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Contracts and Covid-19

Force majeure and other remedies under Dutch law

16 April 2020

Introduction

The Covid-19 crisis is having a major adverse effect on many existing contracts. Parties to supply, services, construction, credit, M&A or joint venture agreements may be faced with government measures, drops in demand, lack of resources, and other business disruptions affecting performance and the contract's objectives and rationale.

This note addresses the position of the parties in light of these circumstances under Dutch law. It discusses when a debtor may excuse itself from performance and/or seek suspension, amendment or termination of the contract, and on what legal grounds. It also discusses which actions a creditor could take in the face of such steps. Many companies will find themselves in both positions vis-à-vis different parties, as part of supply chains or otherwise.

We discuss general Dutch contract law only. Certain contracts are governed by specific statutory regimes (in connection with the Covid-19 crisis or otherwise). Employment and consumer contracts are obvious examples. Statutes and case law may also impose special duties of care, such as those to be observed by financial institutions towards their customers. Such special regimes should always also be taken into account but are not discussed here.

The applicability of the remedies discussed below will always depend on the circumstances of the case. Accordingly, this note does not constitute legal advice.

The terms 'creditor' and 'debtor' are used below not only in relation to monetary obligations but to all contractual obligations, including obligations to deliver goods or provide services.

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Remedies in the contract itself

Primacy of contractual arrangements

Under Dutch contract law, the principles of '*freedom of contract*' and '*pacta sunt servanda*' apply, albeit with some exceptions for small businesses and (especially) consumers. Accordingly, the provisions that have been agreed between the parties should always be the first port of call in any analysis: to what extent can they be deemed to deal with the current situation.

Relevant contractual provisions for assessing the position of a party that has been adversely affected by the Covid-19 crisis include: (a) the contract duration; (b) (early) termination and

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suspension provisions; (c) *force majeure* clauses (or provisions to the same effect, such as MAC, hardship and change of law clauses); (d) guarantees, indemnities and representations and warranties, and (e) limitation of liability and damages clauses. It should be assessed if and how such provisions apply to the present situation.

Interpretation (and supplementation) of contracts

As a starting point, the clear wording of the contract should be considered. Under Dutch contract law, however, contractual provisions are to be interpreted "*by the purpose that the parties to that agreement, in the given circumstances, could mutually reasonably have attached to the provisions and by what they could reasonably have expected from each other in that respect*", taking into account all specific circumstances of the case. The drafting history and the negotiations of the contract are, therefore, an important interpretative tool. Dutch law does not recognise the (common law) 'parol evidence rule'. The more contract terms are vague or ambiguous, or have to be applied in special circumstances, the more these interpretative tools become relevant.

As part of the contractual analysis, it also needs to be considered whether the contract contains a 'gap', eg does not deal with a particular situation (in this instance, an event like the Covid-19 crisis). If there is a gap, and no specific statutory provisions apply to the situation, the contract may have to be supplemented (albeit in line with the gist of the other contract terms) on the basis of the standards of 'reasonableness and fairness'.

Section 6:248(1) Dutch Civil Code (DCC) provides, in this regard:

"*A contract not only has the legal effects agreed to by the parties, but also those which, according to the nature of the contract, apply by virtue of law, usage or the requirements of reasonableness and fairness.*"

The concept of 'reasonableness and fairness' is a central principle of Dutch contract law. Section 3:12 DCC gives some guidance on what it entails:

"*In determining what reasonableness and fairness require, generally accepted principles of law, current juridical views in the Netherlands and the societal and private interests involved in the case must be taken into account.*"

This is generally held to imply that contract parties are obliged to take the reasonable interests of their counterparties into account, both in interpreting, performing and enforcing the contract. This becomes especially relevant in the current circumstances, where clearly also 'societal interests' as mentioned in Section 3:12 DCC are at stake. What this means, in practice, is that parties should not mechanically rely on contractual remedies or on the statutory remedies discussed below, but are often best advised to seek a dialogue with their counterparties to resolve Covid-19 related issues. If the issue is not resolved and ends up in litigation, we believe the courts may look unfavourably upon a party that has avoided such a dialogue.

More generally, although the contractual framework is the starting point, statutory contract law needs to be taken into account, on the one hand because it can supplement the provisions in the contract, and on the other hand because, in special circumstances, it may excuse a party from performance or even set aside contractual arrangements.

Termination provisions

Early termination and suspension provisions are obviously relevant, as these provide that a contracting party may release itself of its obligations towards the other party or suspend performance as per a certain date and/or on certain conditions. Such contracts may not be terminated earlier than agreed, unless this could be justified on the basis of one of the statutory remedies discussed below.

If there are no termination provisions, the question arises whether and how agreements for an indefinite term (such as long-term service contracts) may be terminated. Although there is no absolute rule that such agreements may

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always be terminated, the picture emerging from case law is that termination will generally be allowed, provided a reasonable notice period is taken into account and sometimes (additionally or to compensate for a short notice period) compensation of damages is offered, especially if the counterparty has made significant investments to perform the contract that have not yet been earned back. The exceptional circumstances of the Covid-19 crisis may in some cases justify terminating long-term agreements by a shorter notice period than would normally be allowed.

Force majeure-/MAC-clauses

Some contracts contain a *force majeure* clause, defining which events qualify as *force majeure* and/or what the contractual consequences of *force majeure* are. *Force majeure* clauses vary, but usually they relate to specific circumstances outside of the control of the parties (so-called 'acts of God'). Typical examples are wars and terrorist attacks. The list of *force majeure* events can either be exhaustive or non-exhaustive. If the list is non-exhaustive and the overall test is whether the event was outside the reasonable control of the parties, the Covid-19 crisis probably qualifies as *force majeure*, subject to interpretation. In case of a non-exhaustive list of *force majeure* events, it would also be relevant to consider whether the Covid-19 crisis is sufficiently in line with the listed *force majeure* events. If the list is exhaustive, it should be considered whether any of the defined events applies to this situation. Pandemics or endemics are sometimes expressly qualified as *force majeure* events in a contract.

Contracts can also contain clauses with a similar effect, such as a so-called MAC (Material Adverse Change) clause in an M&A contract, or a change of law clause. It would then need to be considered whether such clause is triggered by the Covid-19 crisis and, if so, what consequences the contract attaches to this. The contractually provided consequences may be different than being excused from performance. A MAC clause may, for instance, provide that an agreed purchase price is to be adjusted.

Obviously, there should be causality between the relevant *force majeure* event and the debtor's inability to perform. Also, it should be checked if there are (express or implied) conditions to invoking the *force majeure* event, eg the debtor taking reasonable measures to prevent or mitigate the effects of *force majeure* (which duty to mitigate may also follow from statutory contract law).

Limitation of liability clauses

Often contracts contain limitations of liability. Like all contractual clauses, such clauses are subject to the so-called 'derogatory effect of the standards of reasonableness and fairness' under Section 6:248(2) of the DCC (discussed in more detail below). This implies, for instance, that if a party invokes a remedy that is not applicable and so wilfully chooses not to perform a contract despite being able to do so, it cannot rely on the limitation of liability.

Risks of wrongly invoking protective clauses (or statutory remedies)

If a party wrongly invokes, for instance, a *force majeure* clause as a reason for not performing, it will be in default and the other party can often claim specific performance, set aside the contract, and/or claim compensation of the damage and loss suffered by it as a consequence of the non-performance. These risks are discussed in more detail below

Statutory remedies

1. Force majeure

Relationship with contractual force majeure clauses

For the greater part, Dutch contract law is not mandatory law. Accordingly, the parties may deviate from the statutory provisions on *force majeure* (Section 6:75 ff. DCC). If the contract contains such a *force majeure* clause, it is an issue of contract interpretation whether this replaces the statutory rules on *force majeure*, or

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whether the parties can rely on statutory *force majeure* in addition to the contractual arrangement.

There are three conditions for invoking statutory *force majeure*.

a) **Inability to perform obligations (permanently or temporarily)**

The first condition requires that it is (permanently or temporarily) impossible (factually or on legal grounds) for the debtor to perform. The condition is also met if performance is so disproportionally onerous that this practically boils down to impossibility.

If the debtor is temporarily unable to perform its obligation due to the *force majeure* event, the debtor is only excused over the period that the *force majeure* event lasts (provided that the further conditions for *force majeure*, as addressed below, are met). In order to determine whether it is temporarily or permanently impossible to perform, the following needs to be taken into account: the likelihood that the possibility to perform will arise again, within what timeframe and what the parties have envisaged in regard of such performance.

That the debtor must be unable to perform is a strict condition. It is not sufficient that performance has become much more onerous or costly for the debtor. Performance should be impossible or disproportionally onerous. That said, there is a limit to the measures that a debtor can be expected to take to perform its obligations and only those methods to perform that were (explicitly or implicitly) factored into the contract would need to be applied. It is difficult to give general guidance on where that limit lies.

The first condition is where most appeals to *force majeure* tend to fail. The fact that goods or services purchased are of no use anymore to the purchaser's operations does not create *force majeure* (but at best an appeal to unforeseen circumstances). Impossibility to perform would typically not apply to monetary obligations, unless payment is factually or legally impossible due to a failure of the banking system or money transfer restrictions.

However, legislation that prohibits certain services (such as flights from certain countries or the organizing of a mass event) would render those services legally impossible. Legislation obliging a manufacturer to sell all its available respirators to the national hospitals would create *force majeure* toward the manufacturer's other counterparties under purchase contracts.

b) **Inability to perform not attributable to the debtor**

The second condition is that the inability of the debtor to perform cannot be 'attributed' to it.

Section 6:75 DCC provides that a failure in performance cannot be attributed to the debtor if it is neither due to its fault nor otherwise for its account, pursuant to the law, contract or 'generally prevailing views' ('*in het verkeer geldende opvattingen*'). These elements will be discussed in turn below.

i) Fault

Non-performance can be attributed to the debtor if the debtor is to blame for it (in a subjective sense). It is difficult to see how a party could be blamed for the Covid-19 epidemic. That said, the creditor may, in some cases, argue that the debtor can be blamed for not having taken reasonable measures that would have prevented its inability to perform, especially if it still could have done so after the onset of the Covid-19 crisis.

ii) The law

In some cases, statutory law provides that non-performance (and inability to perform) is for the account of the debtor. One important example is when the inability to perform arises after the debtor was already in default. In practice this means that if, for example, a party was in default with delivering goods or providing

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services within the contractually agreed timeframe, it cannot invoke *force majeure* even if performance has now become impossible as a result of the Covid-19 crisis.

iii) Contract (or other legal act)

The parties can agree on a *limitation* of statutory *force majeure*, as it is not mandatory law. It is for instance generally assumed that if the debtor has *guaranteed* a certain result, it cannot invoke *force majeure*. Like all contractual provisions, however, this is subject to interpretation. For instance, perhaps it can be argued that the parties did not intend, or could not reasonably expect, guaranteed performance to apply under any circumstances, in particular those deemed highly exceptional such as the Covid-19 crisis.

Furthermore, as discussed above, the contracting parties may have defined certain events as *force majeure* in their contract. If the *force majeure* clause provides an exhaustive list of *force majeure* events which is more limited than statutory *force majeure*, the debtor may no longer be able to rely on the wider statutory *force majeure*. As mentioned above, however, this is also subject to interpretation. It could possibly still be argued that the contractual *force majeure* clause merely intended to supplement statutory *force majeure*.

iv) Generally prevailing views

The standard of 'generally prevailing views' is rather unspecific and must be assessed in light of the specific circumstances of the case. The views may be general or sector-specific. Some guidance may be taken from case law and legal writing.

Circumstances which generally prevailing views consider, in principle, to be for the debtor's account are, among others: (i) financial incapacity; (ii) incompetence or inexperience; (iii) exchange rate fluctuations, and (iv) circumstances that were foreseeable for the debtor at the time of entering into the contract.

Circumstances which generally prevailing views consider in principle not to be for the debtor's account are, among others: (i) illness preventing fulfilment of obligations under a contract, at least where the contract is to be performed by specific persons (a concert pianist being the standard example); (ii) danger to life, health and freedom if the contract would be performed, and (iii) a statute or other measure by public authorities (domestic or, under certain circumstances, foreign) preventing the debtor from performing the contract. It is uncertain what the generally prevailing views hold in case one of the parties can no longer perform as a consequence of the Covid-19 crisis. Depending on the circumstances, all three categories mentioned above could provide a ground to invoke *force majeure*.

Third parties involved in performing the contract

A party relies on its employees and often on suppliers and subcontractors to perform its obligations. This raises the question whether non-performance and, specifically, *force majeure* of such third parties is a ground for that party to invoke *force majeure*.

Non-performance of employees, subcontractors and suppliers are, in principle, for the risk and account of the party employing or contracting them. Based on case law, legal writing and common sense, however, the following exceptions are conceivable.

In the case of employees, *force majeure* may perhaps be invoked if enough employees are ill (or fear for their life or health if they do their job) that performance is impossible and the employer has no other means to perform its obligation (eg by contracting temporary staff).

Non-performance of subcontractors may constitute *force majeure* if: (i) the subcontractor can itself invoke *force majeure*; (ii) the events invoked by the subcontractor would also have

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justified *force majeure* if they would have happened to the principal itself, and (iii) the principal, in fact, cannot perform the subcontracted services himself (or by retaining another subcontractor, unless this would be disproportionally onerous).

Non-performance by a supplier will seldom justify *force majeure*, but it is conceivable if the supplier can invoke *force majeure* and there are no other suppliers available (or only at such cost and burden that this would be disproportionally onerous).

Relevance of foreseeability

If an event was foreseeable, this does not itself exclude invoking *force majeure*. The relevant factor is whether the obstruction to performance was, at the time of entering into the contract, so likely that a prudent debtor with the same knowledge and experience would have factored in the relevant risk, for instance by taking precautionary measures.

Consequences of statutory force majeure

Under Dutch statutory law, in case of *force majeure*, the other party cannot demand performance, nor compensation of the damages it suffers as a consequence of the non-performance. This may provide the (temporary) relief that is needed in view of the impact of the Covid-19 crisis.

In case of *force majeure*, however, the other party may suspend its own obligations under the contract and even set aside the contract on the basis of the supplier's non-performance, provided the non-performance is severe enough to justify the consequences of the contract being set aside (a relatively low threshold).

The debtor may derive and advantage from not having to perform the contract. In that case, the creditor has a claim for his damages against the debtor up to the maximum of that advantage.

2. Contract amendment or termination based on 'unforeseen circumstances'

Dutch statutory law contains a special provision which allows a party, in some cases, to request the court to modify or terminate contracts on the basis of 'unforeseen circumstances' (*'imprévision'*). The courts have to apply this doctrine with restraint. In essence, unchanged continuation of the contract terms should be unacceptable under the circumstances.

Section 6:258 DCC provides that:

1. *Upon request of either of the parties, the court may either modify the effects of a contract or set it aside in whole or in part, on the basis of unforeseen circumstances which are of such a nature that the other party, given those circumstances, cannot expect, in accordance with generally held standards of reasonableness and fairness, the unaltered contract to continue to be valid and enforceable. The court may grant such modification or setting aside a retroactive effect.*
2. *The court shall not grant modification or setting aside of any part of the agreement to the extent that the person invoking the circumstances is accountable for them pursuant to the very nature of the agreement or pursuant to generally prevailing views.*

These conditions for applying Section 6:258 DCC are discussed below.

a) **Unforeseen circumstances**

It is not decisive whether the relevant event was actually *foreseen* by the parties or *foreseeable as such*. What matters is whether the potential event was, implicitly or explicitly, *factored into the contract*. However, especially when the factoring in is implicit rather than explicit, the actual foreseeability would be a relevant consideration and important as evidence. The more foreseeable an event has been for the parties, the more

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likely it will be deemed by the court to have been factored into their agreement.

Pandemics have been rare but have occurred with some frequency, such as the 'Russian Flu' of 1889–1890, the 'Spanish Flu' of 1918–1919, the 'Hong Kong Flu' of 1968–1969 and the 'Swine Flu' of 2009–2010. That said, even if the possibility of an endemic outbreak has actually been foreseeable to some extent, the impact of Covid-19 arguably was not. The way that Covid-19 has spread over the world and the government measures in the affected countries (including the closing of borders, restrictions of flights, social distancing, lock-downs and other measures and their consequences) are historically unprecedented. Actual foreseeability of the current pandemic and its consequences, therefore, is an uncertain argument.

This will be different, however, for contracts that have been entered into after Covid-19 was discovered and measures were being adopted by (domestic or foreign) governments against the spread of Covid-19. It would require further analysis to assess at what time the current state of the Covid-19 epidemic and its fall-out would have become reasonably foreseeable for companies. This may also differ by jurisdiction. In any event, for contracts that are currently being entered into, the Covid-19 crisis would, in all likelihood, be considered a known event and accordingly factored into the contract, even if it is not expressly addressed.

If the relevant contract contains a general *force majeure* clause for events beyond the reasonable control of the debtor or an exhaustive *force majeure* clause including pandemics (or a comparable MAC clause), this clearly suggests that a situation like the Covid-19 crisis was factored into the contract. In that case, Section 6:258 DCC cannot be applied and only the f*orce majeure* (or MAC) clause would apply.

If, conversely, the contract contains an exhaustive list of *force majeure* events not covering pandemics like the Covid-19 crisis, this could imply a (tacit) agreement that such events do not constitute *force majeure*. If so, then arguably such events could also not be considered unforeseen under Section 6:258 DCC. That said, a court may also conclude that a situation like the Covid-19 crisis simply had not been considered by the parties and not factored into the contract. Eventually, this will be an issue of interpretation.

b) **Unaltered continuation cannot be expected**

In view of the principle of *'pacta sunt servanda'*, it is only under exceptional circumstances that unaltered continuation of a contract cannot be expected. Section 6:258 DCC is seen as a special application of the standards of reasonableness and fairness that permeate all of Dutch contract law (see above). All circumstances of the case will, therefore, need to be considered.

c) **Debtor is not accountable**

The accountability test has been discussed above in relation to *force majeure* and applies more or less in the same manner to unforeseen circumstances. A debtor party may not be held accountable for the consequences of the Covid-19 crisis, unless to the extent it has not taken reasonable measures to mitigate the effects thereof. Nevertheless, its consequences may be for its account due to contract, law or generally prevailing views. We refer to the discussion of that issue above.

Potential applications

The following cases are mentioned in legislative history and legal writing as examples where Section 6:258 DCC might be applied: (i) where there is a severe distortion of the 'equilibrium' between the parties under the contract, (ii) where the purpose of the contract can no longer be

achieved, and (iii) where performance has become 'very onerous' for one of the parties. However, in each of these situations, it still depends on all circumstances whether Section 6:258 DCC can be applied.

Examples of court cases in which a party has invoked Section 6:258 DCC (with different outcomes) include adverse weather conditions, change of laws, the financial crisis and the avian flu. A concrete example mentioned in legislative history is a sudden shortage on the global market, as a result of which it would be possible for a supplier to perform some but not all of its contracts. Since for each individual contract it is the case that it could be performed, there is no *force majeure*. However, based on Section 6:258 DCC, a pro rata decrease of its supply obligations could be warranted. Although sudden shortages on the global market would normally be for the risk of a supplier, shortages caused by exceptional circumstances such as Covid-19, may, depending on the terms of the contract and other relevant circumstances, not be a normal business risk of suppliers.

The mere fact that a party would end up in financial difficulties when having to perform the contract is not sufficient.

Taking into account the categories mentioned above, the following circumstances could, in our view, be relevant:

- To what extent the original equilibrium (including the allocation of risks and benefits) between the parties under the terms of the contract has been changed and how the original equilibrium might be restored, including (a) how much more onerous it has become for either party to perform its obligations under the contract and (b) how the original benefits of the contract for each of the parties have been affected
- Whether the original mutual objectives of the contract can still be achieved
- How much more onerous performance under the contract has become for the parties
- How damaging it will be for the other party if the relevant contract terms are not performed (long-term and short-term)
- How long the adverse consequences of Covid-19 are expected to last (for the entire duration of the contract or just for a relatively short part thereof)
- Whether any or both of the contract parties is or might become eligible for government support. On the one hand, this may be seen as evidence of extraordinary circumstances that are not part of normal business risk for the account of the debtor. On the other hand the fact that the debtor receives this support may weaken his case for invoking Section 6:258 DCC.
- How onerous or beneficial the proposed amendments would be for either or both parties
- The duration of the contractual relationship between the parties and the remaining term of the contract
- Whether there are alternatives that would be better (or less bad) for both parties
- Whether, and how, the interests of other parties and societal interests are affected by the existing contract and by the proposed amendment

Procedural aspects

A cancellation or modification of a contract on the basis of unforeseen circumstances can only be granted by the court in main proceedings (or by arbitrators if arbitrations was agreed upon). It will, therefore, remain uncertain whether cancellation or modification of the contract will be granted until the judgment in main proceedings is rendered. Under normal circumstances, this could already take well over one year and will then still be subject to appeal (although Dutch judgments tend to be enforceable notwithstanding appeal). The court may, however, give its judgment retroactive effect.

The amendment or setting aside of the contract may be granted by the court conditionally. By way of example, a court could rule that only part of the contract is set aside or that a modification only applies for a limited period of time. A condition for modification or setting aside of the contract could also be that the creditor is compensated for its damages. The court's discretion is wide when determining the

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conditions; however, modification of the contract may never result in any party being better off than it would be under the original contract. The idea is that the original intention and equilibrium of the contract is restored.

What all this means in practical terms

Requests to modify or cancel a contract under Section 6:258 DCC (although fairly frequently made) have rarely been granted by Dutch courts. Case law shows that economic crises are generally not considered unforeseen circumstances that give grounds to modify or cancel a contract.

The Covid-19 crisis is likely to turn into an economic crisis, but its origins are clearly special in the sense that it is not so much a collapse of certain markets that has caused the crisis, but a global pandemic. Its unique character means that the abovementioned case law cannot automatically be applied to the current situation.

In our view, therefore, application of Section 6:258 DCC can certainly not be discounted in case the consequences of the Covid-19 crisis or similar events have not been allocated to either party under the contract terms. However, the outcome of any court action remains uncertain.

Some authoritative legal commentators have argued that the adverse impacts of the Covid-19 crisis warrant, as a starting point, a 50/50 split between the parties of the adverse consequences of the crisis. Although some courts may adopt this approach in some cases, all matters will be very fact-specific. In our view, it is dangerous to rely too much on rules of thumb. As mentioned above, the court has wide discretion and there is no way of predicting what its approach will be and a '50/50 split' may in practice be difficult to apply as the adverse consequences for each of the parties may be difficult to quantify. In combination with the long duration of court proceedings, this means that an appeal to Section 6:258 DCC often is an uncertain endeavour.

3. Deviation from the contract based on 'reasonableness and fairness'

It was mentioned above that contracts are to be interpreted (and sometimes supplemented) under the standards of reasonableness and fairness. These standards may in exceptional cases also imply that contractual provisions (or even statutory rules) are not applied. This is called the 'derogatory effect of reasonableness and fairness', which is codified in Section 6:248(2) DCC:

"*A rule binding upon the parties as a result of the contract does not apply to the extent that, in the given circumstances, this would be unacceptable according to standards of reasonableness and fairness.*"

Where application of Section 6:258 DCC leads to an amendment of the contract, Section 6:248(2) DCC in principle leaves the contract as it is but allows that specific obligations under the contract do not have to be performed (or not in the manner or timing as originally agreed) in the face of specific, compelling circumstances.

The derogatory effect of reasonableness and fairness is to be applied with restraint. It must be *unacceptable* under the relevant circumstances for the relevant contract terms to be invoked. This is a high threshold. All circumstances of the case will need to be considered. Similar circumstances as listed above in relation to unforeseen circumstances could be relevant.

As mentioned above, also 'societal interests' may need to be taken into account as relevant circumstances, although they will rarely be the decisive factor. For instance, societal interests might be damaged by a creditor insisting on strict compliance with the contract terms despite the circumstances of the Covid-19 situation (or precisely the contrary). This may then be a factor to be taken into account.

Consequences

Section 6:248(2) DCC automatically and immediately results in the relevant contract terms

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not applying in the manner as contractually agreed.

To the extent that one or more of the contract terms are disregarded under Section 6:248(2) DCC, any resulting 'gap' in the contract may be filled based on reasonableness and fairness (as discussed above in connection with the issue of contract interpretation).

Procedural aspects

Different from Section 6:258 DCC, the parties can rely on Section 6:248(2) DCC without court intervention and no separate decision on retroactive effect is required as under Section 6:258 DCC. But if the application of Section 6:248(2) DCC is disputed by the other party, there will be uncertainty until a court (or arbitral tribunal) has adjudicated the issue.

Different from Section 6:258 DCC, a party can also invoke Section 6:248(2) DCC in preliminary (injunctive) relief proceedings, but only to support the claim for such injunctive relief. No final judgment can be obtained on the applicability of Section 6:248(2) DCC in preliminary relief proceedings.

It is generally assumed that Section 6:248(2) DCC cannot be invoked to obtain a modification of the contract, or have the contract set aside, in the way that this can be claimed under Section 6:258 DCC. The contract remains the same, merely certain provisions are not applied in specific circumstances.

Since the (effects of) the Covid-19 crisis are a 'moving target', invoking Section 6:248(2) DCC for temporary relief may in many cases be preferable over embarking on litigation under Section 6:258 DCC for a specific amendment of the contract, which may later turn out to be either unnecessary or insufficient.

Remedies in case of unjustified non-performance

In case a debtor wrongly invokes one of the above discussed contractual or statutory defences or just does not perform the contract, what actions can a creditor take?

The creditor may suspend performance of its own obligations.

If the debtor is not in default automatically (because it confirms that it will not perform the contract, or has not performed by a fatal date stipulated in the contract), the creditor must set it a reasonable term for performance and give it notice that it will otherwise be in default. Default is required for some of the creditor's remedies discussed below.

In general, a creditor can claim specific performance under Dutch law as long as performance is not yet impossible. In some cases, eg where specific performance is possible but unduly burdensome for the debtor, a creditor may have to accept monetary damages instead. The contract may exclude specific performance and limit the creditor's actions to a damages claim.

Specific performance is not an 'equitable remedy' available only on certain conditions (such as damages not being an adequate remedy), as is the case is in some common law jurisdictions. In addition to specific performance, the creditor may claim the damages caused by the delay in performance (including lost profits), for the period that the debtor has been in default.

It is possible to claim specific performance in preliminary (injunctive) relief proceedings. For such claim to be successful, its merits should be convincing, the relief must be urgent and the balance of interests should weigh in the creditor's favour. The creditor should offer sufficient recourse in case it is later proven wrong. Even if a contractual right to performance is strong under the contract, its enforcement may

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be less straightforward because of the Covid-19 crisis. For instance, if raised as a defence, the judge would have to take a prima facie view on whether the debtor can rely on *force majeure*, unforeseen circumstances and/or the derogatory effect of reasonableness and fairness (as discussed above).

Secondly, once the debtor is in default, a creditor may convert its right to performance into a damages claim, unless the breach is too insignificant to justify this. The scope of the damages may be governed by relevant contract provisions, including a limitation of liability clause. In general, under Dutch law, the quantum of damage is determined by comparing the situation that the injured party would have been in if the contract had not been breached, with the situation the injured party is in as a consequence of the breach. The injured party has an obligation to mitigate its damages. In principle, damages cannot be claimed in preliminary (injunctive) relief proceedings, although sometimes an advance on such damages is awarded.

Thirdly, a creditor may set aside the contract, provided the breach is of insufficient severity to justify the consequences thereof. The contract may be set aside entirely (thus triggering an obligation to undo past performance) or in part. An example of the latter is when only future obligations of both parties under the contract are cancelled. In case of default, damages may be claimed to make up for the difference between the creditor's situation if the contract would have been performed and his situation now that the contract is set aside.

Credible damages and other monetary claims may in some cases be secured by pre-judgment attachments (comparable to freezing orders and Mareva injunctions) on the assets of the defaulting party. Dutch law is known for allowing such attachments more often than in most other jurisdictions (and is sometimes seen as a 'Wild West of freezing orders'). However, it is currently the policy of the courts to be much more reticent in allowing attachments in view of the Covid-19 crisis. The same applies to bankruptcy requests filed against a non-paying debtor.

Creditor default

The Covid-19 crisis may result not just in the inability of the debtor to perform its contractual obligations, but also in the inability of a creditor to accept performance (such as taking delivery of goods or services). This does not come into play very often in normal circumstances, but may become especially relevant in the current Covid-19 crisis. In that case, 'creditor default' (schuldeisersverzuim) may arise (Section 6:58 ff. DCC).

Creditor default arises if a creditor:

- prevents the performance by the debtor of its obligation
- does not provide the necessary co-operation, or
- another obstacle to performance arises on the part of the creditor.

Creditor default does not arise if the cause of these hindrances cannot be attributed to the creditor. In that case, the creditor can invoke *force majeure*. We refer to the extensive discussion thereof above. In general, though, any obstacle to performance on the part the creditor (such as inability of a creditor to take delivery of goods or services by the debtor) would be deemed for the risk and account of the creditor.

Please note that creditor default does not apply where a creditor is under a contractual obligation to take delivery of the relevant goods or services. Such an obligation may be implicit in the contract and is for example often assumed in the case of a sale to the creditor of real property. The creditor is then a debtor in relation to the obligation to take delivery. The normal rules for debtor default would then apply.

Consequences

Creditor default has a number of consequences.

The creditor still has to perform its side of the contract and cannot invoke a right of suspension. A court can determine that the debtor is relieved of its obligations. In doing so, however, the court may attach conditions to such relief. Creditor

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default automatically ends any default of the debtor.

Importantly, as long as the creditor is in default, the debtor cannot itself go into default and the creditor cannot set aside the contract. In the same vein, if circumstances arise during creditor default which render performance of the obligations impossible (in whole or in part), this will not be attributable to the debtor, unless the debtor (through its own fault or that of an employee), has failed to apply the care which could have been expected in the circumstances. In that latter case, the creditor may set aside the contract.

Finally, in case of an obligation to deliver movable goods, the debtor is allowed to consign these in accordance with specific statutory rules (which are beyond the scope of this note). The creditor must pay the costs of such consignment before being allowed to demand release of the goods.

The discussion of creditor default makes clear that it may, in practice, make a difference 'which party is in default first'. In this context, it is notable that, if there are grounds to fear that the other party may not (be able to) deliver its end of the bargain under the contract, Dutch law, provided certain conditions are met, allows a party to establish an 'anticipatory breach' and default (Sections 6:80 and 6:83 DCC).

Litigation risks, dialogue and compromise

Whether a party may invoke (or reject) the above-discussed remedies may sometimes be a grey area and this will be all the more so amidst the Covid-19 crisis.

In the context of *force majeure*, impossibility to perform may sometimes be relatively straightforward to establish, but the other requirements of the *force majeure* remedy and the other remedies discussed above will often create uncertainty. Also, as explained above, there is much uncertainty around how the courts will deal with the unprecedented nature of the Covid-19 crisis. Those uncertainties will often render a compromise or other agreed solution (such as a temporary 'standstill') desirable, perhaps more so than in disputes under normal circumstances. As pointed out above, wrongly relying on or rejecting these remedies (such as setting aside a contract based on non-performance of a counterparty and a denial of *force majeure*) may create significant damages claims if that position is later rejected by the court.

We furthermore expect that courts may often require that, considering the extreme circumstances of the Covid-19 crisis, the parties have not avoided a dialogue on resolving its consequences in a manner that does justice to both parties' interests. Reasonableness and fairness dictates that contract parties take each other's interests into account. According to some legal writers, this may imply that they need to constructively consider proposals to adjust the contract, even outside the context of Section 6:258 DCC.

This does not mean that a party in a clear case of, for example, *force majeure* (or the absence thereof) should be afraid to take a firm position and enforce its rights. But relying mechanically on formal positions and avoiding a dialogue may later damage a party's litigation chances.

The Dutch court system is currently functioning at lower speed as a result of the effective lock-down of the courts. Preliminary (injunctive) relief hearings are scheduled only in very urgent cases. The fact that judges are working from home, and that the Covid-19 crisis may well give rise to an additional caseload, means that proceedings may take more time than usual.

The parties could therefore consider submitting their dispute to arbitration (if necessary, by fast track or expedited arbitration proceedings, which we can set up for our clients at short notice). This will, however, obviously require the agreement of both parties and their interests in having fast and efficient proceedings might not be aligned.

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International aspects

Comparative law

The Dutch system of contract interpretation, *force majeure*, unforeseen circumstances, and reasonableness and fairness is, in many respect, structurally different from the system adopted in many other (common law and civil law) jurisdictions.

Force majeure is a concept acknowledged in many countries, but applied in different circumstances. The doctrine of unforeseen circumstances is known in only some countries; there is some similarity to the common law concept of *frustration* and the German law concept of *Wegfall der Geschäftsgrundlage,* yet they would often lead to different outcomes. Reasonableness and fairness play a role somewhat comparable to the concept of equity in common law, but they are applied in a very different manner.

In an international context, the parties must be aware of these important differences. Parties may seek room to step away from their contractual obligations if the Covid-19 crisis deepens or, to the contrary, restrict that option as much as possible. In concluding new contracts, the choice of law today has become a more important matter than ever.

Enforcement outside the Netherlands

A few words of warning are in order with respect to contracts between parties domiciled in different jurisdictions or if performance of the contract needs to take place outside the Netherlands.

Local laws may contain rules of public policy that take precedence over Dutch law, even if that is the chosen law of the contract. As explained in other materials available on A&O's Covid-19 website, some countries have enacted emergency legislation allowing parties to avoid or suspend certain obligations or step away from contracts entirely. These rules may very well be of public policy and trump the outcomes of the above Dutch law analysis.

In this context it must be noted that, in old case law, it has been ruled that measures of foreign governments do not constitute *force majeure*, but it is questioned whether this rule still stands, especially if performance of the contract can only be realised in or from a country in which such measures do create *force majeure*.

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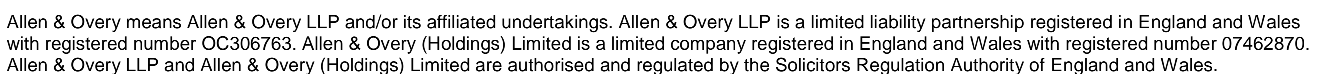
Key contacts

Arnold Croiset van Uchelen
Partner – Litigation

Tel +31 20 674 1303
arnold.croisetvanuchelen
@allenovery.com

Marnix de Planque
Counsel – Litigation

Tel +31 20 674 1307
marnix.deplanque
@allenovery.com



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