



Coronavirus & Contracts

by Russell Advocaten



COVID-19 puts contracts to the test

A supplier is unable to fulfil its obligations as a result of measures taken, goods or services supplied are of no use to the buyer anymore, a debtor encounters payment problems; all due to COVID-19. Can parties rely on force majeure?

Definitions through Europe

Some events, causing a contracting party to fail to perform, qualify as a force majeure event. Typical force majeure events are amongst others natural disasters, earthquakes and war.

Several legal systems in Europe have a specific legal definition of force majeure. These definitions may differ per country. To qualify as force majeure, the event usually has to be: 1) causing a contracting party to fail to perform and 2) beyond the control of the party invoking force majeure. In some jurisdictions there are additional or slightly different requirements, such as the requirement that the event was unforeseeable or performing has become impossible. In general, the threshold is high and any negligence by a party will exclude its application.

In the Netherlands, the concept is set out in the Dutch Civil Code. Force majeure under Dutch law requires that the non-performance is not attributable to the debtor pursuant to the law, a legal act or the relevant standards.



Q&A Coronavirus

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Contractual arrangements

Even if a definition is laid down in the law, parties can nevertheless include a force majeure clause in their contracts, putting aside or deviating from the statutory provisions. Force majeure clauses can vary significantly. It may be a list of examples of force majeure events, an exhaustive list of such events or exclude certain types of force majeure events.

If parties have included a force majeure clause in their contract, the exact language of this arrangement becomes relevant. However, courts in Europe generally will seek to determine the intention of the parties at the time of drafting the force majeure clause and what parties reasonably could have understood that contractual language to mean. The interpretation and application of force majeure clauses by courts is usually made on a case-by-case basis and depends heavily on the wording of the contractual clause under consideration and the specific facts of the case.

Reasonableness and fairness, and unforeseen circumstances

Under Dutch law, the execution of contracts is at all times governed by principles of reasonableness and fairness. According to these principles, it may be unreasonable to expect full performance under the contract in case of so-called 'unforeseen circumstances'. Unforeseen circumstances are circumstances that parties did not take into account in their contract. In Europe, a renegotiation obligation in such situation is not unusual. If that does not have a desired outcome, contracting parties may go to court to request permission to alter the subject contract. Even though this is a very high threshold, COVID-19 may qualify as a circumstance that meets this threshold.

FAQ

1. What is the difference between force majeure and unforeseen circumstances in the Netherlands?

In case of a successful appeal on force majeure, a claim by the non-breaching party for specific performances or damages will be rejected. The non-breaching party may still dissolve or set aside the contract and/or suspend its obligations.

In case of an appeal on unforeseen circumstances the Dutch court is involved. The court may (retroactively) partly or wholly terminate the contract, modify the effects of a contract, or set these aside, provided that these unforeseen circumstances are of such a nature that the other party, according to standards of reasonableness and fairness, may not expect the contract to be maintained in unmodified form.



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Also, parties may contractually extend or limit the circumstances giving rise to force majeure. The right to request a court to amend or terminate the contract as a result of unforeseen circumstances cannot be set aside contractually.

2. Do COVID-19 and its effects qualify as force majeure according to the Dutch law?

Possibly. COVID-19 does present a unique set of circumstances which could justify a force majeure defense due to its unusual nature, the global scale and the unpredictability of the outbreak. However, the application of force majeure will always depend on a case-by-case analysis of the facts and the application and interpretation of a contract between parties.

3. Do COVID-19 and its effects qualify as an unforeseen circumstance according to the Dutch law?

Possibly. The question whether the COVID-19 outbreak qualifies as unforeseen circumstance depends amongst others on the interpretation of the contract and when the contract was concluded. Key is whether the parties have taken the risk of a pandemic and the effects into account in their contract.

4. What is the view of the Courts in the Netherlands when it comes to invoking force majeure or unforeseen circumstances and COVID-19?

On the 29th of April the Netherlands Commercial Court ruled that the COVID-19 outbreak may qualify as an unforeseen circumstance. However, based on to the specific circumstances of this case, according to standards of reasonableness and fairness, the Commercial Court ruled that the arrangements had to be fulfilled as agreed on in the contract. This decision can be seen as a harbinger of how invoking unforeseen circumstances due to COVID-19 will turn out.