
MEMORANDUM – COVID-19, FORCE MAJEURE AND COMMERCIAL CONTRACTS UNDER BELGIAN LAW

From: Pieter Paepe

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Re : High level discussion of the effect of force majeure on commercial contracts under Belgian law

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The COVID-19 outbreak and the unprecedented protection measures taken by the government will in many cases have a far-reaching impact on commercial contracts. This memorandum discusses the main principles to be taken into account to know if and, as the case may be, under which circumstances a contract party can suspend or terminate its obligations on the basis of “force majeure”:

- Considering the truly exceptional nature of the current circumstances, we expect that a party can effectively stop complying with certain **(non-financial) contractual obligations**, but a number of considerations, which are detailed hereunder, are to be taken into account.
- As far as **financial obligations** are concerned, we expect that “force majeure” is less likely to constitute a ground to stop paying your creditor, but other measures can nevertheless be taken. It should also be highlighted the federal government has concluded yesterday an unprecedented agreement with financial institutions to support individuals and companies. That agreement has two pillars:
 - o The financial industry will grant interruption of payment until 30 September 2020 to all viable non-financial enterprises and entrepreneurs as well as borrowers having a mortgage loan having payment difficulties caused by COVID-19 crisis, without any addition costs;
 - o The federal government will activate a guarantee scheme for all new credit loans with a maximum duration of 12 months that banks can loan to viable non-financial enterprises and entrepreneurs.

I. FORCE MAJEURE

1. Pursuant to Articles 1147 and 1148 of the Belgian Civil Code, a contract party does not incur liability if the non-performance of its contractual obligation is caused by an event of “force majeure” (in French) or “overmacht” (in Dutch). These terms are sometimes translated as ‘acts of God’ or ‘extraneous events’.
2. Many commercial contracts contain a force majeure clause. Even if a contract does not contain a force majeure clause, Belgian law allows that the principles of force majeure can nevertheless be applied.

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II. COMMERCIAL AGREEMENTS WITH FORCE MAJEURE (OR SIMILAR) CLAUSES

3. Anyone who considers to invoke the application of a force majeure clause should at least carefully assess the following:
- *Is force majeure defined? And how is it defined?* A force majeure clause may or may not define the circumstances that will be considered as force majeure. That clause may also give examples of force majeure. Usually the given examples are not provided or intended to be exhaustive. Certain clauses may also exclude certain circumstances as force majeure.
 - *Are there any obligations?* Contracts with a force majeure clause can impose, for example, an obligation to notify the event to the other party, often within a certain time limit.
 - *What are the consequences of force majeure? Suspension of the contract? Or termination of the contract? Has the liability in case of force majeure been explicitly regulated?*
 - *Are there any other contractual clauses that are relevant?* Your contract may contain hardship or material adverse change clauses, which are likely to be applicable in the specific case of COVID-19 and the wave of major government-imposed measures.

III. OBLIGATION TO ACHIEVE A SPECIFIC RESULT VERSUS OBLIGATION TO USE BEST ENDEAVOURS

4. In general, the question whether there is a case of force majeure will be relevant when there is an *obligation to achieve a specific result*.¹ Force majeure is less likely to be invoked when the commercial contract contains only an *obligation to use best endeavours*², since one contract party must prove that the other contract party did not use its best endeavours, after the COVID-19 outbreak and the ensuing measures, to take the measures that could have been expected from a 'normally careful and cautious debtor in the same concrete circumstances'.

IV. TWO CONDITIONS TO HAVE A CASE OF FORCE MAJEURE

5. Two conditions must be satisfied to have a case of force majeure:
- *First condition:* the event must make it impossible to honour a contractual obligation.
 - *Second condition:* it must be an extraneous event, which means that the event or circumstances that prevent to perform a contractual obligation may not be imputable to the party invoking force majeure.

IV.1. Does COVID-19 and the protection measures make it impossible to honour an obligation?

6. The first question to be addressed is whether the COVID-19 outbreak and the government measures make the performance of a particular contractual obligation *impossible*. That question cannot be addressed in the abstract, but should be carefully considered on a case by case basis, for each contractual obligation. The outcome may also vary from one industry to another.
7. Force majeure requires an event that is an 'insurmountable obstacle' to honour an obligation.³ Circumstances that make it more difficult or more costly to comply with a contractual obligation, will not be taken into account. Certain courts suggest that that impossibility must be *absolute*. Other courts argue that the criterion of what is *reasonably or humanly* impossible must be

¹ "Resultaatsverbintenis" in Dutch; "obligation de résultat" in French.

² "Inspanningsverbintenis" in Dutch; "obligation de moyens" in French.

³ "Onoverkomelijk beletsel" in Dutch; "un obstacle insurmontable" in French.

applied: considering the concrete circumstances, it is sufficient that a reasonable and normal performance of the obligation has become impossible.

IV.2. Is COVID-19 an extraneous event?

8. Even if COVID-19 has made it impossible to comply with an obligation, it is also required that the contract party invoking force majeure has not contributed to that impossibility. If a contract party could have taken measures that prevented that a contractual obligation is not honoured, there is arguably no case of force majeure. Similarly, if a contract party could have foreseen or anticipated the COVID-19 outbreak and the government measures, but did not take any preventive or mitigating measures, there will arguably also not be a case of force majeure.
9. Here are some further guidelines:
 - If a contractual obligation could and should have been complied with *before* the COVID-19 outbreak, force majeure can in principle not be invoked. There will also not be an exemption from liability on this basis.
 - For contracts concluded before March 2019, we expect that the COVID-19 outbreak will be considered as an unforeseeable event. Contracts concluded since March 2019 must obviously take the COVID-19 outbreak and its far-reaching consequences into account.
 - If COVID-19 and the government-imposed measures make it more difficult or more costly to comply with a contractual obligation, there is arguably no force majeure. The line between what is 'more difficult' and 'impossible' is difficult to draw and ultimately depends on the concrete circumstances. In the current circumstances, we expect that the standard test of impossibility can and should be applied reasonably (and not as an 'absolute impossibility').
 - If a contract party could have taken mitigating measures to correct the consequences of the COVID-19 outbreak and the government-imposed measures, but has failed to do so, it is less likely that force majeure can be invoked. To the extent that (reasonable) mitigating measures have not been taken, a contract party will remain liable. If despite mitigating measures, it turns out that it is not possible to comply with a contractual obligation, there is a very good possibility that force majeure can be invoked.

V. CAN COVID-19 BE INVOKED TO STOP PAYING YOUR CONTRACT PARTNER?

10. That is less likely. Financial inability/incapacity, even if that is the consequence of external circumstances that qualify as force majeure for the debtor, does not discharge the debtor of its obligation to pay.⁴ To give but one example, Swissair could not be discharged of its obligation to pay its debtors on the basis of force majeure, even though it claimed that it had been unable to increase its capital after the 9/11 terrorist attacks.
11. However, the following should also be taken into account:
 - If one contract party can effectively invoke COVID-19 as force majeure to suspend or terminate a (non-financial) obligation, the other party's obligation to pay is obviously also suspended (or terminated).

⁴ Cass. 28 June 2018, case C.17.0701.N. In Dutch: "Financieel onvermogen, ook al is zij het gevolg van externe omstandigheden die voor de schuldenaar overmacht uitmaken, heeft niet tot gevolg dat de schuldenaar van zijn betaalverbintenis is bevrijd"; in French: "Même si elle résulte de circonstances extérieures constituant pour lui une force majeure, l'insolvabilité n'a pas pour effet de libérer le débiteur de son obligation de paiement".

- A court may grant *additional payment terms*, but this power should be exercised 'with great care' and take into consideration 'the situation of the parties'.⁵ We expect that the COVID-19 outbreak may effectively give rise to delayed payment terms, but this will ultimately depend on the concrete circumstances.

VI. CONSEQUENCES OF FORCE MAJEURE: SUSPENSION OR TERMINATION OF THE CONTRACT

12. If the situation of force majeure leads to a situation where there is a **permanent impossibility** to comply with a contractual obligation, the debtor is *discharged* from the obligation to honour that obligation⁶ and the contract will be terminated.
13. However, if the impossibility to comply with an obligation is only **temporary**, that obligation will be *suspended* until it becomes possible again to honour it (unless the contract would have become without object in the meantime). The temporary impossibility does not, as such, imply the termination of the contract. As long as the contractual obligation of one party is suspended, the obligation of the other party (for example to pay) is equally suspended.
14. None of the parties is liable for any damages to the other party as a consequence of the non-performance following a force majeure event (unless stipulated otherwise).
15. In certain industries there may also be specific legislation regulating the consequences of a force majeure situation.

For any questions, you may reach out to Pieter Paepe (ppa@astrealaw.be).
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⁵ Pursuant to Article 1244 of the Civil Code.

⁶ Cass. 28 June 2018, case C.17.0701.N. ("Een schuldenaar is bevrijd indien de nakoming van de verbintenis blijvend onmogelijk is geworden door overmacht").