

Belgium: The Impact of Covid-19 on Commercial Contracts



Since the outbreak of Covid-19, a lot of very stringent measures have been taken by the governments and authorities in different countries all over the world, disrupting normal business. Many companies are not able to perform their contractual obligations under their contracts, temporarily or permanently. A lot of offices and businesses have been shut down due to regulations of public authorities.

What should your company do if it finds itself in the inability to perform its obligations under the contract, e.g. the impossibility to the deliver goods.

It is important to verify the applicable law to your contract. For sales contracts, also the applicability of the United Nations Convention on contracts for the International Sale of Goods of 11 April 1980 ("CISG") should be taken into account. Other international or bi-lateral treaties might apply.

In principle and as a general rule, the contracting party not performing will be liable for breach of contract. This liability could be lifted if the non performing party can prove "*force majeure*".

Hereunder you will find some practical guidelines when assessing if your company can rely on “force majeure”.

1. Contractual Provisions

Checking if your contract provides a “force majeure” clause is key. Such a clause typically specifies which events are considered to be force majeure events. The wording will be important to determine if the particular event falls within the scope of force majeure. The parties could have provided that e.g. government restrictions/measures, epidemics etc. are force majeure events.

Most contracts also stipulate how a party needs to invoke the force majeure clause, e.g. notification requirements to the other party.

2. Force Majeure under Belgian Law

When no force majeure clause is available and Belgian law applies to the contract, your company will have to rely on the rules of general contract law.

According to articles 1147-1148 of the Belgian Civil Code, the debtor of a contractual obligation will be liable to pay compensation if he is in breach, unless he can show that his breach is due to an external cause outside its control, hereafter referred to as “force majeure”.

The debtor who wants to invoke force majeure will have to demonstrate the following:

(1) that it is absolutely impossible (or at least reasonably impossible) to perform his obligations under the contract (the fact that it has become more difficult or more expensive is not sufficient) (e.g. *delivery of certain goods has become impossible due to government measures*);

(2) that the event was unforeseeable at the time the contract was concluded (*your contract should have been entered into in advance of the spread of Covid-19 and the media reporting it*); and

(3) the event that prevents the debtor from performing his obligations is not due to his actions and could not reasonably be avoided.

In case of force majeure, your company should notify the other contracting party in writing as soon as possible. Such a notification should explain the force majeure event as well as the consequences thereof.

3. Consequences of Force Majeure

In case the force majeure event is temporarily, the debtor will only be released to perform its obligations for the duration of the force majeure event and exempted from liability. The co-contractor will also be entitled to suspend his obligations under the contract too, e.g. *when goods can not be delivered temporarily, the other party can suspend its obligation to pay*.

Should the performance of the contractual obligations become permanently impossible, this will lead to the dissolution of the agreement.

Please note that there will not be automatically force majeure and that every situation should be assessed on a case by case basis.

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