



Invoking force majeure clauses and the doctrine of frustration in light of COVID-19: **A practical approach**

The coronavirus pandemic poses an unprecedented stress test to businesses worldwide, with no clear timeline as to when things will return to normal. In order to survive, it is only natural for businesses to evaluate their options in respect to their existing contractual obligations and, where possible, mitigate any negative impact.

For contracts governed by the law of the Republic of Cyprus, two mechanisms may be considered: (a) force majeure clauses and (b) the doctrine of frustration.

Force majeure events

(a) What is force majeure?

It is a clause in a contract which defines and sets out a series of events influencing the contractual obligations of parties.

(b) What is the purpose of a force majeure clause?

A force majeure clause seeks to protect the parties from specific events, as are agreed between the parties, which are usually outside the scope of normal business risks. This may include events such as war, riots, fire, flood, hurricane, earthquake, strikes, lockouts, acts of state or governmental action which prohibit or impede a party from performing its contractual obligations.

(c) Can COVID-19 or the measures taken by the Cyprus government amount to a force majeure event?

This mostly depends on the wording of the contract and what has been agreed between the parties and in the conduct of the parties i.e. whether the party seeking to rely on a force majeure event has made any endeavors to avoid or mitigate the force majeure event.

(d) What happens when a force majeure event occurs?

This depends on the consequences agreed between the parties in an event of force majeure, for example, suspension of performance until the force majeure event ceases or termination; without same constituting a breach of contract.

(e) What if a contract does not include a force majeure clause?

A contract needs to contain a force majeure clause in order for parties to be able to rely on it.

Frustration

(a) What is meant by frustration of a contract?

Frustration of a contract can occur when, after the contract was made, there is a change in the circumstances, which is not the fault of either parties, which would render the contract impossible to perform or would deprive it of its commercial purpose.

(b) What happens when a contract is frustrated?

The contract will be terminated and both parties are automatically discharged from further contractual obligations.



LELLOS P. DEMETRIADES LAW OFFICE LLC

THE CHANTECLAIR HOUSE
2 SOPHOULIS STREET, 9TH FLOOR
NICOSIA 1096 CYPRUS
P.O.BOX 21646, CY1511 NICOSIA
TEL: +357 22676060
FAX: +357 22676061
EMAIL: info@ldlaw.com.cy
WEB: www.ldlaw.com.cy

(c) Is frustration of contracts common?

Courts have been very reluctant to find events of frustration. A contract would not be frustrated if it would be more difficult or expensive to perform, if any of the parties is at fault for the impossibility of performance, where a provision regarding the frustrating event was included in the contract or where the frustrating event could have been foreseen.

Practical Implications in suspending / terminating contracts

In theory, invoking a force majeure clause or claiming that frustration has occurred seems to offer an escape route to businesses that may be struggling.

In practice, however, certain considerations come to mind:

- the potential consequences of a breach and/or default in a contract;
- litigation or arbitration or other proceedings from parties seeking to enforce their contractual rights – such proceedings would mean extra costs on all parties, as well as uncertainty, as a decision may be given long after the pandemic has passed;
- the effect of current and future business relationships.

Final remarks

Deciding how to go about with contractual obligations is not only a legal exercise, but a difficult and sometimes harsh commercial decision. Businesses will do as they see fit in order to protect their interests especially in the short run. However, certain decisions and policies may continue to influence the business (positively or negatively) in the long term.

This note provides a general guide to the subject matter and does not constitute legal advice. For any further information on the matter please contact George Taoushanis at info@ldlaw.com.cy

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