
**March 2020**

## Special Update - Coronavirus

The ongoing global outbreak and spread of Novel Coronavirus 2019 (COVID-19), commonly known as coronavirus, is a dramatic event of global proportions, with far-reaching implications in a wide range of areas. The spread of coronavirus directly affects capital markets, global supply chains, worldwide transportation, large-scale events and conferences, and many other aspects of commerce and business, domestic and international.

In this special update, we summarize principal legal ramifications of the outbreak on capital markets and corporate law, contract law and labor law – the areas on which, to date, the coronavirus outbreak has had the most significant impact.

### Executive Summary

Capital markets and corporate law - The spread of coronavirus requires directors (in both private and public companies) to examine how the virus affects the company's activities, and if necessary, to prepare and take required action to mitigate, hedge and manage risks. This challenge is especially relevant and immediate for directors in public companies, which are required to provide public disclosure regarding the implications of coronavirus on their activities.

Contract law - The spread of coronavirus affects consumer ("B-to-C") contracts, as well as commercial contracts between sophisticated businesses ("B-to-B"). This is particularly true with respect to agreements entered into before to the outbreak of the virus, whose performance has been disrupted or frustrated as a result of the various restrictions that have recently come into effect. Contract law in Israel provides several tools for dealing with such situations, including the doctrine of frustration, force majeure clauses, "approximate" or "cy-pres" performance, and consumer protection legislation.

Labor law - The recent spread of coronavirus required many Israelis to go into home isolation

for a 14-day period; the list of countries and range of cases that give rise to the isolation requirement has been continually updated and extended. As of March 9, 2020, all persons entering Israel from abroad are required to go into home isolation for a 14-day period. The increasing number of individuals subjected to isolation raises many questions among employers and employees, including how to classify days of absence, 'remote' work and similar matters.

**Capital Markets and Corporate Law Considerations**

The dramatic effect of coronavirus on capital markets activity is readily apparent, and the impact of coronavirus on corporate activity may be far-reaching.

The coronavirus outbreak affects not only the ongoing, day-to-day operations of companies that it directly and adversely affects; in addition, in view of the extreme volatility of the capital markets, corporate cash flow is likely to be affected by difficulties in raising and refinancing debt, especially in the wake of a sharp decline in share prices and increase of bond yields.

Public companies must prepare themselves accordingly and publish suitable reports to the public. On March 8, 2020, the Israel Securities Authority (the **"ISA"**) released a staff notice regarding the implications of the spread of coronavirus on reporting companies. The ISA stated that companies whose business activities are **materially** affected or may be **materially** affected by the spread of coronavirus must provide full disclosure to investors, by:

- **Publishing immediate reports**[1] regarding the implications of coronavirus on business activities (including regular and continuous updates on material developments regarding these implications).

- **Providing disclosure regarding the board of directors' explanations in periodic reports**[2] on the effect of the spread of coronavirus on the company, including on its financial position, liquidity and financial strength, sources of financing and ability to satisfy its liabilities, as well as regarding actions that the company intends to take in order to deal with risks and exposures deriving from the effect of the coronavirus.

- **Providing qualitative and quantitative assessment of the impact of the events**, insofar as it is possible reliably to assess their impact on the company's business activities. The ISA staff clarified that companies providing forward-looking information in an effort to update investors on material developments, including expected trends or uncertainties

[1] Pursuant to Regulation 36 of the Securities Regulations (Periodic and Immediate Reports), 5730-1970.
[2] Pursuant to Regulation 10 of the Reporting Regulation.

regarding the effect of coronavirus, may benefit from the protections provided in Section 32A of the Securities Law, 5728-1968 (the **"Securities Law"**).

The ISA staff notice emphasized that companies must present information regarding the implications of the virus in a **clear, detailed and nonselective manner**, to enable investors to evaluate the effects of the outbreak in an optimal and balanced way.

Moreover, the ISA staff added that since the spread of coronavirus may affect attendance at places of work (for example, because of employees in isolation), reporting companies must ensure that they are able to continue publishing reports on the ISA's online reporting system (MAGNA), at the dates and times prescribed by law, including timely publication of periodic reports for 2019.

**Contract Law Considerations**

The spread of coronavirus also has broad implications on B-to-B and B-to-C agreements.

In previous crisis situations (including the September 11 terror attacks and the 2008 financial crisis), business entities found themselves trying to get out of contracts that suddenly became difficult (or even impossible) to perform.

Similar challenges are likely to arise with respect to agreements signed before the outbreak of the virus, whose performance has been disrupted or frustrated in the current circumstances.

Contract law in Israel provides several tools for dealing with such situations.

**The Frustration Doctrine**

Contract law views the contract as a mechanism for risk allocation between the contracting parties, and therefore, in general, the parties' obligations are determined upon entering the contract. However, in light of the inability to foresee all risks, the occurrence of some events may cause a contract to expire without being performed.

Under the doctrine of frustration, a party breaching a contract may have a defense against claims for performance damages or specific enforcement if circumstances arise that were unknown or unforeseeable to the breaching party when it entered into the contract and that it could not have prevented, and as a result of which its performance of the contract is impossible or materially different from what was originally agreed.

In the past, Israeli courts have made little use of this doctrine and the Supreme Court has even ruled[3] that war does not constitute unforeseeable circumstances (since Israel is considered to be under a constant security threat), and in practice, this doctrine was considered a "dead letter."

However, in recent years, the trend in Israeli case law has been to loosen the requirements for determining whether an event amounts to frustration, and to focus on the question whether it was possible to foresee **the effect** of the exceptional event **on the contractual relationship** (as opposed to foreseeing **the occurrence** of the exceptional event)[4].

The doctrine of frustration leads to termination of a contract, rather than to its change. The doctrine deals with circumstances under which the contract cannot be fulfilled and enforced.

Therefore, while the doctrine of frustration protects the violating party against a claim for enforcement of a contract (or for performance damages), it **does not protect** the breaching party from other claims, such as **restitution** of goods or payment that it had received from the injured party, or **reliance damages** (meant to compensate the injured party for expenses incurred in order to fulfill the contract).

Moreover, courts have developed the doctrine of "approximate performance" (also known as the cy-pres doctrine), providing that when it becomes impossible for one party to perform a contract as agreed, the other party is entitled to substitute performance that best approximates the consideration promised to it in the original contract. Under this doctrine, a court may order a party that is precluded from performing a contract as agreed to perform it in a manner that reflects the parties' understandings as closely as possible.

**Changes in the Profitability of Performing the Contract**

While the doctrine of frustration was meant to address situations where external circumstances make performance of a contract impossible or materially different from the parties' original agreement, it is uncertain whether this doctrine should apply if a **contract becomes economically unprofitable (a losing contract)**. On one hand, performance of the contract is fundamentally different from parties' original agreement, and therefore the doctrine of frustration could apply. On the other hand, contract law presumes that increased costs entailed in performing a contract are part of the inherent risk assumed by contracting parties. To refute

[3] Civil Appeal 715/78 **Katz v. Nitzhoni Mizrahi Ltd.,** IsrLR 33(3) 639, 643 (1979).
[4] See, for example: Civil Appeal 6328/97 **Regev v. The Ministry of Defense**, IsrLR 54(5) 506 (2000).

this presumption and apply the doctrine of frustration, a party must prove that the scope and unforeseeability of the increased cost exceed the risk that that party could reasonably be viewed as having assumed.

The unprecedented coronavirus outbreak is likely to give rise to applications of the frustration doctrine. Companies that were forced to cancel transactions that could not be carried out, delays in transportation of goods, and cancellation of events and conferences because of the instructions of the Ministry of Health, are all cases where the frustration doctrine may protect a non-performing party against claims for enforcement or performance damages.

**Force Majeure Clause**

Commercial contracts between sophisticated parties customarily include "force majeure" clauses to allocate risks between the parties in unforeseen circumstances.

In general, these clauses include a list (either closed or open) of agreed-upon circumstances (typically, natural disasters, difficult weather conditions, war and terror events, and the like), that would amount to “force majeure”; when they occur, the parties subject to the "force majeure" are released (either temporarily or permanently) from their obligations under the contract, or the contract as a whole could expire without imposing obligations on the parties.[5]

Generally, when parties agree in advance on the circumstances that constitute “force majeure,” they also include various preconditions for applying the clause (such as providing or receiving notices within a strict timetable). A party that believes that the clause applies in its case must act accordingly.

“Force majeure” clauses can be the subject of disputes over interpretation. For example, historically, "force majeure" clauses generally have not included a "global health emergency" among the relevant circumstances, and thus a party disagreeing with a counterparty's assertion of force majeure may claim that such a situation is not force majeure if it does not appear in the defined list of events.

In general, Israeli courts tend to respect “force majeure” clauses as drafted and pay careful attention to the language of the specific agreement.

[5] There is also precedent for the principle that the question of frustration should be considered in the light of force majeure clause. Civil Appeal 6916/04 Bank Leumi Leisrael Ltd. v. Attorney General of Israel, Paragraph 94 of the Judgment (published in Nevo, 18-Feb-2010).

The Supreme Court recently ruled, in a series of cases regarding the interpretation of commercial contracts between "sophisticated players," such as large companies, that decisive weight should be given to the language of the contract, based on the presumption that such parties are well represented and invest significant resources in formulating their agreements.

**Interim Summary**

If transactions are cancelled or cannot be performed (including cancellations of flights and large-scale events) as the result of explicit instructions from the authorities (including the Ministry of Health), it is reasonable to assume that Israeli courts would be open to applying doctrines of force majeure or frustration, and hence that a party unable to perform the contract for these reasons would be have defenses against claims for performance damages or enforcement.

Nonetheless, if performing the contract is impossible (because of unforeseeable circumstances or the applicability of force majeure) the non-performing party may be obligated to approximate performance, and in any case would not necessarily be protected against claims for restitution or reliance damages.

**Consumer Aspects**

How should a company deal with its customers, when it is forced to cancel a transaction following orders from the authorities (including the Ministry of Health), ordering the cancellation of flights to many destinations and the cancellation of large-scale events, or when consumers wish to cancel transactions at their own initiative?

In case of flight or event cancellations pursuant to orders of the Ministry of Health, the dealer is required to refund payment to the consumer or to offer a substitute product.

**If a consumer asks to cancel a transaction at its own initiative and not as the result of the explicit orders of the Ministry of Health, or if the transaction was performed as a "remote sale transaction" (online or by phone), then the consumer who purchased accommodation, transportation or leisure services or event tickets has the right to cancel the transaction within the later of 14 days after the date it was entered into** (not counting the day on which the transaction was entered into), or from receiving the agreement, so long as there are more than 7 working days until the date on which the service is to be provided.

**Senior citizens, new immigrants and handicapped persons** have a broader right to cancel a

remote sale transaction **from the date of making the transaction, until four months after the later of the date of the transaction or their receipt of the agreement**, as long as a conversation (including by chat) took place between the dealer and the consumer prior to execution of the transaction. The cancellation fees are fixed at the lesser of 5% of the transaction or ILS 100.

The Consumer Protection Law, 1981 (the "**CPL**") applies fully to Israeli dealers, regardless of the involvement of external suppliers. Thus, even if an Israeli dealer contracts with a foreign supplier in connection with a transaction with an Israeli consumer, the Israeli dealer must refund the entire payment to the consumer where the CPL applies, even if the dealer itself does not receive a refund from its foreign supplier. The refund must be effected within 14 days of the dealer's receipt of the cancellation notice, and the dealer must provide the consumer a copy of the cancellation confirmation.

An Israeli dealer that provides a service entirely abroad must offer two alternatives to the consumer: **The first** is the right of cancellation under the CPL, and **the second** is the cancellation policy of the dealer abroad. The consumer has the right to select one of the alternatives. If the alternatives were not presented to the consumer, the cancellation provisions of the CPL will apply.

**Labor Law Considerations**

The spread of coronavirus has led to a significant increase in the number of individuals required to remain in isolation.

Pursuant to Public Health Order (Novel Coronavirus) (Home Isolation) (Temporary Order), 2020 (the "**Order**"), an employee in isolation is "any person who is employed, including a volunteer or a person providing services at the employer's premises, whether or not an employment relationship exists, who must remain in isolation pursuant to the Home Isolation Order."

According to the Ministry of Health, any person who has met the criteria and entered isolation is automatically deemed to receive confirmation of illness, without being required to visit a doctor. The sweeping confirmation of illness, together with the declaration and confirmation of the date of departing one of the countries giving rise to the isolation requirement, constitute a substitute for an ordinary confirmation of illness. Employers are required to accept the sweeping confirmation of illness determined by the Ministry of Health, and may not require any other confirmation of illness from employees in isolation. At the same time, the employee in isolation is obligated to notify his employer, as promptly as possible, that he must remain in

isolation, and regarding the duration of the isolation period.

**In addition, employers may not require employees in isolation to come to the workplace, and are obligated to prevent the possibility of employees subject to isolation from entering the workplace during the isolation period, even if the employee requests to do so.**

Under the Order, **employers may not terminate the employment of an employee who is absent from work because of isolation for concern of having contracted coronavirus.** An employee who is forced to remain in isolation would be deemed absent from work due to illness, and therefore would be entitled to sick pay during the period of absence from work on account of the isolation, and would receive payment pursuant to the Sick Pay Law, 1976. Currently, and until ordered otherwise, the days of absence of an employee in isolation are deducted from the employee's cumulative sick day entitlement. Thus, until other instructions are issued by the Ministry of Health, an employee who uses all of his sick day entitlement would have remaining days of isolation treated as "unpaid leave" that is deducted from his salary.

Can an employer require an employee in isolation work “remotely”?

Although currently there is no prohibition on an employee working from home during isolation, the answer to this question is unclear. On one hand, according to the Order, the employer must require the employee to stay at home, and since the employee receives a full salary for the isolation period, it seems reasonable and fair to require the employee to perform his job from home during that period, insofar as possible under the circumstances.

On the other hand, the same employee is entitled, by virtue of the sweeping confirmation of illness, to receive sick pay, and therefore an employee may argue that he is not obligated to work from home during this period.

Since most employees in isolation are not ill, and are in isolation solely out of caution, a practical approach may be that this matter should be addressed at the employer’s discretion; in our view, it would be a reasonable position that the employer has a legitimate right to require its employee who in isolation but not ill to work in consideration for his regular salary, insofar as this is possible considering the type of work that is required.

To summarize: the spread of coronavirus and the dynamic nature of the instructions of the Ministry of Health continue to expand the scope of employees who are subject to isolation. Accordingly, more detailed instructions regarding “remote” work, the use of sick days beyond

the quota accumulated by the employee as a result of home isolation, as well as additional matters relating to both employers and employees, may be presented in the coming days.

We are at your service should you have any question, and wish you the best of health.

**Sincerely,**

**Fischer Behar Chen Well Orion & Co.**

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