



N. XENOFONTOS LLC

Drafting and Enforcing *Force Majeure* Clauses in the Wake of COVID-19:

Details Matter



What is a force majeure clause?

The term force majeure means ‘superior force’ and is a contract provision that allows a party to suspend or terminate the performance of its obligations when certain circumstances beyond their control arise, making performance inadvisable, commercially impracticable, illegal, or impossible. The provision may state that the contract is temporarily suspended, or that it is terminated if the event of force majeure continues for a prescribed period of time.

Contracts and the Current Pandemic

Because of the outbreak COVID-19, many parties may wish to assess the applicability of force majeure clauses in their contractual arrangements to determine whether it may be possible to terminate or suspend performance of a contract or any other possible legal consequences that may arise.

Whether this pandemic may be considered to be an event of force majeure, such that it allows parties to temporarily or permanently be excused from performing their contractual obligations, will in essence, depend on the circumstances, nature and content of the contract in question.

There is no universally recognised meaning of the term ‘force majeure’ in Cyprus, and therefore, if a court is asked to interpret such a term, it will look at the wording of the contract as a whole and the intention of the parties at the time of entry of the contract.

Practice has shown that most parties use 'standard' forms of force majeure clauses that include a specific and 'closed' list of events that would constitute a force majeure event, the most common events used are: acts of God, wars, riots, floods, earthquakes, hurricanes, lightning, and explosions, The term may also include energy blackouts, unexpected legislation, slowdowns and strikes.

The answer to the question as to whether this pandemic would qualify as a force majeure event is not at all simple as this depends on several factors including the nature and content of the contract and its governing law.

By way of example and assuming Cyprus is the chosen governing law of a contract, parties could seek relief under the doctrine of frustration as enshrined in section 56 of the Cypriot Contract Law Cap. 149, although this generally applies in cases of impossibility to perform the contract, for example due to destruction of the subject matter of the specific contract, illegality, incapacity or death. Even though it is difficult to predict how the COVID-19 outbreak may justify invoking the above provision, at this stage, it remains to be seen how this will be interpreted and applied by the Cypriot judicial courts.

Concluding comments

In conclusion, force majeure scenarios are by character fact-specific and dependent on the content and context of the contract in issue. Going forward parties may wish to pay more attention in drafting the relevant force majeure provisions by for example incorporating reference to pandemics and regulating the consequences in such eventuality.

Prudent businesses and entrepreneurs must evaluate the types of risks their business faces as well and the likely impact these risks will have.

How we can help

- Provision of legal advice of your contracts and agreements to evaluate obligations, duties and consequences of force majeure events.
- Analysis of scenarios and instances of contractual breaches.
- Review of entire spectrum of contracts and agreements in place on the effectiveness of clauses and actions to take.
- Drafting of amendment agreements, where it is deemed necessary.
- Evaluation of corporate directors' duties.
- Liaison between parties, negotiations for mitigation of loss of contract and damages.

Connect with us

A: 140 Athalassas Avenue
3rd floor, 2024
Nicosia
Cyprus

T: +357 22 55 27 05
M: +357 99 33 25 32
E: info@xenofontosllc.com
W: www.xenofontosllc.com

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