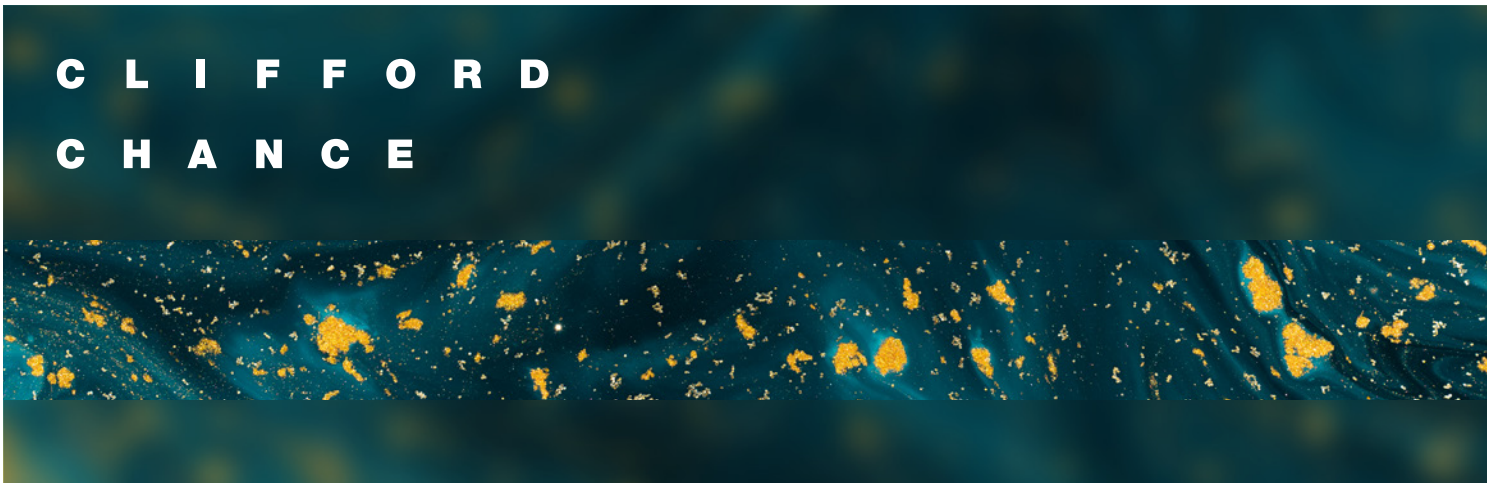

CORONAVIRUS AND THE IMPLICATIONS FOR BELGIAN LAW GOVERNED AGREEMENTS – WHAT REMEDIES TO INVOKE OR NOT TO INVOKE?

As companies and entire countries are grappling with the consequences of the Covid-19 outbreak, questions start to arise on whether the parties can be compelled to continue to execute their contracts, and what remedies may be available to either (i) avoid performance or (ii) force a company to comply with its contractual obligations.

The present briefing examines what remedies parties could possibly invoke under Belgian law governed agreements. Obviously, there is no "one size fits all" and the availability and usefulness of such remedies will need to be assessed on a case-by-case basis.

In addition, such remedies might be impacted by any governmental or regulatory measures taken to alleviate the economic difficulties experienced as a result of the Covid-19 outbreak, such as emergency financial assistance to distressed companies, suspension of certain contractual obligations or restrictions on enforcement measures.

Contractual remedies

The starting point for any analysis of whether a company can be forced to comply with its contractual obligations will of course be the contract itself. A party must, more particularly, consider what contractual provisions, if any, the agreement already contains which cater for specific concerns arising from a sudden health crisis/virus outbreak.

Clauses which might typically be relevant in such a situation are (i) *force majeure/ hardship* clauses which allow a party to suspend/terminate a contract if the performance of its obligations is partially or entirely impeded, or (ii) Material Adverse Change clauses. Of course, the question will always be whether the situation is indeed covered by the relevant clause. This may depend on factors such as:

- when the contract was entered into (i.e. largely before the outbreak or at a point in time where its impact was already foreseeable);
- whether any specific notification or mitigation requirements apply; and
- whether the circumstances indeed render performance impossible or impact performance in such a manner that they have a material effect on that party.

These clauses may, however, not be the only remedy available. Aside from such clauses, other provisions might also be relevant such as, e.g. clauses allowing a party to suspend/terminate a contract if the counterparty fails to perform during a certain period of time, clauses entitling a party to terminate if attachments are being made or if the business/activities of the counterparty are being interrupted (provided always that such counterparty cannot invoke *force majeure*).

Extra-contractual remedies

To the extent not contractually excluded, parties may furthermore seek to rely on other remedies available under Belgian law in case they wish to avoid performance.

If the contract does not contain any *force majeure* or MAC clauses, a party could, for instance, seek to invoke the Belgian concept of *force majeure*. While this concept traditionally requires a party to be able to prove that the performance by it of its contractual obligations is temporarily or definitively impossible, more recent case law and legal doctrine has also applied this theory where it has become economically impossible or excessively onerous for a party to perform a contract. When the performance of the obligations is temporarily impossible, the effect of the concept of *force majeure* will be the suspension of the agreement for the duration of this impossibility. The application of the principle of force *majeure* must be reasonable and limited to what is strictly necessary: where temporary suspension is reasonably possible, the termination of the agreement will not be granted. It will, generally speaking, be difficult to invoke the theory of force majeure to suspend an obligation to pay a monetary sum (e.g. rental payments), save for certain specific circumstances, e.g. where the payment is conditional upon third party financing which is refused. An "*Act of government*" (*Fait du prince*) concept, i.e. where the performance of the obligations is impeded as a result of a decision of the government, will have the same effects as the concept of *force majeure*.

Where a party insists on the performance of a contract in economically dire circumstances and the conditions of *force majeure* are not satisfied, this might furthermore be considered to constitute an abuse of rights. For international contracts for the sale of goods, hardship could be invoked on the basis of article 79 of the Convention on the International Sale of Goods.

It is to be noted that, whether any of the above theories would apply and could successfully be invoked will always depend on the concrete circumstances of the case. This is notably the case where the situation does not render performance partially or completely impossible. While certain theories, notably those of *force majeure* and performance in good faith, can be used in certain circumstances, no general theory of hardship exists under Belgian law. It therefore remains doubtful whether one will in all cases be able to rely on such theories in circumstances which border on hardship.

Other contractual law mechanisms such as a vice of consent (e.g. *erreur substantielle/ onverschoonbare dwaling*) or invalidity for lack of object (*caducité/verval*) of the agreement could also be invoked in order to rescind, but the chances of success of such theories are more limited. In the context of a share purchase agreement, case law and the doctrine more particularly consider that an error on the value of the assets or of the shares, or on the economic prospects is not actionable.

Lastly, a party could furthermore, and subject to certain conditions, suspend performance of a contract if its counterparty has failed to perform first. It could also seek to apply set-off mechanisms where available.

Means to recover outstanding debts or obtain performance

From the perspective of the party seeking performance of a contract from a party refusing to comply in light of the Covid-19 outbreak, the abovementioned contractual and extra-contractual remedies will of course likewise need to be considered.

If it is clear that performance remains possible, a party could take several measures to force its counterparty to comply. An obvious means to put pressure on a counterparty is by attaching its assets to secure performance. Likewise, to the extent security has been granted by the counterparty, it could be enforced. Assets sold subject to a retention of title can be repossessed. In case of (extreme) urgency, a party could also seek injunctive relief from the courts or seek to have the contract performed by a third party. To the extent that a party fails to pay invoices which are due and payable, it may also be possible for a party to seek a payment order by means of out-of-court proceedings through a bailiff.

Practical issues may, however, in each case arise where a party is prevented from enforcing based on specific legislative measures pending the outbreak (as is the case in Italy), or because of operational concerns (e.g. reduced public services and restrictions on the functioning of courts, the rendering of bailiff's services etc.).

Finally, a party may also seek insolvency measures, such as the opening of (certain types of) judicial reorganisation proceedings, the dissolution of a company where it fails to publish annual accounts, or the outright opening of bankruptcy proceedings. If there are serious management issues within the company, a displacement of the management and appointment of an interim manager/court officer might also be sought.

Asset and share purchase agreements

Where the parties have entered into a share/asset purchase agreement, they may have provided for specific contractual provisions covering *force majeure* or *material adverse change*. Where the sale has already occurred but has not yet closed, there may furthermore be specific conditions precedent or conditions subsequent which can no longer be satisfied and would prevent the deal from closing or may constitute a grounds for termination.

If the impact of the Covid-19 outbreak was not disclosed, this may furthermore give rise to a breach of representations and warranties, or possibly even a vice of consent allowing for the annulment of the transaction. If the impact was disclosed or is known, the parties may have negotiated specific indemnities. Insurance protection could also be available in certain circumstances.

In each case, the parties will need to carefully assess when and how to invoke any such protection. Particular care will also need to be taken to ensure that the contract is still performed in good faith in these circumstances, and such conditions are not invoked lightly and, as the case may be, after having triggered the applicable remedy periods and dispute resolution mechanisms.

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