

Brussels, April 14th

FAQs for COVID-19 and Force Majeure

Question 1 : What are the applicable COVID-19 measures in Belgium ?

On March 17th, the National Security Council has taken an important set of measures to limit the spread of the virus :

- Non-essential travel is prohibited ;
- Citizens are required to stay at home to avoid contact outside of their family as much as possible:
 - o Except to go to work ;
 - o Except for essential travel (doctor, bank, pharmacy...) ;
 - o Large gatherings of people are not allowed.
- All companies without exception must organise working from home for every worker when possible ;
- Non-essential shops and retail outlets will remain closed, with a few minor exceptions such as pharmacies or food stores. Those measures might be partially lifted in the course of May but the exact calendar will of course depend on the evolution of the pandemic.

Question 2 : Could the COVID-19 be qualified as a 'Force Majeure ' ?

As a consequence of the above shut-down measures, many shops cannot perform their commitments towards their customers. Contractors cannot buy construction materials they need. Part of the personnel might be ill or is not allowed to work because social distancing rules cannot materially be enforced.

This raises the question of whether this situation is a « force majeure ». To our opinion, although epidemics are quite common, shut-down measures are not and certainly not of such size. Also, the governmental measures were not predictable and of irresistible nature. Restrictions of movement of this scale are unprecedented and may be deemed as a Force Majeure under Belgian law.

Question 3 : How is « Force Majeure » defined under the Belgian civil code ?

Article 1147 and article 1148 of the Belgian civil code state that *“the defendant will be held liable to pay damages for non-performance of an obligation, unless damage is proven to be due to an outside cause”* and that *“damages are not due, when the defendant was prevented from performing an obligation by an Act of God”*.

Force majeure is generally defined as *“unforeseeable circumstances that absolutely prevent a contracting party from fulfilling its contractual obligations”*.

Question 4 : What are the implications of 'Force Majeure' on contractual arrangements ?

One should keep in mind that the party that does not perform its obligation must be « *absolutely prevented* » from fulfilling its contractual obligations.

As an example, a contractor cannot pursue the construction of a wall because it became impossible due to certain bricks being no longer available on the market. Therefore, the contractor could successfully invoke « *Force majeure* » and not perform his obligations without having to pay damages.

To the contrary, Force majeure cannot be claimed not to pay a rent. An obligation to pay is a remittal of money. While money is still 'available', it is not « *absolutely* » impossible for the debtor to perform her or his payment obligation. It might be more difficult for him but not « *impossible* ».

Question 5 : Does Belgian case law recognizes the theory of unpredictability ?

In some jurisdictions, the judge has the power to rebalance the rights and obligations of parties when a major change of circumstances that could not be predicted at the time of conclusion of the agreement has made it very difficult or costly for this party to perform its contractual obligations. According to Belgian Supreme Court' case law, judges have no power to perform adjustments.

Question 6 : Are other options open to the party that is affected by the governmental COVID-measures ?

Yes, it could invoke the theory of abuse of rights : under limited circumstances, when a party is demanding the performance of its debtor knowing that this will cause a disproportionate damage to the other party, the judge has the power to reduce the obligations of the former.

Also, for commercial leases, tenants could claim that the landlord is also in default to provide access to the leased premises. In such case, both parties are in default to perform their obligations and the tenant could suspend the payment of the lease as long as customers are prevented from accessing the building. The tenant could in such case invoke the « *exception of non-performance* ». Case confirming this possibility will most probably only be public within a year or more. Negotiations are currently ongoing between institutional landlords/ funds and tenants to reduce monthly leases.

Question 7 : What are the governmental measures supporting businesses suffering from the COVID-crisis ?

There is a range of measures to help businesses facing difficulties :

- State-backed credit facilities can be granted by commercial banks ;
- Postponement of VAT and tax filings ;
- Technical (temporary) unemployment ;
- Increased assistance to businesses in distress to avoid filing for bankruptcy ;
- Financial subsidies for specific companies (restaurants, bars...) ;
- Annual General Meetings may be postponed up to 10 weeks.

Finally, there is a consensus that out-of-court solutions to the crisis must be promoted and Belgian courts will certainly push parties to negotiate new terms to their current arrangements.

We will be happy to assist you for any additional question.

Stay safe !

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