

Avoiding Pitfalls When Leasing Real Estate In India

Law360, New York (April 28, 2016, 11:58 AM ET) --

Over the last 20 years or so, many international companies based in the United States have followed a strategy of outsourcing segments of their businesses to local companies in India in order to significantly save costs. More recently, for several reasons, such as the increasing cost of using third-party companies in India and the benefits of retaining control and proprietary rights, it has become more commonplace for U.S. companies to undertake a new strategy of “insourcing,” which involves the U.S. company forming one or more Indian subsidiaries and hiring its own employees in India to perform the work previously performed by third-party Indian companies.



Edward Goodman

One of the results of this new strategy is that U.S. companies investing in India require office space, often covering very significant square footage. The need for such space appears to increase exponentially, as evident from the tremendous and growing appetite for office space in certain markets such as Bangalore, Hyderabad and Gurgaon, which are popular with foreign companies setting up subsidiaries for the purpose of insourcing.

With respect to the process of leasing office space in India, those involved in this process in the United States will find that many of the real estate concepts they are familiar with are also applicable in India. However, it is crucial for U.S.-based companies increasing their presence in India and getting involved in lease transactions to be aware of certain *unique legal requirements in India* that must be complied with to ensure that the company’s rights will be protected in the event that problems arise under the lease (or “lease deed,” which is the term commonly used for a lease in India) in the future. Two such requirements are: payment of “stamp duty” and “registration” of the lease deed.[1]

The Indian Registration Act of 1908 requires certain lease deeds, such as those having a term exceeding one year or reserving a yearly rent or renewable from year to year, to be registered with the appropriate registrar’s office and registration fees to be paid at the time of registration. To register the lease deed, the persons executing the lease deed on behalf of the lessor and lessee typically personally appear at the registrar’s office with a number of documents that establish the identity of the signers and their authorization to sign by their respective companies.

A registration fee is payable on every lease deed to be registered, which amount is determined based on the term of the lease and differs from state to state. For instance, the registration fees payable in the state of Telengana (where the city of Hyderabad is located) is calculated at the rate of 0.1 percent of the value taken for charging the “stamp duty.” However, the registration fee is modest compared to the far

more expensive “stamp duty” that must be paid at the time of registration.

Every lease deed, irrespective of whether it is required to be registered or not, is required to be stamped as per the stamp duty prevailing at such point in time, in the state in question. A lease deed cannot be registered unless it is accompanied when submitted for registration with the applicable “stamp duty.” The stamp duty varies from state to state and can be significant, particularly in the case of lease deeds with substantial rent obligations and longer terms. For example, in the case of the state of Telengana where the term of the lease deed is more than one year but does not exceed five years, the stamp duty is equal to 1 percent of the total amount or value of the average annual rent. For a lease deed having a term of five years or more, the applicable rate can be *2 percent, 6 percent or even 15 percent of the average annual rent*, depending on the actual number of years in the term.

There are severe consequences for those that fail to register a lease deed of the type requiring registration within the statutory period of four months, the most significant being that *a lease deed not registered as legally required is inadmissible in evidence*. Another serious consequence is that *the tenancy under an unregistered lease deed is deemed to be a month-to-month lease, terminable by either party on 15 days notice*. These consequences can be devastating for a lessee making a substantial investment in its India office and planning for a long-term occupancy. Additionally, while rarely seen in practice, if unstamped or insufficiently stamped instruments come into the possession or custody of any governmental authority, the officers are empowered to impound the document and impose a penalty of *up to 10 times the value of the deficient stamp duty*. And, notwithstanding the payment of the penalty, the consequences of failing to register at the appropriate time will continue to apply.

It is essential that any company considering leasing space in India be aware of the legal impact of a failure to register. It is not uncommon for shortcuts to be taken, and attorneys not that familiar with the unique concerns and needs of U.S. companies may take an informal approach to lease transactions and dismiss the need for registration, perhaps in an attempt to save their clients the expense of the stamp duty and registration fees. Hopefully, having an understanding of the process of leasing space in India and the risks of failing to follow the necessary procedures, will enable U.S. companies to avoid the disastrous consequences that may follow from entering into lease transactions in India without being fully informed.

—By Edward Goodman, Ingram Yuzek Gainen Carroll & Bertolotti LLP

Edward Goodman is a member of the real estate group at the New York City law firm of Ingram Yuzek Gainen Carroll & Bertolotti LLP, where his practice includes the representation of clients in local, national and international commercial leasing transactions.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] It should be noted that even leases for a short period which are not required to be registered, need to be stamped.