

COVID-19: IMPACT ON CONTRACTS



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As widely publicised, the Belgian federal government has imposed **nation-wide containment measures effective as from March 18, 2020 and lasting until (at least) April 5, 2020**. These measures include (amongst others):

- ✦ the **immediate closure of all stores and commercial outlets**, to the exception of a limited number of essential businesses (in particular food stores, pharmacies, libraries and gas stations);
- ✦ **restricted circulation on the entire Belgian territory**;
- ✦ **mandatory homeworking for all workers of all companies**, except for those companies active in specific sectors exhaustively listed in the annex to the Ministerial Decree of March 18, 2020.

As similar measures are being adopted worldwide and combined with the global economic downturn, the repercussions of this unprecedented situation on Belgian enterprises are immediate and may lead to supply problems, disruption in production, difficulties to source or deliver goods or services. More generally, these measures result in a reduction of business activities or, in extreme situations, to a temporary suspension of all business activities.

In this framework, **enterprises may**:

- ✦ **no longer be able to perform their contractual obligations towards customers or suppliers**; or
- ✦ **be faced with contracting parties who are unable to perform all or part of their contractual obligations**.

Enterprises facing such situations will need to **review their existing commercial contracts** in order to react appropriately and in due time, with a view, when possible, to:

- ✦ **avoid breaching their obligations and incurring potential liability**;
- ✦ **mitigate their losses**;
- ✦ **suspend or terminate the relevant agreements**;
- ✦ **enforce their rights against business partners facing difficulties**.

Each situation needs to be assessed on a case-by-case basis, based on the terms of the applicable contract and the factual situation of each party to the agreement and of the circumstances surrounding the performance of the contract.

Belgian law does not provide for a “one size fits all” solution to events such as the current COVID-19 pandemic.

APPLICABLE LAW AND JURISDICTIONS

You first need to determine what is the law applicable to the contract, as there are relevant differences between the legal systems, even within Europe, for example with respect to hardship (see below).

Also, the way the courts may consider the implication of the COVID-19 pandemic may vary from one country to another.

FORCE MAJEURE

Under Belgian law, force majeure allows a party in breach of its contractual obligations to escape contractual liability towards its creditor and obtain the suspension or the termination of the relevant obligation and, as a consequence, of the whole contract.

For an event to qualify as force majeure, such event must be insurmountable (i.e. resulting in an impossibility to perform the contractual obligation), unforeseeable and exterior to the debtor of the contractual obligations (i.e. not being the result of a fault on the part of the debtor).

Although one may think that, based on the above-mentioned criteria, the COVID-19 situation and the resulting measures immediately qualify as a force majeure event, **the legal reality may be different**, notably as:

- ✦ when assessing the impossibility to perform its contractual obligations, the debtor may be under the obligation to implement alternative measures (e.g. using alternative suppliers);
- ✦ depending on the date of the conclusion of the contract, the current situation may have been foreseeable, to a certain extent;
- ✦ certain types of obligations (typically, cash payments) may be considered as not being affected by a force majeure event, the parties then not being released from such obligations.

Enterprises active in sectors for which closure measures are imposed by the public authorities may be better positioned to invoke the mandatory government measures as a force majeure event, in this case based on the decision of the authority ("fait du Prince") rather than on the basis of the epidemic itself. Again, this will need to be assessed on a case by case basis.

For enterprises willing to invoke force majeure with respect to all or part of their contracts, it is paramount to carefully review the relevant agreements. Indeed:

- ✦ force majeure must be notified immediately to the other party; due to its extraordinary nature and the effect it has on the contract. Failing to do so may undermine the capacity to validly invoke force majeure at a later stage;
- ✦ a force majeure clause may exist in certain contracts, with specific notification procedures and conditions to be observed;
- ✦ in the absence of a specific clause and if force majeure cannot be validly invoked under the relevant contract, the suspension of the performance of its obligations by a party will constitute a *breach of contract*, possibly resulting in the termination of the contract, the payment of indemnities or of interest;
- ✦ declaring force majeure under an agreement may also have undesirable effects, as agreements often provide that if the force majeure event lasts for a certain period of time, specific termination rights become available.

As shown above, the decision to invoke force majeure under a contract must be carefully assessed, both legally and commercially, also taking into consideration the impact of such a decision for the business in the short and long term.

HARDSHIP

The theory of hardship, which would allow to renegotiate the terms of the contract if its economy is substantially modified by an unforeseeable event, is in principle not currently part of Belgian law (as opposed to certain other legal systems such as Italy or France). However, depending on the circumstances, similar results can be obtained on the basis of a flexible application of the force majeure concept, the prohibition of abuse of rights and the obligation to perform the contract in good faith. The need to take the situation of the contracting party into account can also depend on the nature of the agreement.

The parties can regulate in their contract the consequence of a hardship event and the existence of a "hardship" clause must in any event be verified in each contract and, if as the case may be, activated as soon as possible.

CONTRACTUAL FREEDOM

The parties are free to modulate the conditions and effects of the occurrence of force majeure event or a change in circumstances in their contract.

Clauses organizing the consequences of a force majeure (or hardship) event often provide for strict notification procedures and conditions to be met in order for force majeure to be validly invoked.

Such clauses may include a list of events qualified as force majeure (or hardship) by the parties (fire, flood, tornado, war, etc.), which can be exhaustive or non-exhaustive. Interpretation of the clause may be needed if epidemics are not listed as a force majeure (or hardship) event.

The party that is the victim of an event of force majeure (or of hardship) will have to carefully observe the terms and notification procedure provided in the contract in order to notify the other party of the occurrence of such an event. Failure to act on a timely basis and in accordance with the terms of the relevant contract may lead to the party victim of force majeure (or of hardship) not being able to validly invoke the clause against the other contracting parties or to other negative consequences.

For the beneficiary of the obligation, it will be necessary to verify whether the conditions provided in the contract have been respected and if the consequences of the COVID-19 epidemic, as may be invoked by the counterparty, effectively qualify as a valid force majeure (or hardship) event.

Review of the contracts, of the factual situation of each party and of the circumstances surrounding the performance of the contract will again be key.

IN A NUTSHELL: KEY ACTIONS WITH RESPECT TO CONTRACTS

✦ **Thorough legal review of the contracts is needed in order to identify whether force majeure or hardship clauses are provided, and to determine if the conditions to invoke such clauses are met in practice:**

- how is the clause drafted and what are the conditions to be able to invoke force majeure or hardship?
- are there specific notification procedures and terms to be observed in order to validly invoke the clause?
- does the current COVID-19 situation, when assessed based on the contract and the circumstances surrounding the performance of the contract, effectively allow to trigger the application of the clause?

✦ **The impact of invoking such clauses must be assessed from a commercial and legal perspective, not only in the short term but also in the long term:**

- what are the consequences of invoking such a clause: suspension of all or part of the contractual obligations or termination of the contract?
- what are the consequences if the counterparty challenges the decision to invoke such clauses: contractual breach, damages or penalties, termination of the contract, etc. - review of the dispute resolutions clauses will be necessary, to anticipate potential court proceedings (what type of proceedings, their anticipated duration and costs, etc.)?
- are there reasonable alternatives to the application of the clause and is there a duty to mitigate (e.g., finding alternative suppliers, taking temporary measures to limit losses, etc.)?
- what is the impact of the potential termination of a contract on the business as a whole and should long term perspectives command to act differently?

- ✦ **Communication with counterparties is recommended in order to understand the difficulties they may be facing and the impact it will have, in the short term, on the performance of the contractual obligations, in order to avoid abuse of right to be invoked if the contracts are abruptly terminated or suspended.**

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If you are confronted with difficulties related to the COVID-19 epidemic and you require legal assistance, feel free to contact us.

Strelia has set up a dedicated team to help its clients deal with the various legal challenges related to the COVID-19 situation.

Please contact your usual point of contact or:

- ✦ **with respect to employment issues:** herman.craeninckx@strelia.com or pauline.vanparys@strelia.com
- ✦ **with respect to commercial and corporate issues :** laurent.verhavert@strelia.com gaetano.jannone@strelia.com or camille.cornil@strelia.com
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