



NEWSLETTER

From: Commercial Law Department
Subject: Rent payment in times of COVID-19
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RETAILERS STOP PAYING RENT IN TIMES OF COVID-19: CAN THEY INVOKE FORCE MAJEURE?

1. Unilateral suspension of contractual obligations by a tenant

The payment of the rent is the main and essential obligation of a tenant. Generally, a tenant can only suspend the performance of this essential obligation on the basis of a court order allowing it to do so or in case the landlord is not respecting its own contractual obligations, which merely consists of making the rented property available to the tenant and ensuring peaceful use thereof.

Tenants could take the position that because of the closure of the store the landlord no longer fulfills these obligations and that they are therefore entitled to suspend their own payment obligation (in application of the general principle of law "*exceptio non adempti contractus*").

It remains to be seen whether this line of reasoning could succeed, but since the landlord is not obliged to warrant the tenant against the disorder caused by third parties through factual circumstances (article 1725 Civil Code) and the Belgian government is also considered to be such third party, this seems unlikely. In cases where it became more difficult or impossible for a tenant to use a rented property as a result of a government decision (e.g. road works), it has already been ruled that there was no warranty obligation for the landlord. Also, a landlord could probably invoke force majeure to be released from liability (see next chapter), which would make unilateral suspension by the tenant unjustified.

2. Force majeure could be hard for a tenant to substantiate

Force majeure is generally defined as an unforeseeable and unavoidable event independent of the will of the party invoking force majeure, which

makes it impossible for this party to (further) perform its contractual obligations. It is generally admitted that it does not suffice that it becomes more difficult and/or more burdensome to fulfill the contractual obligation (hardship is as such not yet generally recognized under Belgian law). If the situation of force majeure is only temporary, contractual performance can be suspended for the duration of the event qualified as force majeure. The party entitled to invoke force majeure shall not be liable to pay any compensation for breach of contract.

If one of the conditions for force majeure is not met, one cannot rely upon it to be exonerated from his obligations.

It being clear that the corona-crisis and its consequences are events independent of the will of the tenant and assuming that the corona-crisis and the subsequent government measures are unforeseeable and unavoidable events for tenants (which is, however, not always the case – see our news item of 19 March 2020 [here](#)), the main difficulty for tenants to invoke force majeure will be demonstrating that it became *impossible* for them to continue the rent payment.

Even though there will possibly be some cases where a tenant can be successful, it will often also be hard to substantiate force majeure. From a factual point of view the tenant will often still be able to pay the rent and only because this mere possibility exists, there is a greater chance that force majeure will be rejected. Relevant is also that the Court de Cassation has ruled in 2018 that financial impossibility, even if due to external circumstances that constitute force majeure for the debtor, does not in principle release the debtor from his payment obligation.

On top of that a landlord could argue that closure of the store following a government order is part of the entrepreneurial risk and that force majeure may not lead to a shift of the economic risk to the landlord.

On another note: if it would be admitted that the landlord would not fulfill his contractual obligations and that this could justify a tenant suspending his payment (see previous chapter), the question can be asked whether landlords themselves could not invoke the force majeure argument. Does the government order to close the stores in this hypothesis not render it impossible for the landlord to fulfil his obligations? This seems more likely.

3. Other arguments for the tenant to “escape” payment

Reasonableness, good faith performance of contracts and the prohibition of abuse of rights, principles which should prevent the landlord from taking unfair advantage of the tenant confronted with an unreasonable disadvantage, could be other, and possibly more useful, grounds to consider for justifying suspension (or reduction) of rents in times of

corona. These are, however, not immediately arguments that would justify the unilateral decision of the tenant to suspend or reduce the rent, but are rather to be invoked in the context of a claim for suspension or reduction in court.

Furthermore, judges are generally allowed to grant moderate deferment of payment and suspend proceedings, notwithstanding any clause to the contrary, "*having regard to the situation of the parties*" (article 1244 Civil Code). Given the extraordinary nature of the corona-crisis, the unanimous call for reasonableness and the size of the group of possibly affected tenants, it is not inconceivable that judges would decide to impose some kind of compensation or concession in favor of the tenants.

4. Possibility to mutually agree

Nothing prevents parties to enter into discussions and to agree upon a temporary suspension, postponement, reduction etc. of their mutual obligations.

As shown by the uncertainties described in this document and so as not to compromise the future course of the relationship, a mutual agreement fit to the specific circumstances and to the benefit of all parties could maybe even the best solution. In the end, it is not to the advantage of a landlord either that his tenant eventually gets into trouble.

Wish to contact our legal experts?

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