May 2021.

<sup>6</sup>'Force Majeure' Under RERA- A Step To Combat Covid Disruption' (*BW Businessworld*, 2021)

<<http://www.businessworld.in/article/-Force-Majeure-Under-RERA-A-Step-To-Combat-Covid-Disruption/19-05-2020-192537/>> accessed 19 May 2021.

<sup>7</sup>D. SANTHOSH KUMAR and Ramesh Kumar Miryala, 'Impact Of RERA On Home Loan Borrowers In India' (2020) 1 International Journal of Indian Culture and Business Management.

<sup>8</sup>Force Majeure And The Impact Of Covid-19 On RERA Registered Projects - Coronavirus (COVID-19) - India' (*Mondaq.com*, 2021)

<<https://www.mondaq.com/india/litigation-contracts-and-force-majeure/936146/force-majeure-and-the-impact-of-covid-19-on-rera-registered-projects>> accessed 19 May 2021.

March, 2020. Only 'for such agreements, the agreed construction period would be understood to be extended by six months'<sup>9</sup>.

Under RERA, at the time of making an application for registration, a promoter is required to declare to the respective state authority established under RERA ('RERA Authority'), the period within which the real estate project is to be completed by the promoter. Accordingly, the certificate of registration of the real estate project is valid for the period applied for.

Section 6 of RERA empowers RERA Authorities to grant an extension of the registration period in certain circumstances viz., (a) in the event of a force majeure event; or (b) on account of reasonable circumstances (if so deemed fit by the RERA Authority) not attributable to a default on the part of the promoter.

Thus, in order to seek an extension of the registration period for the real estate project, the development of the real estate project must have necessarily been affected either by a) one of the aforesaid events set out in the definition of force majeure; or (b) any other reasonable circumstances which, in the opinion of the relevant RERA Authority, warrants an extension of period of registration. The terms 'calamity' it can certainly be argued that the term force majeure would also include other events, such as the pandemic caused by COVID-19, which are beyond the control of the concerned party. The Union Finance Minister has also, at a press conference held on May 13, 2020, announced that, as a part of the Covid-19 Economic Relief Package granted by the Prime Minister of India, the Ministry of Urban and Housing Affairs will advise the States and UT's and their RERA Authorities to (a) treat Novel Coronavirus or Covid-19 as a "Force Majeure" event under RERA; (b) However, since the onset of the Novel Coronavirus or 'COVID-19', there has been a cascading effect on the economy including the real estate sector. The Government of India had earlier imposed a complete lockdown over the entire country for 21 days with effect from March 24, 2020 and which has now been further extended till May 3, 2020. Delays in construction and completion timelines of real estate projects and for a further period of upto 3 months, if required. Additionally, the promoter can seek an extension of the registration on grounds of the delay being due to 'reasonable circumstances not attributable to a default on the part of the promoter' since the pandemic and the consequent lockdown was beyond the control of the promoter.

Keeping this in mind and with a view to reduce the stress on the developers and promoters, several RERA Authorities have taken cognizance of the current situation arising on account of COVID-19 and have, even prior to the press conference of the Union Finance Minister, suo-motu, issued notices/ circulars, inter alia, granting extension of registration of the real estate projects and the timelines for statutory compliances.

This is an advisory from the Central Government to the States and the Union Territories. Considering the present situation, the advisory will most probably be followed by the States and the Union Territories. However, we will have to wait until the requisite circulars/ directions are issued in this regard by the relevant RERA Authorities.

Other States may follow suit given the extension of the lockdown and mounting pressure from developers and real estate bodies who are reeling under the strain of the situation.

In view of the nation-wide lockdown, the Real Estate Regulatory Authority in certain States have acknowledged the severe impact that COVID-19 has had on real estate projects. Recently, Uttar Pradesh RERA issued a Press Release dated April 14, 2020, in pursuance of its first and second meetings held by video conferencing on April 13 and 14, 2020. In its meetings the Authority deliberated on the issue of whether to 'grant of extension to the registration of the projects in view of the nationwide lockdown in fight against COVID- 19 pandemic' and extended the date of completion of the projects. The Authority further allowed the promoters to update the QPR of the first quarter for 2020 and extend the date for other statutory compliances to May 31, 2020<sup>10</sup>.

The Real Estate Regulatory Authority of Madhya Pradesh hereby determines that under section 5 of the Act, the current Covid-19 pandemic is a force majeure situation of a special kind affecting the regular development of real estate projects in the State. The nature of the calamity is such that it has a similar and equal effect on all projects. Hence a common decision is being taken rather than a case-to-case decision on individual applications

Similarly, the Karnataka RERA issued an order vide notification dated April 04, 2020. The Authority further provided relaxation of timelines for statutory compliances and extended the same upto June 30, 2020

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<sup>9</sup>'Force Majeure' Under RERA- A Step To Combat Covid Disruption' (*BW Businessworld*, 2021)

<<http://www.businessworld.in/article/-Force-Majeure-Under-RERA-A-Step-To-Combat-Covid-Disruption/19-05-2020-192537/>> accessed 19 May 2021.

<sup>10</sup>'Himachal RERA Invokes Force Majeure In Wake Of Covid-19 Outbreak' (*Hindustan Times*, 2021)

<<https://www.hindustantimes.com/cities/himachal-rera-invokes-force-majeure-in-wake-of-covid-19-outbreak/story-WMMo2V8Jops5iR67Ln98M.html>> accessed 19 May 2021.

### 3. Analysis

The Novel Coronavirus or Covid-19 Impact On Real Estate Regulatory Authority (RERA) Registered Projects. In this section, we seek to analyse the Impact of COVID-19 on real estate projects registered under RERA. The incidence of Coronavirus (COVID-19), as we are all aware, has caused worldwide disruptions and has forced businesses to deal with operational and financial challenges overnight. In India, a nationwide lockdown of 21 days commencing from March 25, 2020 was imposed by the MHA to battle and prevent the spread of Novel Coronavirus or COVID-19 which has now been extended until May 17, 2020<sup>11</sup>.

Proposed Date of Handover of Possession of a Unit, RERA Act 2016 read with the rules and regulations were brought into effect to inter alia regulate developers and ensure the compliance of timelines for completion of projects.

It is appropriate to note that while the Act imposes penalties in case of delays in completion of project within the specified timelines, it also provides for a mechanism to apply for an extension.

The process of applying for an extension is further laid down under the State Rules. In Haryana for example, the Haryana RERA Rules, 2017 under Rule 6 of the Haryana RERA Rules, 2017 prescribes Form REP V to be submitted before the Authority:

The real estate sector, which was already reeling under the effects of a slow economy, has been further severely affected on account of this lockdown. During this lockdown period, construction activities were prohibited (subject to certain exemptions in specific areas) which brought the development of real estate projects to a grinding halt<sup>12</sup>. The present situation not only impacts the allottees/ flat purchasers but also exposes the promoters/developers of the real estate projects to a risk of potential default under the RERA Act 2016 ('RERA') as well as the various agreements executed with the allottees in relation to such projects.

Hence, RERA has provisioned for force majeure events while considering an application for extension. The issue is whether the COVID-19 pandemic and the ensuing lockdown would be considered a force majeure event under the Act.

In this regard, various groups and organisations from the industry including CREDAI and NAREDCO have sought to make COVID-19, under Section 6 of RERA, extension of project timelines by a year, in addition to other relief.

RERA does not contain any specific provisions for extension of timelines for handover of possession of a unit to the allottee on account of a force majeure event similar to the extension provision envisaged under Section 6 of RERA in relation to the registration period. The Impact of COVID-19 on the proposed date of handover of possession of a unit to an allottee will, therefore, depend on the terms of the agreement executed between the promoter and the allottee ('Agreement') and the inclusion of a force majeure clause in such an Agreement.

If the Agreement contains a clause for extension of timelines for handing over of possession of a unit on account of a force majeure event, the provisions of such clause will have to be considered carefully to ascertain whether a delay on account of (a) a pandemic/ epidemic; or (b) any order/ circular/ notice issued by the Government or any competent authority affecting the development of the project; or (c) any other reason beyond the control of the promoter which affects the development of the project, is included within its ambit. If such circumstances are clearly included within the ambit of the relevant force majeure clause, the promoter will be entitled to an extension of time in accordance with the terms of the Agreement either on the basis that COVID-19 is clearly a pandemic/ epidemic, or on the basis that the lockdown imposed by the Government is an order/ directive by the Government and is clearly beyond the control of the promoter. It is, therefore, essential to review each Agreement carefully and specifically, the force majeure clause, to ascertain the implication of COVID-19 on the proposed handover date.

If the Agreement does not contain a force majeure clause or where the Agreement contains a force majeure clause but the provisions thereof do not bring within its fold the circumstances provided above, the promoter may not be able to claim extension of time for handing over the possession of the unit to the allotted. In such cases, the promoter will be liable under Section 18 of RERA, i.e., at the allottee's option, to either (a) refund to the allotted, the entire amount received by the promoter together with the prescribed interest thereon and also, pay the prescribed compensation.

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<sup>11</sup>Impact Of COVID-19 On Real Estate Industry With Reference To India' (2020) 4 Regular Issue.

<sup>12</sup>Marina Jovanović-Milenković and others, 'The Impact Of Covid-19 Pandemic On The Real Estate Market Development Projects' (2020) 10 European Project Management Journal.

There has been a complete closure of all offices, shops, business operations (other than essential services) with disruption in supply chains and mass exodus of migrant labourers<sup>13</sup>.

The supply of raw material for construction also stopped as the lockdown orders only exempted transportation of essential supplies. This situation has led to a complete halt of work at construction sites throughout India.

The abrupt halt in construction of upcoming projects is bound to lead to delays in completing project and it is estimated that this would have a direct impact on approx. 15 lakh under construction residential units across India and out of which 4.25 lakh under construction flats in Delhi NCR alone according to Anarock, real estate consultant firm. All are aware that at present all Countries in the World.

Further in our Country complete lockdown has been declared and imposed from 24th March 2020 the same has been extending till 17.05.2020 from time to time. During lock down period only selected essential services to the public are in operation. In view of complete lockdown, the construction works of registered projects have been affected due to non-availability of construction material and Labour properly<sup>14</sup>. Some of the Labour who came from other States are going back to their home States in different ways. The Govt. of India has provided Shramik trains for migrated labour to reach their home States.

Therefore, to control the damage of COVID-19 on Real Estate sector, the Authority has issued following relaxation Order basing on the instructions issued by the Govt. of India.

The extensions of registration of the registered projects are not liable to pay any fee as the Covid-19 pandemic is a force majeure situation of its special kind.

#### **4. RERA Registered Real Estate Projects Solution Measures**

In order to tackle the present crisis, various Government departments have provided relief measures, some of which have a direct bearing on real estate projects are briefly discussed here.

RBI has recently allowed moratorium of six months till 31 August 2020 to home- buyers for payment of dues in view of COVID-19. Hence, borrowers effectively get nine months to put their accounts in order without becoming non-performing assets (NPAs). "These measures have been taken to ensure that projects do not get stalled due to disruptions caused by COVID-19 pandemic & flats/ homes get delivered to the home-buyers albeit with some delay. However, it may be noted that the relevant State/UT/ district administration will operationalize the exemptions and ensure appropriate arrangement as per the Standard Operating Procedures for social distancing, other requirements to be implemented in such workplaces, offices, etc. are in place. While the MHA has issued a general SOP, the State/ UT/ district level orders and direction are awaited, and are expected to be issued in the coming days.

In the wake of COVID-19 pandemic, the Authority has received representations from various organisations representing the real estate sector in the State viz. NAREDCO, Office bearers representing different organisations of the real estate sector and different promoters also raised their concerns in this regard in a meeting of promoters held by the Authority through video conferencing.

Therefore, considering all the aspects, having a detailed deliberation in this regard and also having in view the aforesaid advisory issued by Government of India.

The time limit for various compliances (including any of the previous Quarterly Progress Reports and Annual, Audit Reports of project's) under the RERA Act 2016, the U.P. RERA Act Rules, 2016, or under U.P. Real Estate Regulatory Authority Regulations, 2019 and the Orders of the Authority, which were due to be made by 31.03.2020, is hereby extended upto 30th June, 2020, on the ground of force majeure.

For the aforesaid extension of time-limit for submission of any of the previous QPRs and Annual Audit Reports, the late fee as prescribed in Office Memorandum No. 3206/ U.P. RERA Pari. Panjee. 2019-20 Dated 10 April, 2019 is hereby waived as a one-time measure provided the promoter fills and submits all such reports by 30th June, 2020. The directions, issued as above, shall come into force immediately.

#### **5. Conclusion**

Due to COVID-19, works of ongoing real estate projects have halted. Large-scale reverse migration of labour and huge disruption in supply chain of materials has adversely impacted construction works. The recent MHA order allowing construction activities in rural areas and in-situ construction in case of municipal areas is a step in the right

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<sup>13</sup>Marina Jovanović-Milenković and others, 'The Impact Of Covid-19 Pandemic On The Real Estate Market Development Projects' (2020) 10 European Project Management Journal.

<sup>14</sup>David C. Ling, Chongyu Wang and Tingyu Zhou, 'A First Look At The Impact Of COVID19 On Commercial Real Estate Prices: Asset Level Evidence' [2020] SSRN Electronic Journal.

direction. However, it remains to be seen whether construction can resume effectively given the disruption in supply of material, non-availability of manpower due to the exodus of migrant labour and implementing SOP.

However, there is still ambiguity on the extent of activities that are permitted within construction itself that need to be further clarified.

While certain steps have been taken by the Government towards mitigating the hardship, there is still a need for bigger relief to address the liquidity challenges being faced by the real estate sector and ensure the long term sustainability of this sector. State governments also need to step in, including RERA, by granting extensions, to project deadlines, if not already provided, and allowing further relaxations to project related compliances.

With the recent increase in the number of COVID-19 cases in India and especially, in the State of Maharashtra, the likelihood of the lockdown being extended is high. This would only prolong the misery of the already bleeding real estate sector and potentially expose the promoters to a vast number of claims and complaints.

Having stated the above, it may be noted that MHA has, by an order dated May 1, 2020 passed under the Disaster Management Act, 2005, issued new guidelines on lockdown measures. In terms of such guidelines, while all construction activities have been permitted in rural areas subject to certain guidelines, only in-situ construction activities have been permitted in urban areas.

Given the directions of the Government, the restrictions on development and the direct impact of such restrictions on timelines, in the present scenario, should a promoter/ developer seek extension of the registration period, the relevant RERA Authority may be more inclined to grant such extension.

On the extension of timelines for delivery of possession, whilst the principles of law will be considered in terms of force majeure clauses in the Agreements and the specific facts of the case, considering the gravity of the present situation, impact of lockdown and the detrimental effect on the economy, we would expect the relevant RERA Authority/ Courts to adopt a more balanced approach and direct resolutions to any disputes in this regard factoring equities.

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#### **Abbreviations**

RERD Act 2016:Real Estate (Regulation & Development) Act, 2016

CREDAI:Confederation for Real Estate Developers Associations of India

NAREDCO:National Real Estate Development Council

MHA:Ministry of Home Affairs