

FORCE MAJEURE AND BUSINESS INTERRUPTION IN THE WAKE OF COVID-19

neither anticipated nor controlled. • The term includes both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes, and wars). — Also termed *force majeure*; *vis major*; *superior force*. Cf. ACT OF GOD; VIS MAJOR.

force-majeure clause. A contractual provision allocating the risk if performance becomes impossible or impracticable as a result of an event or effect that the parties could not have anticipated or controlled.

Dutch Caribbean, March 2020

1. INTRODUCTION

On March 11th, the World Health Organization characterised Covid-19 as a pandemic. This is a new virus with extreme unprecedented consequences. We are all learning and have lessons to share. HBN Law & Tax aims to play a part in the transfer of relevant know-how in these trying times. This newsletter serves to provide preliminary guidance for businesses that are being confronted with the economic fallout of the pandemic. Given the limited scope of this newsletter, the contents thereof are not intended to be comprehensive in nature.

2. NON-IMPUTABLE FAILURE TO PERFORM AND FORCE MAJEURE

Under Dutch (Caribbean) law, any contracting party is in principle liable for damages if they fail to perform their obligation under the contract, unless that failure is not attributable to them. There is no attributability if the breaching party is not at fault and the breach is also not for their risk and account based on the law, the contract or generally accepted principles (“common opinion”). This is often referred to as “force majeure.” If a party cannot perform due to force majeure, they should take all possible steps to avoid or mitigate the consequences, to the

extent this is reasonable and proportionate, taking into account the availability and the costs of the remedial steps required.

If one party cannot perform their obligation as a result of force majeure, the other party can (partially) dissolve the contract or suspend its own performance. In the case of dissolution, parties are no longer required to perform the contract and must reverse any past performance, where possible. In principle, damages claims are not possible in the case of force majeure. However, any advantage gained by the non-performing party as a result of the non-performance, the impossibility to comply with the obligation to undo/reverse and/or the dissolution could lead to a claim.

The above is the essence of the legal framework that automatically applies to any contract if parties have not agreed otherwise. Parties can however also draft their own “Force Majeure” clauses in the contract or general conditions if they wish to override or deviate from the statutory provisions. There are a few restrictions for business-to-consumer relationships, but we will not discuss those here.

A “Force Majeure” clause is a clause that (typically) relieves both parties from liability or the obligation to

perform in case of an extraordinary event or circumstance beyond the control of the parties. Common examples of force majeure include war, political unrest, strikes, riots and natural disasters (also referred to as “Acts of God”), such as hurricanes, floods or earthquakes.

If the force majeure clause does not specify “pandemics”, “epidemics” or “diseases”, such events may still be “caught” under a “catch-all” clause dealing with all events beyond the reasonable control of a party. It is likely that COVID-19 as a pandemic would normally qualify as such an event.

Please note that force majeure does not include the situation where the contract can be performed but this becomes only more onerous (e.g. less profitable) for one party as a result of unforeseen circumstances (such as the consequences of the preventive measures taken because of the COVID-19 pandemic). If the performance only becomes more onerous, other remedies may be available.

3. INSURANCE COVERAGE

Whether an insurance policy covers COVID-19 losses depends on the type of insurance, the type of loss and the specific policy conditions, including its endorsements.

The most obvious type of insurance that will play a role is the Business Interruption insurance (“BI”). A typical commercial property insurance policy provides BI cover, but such cover will only be triggered by an event covered under the commercial property policy as a named peril, e.g. “physical loss” caused by fire, storm, flooding, etc. More often than not, a pandemic is not a named peril or it is explicitly excluded. BI policies providing coverage would be linked to property insurance on a “all-risks” basis, with broad wording such as “all risks of direct physical loss or damage from any external cause.” or those policies that have extended coverage for “virus” and “disease” by means of an endorsement.

If a pandemic is not explicitly excluded, a “physical loss” under the property insurance in the context of COVID-19 may be construed in the event that the work premises become contaminated and therefore unusable.

An alternative extension of coverage for BI concerns coverage for “contingent business interruption” and “supply chain risk”. These endorsements cover losses arising from disruptions to an insured’s supply chain. This may include both suppliers and customers. Depending on the specific policy wording, coverage may apply in the event that

a supplier ceases operations as a result of COVID-19, and as a result thereof adversely impacts the operations of the insured. The coverage provided may be subject to certain limitations, such as a specified territory, specified goods or services or only "direct" suppliers. Whether coverage will extend to losses arising from COVID-19 will depend on the specific facts.

General Liability insurance may play a role for instance if a third party alleges that protective measures adopted by the insured were disproportionate or unnecessary and caused damages. Or if the lack of adequate mitigation measures by the insured caused damages to a third party, e.g. when they can substantiate the causal link between their illness and their presence in an infected area on the insured's premises.

Another insurance that could be relevant is Workers Compensation / Employers' Liability insurance. This insurance provides cover for loss caused to an employee in the workplace or as a result of their work activities. Employees who got infected or quarantined while on business travel to infected areas or due to a lack of adequate protective measures may hold their employer liable for damages.

In respect of all these (potential) insurance claims, the insurance company should be notified at once.

4. PRACTICAL SUGGESTIONS

- Review contracts and general conditions to determine whether general language is included that provides relieve in case of force majeure.
- Review insurance policy conditions to determine coverage for losses or liability resulting from COVID-19.
- Review whether there are any notice requirements to trigger the relief, including requirements that concern time limits and required substantiating documents.
- Consider what steps can be taken to avoid or mitigate effects of COVID-19 on your ability to perform contractual obligations.
- Record and document the mitigation measures that have been evaluated and/or executed.
- Carefully consider the wording in the notice and framing of the force majeure event, as well as the consequences linked thereto.
- When receiving a notice of force majeure yourself, check whether it is within the scope of protection offered by the law and/or the contract. Verify whether there is a causal link and whether all reasonable mitigation measures have been depleted.



hbn | law & tax

For further information please contact:

Aruba Office:

Eline J.M. Lotter Homan

Senior associate

Eline.LotterHoman@hbnlawtax.com

Bonaire Office:

Chris de Bres

Partner

Chris.DeBres@hbnlawtax.com

Curaçao Office:

Eric R. de Vries

Managing Partner

Eric.DeVries@hbnlawtax.com

Sint Maarten Office:

Joanneke Deelstra

Senior Associate

Joanneke.Deelstra@hbnlawtax.com

Amsterdam Office:

Jan Pas

Partner

Jan.Pas@hbnlawtax.com

Amsterdam

Concertgebouwplein 7
1071 LL Amsterdam
The Netherlands
T. +31 20 303 3020
E. info@hbnlawtax.com

Aruba

L.G. Smith Boulevard 54
Oranjestad, Aruba
T. +297 583 9311
E. info@hbnlawtax.com

Aruba

Beatrixstraat 38
Oranjestad, Aruba
T. +297 588 6060
E. info@hbnlawtax.com

Bonaire

Kaya Korona 40
Kralendijk, Bonaire
Dutch Caribbean
T. +599 717 6944
E. info@hbnlawtax.com

Curaçao

L.B. Smithplein 3
Willemstad, Curaçao
T. +5999 4343300 (general)
T. +5999 7325400 (tax)
E. info@hbnlawtax.com

Rotterdam

Weena 505
3013 AL Rotterdam
The Netherlands
T. +31 10 800 5483
E. info@hbnlawtax.com

Sint Maarten

W.G. Buncamper Road 33
Philipsburg, St. Maarten
T. +1 721 542 2272
E. info@hbnlawtax.com

©2016 HBN Law | The information provided in this document is for general information purposes only and does not constitute legal or other professional advice. No rights can be derived with respect to its reliability for specific purposes and no warranty is given to its accuracy or completeness.