

THE INGRAM YUZEK WIRE



INGRAM YUZEK GAINEN CARROLL & BERTOLOTTI, LLP

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U.S. COMPANIES LEASING SPACE IN INDIA: NAVIGATING THE MINEFIELD

Advances in technology and an increase in the pool of educated English-speaking workers in India have made outsourcing in that country an attractive option for U.S. firms. However, U.S. companies unaccustomed to doing business in India will find that the negotiation of commercial leases presents unique challenges. As with any negotiation, it is what you don't know (or *don't know* that you don't know) that may significantly disadvantage you.

From a tenant's perspective, the unique issues arising when negotiating a commercial lease in India include:

Avoiding entanglement in land disputes

No tenant wants to become involved in its landlord's land ownership disputes, which have the potential to result in the tenant's eviction from its premises or having to renegotiate some of the terms of its lease in order to avoid eviction. In India, in order to confirm the ownership of the landlord, it is necessary to conduct very careful due diligence, which involves more than simply ordering a "title search", because certain documents may not be registered, or may be written in local languages, or stored in different local government offices. To make matters worse, the laws of succession in India are very complicated and it is not unusual for distant relatives of a prior owner or the record owner to emerge with claims of a fractional right to the property by virtue of a family relationship, particularly after the property has become more valuable.

SUGGESTION: One of the best ways to avoid entanglement in land disputes is to lease premises on land purchased or leased from governmental or quasi-governmental authorities and allotted for a particular type of development. It is commonly understood that one can rely upon the validity of such ownership.

Sidestepping "doing business as usual" surprises

While India has its own "anti-bribery" statutes, many of them are not widely enforced. U.S.-based companies need to avoid inadvertently being placed in a situation where allegations arise of bribery and corruption involving the company and Indian government officials. This can result in damaging publicity and even in the violation of U.S. statutes governing foreign corruption.

SUGGESTION: It is essential that a company setting up operations in India be transparent in its actions and avoid short-cuts. In the context of a lease, a company can also protect itself from any involvement in, or the appearance of, corruption, by ensuring that the lease contain a covenant on the part of the landlord not to engage in such behavior and, more specifically, not to undertake any actions that would violate the U.S. Foreign Corrupt Practices Act. The lease should grant the tenant appropriate remedies in the event that the landlord engages in such improper behavior.

Structuring your lease to minimize Stamp Duty and Registration Fee liability

In India it is necessary to register a lease with the local registrar, and to pay stamp duty and registration fee on the lease

document and for its registration. The failure to appropriately stamp or register a lease will result in an inability to use the document as evidence in any court proceeding brought by a tenant to enforce its rights under the lease.

SUGGESTION: Structure the term of the lease in a way that will minimize the applicable stamp duty, which, depending on the area being leased, can be quite costly. For example, if a lease has several renewal options, a tenant is required to pay a stamp duty for the initial term and then an additional stamp duty for each subsequent renewal term when each option is exercised. In order to lower stamp duty, the lease should be structured with a longer initial term and one or more early cancellation options.

Negotiating liability as between landlord and tenant for applicable service taxes

The Central Government in India has recently imposed a “service tax” on the renting of commercial real estate. This tax has been challenged on the ground that the Government does not have the legislative authority to impose such a tax on commercial real property leases. There is a split in the India courts regarding this issue and the matter will eventually be resolved by the Supreme Court of India.

SUGGESTION: Since the Central Government’s power to impose a service tax on leasing of space is still being litigated, if the lease requires a tenant to pay this tax on behalf of its landlord the tenant should insist that the lease include an obligation on the landlord to file a refund application with the applicable governmental authority at least twice a year in order to preserve the tenant’s right to a refund from the applicable governmental authority if the levy is ultimately struck down by the Supreme Court.

Dispute Resolution

Because the Indian court system is known to move slowly, it is essential that every commercial property lease provide for an effective means of alternative dispute resolution.

SUGGESTION: To minimize the risk that a U.S. company-owned tenant will be subject to a less than impartial dispute resolution process, the tenant may be better off, depending on the jurisdiction involved, negotiating into the lease a provision to the effect that all lease disputes will be resolved by arbitration outside of India. In this role, the Singapore International Arbitration Centre is a recognized center for arbitration.

Financial Difficulties of the Landlord

A tenant entering into a substantial lease in India needs to try to ensure that its lease rights will not be impacted if the landlord runs into financial difficulties. However, a “non-disturbance” agreement (which allows a tenant’s lease to remain undisturbed even if a mortgage on the building is foreclosed) is not widely used in India and may be more difficult to obtain there than in the U.S.

SUGGESTION: In order to mitigate the risk of a lease termination upon a mortgage foreclosure, the tenant should demand that a “no-objection” letter be obtained from the mortgagee confirming that it has consented to the terms of the lease. Fortunately, the risk of a lease terminating upon a mortgage foreclosure has recently diminished as a result of recent case law in India supporting the position that a tenant’s possession of a property under a valid lease cannot be disturbed by a foreclosing lender.

In summary, while the basic concepts in a lease of commercial property in India are not substantially different from those in U.S. commercial property leases, knowing how to skillfully deal with those particular issues unique to the lease of real property in India will provide a significant advantage to U.S.-based companies setting up operations in that country.

For more information about any of the foregoing, the full version of this article, and/or other issues involving commercial real property leases, please contact Edward Goodman at 212-907-9620 or Amol Pachnanda at 212-907-9625. They can also be reached at egoodman@ingramllp.com and apachnanda@ingramllp.com.

Ingram Yuzek Gainen Carroll & Bertolotti, LLP has since 2005 represented clients in India in the negotiation of leases totaling more than 1.5 million square feet in the aggregate. Among their representative transactions in the cities of Mumbai, Hyderabad, Bangalore and Gurgaon are the negotiation of space leases ranging from 145,000 square feet to 220,000 square feet and built-to-suit development agreements covering approximately 300,000 square feet.

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counsels both institutional and non-institutional clients in commercial leasing transactions, and acquisitions, development and sales of all types of commercial properties throughout the U.S., as well as real estate finance transactions on behalf of both lenders and borrowers.

Note that no foreign law firm, including Ingram Yuzek Gainen Carroll & Bertolotti, LLP, is authorized to practice law in India. Ingram Yuzek acts as lead attorney in lease negotiations in consultation with local practitioners. Outcome or results of any negotiation are not guaranteed.

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