COVID-19: FORCE MAJEURE AND HARDSHIP IN BELGIAN B2B CONTRACTS

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By: Jeroen Smets, Patrice Corbiau, Charlotte Stynen

In the light of the current COVID-19 crisis, the performance of certain business contracts can become challenging or even impossible. Numerous companies see themselves forced to renegotiate, adjust and, in worst-case scenarios, terminate their business contracts in the light of the exceptional circumstances they currently face.

Below, we address the legal basis of such measures according to Belgian law. More specifically, we analyse the concepts of force majeure and hardship, and assess what can be done when a contracting party finds it impossible to perform its obligations under a contract or is confronted with a counterparty invoking such impossibility. This supplements the significant analysis our K&L Gates colleagues from around the world have done on similar issues. Our team is actively assisting clients in analysing and contractual provisions and developing a strategy to engage commercial counterparties on these issues.

FORCE MAJEURE

Concept

Force majeure is generally defined as an unforeseeable and insurmountable circumstance beyond the party's control that renders the further performance of a contract impossible.

The so-called "acts of God" (natural occurrences without the interference of human agency) come to mind, such as earthquakes, lightning, hurricanes, epidemics, exceptional drought, etc. Acts provoked by humans such as strikes, war, and government decisions ("le fait du Prince") can also constitute force majeure in certain cases. Both COVID-19, that might be considered to be an act of God, and the measures currently taken by governments to contain the spread of the pandemic, that can be considered as a "fait du Prince", can thus be qualified as events of force majeure, provided that their impact on the performance of a particular contract can be proven.

Indeed, it should be proven that the event prevents the performance of the contract, for example by the impossibility to export supplies out of a country that has imposed export restrictions as a reaction to COVID-19.

Interpretation

The interpretation of the concept of force majeure can be challenging and, in case the contract parties do not agree on its occurrence, it is left to the courts and tribunals to decide if the legal conditions are fulfilled.

Some courts, including the Court of Cassation, take a strict approach, requiring proof of the event qualifying as force majeure, as well as its insurmountable and unavoidable character. Certain case law takes a more lenient approach, by taking into account the level of expertise and precision that is expected from a contracting party in

order to obtain a certain result. Some courts go as far as assimilating the absence of proven mistake in the performance of a contract, where the promised result was not achieved, to the occurrence of force majeure.

Another point of discussion is whether the event should render the performance of the contract completely impossible or only reasonably impossible. Those who defend the first stance (complete impossibility) only take into account material or legal reasons, such as the destruction of a good to be delivered by a natural disaster or an interdiction by the government to export certain goods to be delivered. Adherents of the second milder stance state that practical and human considerations, such as the financial situation or the health of the concerned party, should equally be taken into account.

Generally, there seems to be an evolution in doctrine and case law towards a milder interpretation of the force majeure concept with regard to its capacity to render obligations of the parties impossible.

Legal Consequences

Regarding the consequences of force majeure, a distinction should be made according to the temporary or the permanent nature of the situation:

- If the event only temporarily hinders the performance of the contract, the obligation to perform is suspended from the moment the force majeure situation arises and resumes as soon as the execution becomes possible;
- If the event is of a permanent nature, the debtor is relieved of its contractual obligations and/or compensation.

As a general rule, in reciprocal contracts, the obligation of the other party is also cancelled or suspended. The contracting party that is unable to perform certain services for cause of force majeure can therefore not claim any payment by the other party for such services.

An exception to this rule is made for contracts that involve the transfer of ownership of a particular item. In such contracts ownership and risk are normally transferred at the moment the contract is concluded, even if delivery of the item does not take place right away. This means that, if delivery becomes impossible (for example if the item is destroyed), the contracting party that was obliged to deliver the item no longer has to perform its contractual obligation. The other party, on the other hand, will still be held liable to pay the price of the item, which had already become its property and for which it already bears the risk.

Exceptions to both the general rule and the exception in case of the transfer of ownership can be provided for in the contract, as further explained below. Note that contractual derogations to the automatic transfer of ownership and risk are very common, for example, through the application of incoterms.

Note that, regarding the delivery of goods, force majeure will generally be successfully invoked for the delivery of goods that are particular or one of a kind, as opposed to replaceable goods. If it is impossible for a contracting party to deliver a replaceable good, nothing excuses this party from obtaining a replacement and thus still perform its obligations. The obligation to pay a sum of money, for example, will generally not be considered to be impeded by force majeure. Rare exceptions are made to this rule, as confirmed by the Court of Cassation, for example if a government order forbids certain payments.

Contractual Arrangements

As stated above, the interpretation of the concept of force majeure can lead to considerable doubt if its occurrence is to be determined by courts. Furthermore, its consequences are, in most cases, governed by non-mandatory legal provisions, so that it is possible to derogate from these rules or to further elaborate them in a contract.

Many business contracts list the specific cases that will be considered as force majeure in the light of their contractual relationship. These lists, that are usually non-exhaustive, frequently mention strikes, lockouts, acts of God, riots, acts of war and terrorism, embargoes, boycotts, changes in governmental regulations, epidemics, fire, communication line failures, power failures and natural disasters.

With regard to the consequences of force majeure, several derogations or specifications to the existing legal regime can be provided for in the contract. For example, the risk of non-performance can be shifted by providing that, in case of suspension or cancellation due to force majeure, the other party's obligations (such as payment obligations) will remain unaltered. In contracts regarding the transfer of ownership, clauses shifting the moment of transfer of ownership, risk, or both, are frequent (frequently through incoterms). Some clauses also foresee that in case of suspension of one party's obligations, the total duration of the contract will be prolonged by the time of this suspension.

Well-drafted force majeure clauses contain information and best efforts obligations for the party that is confronted with a case of force majeure. Such clauses detail when and how the occurrence of the event should be notified to the other party and state that the affected party should use its best efforts to remedy this situation as soon as possible.

HARDSHIP

Concept

Hardship is generally defined as a circumstance, that is unforeseeable at the moment of the conclusion of a contract, that is beyond the party's control and that fundamentally alters the equilibrium of the contract, resulting in an excessive burden being placed on one of the parties involved. The event that is considered hardship, however, does not render the performance of the contract impossible for the affected party, as is the case with force majeure.

Contrary to the concept of force majeure, hardship is not recognized in the current Belgian legislation as a valid reason to terminate or renegotiate business contracts, except for some specific legal exceptions in the matters of, inter alia, public procurement, insolvency and lease agreements.

This will change with the entry into force of the new Belgian Civil Law Code, of which the current draft contains an article 5.77 introducing the concept of hardship into Belgian law. The new article states, after repeating the general principle that each party must comply with its commitments, that a contracting party may ask its counterparty to renegotiate the contract with a view to its adjustment or termination if (i) a change of circumstances makes the performance of the contract excessively onerous, to such an extent that its implementation cannot reasonably be demanded anymore, (ii) the aforementioned change was unforeseeable at the moment the contract was concluded and (iii) the aforementioned change is not imputable to the affected party.

In the event the renegotiation of the contract fails, the contract can be submitted to the court, which is allowed to adjust the contract in order to make it compatible with what the parties would have reasonably agreed upon at the time of the conclusion of the contract if they had taken into account the change in circumstances. The court can equally decide to terminate the contract, in whole or in part.

The date of entry into force of this part of the Civil Law Code has not yet been determined. It can, however, be expected that courts will draw some inspiration from the new regime, for example, in cases where a hardship clause in a contract allows for hardship to be invoked without clearly stating the definition or the consequences of hardship in the contract.

Interpretation

So far, the Court of Cassation has always rejected the concept of implied hardship, and was followed by most Belgian courts.

According to the Court of Cassation, the only circumstances that allow for a contract to be adjusted are: ,

- The impossibility of the performance of the contract (force majeure);
- The existence of a hardship clause in the contract; or
- The existence of an abuse of rights.

The above conditions have led certain authors and courts to conclude that the theory of abuse of rights can allow, in certain cases, for an implicit application of the concept of hardship.

Another indirect application of hardship has been made by the Court of Cassation in two cases where the United Nations Convention on Contracts for the International Sale of Goods (hereinafter the Vienna Sales Convention) was applicable to the contract.

Article 79 of the Vienna Sales Convention stipulates that a party is not liable for a failure to perform any of its obligations if it proves that the failure was due to an impediment beyond its control and that it 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.

According to the Court of Cassation, changed circumstances which could have not reasonably been foreseen when the contract was concluded, and which are manifestly such as to disproportionately increase the burden of performance of the contract, may, in certain circumstances, constitute an impediment within the meaning of this provision of the Vienna Sales Convention. With this decision, the Court recognizes that article 79 of the Vienna Sales Convention not only covers events of force majeure, but also events of hardship.

Since the abovementioned decisions, the Court of Cassation has opened the door to an application of the hardship concept in cases where the Vienna Sales Convention is applicable. This convention applies to international B2B contracts regarding the sale of goods, when the parties are located in contracting states (such as Belgium), in so far as its application is not excluded by the contract.

Based on the abovementioned case law, it can be argued that hardship, although not recognised as such, still has some implicit applications in Belgian law through the concept of abuse of rights and the application of the Vienna Sales Convention.

Legal Consequences

As a general rule, in the current state of the legislation, hardship can only be invoked for contracts that specifically contain a hardship clause and that, without such a clause, parties are not entitled to suspend, cancel or renegotiate a contract based on the occurrence of hardship and that the parties will be held to perform the contract without any alterations.

As mentioned above, however, the abuse of rights theory and the Vienna Sales Convention allow, in some cases, for the court to make certain adjustments to the contract. If an abuse of rights exists, the court may impose a reasonable exercise of a party's contractual rights and thus, implicitly, makes adjustments to the contract. In case article 79 of the Vienna Sales Convention applies, this article allows for an exemption for the performance of the contract for the period during which the impediment exists.

Contractual Arrangements

The fact that the concept of hardship is so far not recognized under Belgian law does not prevent the parties from validly including a clause in their contract regulating the event that unforeseen circumstances upset the contractual balance.

As is the case with force majeure, hardship clauses often include both a general definition as well as a list of circumstances that should be considered hardship, such as changes in legislation, changing product types and/or product mix for processing, changing non-wage labour costs and changing fuel prices that impact a substantial element of one of the parties' costs.

The consequence of hardship is usually an obligation for the parties to renegotiate the contract. If no agreement can be found, some clauses offer the possibility for the parties either to delegate the decision to a third party or to terminate the contract, taking into account a certain notice period.

Well-drafted hardship clauses also contain a notification obligation and a term for such notification.

APPLICATION OF FORCE MAJEURE AND HARDSHIP IN THE CONTEXT OF COVID-19

Some effects of the COVID-19 outbreak are obvious, such as, travel restrictions, lockdowns, quarantines, and shortages of medical and safety equipment. However, their immediate impact on contracts, such as the ability to pay, deploy resources on time and meet agreed service levels , and the amount of increased costs may be less so.

Force Majeure

In order to determine if an event is considered as force majeure, it has to satisfy all the legal components. The event has to be insurmountable, unforeseeable and beyond the party's control. This means that all alternatives that might allow for the performance of the contract, no matter how onerous or complicated, need to be envisaged and tested before force majeure is invoked, and the existence of force majeure will be judged differently depending if the contract was concluded several months or even years ago or if it was concluded after the worldwide outbreak of COVID-19, when the seriousness of the pandemic was already obvious (the official qualification by the WHO of COVID-19 as a pandemic on 11 March 2020 might be a key date in this respect).

In the light of COVID-19 , two possible causes of force majeure come to mind. First, there is the pandemic itself, which can, for example, impact factories whose employees are ill or quarantined, causing a failure in the production of goods. Secondly, the government measures that are currently being taken in numerous countries, including prohibitions of gatherings as well as import and export restrictions, could be considered as a "fait du Prince".

The abovementioned consequences will generally justify a suspension of the performance of the contract. Cancellations can be envisaged for short-term contracts, for example those whose duration only covers a few months.

In any case, each party that considers itself to be in a situation of force majeure, should immediately inform its contracting party of this circumstance, along with a detailed description of impact of the events as well as an assessment as to whether it entails a suspension or a cancellation of the contract. In case of a suspension, the party needs to indicate which measures are being taken to remedy the situation as fast as possible. As soon as the event has ceased to exist or impact the performance of the contract, this should equally be notified to the contracting party.

Except for contracts regarding the delivery of a particular (non-replaceable) good, and only in case there are no contractual provisions derogating from the general regime, the occurrence of force majeure will equally liberate the other party from the performance of its obligations under the contract. This means that, even in case a contracting party successfully invokes a case of force majeure, the economic risk of the situation will, in most cases, still be assumed by the concerned party, who will not be held to perform its obligations, but not obtain any payment either.

If the contract contains a force majeure clause, it is essential to analyse any possible derogations from the general legal regime (e.g. regarding transfer of risk and ownership, as well as the consequences for the obligations of the counterparty) and to apply specific procedures that might be detailed in this clause regarding notification and best efforts obligations.

Hardship

There are circumstances that are both unforeseeable at the time of the conclusion of the contract and beyond the affected party's control, but not insurmountable.

For example, companies that are currently unable to obtain products from their usual suppliers and are forced to turn to other more expensive suppliers in order to fulfil their own contractual obligations, will find themselves in a position where the performance of the contract is not impossible, but considerably more onerous and maybe even causing considerable losses.

In that case, hardship can be invoked if the contract allows for it, and taking into account the conditions and consequences of hardship as governed by the applicable contractual clause, which will, in most cases, give rise to a renegotiation of the contract.

As mentioned above, if the Vienna Sales Convention applies to the contract, the event might allow for an exemption for the performance of the contract for the period during which the impediment exists.

A final option would be to assess whether or not the demand by one's counterparty to perform the contract constitutes an abuse of rights, in which case a court could also impose certain nuances to the contract.

In any case, the affected party, who intends to invoke hardship, should immediately notify the other party of the circumstances, together with a detailed description of their impact on the performance of the contract.

Consensual Derogations from the Legal Regime or the Existing Contract

In these exceptional times, it is the intention of most commercial partners to maintain solid relationships and to adopt, as far as possible, a flexible attitude towards contracting parties faced with the many challenges of COVID-19.

Since the general legal regime governing force majeure is not considered mandatory and hardship is currently not governed by Belgian law, the existence and consequences of both these concepts can be mutually agreed upon. This can be done either by way of a contractual clause, as described above, or by the conclusion of a mutual agreement post facto in the light of specific events.

A contracting party faced with hardship, where no hardship clause is provided for in the contract, could for example rely on the goodwill of its counterparty to renegotiate the contract. It is also possible to derogate from existing contractual clauses if the parties agree to do so.

It goes without saying that such agreements should be duly formalized in writing (e-signatures being recommended).

If you have any questions about the impact of COVID-19 on your B2B contracts, feel free to contact our K&L Gates Brussels corporate team.

KEY CONTACTS

JEROEN SMETS
PARTNER

BRUSSELS
+32.2.336.1918
JEROEN.SMETS@KLGATES.COM

PATRICE CORBIAU
PARTNER

BRUSSELS
+32.2.336.1902
PATRICE.CORBIAU@KLGATES.COM

