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COVID-19 AND FORCE MAJEUR IN THE NETHERLANDS

Yvette Borrius
Heleen Biesheuvel
Tom Janse

The Covid-19 outbreak and measures taken by the Dutch government to contain the same, have led to unprecedented business disruptions for companies. The pandemic and the measures taken, may also have a significant impact on commercial contracts. This document aims to provide a high level overview on force majeure and other potential remedies available in the Netherlands.

Force majeure

Under Dutch contract law, parties to a commercial contract are entitled to specific performance of the obligations arising from such contract; if a contracting party does not fulfil such obligations, the other party may claim specific performance. In addition, the other party is liable for damages resulting from the breach, unless the breach cannot be attributed to it (Article 6:74 Dutch Civil Code ('DCC')). A breach is not attributable when it is the result of force majeure (*overmacht*). A successful recourse to force majeure may (temporarily) release a party from its contractual obligations and its liability for damages.

The Dutch statutory rules on force majeure are laid down in Article 6:75 DCC. Parties are, however, free to include force majeure clauses in commercial contracts. Such contractual clause may deviate from, supplement or even exclude the statutory regime.

When invoking force majeure, it should be taken into account that the same does not prevent the other party (i.e. a creditor) from suspending its own obligations and/or setting aside the agreement in whole or in part following a breach of the debtor.

Force majeure – contractual clauses

Many commercial contracts include a force majeure clause, which generally sets out the events that qualify as force majeure and the consequences thereof. Whether a particular force majeure clause applies and can be relied on as a result of the Covid-19 outbreak, will therefore depend on the content of a specific clause.

The content of (clauses in) (commercial) contracts, including force majeure clauses, governed by Dutch law, is determined through interpretation. In interpreting clauses significance is given to the meaning of the wording, however, it remains decisive what meaning the parties could reasonably attach to the clause in the particular circumstances and what they could reasonably expect from each other in that respect.

Whether the Covid-19 crisis or the measures taken in relation thereto trigger a contractual force majeure clause and, if so, the consequences thereof, will depend on the specific circumstances of a particular case.

Force majeure – statutory framework

The threshold for successfully invoking force majeure is deemed to be rather high. According to Article 6:75 DCC, a party may invoke force majeure in the event the failure in performance is not due to his fault or not for his account pursuant to the law, a legal act or generally accepted principles. With respect to the latter, common and/or sector specific opinions regarding risk distribution may be a relevant factor to take into account.

In general, unforeseen Covid-19 measures issued by a government (such as an export ban or lock-down) that prevent a party from performing its obligations under a commercial contract could be considered examples of circumstances that justify invoking Article 6:75 DCC.

Other remedies

Besides force majeure, other legal remedies under Dutch contract law may be available for a party to modify or evade its contractual obligations. While not exhaustive, the following remedies are discussed: (i) unforeseen circumstances, (ii) reasonableness and fairness, and (iii) material adverse change or material adverse effect reasonableness and fairness.

Unforeseen circumstances

A party to a contract may request the Dutch court to modify (the effects of) a contract or to set a contract aside in whole or in part on the basis of unforeseen circumstances (*onvoorziene omstandigheden*) of such nature that the other party, according to standards of reasonableness and fairness, may not expect the contract to be maintained in unmodified form (Article 6:258 DCC).

For the purpose of this remedy, a particular event is considered an unforeseen circumstance if the parties have not, either explicitly or implicitly, incorporated the occurrence of said event in the contract. It is not relevant whether the circumstances were *foreseeable* by the parties at the time of concluding the agreement, but whether the parties have contractually envisaged the potential occurrence or event. Circumstances will not be considered unforeseen if they already occurred at the time the agreement was entered into.

The bar for invoking this remedy successfully is (again) rather high; courts exercise restraint when requested to apply it. By way of illustration: the financial crisis in 2008 was generally considered an 'ordinary' economic risk. However, there seems to be a general expectation among scholars that the Covid-19 crisis and its consequences are likely to qualify as an unforeseen circumstance (provided the contract was entered into before approximately March 2020).

As Article 6:258 DCC concerns Dutch mandatory law, parties cannot derogate from it by contract.

Reasonableness and fairness

As a general principle under Dutch contract law, contracting parties must treat each other in accordance with the standards of reasonableness and fairness (*redelijkheid en billijkheid*). This principle is of importance when interpreting contractual clauses and may entail supplementary rights and duties of, that have not been expressly agreed between the parties (the "additional effect", Article 6:248(1) DCC). In addition, the standards of reasonableness and fairness may entail that that, under the circumstances, certain contractual provisions cannot be relied on (the "restrictive effect", Article 6:248(2) DCC).

In the context of the Covid-19 crisis, the principle of reasonableness and fairness could particularly affect the consequences of a contractual breach. For instance, it could entail that the parties to a contract are bound to certain obligations that are not (explicitly) provided for in the text of the agreement or that they are under an obligation to renegotiate the terms of their agreement. Furthermore, it could (temporarily) restrict or exclude a creditor's right to claim specific performance or to rely on certain contractual provisions (such as penalty clauses). We do note that the *restrictive* effect is only applied in exceptional cases and is therefore used sparingly by Dutch courts.

Material adverse change or material adverse effect

In particular in the context of Mergers & Acquisitions, parties to a contract may include a material adverse change ("MAC") or material adverse effect ("MAE") clause. Such clauses are typically included in Share Purchase Agreements as a condition precedent or as a seller's warranty. They aim to allocate the risks if a material adverse change / effect occurs between signing and closing of the transaction.

Whether the Covid-19 crisis and its effects qualify as a MAC or MAE will depend on the wording of such clause and, as described above, on the meaning the parties could have reasonably attached to it. Consequently, a case-by-case analysis is required.