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COLOMBO, SRI LANKA

LITIGATION AND DISPUTE RESOLUTION DIVISION UPDATE IN THE CONTEXT
OF THE COVID-19 CRISIS

Presently, the Government of Sri Lanka has taken steps to relax the curfew that was enforced throughout Sri Lanka, in an effort to curb the spread of COVID-19 (“C-19”). Accordingly, the curfew is to be relaxed in most Districts of Sri Lanka from the 20th of April onwards, between 5am and 8pm. The curfew in the remaining Districts (including Colombo) is to continue to be in force until 5am on the 27th of April.

In light of this situation, the Litigation Division of the Firm has prepared this note to provide an update on the status of the functioning of court and court registries, as well as addressing how best to proceed with certain litigation related matters which many of our clients have been concerned about over the past few days.

1. COURTS AND COURT REGISTRIES

Courts and Court Registries are expected to resume functioning in Districts where the curfew is relaxed, with social distancing measures being put in place to reduce the crowding of the Court premises. Accordingly, filing of cases and other applications will be possible in such Districts and Courts will resume hearing cases, although the number of cases taken up per date may be reduced, in order to restrict the crowding of Courts.

As regards, the Districts where the curfew is to continue, no hearing of cases will take place and the cases already fixed will be rescheduled. The filing of cases will also be extremely unlikely, due to the lack of Registry staff, as a result of the curfew. Courts in key judicial zones such as Colombo (Hulftsdorp), Mt.Lavinia, Marawila and Puttalam will remain non-operational due to the continuation of the curfew. However, bail hearings fixed in the Magistrates Court of Colombo, will be taken up in the Magistrates Court of Fort.

2. KEY CONCERNS/FAQs

Note: In all of the instances set out below, where applicable, action can be instituted in Civil Courts, if the action can be brought within a jurisdiction¹ where the curfew has been lifted.

AREA OF CONCERN	FAQ
<p>Money Recovery</p>	<p>Recovery by a Bank or Finance Institution of a Loan or lease facility</p> <p>a) <u>Options available for a debtor</u></p> <p>You will be able to avail yourself of the various concessions and protections afforded by the Central Bank by way of recently published Circulars.²</p> <p>If you come within the criteria of such Circulars and recovery proceedings have already been instituted against you or Notice has been served on you under the Recovery of Loans by Banks (Special Provisions) Act³, the Mortgage Act⁴ or the Finance Leasing Act⁵, then such recovery proceedings will be suspended, subject to the conditions set out in said Circulars.</p> <p>If you do not meet the criteria set out in said Central Bank Circulars, the Creditor will still not be able to institute action against you immediately, due to the closure of Courts. This will give you time to enter into negotiations with the Creditor and arrive at an amicable settlement.</p>

¹ Jurisdiction in civil matters is determined based on where; 1) the Defendant resides; 2) The land forming the subject matter of the action is situated; 3) where the cause of action arises; 4) where the contract sought to be enforced was made. (Section 9 of the Civil Procedure Code)

² https://www.cbsl.gov.lk/sites/default/files/cbslweb_documents/laws/cdg/bsd_circular_no_5_of_2020_e1.pdf
https://www.cbsl.gov.lk/sites/default/files/cbslweb_documents/press/pr/press_20200330_central_bank_of_sri_lanka_implements_extraordinary_regulatory_measures_to_facilitate_banks_to_support_covid_19_affected_businesses_and_individuals_e.pdf
https://www.cbsl.gov.lk/sites/default/files/cbslweb_documents/press/pr/press_20200331_central_bank_of_sri_lanka_decides_to-establish_a_rupees_50_billion_six_month_refinancing_facility_e.pdf

³ No.04 of 1990 (as amended)

⁴ No.6 of 1945 (as amended)

⁵ No.24 of 2005 (as amended)

	<p>b) <u>Options available for a Creditor</u></p> <p>You may (provided the Debtor is not covered under the said Central Bank Circulars), send a letter of demand to the Debtor, through an Attorney-at-Law, demanding the amount payable. If postal deliveries are non-operational due to the prevailing curfew, the Letter of Demand may be dispatched by email and you may consider sending a follow-up Letter of Demand as soon as postal deliveries recommence. You may also give an Attorney-at-Law necessary instructions to prepare the relevant papers to be filed in Court, as soon as Court Registries re-open.</p>
<p>Contracts</p>	<p>a) <u>Inability to honour obligations under a contract</u></p> <p>If you are unable to honour your obligations under a Contract due to the current crisis and the contracting party is in the process of initiating action against you, the following defences will be available to you. The key ingredient of these defences which has to be established, is the fact that the breach was due to circumstances beyond your control.</p> <p><u>Force Majeure</u></p> <p>Force majeure clauses in contracts protect parties from action in certain specific circumstances/events recognised as being unforeseeable and outside the normal business risk and beyond the control of the parties. The clause excuses the parties from their contractual obligations, where they have been prevented from performance of the contract, due to the occurrence of such specified event.</p> <p>Depending on the wording of the force majeure clause in the contract a pandemic such as C-19 will be covered and you will be in a position to invoke the clause to avoid liability for breach of contract.</p> <p>However, a party relying on the force majeure clause, will have to establish that he took all reasonable steps to mitigate his non-performance, even if it is due to the occurrence of an event set out in the clause.</p> <p>However, the rapid and varying developments that occur due to C-19, such as the sudden government-imposed restrictions, could enable you to argue that the event could neither be foreseen nor reasonably mitigated.</p>

	<p><i>Refer our note on Contracts for more details and on how to manage contracts.</i></p> <p><u>Frustration</u></p> <p>If the contract does not have a force majeure clause or the clause is not broad enough to cover C-19, you may still rely on the doctrine of frustration. Here, Court can excuse both parties from their obligations under the contract, where the performance of the contract becomes impossible due to no fault of either party. If this is proven successfully, you will be in a position to avoid liability for a breach.</p> <p>b) Breach of contract by other party</p> <p>If you have entered into a Contract and the other contracting party has breached the Contract, you may serve a Letter of Demand on such party demanding that he honour the contract. <i>(Note:- Our advice set out in item (b) under Money Recovery will apply here.)</i></p>
Matters requiring Injunctive Relief	Where immediate action is required to stay an Illegal act, if the said act can be brought within the purview of criminal liability, then an immediate complaint can be made to the police and the police will take appropriate action.
Actions in Tort	If you have a claim for damages against someone and the same can be brought within the ambit of criminal liability (for instance, criminal negligence), once again, you may make a complaint to the police. Here, although the police cannot award damages, the initiation of criminal proceeding will put you in a stronger position to negotiate a settlement with the other party which is favourable to you.
Divorce	<p>a) Initiating Divorce Action during this period</p> <p>If you intend to initiate divorce proceedings on the basis of adultery or malicious desertion, you may file a police complaint for the purposes of having the allegations on record, which will add more evidential to your case when the same is eventually filed in Court.</p> <p>If the divorce is to be uncontested, you can negotiate the terms with your spouse and once the terms have been agreed on, you may draft a settlement agreement with the assistance of an Attorney-at-Law, so that the same can be annexed with the Complaint, at the time of filing.</p>

	<p>b) Pending Divorce proceedings after being issued the Decree Nisi</p> <p>If divorce proceedings has already been filed and Decree Nisi has been issued, you will still be required to tender the Decree Absolute, either to the Court Registry or in open Court once 3 months from the Decree Absolute has lapsed. If Courts are closed however due to continuation of Curfew, when the said 3 months period lapses, you will not be able to tender the Decree absolute to Court and thus will be unable to remarry.</p> <p>If, on the other hand, the proceedings are pending in a Court which will resume sitting, as a result of the curfew being relaxed, you will be able to tender the Decree Absolute to Court, upon the lapse of 3 months and conclude the proceedings. You are legally permitted to remarry in this instance.</p>
<p>Limitation/ Prescription</p>	<p>If the time frame to file a case or an Appeal lapses on a date when the Courts are closed due to the prevailing curfew, resulting in you being unable to file the case within the relevant time period, you can take up the following defences:</p> <ol style="list-style-type: none"> 1. Parties can rely on Section 8(1)⁶ of the Interpretation Ordinance⁷; 2. Application of legal maxims: Courts have, in the past, applied the legal maxim “Lex non cogit ad impossibilia” (“The Law does not compel a man to do what he cannot possibly perform”) and excused parties who were unable to file action within the relevant time period, due to circumstances that made it impossible to file action within the given time period.
<p>Labour</p>	<p>If your employer seeks to terminate your services in order to downsize his business, he will have to obtain your consent or the consent of the Commissioner General of Labour first. If he proceeds to terminate your services without having obtained the requisite consent, you can proceed to make an immediate complaint in that regard to the Department of Labour.</p>

⁶ Section 8(1) of the Interpretation Ordinance states as follows;

“Where a limited time from any date or from the happening of any event is appointed or allowed by any written law for the doing of any act or the taking of any proceeding in a court or office, and the last day of the limited time is a day on which the court or office is closed, then the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day thereafter on which the court or office is open.”

⁷ No.21 of 1901 (as amended)

	<i>Refer our note on Labour for more employment related details.</i>
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NOTE:

1. Any reference to any laws and regulations/directives/circulars/government press releases etc are as at the date of the issue of this document.
2. Only references to any directives/circulars/government press releases etc which may have a bearing on litigation matters have been referred to herein.
3. The contents of this document should not be considered as legal advice and is provided for information purposes only. If you require legal advice on any specific matter for purposes of decision making, do feel free to contact us.

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