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从现实视角来看：新冠病毒时期的协议

Agreements During Times of Coronavirus – A Practical Perspective

- English Follows -

1. 2019冠状病毒病（以下简称为新冠病毒）被世界卫生组织宣布为全球大流行病。它的爆发和在全球的传播正在对各种现有协议造成影响。这里所谈到的协议包括长期协议（如租赁协议、服务协议以及项目执行等）；也包括一次性合同（如规定交货日期的销售合同）。
2. 新冠病毒对这些协议的影响，有可能是绝对的，比如说导致合同无法执行（如因为政策影响而被取消的一次性活动）；有可能是临时性的（如政府颁发的限制令禁止租户使用他们所租赁的房产）；有可能是完全的（比如说禁止在商场中所有的商店开放）；也有可能是部分的（如限制在某工作场所的员工人数或可以进行的活动）。
3. 新冠病毒同时也影响着新的协议的起草。
4. 这是一个还未进入尾声的持续性危机。除此之外，该危机的期限、范围以及影响还未明朗。在新冠的框架下所颁布的各种政府指令是根据事态的发展而随时更新的。新冠对不同的商业活动和领域也会有不同的影响。因此，如果了解当事人可以采取的行动和其相关的风险或可能性，非常重要的一点是根据每个案例特定情况了解对以下问题起决定性作用的法律框架：
 - 合同的双方是谁？合同的种类是什么（私人合约、商务合约、消费合约或者是国际合约）？
 - 适用法律是什么？如果外国法律适用，它们的相关条款有可能与以色列法律不同。
 - 合约中是否有条款规定在极端情况下（如冠状病毒大流行）双方的风险如何分配？在双方同意某种风险分配条款的情况下，不论是明确写出还是暗示，这些条款通常可以凌驾于相关法律的规定以上。
 - 是否有特定法律适用于该合约，而该法律与一般法律条款的关系如何？例如，以色列的《租赁法》（1971）规定该法律中所规定的补救措施是附加的，不能废除《合同法（违约救济）》（1970）中对于违约救济的规定。与此相反，有些法律是特殊法律，它们能够废除一般法律中的规定和/或协议中的规定。
 - 新冠病毒的爆发对双方履行合同义务的能力有多大程度的影响——哪一方是违约方，哪一方是受损方？
 - 新冠病毒的爆发对于双方造成的损失是什么，如何减少损失？



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5. 在媒体上有很多人在讨论新冠病毒的爆发是否属于“不可抗力” force majeure)。如果“不可抗力”的条件满足的话，就可以使用《合同法（违约救济）》（1970）第18条对“预期违约”（anticipatory breach）的规定。然而，法院只在非常极端的情况下才会使用该条款。该条款所适用的情况必须是造成合同无法履行或者让合同的履行方式与双方的合意有本质上的不同的情况。在协议履行只是受到了临时的，甚至是部分的限制的时候，“预期违约”相关条款的适用性是大可质疑的。进一步来说，即使已经确定“预期违约”条款适用的条件成立，虽然这意味着违约方不需要为预期的损失以及合同的执行承担责任，但是法律仍然认为称自己适用“预期违约”的合约方造成了违约。这样，合约的另一方可以因为该违约行为取消合约并且要求恢复其损失或者要求赔偿。这未必是合同方所期望的结果。
6. 2020年3月31日，以色列财务部向其他政府部门颁发了一项声明，称新冠病毒爆发在建筑行业内不应被认为是“不可抗力”。原因是政府对于商业和工业的新冠限制条令并不适用于建筑行业。这也是得益于该行业的重要性。然而，该声明中强调不同的案例需要具体分析，而限制条令的变更也可能带来重新诠释。声明中更宣布，司法部正在组建一个特殊委员会来专门应对“不可抗力”的问题以及在新冠爆发期间的违约行为。
7. 目前关于新冠病毒爆发是否可以被视为“不可抗力”以及它对协议的影响并没有明确的规定和法律上的确定性。
8. 除了“预期违约”的相关规定，目前还有其他的条款和法律学说可以在超常规外部条件影响下适用于合同的履行。例如，在因外部条件导致合同本质性变化的情况下，如果合约一方执意要求执行合同，诚信（good faith）原则可以适用，而另一方可以声称对方并没有“诚意”。
9. 在协议的框架下，协议任何的一方的行为（包括采取特定行动或决定）往往是无法逆转的。因为，建议在行动以前先考虑所有的可能性，并做出明智的选择。
10. 有时候在不确定的状态下，最好的解决方案是双方先达成一个临时的协议，同意暂缓某些义务的执行、或者部分执行这些义务、或者两者结合；这样可以把双方的争论推后。
11. 如果双方在就新的协议进行谈判商议，那就需要根据情况与合同的相关性决定如何为新冠病毒爆发这个事件定性，特别需要考虑在合约对于无法预知的事态发展进行定义、决定相关的风险分担、和对其他（希望不会发生）的极端事件有所规定。

祝大家身体安康。

我们协助您您度过难关，如果有任何问题，请联系Orna Sasson - orna@arnon.co.il 和 Barak Tal - barakt@arnon.co.il。

此更新仅提供信息，不应视为法律建议或法律意见。

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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.

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

