

## **News Alert Coronavirus : Is the Covid-19 pandemic a force majeure event under Belgian law? Frequently Asked Questions**

Covid-19, also known as the coronavirus, continues to spread across the globe, including in Belgium. The Belgian authorities have imposed a lock down on all private individuals and enterprises as from 18 March 2020 until 4 April 2020 (the **Lock Down Period**), but this Lock Down Period will in all likelihood be extended.

Measures taken by the authorities for the duration of the Lock Down Period include the closure of non-food shops, restaurants, bars and other retail outlets, employees being instructed to work from home to the extent possible, travel restrictions and the partial closing of borders for persons except in case of essential travel (the **Measures**).

As a result of the Measures, certain agreements cannot be performed anymore, such as commercial lease agreements and contracts for the supply of goods or services.

What is the effect of the Measures on a contracting party's legal obligation to perform the agreement? For example, does it have to pay the rent for its closed shop/restaurant? Does it need to pay the supplier for the food delivered which will perish because of a restaurant closure? Does the supplier need to continue performing its supply agreement?

This FAQ document answers a series of business questions that our clients have raised in this respect.

For any question regarding employment law, we refer to our FAQ available [here](#).

### **1. How could coronavirus affect my contract?**

Contracts may be affected by the legal and economic consequences of the Measures, supply chain disruption, travel restrictions and turmoil across different markets.

Parties may struggle to perform their current contracts due to the Measures and Covid-19. Whether a contracting party is excused from its contractual obligations or could seek to terminate a contract will depend on the terms of each contract and the factual circumstances.

In contracts which are being drafted during the Lock Up Period, parties have to make sure to include additional commercial terms to try to protect themselves against the effects of the Measures (e.g. pricing adjustment clauses for contracts relying on tariffs or affected by exchange rate fluctuations, step-in or buy-out rights to address performance concerns, new provisions regarding the force majeure consequences, new provisions regarding the calculation of damages, etc.).

**2. Definition of force majeure event**

Under Belgian law, a force majeure event is defined as an event of an insurmountable and unforeseeable nature, independent of any fault of the debtor, which prevents the debtor from performing its obligations, while remaining within the limits of the diligence that may be expected of it.

If the performance of an agreement has been made temporarily impossible due to a force majeure event, a contracting party can suspend temporarily the performance of the agreement without incurring an obligation to pay damages to the other contracting party. Such a suspension can occur without the intervention of the courts.

Additionally, if the performance of the agreement has been made impossible for a long or unlimited period of time, the agreement can even be terminated because of force majeure.

Classic examples of force majeure events are natural disasters, theft of the goods to be delivered, terrorist attack or fire (e.g. fire resulting in destruction of rented premises).

**3. Can the Measures be considered as a force majeure event?**

No general rule or principle allows for a general qualification of the Measures as a force majeure event. Each situation has to be examined on an *ad hoc* basis for which purpose the following questions have to be answered:



**4. Can the spread of Covid-19 be considered as a force majeure event?**

Certain large industrial players closed their manufacturing facilities in Belgium for reasons of hygiene and employees' safety but also because of disruptions or fallen demand directly linked to the spread of Covid-19.

In that case, no general rule or principle allows for a general qualification of Covid-19 and its consequences as a force majeure event. Each situation has to be examined on an *ad hoc* basis following the same questions path as stated above (section 3). In principle and if the other conditions are met, the spread of Covid-19 should be considered as a force majeure event as the spread of a disease in principle is unforeseeable and is beyond the parties' control.

**5. Consequences of a qualification as a force majeure event for specific agreements - FAQ**

**Lease agreements: can I suspend the payment of the rent?**

If, because of the Measures, the lessee cannot access the rented premises, it could be argued that a force majeure event impedes the performance of the contract.

In that case, the lessee will need to notify the force majeure event to the landlord and explain how the conditions of force majeure are met for its specific lease contract. As from the date of the notification, the lessee can suspend the payment of the rent but it remains to be seen how the courts will deal with disputes of this nature.

**Credit agreement: can a borrower suspend the reimbursement of its credit agreement because the activity of its company is suspended?**

Even if no revenue is forthcoming and this impacts on the company's ability to reimburse the credit, those circumstances will not be considered as a force majeure event. The bank has provided the funds and the company has to reimburse them. The reimbursement of the credit is not rendered impossible by the Measures but by the company's lack of cashflow. It is difficult to argue that the Measures impeded the performance of the credit agreement so they cannot justify the suspension or the termination of that agreement.

However, the Minister of Finances Alexander de Croo announced the postponing of the reimbursement of all credits for non-financial businesses and self-employed private individuals until 30 September 2020. Some banks (such as ING, KBC or BNP Paribas Fortis) have already taken the initiative to freeze loan repayments for up to six months for non-financial companies which are in financial difficulty as a result of the current crisis.

**Supplier contract: can a party suspend the delivery and the payment of goods that it can no longer sell in turn to the end customer?**

If the goods are perishable goods that cannot be sold/delivered, for example, to a restaurant that needed to close, the buyer can suspend the delivery and the payment for these goods due to force majeure.

However, if the goods are not perishable (for example, clothes, mechanical components, etc.) and can be stored at the buyer's premises, there is no justification to suspend the contract and the goods will have to be delivered and paid pursuant to the contract. However, if the stock/accumulation of goods will involve a

very significant cost, this could be likened on the basis of case-law to a force majeure event justifying the suspension of the contract.

Attention must be paid to the condition that a force majeure must be unforeseeable. If the goods were ordered after the Measures were announced, the condition of unforeseeability could be challenged so that force majeure would not be established and the goods will have to be delivered and paid.

**Supplier/sale contract: can a party suspend the production and sale of goods?**

As long as the manufacturing and sale of the goods are impeded (for example because the manufacturer's employees are not working as a result of Covid-19 or the Measures or in the absence of raw materials), the production/sale contracts can be suspended or terminated because of force majeure without paying an indemnity to the co-contracting party. Conversely, that co-contracting party can suspend its own contractual obligations (e.g. payment of the goods).

**Must a party notify its co-contracting party of the suspension of the contract?**

If the contract contains a force majeure clause, the provisions of the clause have to be complied with. Such a clause normally will contain a notification obligation.

If the contract does not contain a force majeure clause, general contract law applies. In that case, the principle of the performance of contracts in good faith and the obligation to mitigate the loss of the other party mean that there is an obligation to notify the co-contracting party of the suspension of the contract for force majeure.

**Other contractual issues to keep in mind?**

**Commercial conditions:** may need to be renegotiated to reflect the changed underlying economics of the contract as a result of the Lock Down (e.g. changes in the market, excise procedures and tariffs, supply chain impacts or restrictions on movement of private individuals).

**Insurance:** depending on the insurance contract, the insurance can cover a part of the loss suffered by a company as a result of the Measures.

**Representations and warranties:** for future contracts, it should be considered whether such representations and warranties need an overhaul. For example, representations in a contract stating that there is no default under a material contract or that a material contract can be performed could be breached due to the spread of Covid-19 and its consequences.

**Change of law:** what if new legislation is passed linked to Covid-19 which results in contractual provisions becoming illegal or unenforceable? In that case, it is recommended to amend these provisions or sever them from the rest of the contract, in particular when those changes could cause the invalidity of the whole contract.

**Currency and pricing fluctuations:** For new contracts, consider how to allocate future risk (flexible pricing).

## VAN BAEL & BELLIS

### 6. How can Van Bael & Bellis assist you?

Van Bael & Bellis can advise you regarding the application and consequences of force majeure events for your company.

This material is intended for general information purposes only and does not constitute legal advice. For legal issues that arise, the reader should consult legal counsel.

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### Get in touch

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