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Covid-19 coronavirus: hardship and force majeure – a Belgian analysis

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Speed read

The rapid and global spread of Covid-19 and the resultant governmental strategies are having an increasingly disruptive effect on our daily lives, and also on global supply chains, including in Belgium. Disruption means a potential breach of contractual obligations and delays in performance, and raises the question of who assumes the risk of contractual non-performance caused by this crisis. The question of risk allocation can be resolved by considering the concepts of force majeure and/or hardship. These are legal and contractual concepts that are heavily dependent on the facts and require a case-by-case analysis.

This publication will address the applicable rules on force majeure and hardship under Belgian law, how these concepts may be affected by specific contractual provisions, and some steps you could consider taking to better protect your business in its current and future contractual dealings.

Force majeure

The concept of force majeure is a familiar one in Belgian law. If a contract is governed by Belgian law, the doctrine of force majeure will be implied even if the contract does not contain an express force majeure clause. Articles 1147 and 1148 of the Belgian Civil Code indeed provide that a debtor shall not be ordered to pay damages if they cannot properly fulfil their contractual obligations due to an extraneous event, such as a force majeure event. Force majeure can accordingly excuse a non-perfoming party for its non-performance.

What are the prerequisites?

Two key conditions must be met for an event to qualify as a force majeure event:

- the event must be an insurmountable obstacle which renders performance absolutely impossible (even though there is case law which tempers this requirement of absolute impossiblility and holds that there needs to be a degree of reasonableness in assessing the impossibility); and
- the event may not be attributable to the defaulting party or its representatives, and the event's consequences must be unavoidable. This condition is often taken to mean that the event's consequences on the possibility of contractual performance must have been

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unforeseeable upon entering into the agreement.

To the extent that these conditions are met, the impact of Covid-19 could constitute a force majeure event and may be invoked by a defaulting party. Note that in the event of a dispute, the courts will examine the existence of a force majeure event on a case-by-case basis. There are precedents where the courts have accepted health reasons and even a local epidemic as amounting to force majeure.

What are the consequences?

The burden of proof of the existence of (the prerequisites of) an event of force majeure is upon the defaulting party. If the defaulting party proves that these conditions are fulfilled, it may **temporarily suspend** the performance of its own affected contractual obligations for the duration of the force majeure event, without having to pay any damages or compensation to its contracting party. The basic principle is that this relief will be limited to the duration of the force majeure event. If it is shown that the force majeure event renders the defaulting party's performance definitively impossible or that the other contracting party has lost any concrete interest in the performance of the agreement, the defaulting party will be **released entirely and definitively** from its obligations.

Belgian law takes the view, expressed by the maxim *genera non pereunt*, that an obligation to supply fungible goods, which by definition are replaceable by other similar goods, is not rendered impossible by the mere fact that the goods to be supplied have perished or have been destroyed. This includes money. Therefore, a defaulting party can never claim that it is freed from a payment obligation by relying on force majeure. One of the rare exceptions to this rule would be an event of the authorities forbidding certain payments from taking place, which is sometimes also called *fait du prince*.

The benefit of force majeure will not be granted automatically, but must be raised by the defaulting party. Also, a defaulting party will no longer be able to invoke force majeure as a ground for relief when it has already been put on notice by its contracting party to perform the relevant obligations prior to the occurrence of the force majeure event. It is therefore worthwhile to be proactive: the notification by a non-defaulting party to a defaulting party of its non-performance, may affect the defaulting party's possibility to later on rely on a subsequent force majeure event to become released from its obligations.

What about bilateral agreements?

If a defaulting party to a bilateral agreement is freed from the performance of its obligation by a force majeure event, the other contracting party will no longer be required to perform its own corresponding obligation. This is commonly referred to as the *risk theory*. The other contracting party could for instance be freed from a payment obligation that was due in exchange for a service which had to be performed by the defaulting party, but which the defaulting party is excused from after the occurrence of a force majeure event. Absent any contractual provisions to the contrary, the financial risk is therefore borne by the defaulting party who was freed by the force majeure event. For example, a supplier who can successfully argue that it was prevented from delivering the ordered products, may be excused, but depending on the specific contractual arrangements between the supplier and the customer, the customer may not be required to pay for the non-delivered goods either.

Hardship

As explained above, in principle, financial or other difficulties which render the performance of an agreement more onerous – but not impossible – will not be accepted as a case of force majeure. This is where the concept of hardship steps in.

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What qualifies as hardship?

Hardship can be defined as circumstances which are (i) extraordinary and unforeseeable, (ii) not attributable to either party, and (iii) which render the performance of its obligations by one party more onerous to the point that the balance of the contractual relationship is affected.

How is hardship applied under Belgian law?

Some legal systems allow for a contract to be renegotiated or otherwise modified in hardship circumstances. Not so under Belgian law: the theory of hardship has been much debated over the years, but was eventually firmly rejected by the Belgian Supreme Court.

This means that, in the absence of specific contractual provisions, consequences of Covid-19 which do not render contractual performance (absolutely) impossible (and therefore do not constitute a force majeure event), cannot be taken into account as grounds for renegotiation, suspension or termination of a contractual agreement.

Are there any alternatives?

In its decisions rejecting hardship as an implied contract term, the Supreme Court did pave the way for a possible solution in the presence of a change in circumstances which falls just short of force majeure. The Court indeed decided that the insistence by a contracting party to obtain performance of the other party's obligations can constitute an **abuse of rights**, which is contrary to the **principle of good faith**. This could be the case, for instance, when the advantage sought by the non-defaulting party causes a much greater prejudice to the defaulting party and the non-defaulting party is fully aware of this.

An interesting example is a decision of the Ghent Court of Appeal of 3 February 2014, in which it considered that a carrier had committed an abuse of rights by enforcing a provision in a 4-year old contract which required its customer to place a minimum number of transport orders, despite the fact that the customer's business had been severely affected by the 2008 financial crisis and therefore no longer had the need for that amount of transport jobs. The Court allowed the customer to place a lower number of orders and did not grant the carrier compensation for the lost orders.

Towards a broader acceptance of hardship under Belgian law

The above only applies when there is no specific legislation which deviates from the standard regime. This includes Belgian legislation that allows hardship to be invoked in relation to government contracts, which will be addressed in a separate publication.

In the commercial context, an example of such legislation can be found in Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG), which introduces the following provision: *"A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences*." In two decisions of 19 April 2009 and 12 April 2013, the Belgian Supreme Court clearly stated that this provision does not only include events of force majeure as they are known in Belgian law, but also hardship events.

This more recent case law has been construed as gradually leading the way towards a broader acceptance of hardship in Belgian law. The Belgian legislator has taken these developments into account in the planned reform of the Civil Code.

The current draft reform act includes a new Article 5.77, which provides that a debtor may ask their contracting party to renegotiate the contract with a view to its modification or

termination if a change of circumstances renders the performance of the contract excessively onerous to the point that it would be unreasonable to demand its continued performance. If the current draft version of the new Civil Code were to be adopted, this would introduce the theory of hardship into Belgian law. However, this hardship provision would then only apply to agreements that are concluded after the entry into force of the new Civil Code.

Contractual derogations

The rules on force majeure and hardship are not mandatory and can be derogated from by contact, including by a party's general terms and conditions. Careful consideration must be given to contractual provisions which govern the consequences of a change in circumstances.

Typical force majeure clauses

Typically, force majeure clauses will cover at least one of the following:

– a definition of circumstances which constitute a force majeure event, often broadening the legal definition by providing, for instance, that it is sufficient if performance has become *reasonably* impossible;
– a list of events which qualify as force majeure, which depending on the wording could be exhaustive or non-exhaustive, conclusive or merely exemplary – epidemics are often included and obviously a pandemic such as Covid-19 would fall in its scope;
– a procedure, including deadlines, to provide notice of a force majeure event to the other party (sometimes drafted as a hard deadline, by which the defaulting party loses the right to rely on an event of force majeure);
– the consequences of a force majeure event, such as an initial suspension of the performance, the requirement that the defaulting party notifies its own assessment of the period during which contract performance will need to be suspended, and a long stop date by which, if the force majeure event is still ongoing, the other contracting party will be entitled to terminate the contract.

Hardship clauses: the missed opportunity

In contrast, outside of the M&A and financing context where material adverse change (MAC) clauses are commonly seen, hardship clauses are less prevalent in commercial agreements. They could, however, be used to regulate the financial consequences of unforeseen circumstances and particularly so the circumstances which do not lead to a real impossibility to continue to perform (such as regulatory changes that impact on the position of one of the parties). They could, alternatively, provide the option to renegotiate the contract and restore its balance in a way which is more flexible than the binary option of either suspension or termination which is offered by the force majeure doctrine. In a contractual hardship regime, contract termination will only be the last resort in the event the parties fail to successfully renegotiate the contract and to restore the balance.

What's next?

Under the current circumstances, it is highly recommended to proactively conduct a review of the force majeure and/or hardship clauses included in your existing agreements, which you suspect could be affected by Covid-19 and/or by the adopted measures to curb its spread. Depending on the wording of the clause, you or your contracting parties may need to make notifications and may, or may not, rely on the current circumstances to suspend or perhaps terminate contractual obligations. This may also be the opportunity to consider adapting wording which you usually incorporate in your

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agreements and to contemplate inserting a hardship clause.

Also, we recommend to document the way in which your obligations are affected by Covid-19, and the measures you are taking to try to limit its adverse consequences. If you are at risk of defaulting on a contractual obligation, it is generally recommended to notify your contracting party immediately of the force majeure event that is preventing you from assuring contractual performance. The contemporaneous documentation of the real impact and mitigation measures are often key in a subsequent dispute to help courts or arbitrators to determine liabilility and, even more so, compensation.

If you would like to discuss any of the points covered in our ePublication in more detail, please let us know

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