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### Frequently Asked Questions (FAQ): Corona Virus (COVID-19) and Contractual Obligations in Saint Lucia

On 20<sup>th</sup> March 2020, the Government of Saint Lucia announced the *Implementation of the Heightened Protocol and Social Distancing Regime* with measures which came into effect on Monday 23<sup>rd</sup> March 2020. The measures implemented resulted in a partial scale down of all non-essential economic activities for the two-week period commencing Monday, 23<sup>rd</sup> March 2020 in the first instance. Furthermore, on 23<sup>rd</sup> March 2020, Statutory Instrument No. 39 of 2020 - Constitution of Saint Lucia - Proclamation for Declaration of State of Emergency was promulgated. Since then, the Prime Minister has introduced a range of measures which have partially, and in some instances, totally, restricted all non-essential economic activities in St. Lucia for varying periods. At the time of writing, St. Lucia remains in a State of Emergency pursuant to Statutory Instrument No. 63 of 2020 with no set date for full resumption of economic activities.

The present state of affairs has led to much uncertainty and many businesses have been left struggling to meet contractual obligations. In this guidance note, we address the effect of the scale down of non-essential economic activities and other government interventions on the contractual obligations of parties. No special legislation has been passed in response to this novel and unprecedented situation and so we must look to common law principles to determine enforceability of contractual obligations. **The advice contained herein is of general application and intended solely to advise businesses and entrepreneurs of their general legal rights. Every contractual situation is specific and tailored legal advice should always be sought.** This guidance note is in no way intended to be exhaustive and, in all cases, it is important to look to the terms of the specific contract.

#### *Are contractual obligations still enforceable?*

A contract will remain enforceable, unless it is brought to an end by the application of relevant contractual terms (force majeure) or common law principles (frustration).

Force Majeure only arises when parties incorporate into their contracts terms which stipulate that a contract comes to an end or is temporarily suspended where either party is unable to

fulfill his/her/its contractual obligations due to unforeseen and unpreventable circumstances commonly referred to as 'Force Majeure events'.

### *Is Covid-19 a Force Majeure Event?*

Most commercial contracts contain Force Majeure clauses. Whether the legislative restrictions imposed by the Prime Minister in response to the pandemic will fall within a Force Majeure clause will depend on the express wording of the contract. It is therefore important to interpret the contract to find the true intention of the parties; it is not a 'one size fits all'. The fact that a contract becomes more difficult or costly is not usually sufficient to constitute a force majeure event; a party should be truly incapable of performing their contractual obligations, having taken all reasonable steps to mitigate adverse consequences. Careful consideration should also be given to whether a Force Majeure clause has the effect of terminating the contract or merely suspending its operation for a period of time.

### *What if a contract does not contain a Force Majeure Clause?*

Where contracts do not provide for Force Majeure, contractual obligations may be terminated by frustration. Save and except certain circumstances, Frustration may only be relied on where parties have not incorporated Force Majeure clauses into their contracts. Where a Force Majeure clause is incorporated, parties can usually only rely on the terms of that clause.

Frustration occurs when through no fault of either party, it becomes impossible or illegal to perform one's contractual obligations, or where compliance with outstanding obligations would be unreasonable because the circumstances in which performance would have to take place would be radically different from what was envisioned by the contracting parties. Once frustration occurs, the contract is immediately terminated.

### *Has my contract been frustrated?*

In certain situations, the disruptive effect of the current lockdown may be severe enough to frustrate contracts which were made prior to these measures being implemented. This is especially true where businesses have been forced to remain closed for extended periods under the current legislation and performance of obligations becomes illegal. It is important to note however that frustration will depend on the terms of the contract and whether in fact performance, even at a later or delayed date, would be unreasonable or impossible in the circumstances. To determine whether a contract is frustrated, one must thus look to the terms of the contract, the context of the contract, the parties' prior knowledge of the potentially frustrating event, the nature of the potentially frustrating event and the parties' reasonable expectations in respect of future performance of the contract. As noted above in relation to force majeure clauses, the fact that a contract becomes more difficult or costly is not usually sufficient; a party should be truly incapable of performing his/her/its contractual obligations as a direct result of the implementation of Covid-19 measures.

*Are costs incurred or payments made before Force Majeure or Frustration recoverable?*

Force Majeure clauses usually provide for the recovery of costs and payments made prior to Force Majeure events. However, if the clause is silent as to the recovery of expenditure, the usual position is that “costs lie where they fall”, meaning that they are unrecoverable.

Under the Civil Code of Saint Lucia, costs incurred in partial fulfilment of contractual obligations are generally recoverable. The usual position is that a party who has performed their obligation in part must be compensated for the benefit gained by the receiving party for that part fulfilment. Monies paid where no benefit has been received by the paying party must also usually be returned. As in all cases, this may vary depending on the terms of the contract and the nature of obligations contained therein.

*What should I do if I believe that a contract has been terminated due to Force Majeure or Frustration?*

If you neglect to fulfil contractual obligations without the other party’s written agreement that Force Majeure or Frustration apply, you may be liable for breach of contract if your non-performance/termination is found to be unlawful. In the absence of such agreement, legal advice should be sought.

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