# Living-up to promises in Covid-19 Times

***Advocating Force Majeure, Hardship and other concepts***

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With the Covid-19 crisis, businessmen face all kinds of challenges in the performance of their contractual obligations. Undoubtedly, the variety of unforeseen events which may prevent performance, or which may substantially upset the equilibrium of the respective obligations of parties, has increased dramatically. Covid-19 and the governmental measures to combat the virus and its recent resurgence have hit businesses and the magnitude of the economic impact still needs to be delineated. It is even impossible to confine such impact in the near to long term future.

In this contribution, we focus on how to cope with this situation under Belgian law.

Entrepreneurs and their contract partners struggle with the following kind of situations:

1) Some commitments can simply no longer be carried out (in the agreed time frame). Examples: raw materials are not available, their production has been stopped, key contract partners went bankrupt, …
2) Others cannot be accomplished temporarily, and the future performance may be predictable to some extend or not at all. Examples: distribution of materials has been interrupted sine die, traffic limitations impede production and deliveries, …
3) Some commitments can undoubtably still be lived up to, but contractual compliance requires extraordinary costs and additional efforts that were never expected, let alone discussed, when the deal was negotiated. Business deals get out of balance and, if one party would insist upon the performance of the obligations by the other, the latter would suffer to an extend that he would never have accepted the obligation had he known that the circumstances would change so dramatically.

In an international context, parties often cover this kind of situations with appropriate clauses in their contract. But not everybody does.

Below we discuss the legal concepts that may apply under Belgian law in this kind of circumstances. They include force majeure, hardship (and abuse of rights). These concepts may be raised in the performance of an existing contract.

For those who are in the middle of negotiating a new deal, we add yet another concept, the so-called qualified disadvantage (*gekwalificeerde benadeling / lésion qualifiée*). This concept questions parties' behaviour at the time of the negotiation of a contract and it particularly focuses on negotiation in good faith and on the question whether one party took advantage from the economically weaker position of another party to impose an unbalanced contract? This concept may become quite important when negotiating new deals given the current crisis.

## Content

# A. FORCE MAJEURE

Most will have heard of 'force majeure'.

The Belgian legislator has never defined the concept and opted to have it clarified and interpreted by the courts on a case-by-case basis.

Courts require that two conditions are met:

i) The affected party must face an **insurmountable event** that makes it **impossible to perform its obligation**. There may be **no reasonable alternative** available. Case law tends to be flexible. It is often sufficient if the performance of the obligation is **reasonably impossible**, as opposed to absolutely impossible.

ii) The event must be **independent of any fault** of the affected party. This often means that the event must have been **unforeseeable or unavoidable**.

## Reasonable?

Needless to say, that the success of the party invoking force majeure will very much depend upon the assessment of the particular case at stake. For example, when it may be possible in theory to ship by plane a large quantity of luxury cars when shipment by sea (as agreed in the contract) is prevented, the force majeure argument may be successfully argued if the affected party can prove that shipment by air is not a reasonable way to overcome the impediment.

## The importance of a force majeure notice

Force majeure can be called upon even if parties have not expressly taken up a force majeure clause in their contract. However, a specific force majeure situation is never presumed. A concrete force majeure situation must be demonstrated by the affected party.

First, the party invoking force majeure should send a notice to the beneficiary of the obligation. If no notice mechanisms are contractually provided, the best thing to do is to send a registered letter.

Secondly, the argument of force majeure must be brought up with great care.

The force majeure notice is the reverse of a default notice sent by the beneficiary of the obligation meant as a last reminder that he expects the affected party to perform under the agreed contract. With his own force majeure notice, the affected party shows his commitment under the contract and informs the beneficiary of the situation and the impact for both parties. It is a clear signal of good faith, it shows professionalism. It should be more than an excuse for non-performing or late performing. The affected party bares the burden of proof and he should substantiate the existence of a force majeure situation. But the notice is more than that. It should be an offer to discuss the realism of expected performance, or the lack of it, and allow the beneficiary to find alternative solutions. It is a way to mitigate the damage at both sides.

The force majeure notice also allows the affected party to benefit from its effects. The notice will, if recognized by the other party or a judge or arbitrator, relieve the affected party from performance and possible penalty. The relief will only benefit the affected party from the date on which it has informed the other party (or an earlier date, if the force majeure situation prevented the affected party from informing the other party, provided that the affected party immediately informed the other party once it was able to). This should prevent a party from invoking the existence of an alleged force majeure event only when the other party claims non-performance of its obligations.

The force majeure notice has another practical role: the notice may contribute to the discovery of the force majeure situation and the party's awareness of it. Force majeure cannot be invoked if the affected party was already put on notice by the other party before the force majeure event occurred. A well substantiated force majeure notice timely sent to the other party will avoid a discussion on the appropriateness of the notice, or at least help to steer it properly.

## Temporary or final effects of force majeure

Force majeure may have a temporary or definitive effect on the performance of the obligation. If it only has a temporary effect, the affected party can suspend the performance of its obligation until the end of the force majeure. He will not be required to compensate the other party.

If the fulfilment of the obligation becomes definitively impossible or meaningless given the subject or nature of the agreement, the affected party will be fully released from the obligation. Again, no compensation will be due to the other party.

## Does the loss of the object of a deal equal force majeure?

The answer to that question will very much depend upon the specific circumstances of the transaction. Clearly, the fault by the debtor will never release him from the obligation to perform or to compensate the other party. But if the force majeure is the only cause for the loss of the very subject of a deal, the affected party will be released from its obligation. Example: if a gross seller loses half of his stock due to force majeure, he may claim to be released from his obligation if the stock contained an item that was essential to the deal (e.g., a specific numbered piano of a specific brand, manufactured in a particular year, using an exclusive kind of wood). However, if the deal did not cover a specific item but a rather general description, and he has immediate alternatives in the stock left or if he is able to obtain an alternative item elsewhere, the affected party will not be released from his obligation (e.g., a baby grand piano manufactured by Steinway & Sons, but with no specific details of the product).

A similar question raises when an agreement requires the personal involvement of a specific person (e.g., an attendance to a meeting, or the performance at an event – is it a specific person, because of his or her name and fame and experience and reputation, or is any qualified person with the same experience an acceptable alternative?). We think of an agreement requiring the in-person presence of an artist at an event that is rendered impossible due to lockdown measures imposed by the government.

### What's the impact on the obligations of the other party?

As a principle the beneficiary of an obligation must not perform his own obligation when confronted with an affected party. He will not have to deliver the agreed consideration, such as the payment of a price or, in the case of a barter, the delivery or performance of a specific good or service. However, much will depend upon the party's agreement. Subject to party's agreement to the contrary, in case of force majeure, advance payments made by the beneficiary of the obligation will need to be reimbursed.

The message is clear: detailed agreements on obligations and expectations, and a common understanding of what parties agree to cover in a force majeure clause, and what not, is the way to go.

A contract lapses when an essential condition of the contract disappears. So, an unambiguous agreement on what is key to the parties in the deal they both accepted, will help avoid discussions. And parties will be required to take into account legal provisions covering specific contracts. For example, in the sale of goods, the buyer is considered to bear the risk of losing the goods as from the transfer of ownership, even if the actual delivery has not (yet) been made. Parties may wish to expressly agree otherwise.

# B. HARDSHIP

Unlike force majeure, hardship does not require that it is impossible to perform an obligation. Rather, hardship typically occurs when **extraordinary and unforeseeable circumstances** complicate the fulfilment of the obligation to such extent that it **changes the balance of the contract**. The affected party will be able to perform obligations but, on the balance, that performance will require efforts with a result that the cost of the performance will be considerably higher than at the moment of the negotiated agreement.

Belgian Law does not (yet) recognize hardship as a general ground for suspension or termination of a contract. However, the concept is taken up in specific legislation (e.g., in relation to government contracts) and the Belgian Supreme Court rendered two decisions in favour of the application of hardship in the context of international sales of goods.

Lower courts tend to evolve towards a broader acceptance of hardship,

sometimes by applying related concepts such as an extensive interpretation of force majeure or the concept of **abuse of rights**. The concept of abuse of rights is based on the requirement to perform contracts in good faith. An affected party can call upon this principle when he can still perform a contractual obligation, but when it would be **unreasonable** to request performance due to the change of circumstances. This is the case when the harm caused to the affected party by the performance of the obligation is not in proportion to the other party's benefit.

Hardship has been taken up in the latest draft adapting the current Belgian Civil Code. The draft provides for a possibility to renegotiate an agreement in case of hardship.
It is recommended that business partners who are favourable towards the concept cover it in a specific clause in their contract, an exercise that will be even more difficult than drafting of a force majeure clause. The drafting will require the skills to differentiate factors that a committing party may never wish to share because of confidentiality reasons (e.g., the price of raw material used in a production process) from factors that the other party may be able to check and recognize as being allegedly impacted by specific circumstances (e.g., the cost of fuel because of an unexpected sudden increase of crude oil and the collapse of the dollar).

# C. QUALIFIED DISADVANTAGE

For contracts entered into during the Covid-19 crisis and that will be entered into in the near future, the concept of 'qualified disadvantage' (*gekwalificeerde benadeling / lésion qualifiée*) may require some attention. It is typically brought up in a claim based on tort. It requires several conditions: a manifest disparity between parties' obligations, a circumstance of inferiority on the part of one of the parties to the contract, and the abuse of the inferiority by the other party. The disadvantaged party may never have entered into the contract or it may have required different conditions, had it been aware of the full circumstances.

Clearly, this concept will require a serious substantiation and it is the claimant who will have the burden of proof. A successful call upon the concept will end into a dramatic result: the annulment of the contract or at least of a substantial part of it. The concept has not been taken up as a separate concept in Belgian law. Rather, it has been based on several legal grounds like culpa in contrahendo, abuse of right and violation of the obligation to act in good faith.

# D. BEST PRACTICES

Be conscious that an assessment of the impact of Covid-19 requires a party-specific and contract-specific analysis. You will need to perform a case-by-case analysis and you will need to learn from the past and look into the future.

Here are some suggestions:

## Screen your contracts

- Assess the risk that your obligations may be impacted. Ask the following questions:
    - Will you inevitably breach your contractual obligations?
    - Or will there be a delay in performance?
    - Do you have alternatives to offer?
- Assess the risk that your contracting partners may be affected. Ask the following questions and don't hesitate to ask the other party:
    - Will they definitely breach their contractual obligations?
    - Will there be a delay in their performance?
    - Do they have alternatives that you can live with?

## Contact your contracting partners

First

- Send a force majeure notice.
- Envisage a hardship notice.

or

- Send a default notice.

Second

- Talk to clarify if expectations can be fulfilled.
- Negotiate an alternative deal.

## Carefully draft contracts for new deals

- Force majeure is provided in the law which may make parties think they must not provide it expressly in the contract. But it is recommended they do and that they list possible situations that they qualify as force majeure to avoid discussions in case of default or late performance. It is also recommended to be specific as to the consequences and remedies that apply to a specific situation (like non-performance and late performance)

- Hardship is not provided in the law. It is recommended to expressly negotiate such a clause and try to be as specific as possible by adding concrete examples covered by the contract. Re-negotiation may be a specific remedy that parties wish to expressly provide in the contract.

- Avoid copying clauses from other contracts or from the internet. These do not always satisfy the actual needs of the parties. At a minimum, verify the quality of the text. Maybe, balanced and effective draft clauses prepared by professional organisations can be used as a basis for drafting a tailor-made clause.

  Remember when drafting a force majeure clause: the purpose is to find a compromise between the right of a party to be exonerated from its obligations when their fulfilment is prevented by unforeseeable events for which it is not responsible, and the right of the other party to obtain the performance of the contract. The best approach may be a general definition followed by a list of force majeure events that may best fit for the specific contract.

- Qualified disadvantage is based on different legal grounds, but it is generally recognized as a valuable concept. It requires parties to be transparent and obtain key information on each other and the circumstances before executing new contracts.

- It is particularly important to rethink the duration of contracts. We may all prefer long-term relationships, but it may be better for all parties to have a sound deal and attempt to renew it once or more, instead of being stuck to a party and strict conditions that ultimately may end up into unrealistic expectations, disputes and legal proceedings.

## In case of a persistent conflict

- Understand the best alternatives to a negotiated agreement.
- Think of Alternative Dispute Resolution like expedited arbitration, emergency arbitration and a full fletched arbitration.
- If really necessary, understand how effective court proceedings may be in these times, or not. Maybe the courts should only be asked to order temporary and conservative measures and arbitrators should be invited to rule on the merits and substantive issues.

## Check whether local temporary specific Covid-19 legislation impacts your contracts

- In response to the COVID-19 pandemic, the Belgian Government has taken specific (and often temporary) legal measures on numerous topics (e.g. regarding cultural events, package holidays, etc.). Parties must verify whether such measures apply to their contract. The measures may provide temporarily protections of weakened parties, despite other laws or contractual arrangements.
- By way of example, on April 24, 2020, the Belgian Government approved a royal decree to protect companies impacted by the COVID-19 pandemic: it granted a delay to pay outstanding debts.

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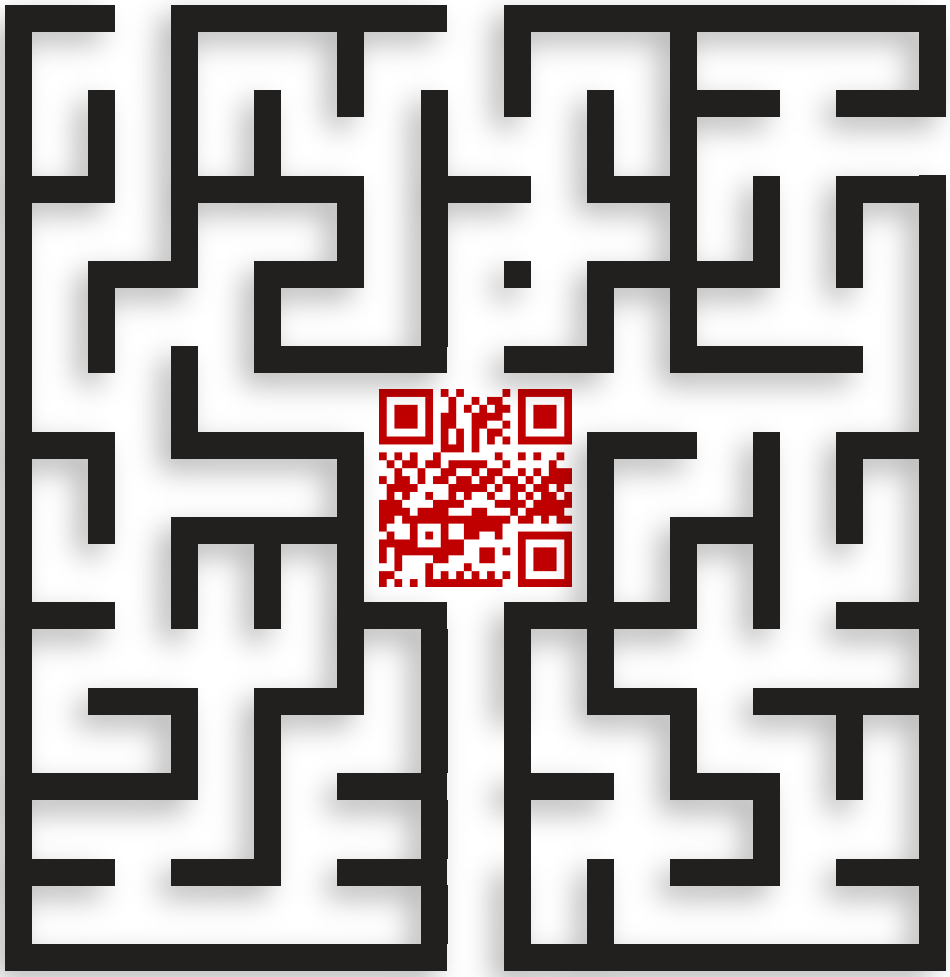

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