March 2020

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COVID-19 as a Potential Force Majeure Event under Israeli Contract Law

The Corona virus pandemic and the resulting precautionary measures taken by the Government of The State of Israel and by other governments worldwide might have a significant impact on the ability of parties to contracts to fulfill their contractual obligations. For example, factories and businesses closed in various countries worldwide and severe restrictions on international and domestic travel over lengthy periods of time will inevitably lead to material delays in contractual timelines.

Both domestic and international contracts often include force majeure clauses which in many cases apply in the event of pandemics and excuse the resulting breaches of contract. In the event that a contract subject to Israeli law does not include a specific force majeure clause (and in some cases also where there is a specific force majeure clause) the general provisions of Israeli contract law will apply.

Section 18 of the Israeli Contracts Law (Remedies for Breach of Contract) of 1970 ("**Section 18**") is the main provision which applies to force majeure events. It is based on the concept of frustration of contract, and provides that in the event that the performance of a contractual obligation is frustrated due to circumstances of which the breaching party was not aware and should not have been aware or did not foresee and should not have foreseen when entering into the contract, such circumstances could not have been prevented by the breaching party, and performance of the contract under such circumstances is impossible or fundamentally different from the original agreement of the parties,

the breach will not give cause to enforcement of the contract or to a claim for damages.

Several important factors should be noted in this respect. The approach of Israeli courts to the question of the "foreseeability test", which lies at the heart of Section 18, underwent significant changes in recent years. Earlier rulings of Israeli courts, including the Supreme Court of Israel, reflected a position according to which almost every occurrence is or should be foreseeable by the parties when entering into a contract. For example, several court decisions ruled that, in Israel, war is a foreseeable event and accordingly does not result in frustration of contracts. More recent decisions may reflect a tendency towards a more lenient approach. One Supreme Court judge stated that these previous decisions are not a binding precedent and that war is an extraordinary event, which impact on the contract in question should be considered on a case by case basis. General strikes in Israel which prevented airline companies from keeping their flight schedules were ruled to justify frustration of contracts. Extraordinary and rare weather conditions have also been recognized as fulfilling the requirements of Section 18.

Israeli courts have further recognized that events occurring outside of Israel may justify a frustration of contract defense under Israeli law if they prevent an Israeli party from fulfilling the contract. For example, an Israeli court rejected a claim by passengers against an Israeli airline that could not fly to New York following the 9/11 events due to fight restrictions imposed in the US, as these events were recognized as justifying a defense of frustration of contract.

Government actions may also fulfill the requirements of Section 18 under the appropriate circumstances. For example, an Israeli court ruled that a long term, general blockade by the Government of Israel preventing residents of the Palestinian Authority from entering into Israel may justify a defense of frustration of contract. In another case a court order which prevented a lessee from using the leased property for the stated purpose of the lease was found to frustrate the lease contract.

Another factor which should be taken into account is that Section 18 does not excuse or suspend performance or remedy breaches but rather provides relief from enforcement and damages. The contract is still considered to have been breached by the party claiming frustration of contract and the other party may choose to terminate the contract. Section 18 goes on to provide that the court may order restitution as well as payment of reasonable expenses and compensation of reasonable commitments undertaken by the non-breaching party, whether or not the contract is terminated.

One should also note that Section 18 is widely viewed as a purely defensive measure. The party affected by events governed by Section 18 may use this

section in order to obtain relief from enforcement and damages but it is still considered as a breaching party and accordingly cannot rely on Section 18 to justify termination of the contract. This remains the prerogative of the other party to the contract.

A second possible means to address force majeure circumstances in Israel is Section 39 of the Israeli Contracts Law (General Part) of 1973, which provides that parties to a contract must fulfill their contractual obligations in good faith and in a customary manner. One Supreme Court judge has expressed the view that under circumstances that constitute force majeure, the unaffected party to a contract cannot expect in good faith unchanged performance of the contract by the affected party. This view, if adopted in a binding decision of the Supreme Court, may lead to a more flexible approach to contracts under circumstances of force majeure, allowing courts to adjust the contractual obligations to conform to the changing circumstances created by the force majeure event.

Given the complexities and uncertainties involved, and the unprecedented nature of the Corona virus pandemic, parties to contracts subject to Israeli law should seek specific advice before taking the required and appropriate measures to safeguard their rights and interests in these challenging times.

For further information please contact:

Eyal Raz, Partner
raz@gornitzky.com

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