



YIGAL ARNON & Co.
LAW FIRM

Client Update – April 1, 2020

Agreements During Times of Coronavirus – a Practical Perspective

1. The Coronavirus outbreak, which was declared a global pandemic by the World Health Organization, is an unfolding global event that affects existing agreements, whether a long-term contract (such as lease agreements, services provision agreements or execution of projects), or a one-time contract (such as a sales contract with a specific delivery date).
2. The effect can be absolute, i.e., the agreement can no longer be executed (as in the case of a one-time event, which is cancelled due to the orders issued), temporary (such as a restraining order preventing a tenant from using a rented property), complete (such as the prohibition on opening stores in malls) or partial (such as restrictions on the number of people or activities in the workplace).
3. The Coronavirus pandemic will also affect the drafting of future agreements.
4. This is an ongoing crisis, which has not yet come to an end, and there is no certainty as to the duration, scope and consequences of the outbreak. The orders issued within the framework of the crisis are updated according to developments. Its effects will vary in different fields of business activities and agreements. Therefore, in order to examine the options for action and the risks/possibilities involved, it is important to understand the relevant legal framework that will determine, in each and every case, according to specific circumstances, including:
 - Who are the parties and what type of contract is it (private, business, consumer, international)?
 - What law applies to the agreement? If a foreign country's law applies, its provisions may differ from Israeli law.
 - Are there any clauses in the agreement intended to regulate distributing the risk between the parties in case of extreme situations, such as the Coronavirus pandemic? To the extent that such an allocation was agreed upon, express or implied, it generally overrides the provisions of the law.
 - Is there a special law that applies to the agreement and what is its relationship to the general provisions of the law? For example, Section 23 of the Lease and Lending Law, 1971, states that the remedies determined therein are additional and do not detract from the remedies under Contract Law (Remedies for Breach of Contract), 1970. There are special laws that override general law and/or the provisions of the agreement.
 - What are the effects of the pandemic outbreak on the ability of the parties to carry out their obligations - who is breaching the contract and who is the injured party?
 - What damages did the outbreak cause to the parties and how can they minimize these damages?



5. There is a lot of talk in the media about if the pandemic and its consequences are considered a "superior force" or "force majeure", and if the conditions for a "force majeure" are fulfilled, in accordance with Section 18 of the Contracts Law (Remedies for Breach of Contract), 1970, which addresses anticipatory breaches. However, the courts have limited the use of this provision to exceptional cases. The provision itself speaks about circumstances that render the performance of the contract impossible or fundamentally different from what was agreed upon between the parties. Considerable doubt exists as to the possibility of using the "anticipatory breach" provision in cases of temporary, let alone partial, restrictions in ongoing agreements. Furthermore, even if it is determined that the abovementioned provision applies, it would exempt the party in breach from liability for expected damages and from enforcement of the agreement, but the law still considers the party claiming the applicability of the "anticipatory breach" provision to be breaching the agreement, allowing the other party to cancel the agreement due to the breach and claim restitution and compensatory damages. This is not always the desired outcome.
6. On March 31, 2020, the Ministry of Finance issued a statement to other government ministries, stating that the Coronavirus outbreak should not be recognized as a "force majeure" in the construction industry, since the restrictions imposed on the business and industry sectors do not apply to the construction industry, due to its essential status. However, it was mentioned in the statement that this will be re-examined in particular cases or following a change in the restrictions. It was also announced that the Ministry of Justice is setting up a committee to deal with "force majeure" and breach of contracts during the Coronavirus period.
7. Currently, there are no clear rules and no legal certainty regarding the agreements and circumstances under which the Coronavirus outbreak will be considered a "force majeure".
8. Along with the "anticipatory breach" rule, there are other provisions and legal doctrines that can apply in the event of unusual external circumstances, which stand in the way of carrying out the contract. For example, the good faith doctrine can apply to a situation where a party to an agreement demands the execution of the agreement, despite the material changes due to external circumstances. In this case, it is possible to claim that such party is not acting in good faith.
9. A party's action within the framework of the agreement, including taking a particular position, is sometimes irreversible. Therefore, it is advisable to consider all the alternatives first and to choose wisely.
10. Sometimes, in a situation of uncertainty, the best solution is to come to a temporary agreement regarding postponing the execution of certain obligations, partial execution, or a combination of the two, while tabling both parties' arguments for the future.
11. Parties negotiating a new agreement are now required to decide how to address the pandemic (where relevant to the agreement), where it is impossible to know how it will develop, and to define and determine the allocation of related risks and other extreme events (which hopefully will not happen).

Wishing you all good health.

We are here to help you through the difficult times. Orna Sasson - orna@arnon.co.il and Barak Tal - barakt@arnon.co.il.

This update is informative only and should not be treated as legal advice or legal opinion.

