



## Commercial relations in times of crisis

As a result of invasive measures by government and industry in the fight against the Coronavirus, business- and production processes are stagnating at all levels. More and more parties have difficulty in fulfilling their contractual obligations, from real estate investors to service providers and from producers to consumers. As a company, maintaining commercial relations with counterparties only goes to a certain extent. At what stage does the enforcement of the contract or a legal right prevails in these turbulent times?

*“Tough times never last, people do”*: suppliers, employees, distributors, and other stakeholders, it is likely that we will meet and need one another once this crisis has passed.

## Introduction

We advise to determine your legal position and proactively seek dialogue with essential contract partners based on your legal position. In this respect, it is important to identify what obligations can and cannot be met anymore.

If possible, try to (temporarily) suspend obligations or renegotiate agreements. This may effectively prevent disputes from escalating or to even arise in the first place.

This Law Alert discusses a grasp from the numerous questions we receive from clients at this time of crisis:

1. Does the Corona crisis result in force majeure within the meaning of art. 6:75 Dutch Civil Code ("**DCC**") or unforeseen circumstances within the meaning of art. 6:258 DCC ?
2. What happens if, for example, payment has already been made, but the ordered product or service has not yet been delivered?
3. And vice versa: if the ordered product or service has already been delivered, but has not yet been paid for?
4. What liability risks arise for directors acting on behalf of a company facing financial hardship?
5. Previous crises: Lessons learned? Any advice?

## 1 Does the Corona crisis result in force majeure or unforeseen circumstances?

### Force majeure

First of all, it is necessary to consider whether the contract (including the applicable terms and conditions) provides for a force majeure-clause. If the contract does not provide for such clause, in order to successfully invoke force majeure (article 6:75 DCC) it is for example required that government measures negatively affect the (timely) fulfillment of contractual obligations.

One can for example think of the organization or cancellation of an event because of a statutory restriction to hold physical meetings. In view of the current Corona measures that the Dutch government has issued, this is only applicable to a limited number of cases.

### Unforeseen circumstances

The Corona crisis caused difficulty to meet certain types of contractual obligations. For example, a contractual obligation to purchase products (e.g. flowers) or services (e.g. package holidays or office cleaning) for which products and services the demand has decreased.

In these situations, fulfillment of the contract is strictly still possible. However, such fulfillment may result in a disproportionate disadvantage for one of the contracting parties. In the event that contracting parties have not taken into account the risk of a pandemic in their contract, unforeseen circumstances within the meaning of art. 6:258 DCC potentially provides a solution.

If fulfillment of the contract can no longer reasonably be required of a contract party, for example if the ratio between the performance of the contract and the remuneration of such performance has been disproportionately affected as a result of the Corona crisis, the party that has to perform may attempt to renegotiate the contract. If that does not work, one may request the district court to adjust or even terminate the contract.

It should be noted, however, that under Dutch law, courts exercise restraint in awarding requests to terminate or adjust contracts on the basis of unforeseen circumstances. In addition, district courts have mostly been closed due to the Coronavirus and therefore receiving a judgment is taking longer than usual.

## 2 What happens if, for example, payment has already been made, but the ordered product or service has not yet been delivered?

### Force majeure

If a debtor (e.g. the operator of an event complex) successfully invokes force majeure, the creditor (e.g.

the host of the event) can no longer demand fulfillment of the contract or damages. However, the creditor may choose to terminate the contract in whole or in part instead and require cancellation of obligation performed (typically payment). As a principle, the creditor could demand repayment due to termination of contract. Whether termination of the contract and full repayment are justified has to be assessed on a case-by-case basis.

#### **Unforeseen circumstances**

In the event of a successful appeal by the debtor to adjust the contract due to unforeseen circumstances, the result is slightly different: the district court is entitled to either adjust or terminate the contract at his discretion.

### **3 And vice versa: if the ordered product or service has already been delivered, but has not yet been paid for?**

#### **Force majeure**

If a product or service has already been delivered, but the debtor has not paid (timely) as a result of force majeure, the creditor has the right to terminate the contract. The debtor could argue that, due to unforeseen circumstances, his default does not justify termination.

In the event of termination of the contract, the debtor will have to return the delivered product or service. If this is no longer possible, the value of the delivered product or service will have to be determined and in principle reimbursed.

#### **Unforeseen circumstances**

In the event of a successful appeal by the debtor to adjust the contract due to unforeseen circumstances, the district court is entitled to adjust or terminate the contract at his discretion. This can also be done if the total performance (product/service) has already been delivered.

### **4 What liability risks arise for directors acting on behalf of a company facing financial hardship?**

The Corona crisis, the increasing measures taken by government and industry and its invasive effects on people and society, call for increased vigilance of each individual director of a company. This is particularly true for a company facing financial difficulties.

Whilst incurring new contractual obligations (e.g. placing an order) each director will have to ask himself not only whether the company can meet those obligations, but also if the company offers means for redress in the event of default.

If a director should have been aware that from the onset of the contract, the company would not have been able to meet its obligations, each individual director may be held personally liable for the damages of the creditor.

Also, payment of creditors requires special attention from each director during these turbulent times. Directors may be held personally liable if they do not pay certain creditors on behalf of the company, while other creditors are paid instead. This is called '*selective (mis)payment*'. This, too, may constitute a basis for personal liability of an individual director if the company goes bankrupt.

### **5 What lessons have we learned from previous crises? Advice?**

#### **2007 | Real estate crisis**

Many debtors have tried to invoke the difficult economic circumstances as result of the real estate crisis as a ground to adjust or terminate a contract by a district court.

We have learnt that changed market conditions do not render a tenable ground to invoke force majeure or (partial) termination of a contract. This is considered to be a normal entrepreneurial risk for companies.

#### **2003 | Avian influenza**

We have found example cases in which government measures in reaction to a virus epidemic (avian influenza) justified an appeal to force majeure / unforeseen circumstances, which for example relieved purchasers from their obligations under a contract.

#### **1973 | Oil crisis**

It is striking that there is little case law relating to the oil crisis. However, some case law of the Board of Arbitration exists. The oil crisis apparently triggered a

situation where commercial parties chose to jointly seek a solution to a shared problem by proactively seeking dialogue: possibly the panacea that could also mitigate the economic impact of this Corona crisis.

Proactive dialogue requires thorough knowledge of your legal position and – if possible – that of your contract partner. After all, this is the starting position in discussions with your contract partner.

It is important to identify what contractual can and cannot be met anymore. If possible, try to (temporarily) suspend obligations or renegotiate agreements. This may effectively prevent disputes from escalating or to even arise in the first place.

#### What HVG Law can do for you:

The Coronavirus has a significant impact on the economy in The Netherlands. We understand its impact on your business and the sensitivity of commercial relationships.

We are on stand-by to assist you in facing the challenges in these profound and intense times.



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