

This client briefing provides a short description of important points to take into account when considering whether to invoke a *force majeure* event resulting from the coronavirus disease 2019 (COVID-19) crisis in respect of a Belgian law-governed agreement.

### 1. Important Points to Be Considered

A party who believes that they are affected by an event that qualifies as a case of *force majeure* will need to take into account the following when considering whether to invoke a *force majeure* event:

- The current COVID-19 crisis does not necessarily qualify as a *force majeure* event
- It is necessary for an affected party to check that the legal (or contractual) conditions for invoking a *force majeure* event are fulfilled (these are briefly set forth below)
- If a party is affected by a *force majeure* event, it must quickly notify the other party thereof (or it may lose the benefit thereof)
- An affected party will need to use its reasonable efforts to mitigate the consequences of the *force majeure* event
- An affected party should consider the benefits and disadvantages of invoking a *force majeure* event (including the possibility for the other party to suspend the performance of its own obligations and/or for the other party to claim that the *force majeure* event has led to the termination of the agreement)

### 2. General Principles vs. Contractual Provisions

*Force majeure* is a general principle under Belgian law, which, in principle, applies to all contracts that are governed by Belgian law, even if they do not include any express *force majeure* provisions.

However, the parties to an agreement may deviate from the general principles applying to *force majeure* under Belgian law or even exclude the concept altogether in their agreement.

A party wishing to invoke a *force majeure* event will, therefore, need to consider whether the relevant contractual provisions deviate from the general Belgian law principles.

### 3. Conditions of Force Majeure

COVID-19 does not automatically qualify as a *force majeure* event allowing a party to suspend its obligations under a contract.

An affected party will need to ensure that the following conditions are satisfied:

- **An unforeseen and inevitable event** – There must be an unforeseen and inevitable circumstance, i.e. the affected party could not have taken the event into account when entering into the contract, nor could they reasonably prevent or avoid the event (or its consequences).

While it is safe to say that the COVID-19 crisis and the resulting government measures would indeed satisfy this first condition, this would not be the case, for instance, if the agreement had been entered into at a stage where such events had become foreseeable because the virus had already clearly started to spread in Belgium and the first governmental measures had been announced.

In Belgium, we would expect that this would be not long before 13 March 2020, being the date on which the lockdown was announced.

For new agreements, this difficulty can be avoided by specifically qualifying the current COVID-19 crisis as a *force majeure* event in the agreement, and this would be recommendable if a party determines that the current circumstance may result in it being unable to perform its obligations under the agreement.

- **An event not attributable to the affected party** – This circumstance cannot be due to, or related to, the negligence of the affected party.

This condition should generally be satisfied given the nature of the epidemic. However, a case-by-case review is required to ensure there are no particular circumstances that result from the negligence of the affected party.

- **Impossibility to perform** – This circumstance must make the performance of the contractual obligation entirely impossible. While case law traditionally applied this test on an absolute basis, case law in recent years has gradually lowered the bar and accepts a normal, practical and reasonable impossibility. If, however, the event only makes the performance more difficult, *force majeure* will typically not be retained.

It should be noted that it will generally not be possible, under Belgian law, to invoke a *force majeure* event to suspend a payment obligation.

## 4. Notification of Force Majeure

A *force majeure* event must be notified as soon as possible by the affected party to the other party. A reasonable level of explanation of the *force majeure* event should be included in the *force majeure* notification.

The affected party should check the relevant agreement in order to ascertain whether there are any contractual provisions that govern the notification of a *force majeure* event that would need to be complied with.

## 5. Consequences of a Force Majeure Event

Under Belgian law, in the case of a *force majeure* event, the affected party is excused from performing the obligations that have become impossible to perform and is released from any liability in connection therewith. If the contractual obligations can still partly be performed, the affected party remains contractually bound to perform those (partial) obligations. The release will only apply during the period that the *force majeure* continues.

Please note that the other party to the agreement will be entitled to suspend the performance of its corresponding obligations under the agreement.

If the delay is such that performance no longer makes any sense, or would be unduly delayed given the expected duration of the *force majeure* event, or if it is not possible to determine the length of such delay, the *force majeure* event could lead to the termination of the agreement.

The affected party will, in any case, have to mitigate the damages stemming from the non-performance of the contractual obligations due to the *force majeure* event.

The affected party should check whether the agreement contains a *force majeure* clause that would exclude the consequences set forth above or include different consequences.

An affected party should consider these consequences when deciding whether it is in its interest to declare a *force majeure* event.

## Contacts



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