



Due to the corona crisis, many companies had to shut down activities. Agreements could no longer be executed or were temporarily put 'on hold' and force majeure was invoked: an unforeseeable and unavoidable event that makes it (temporarily) impossible to fulfil a contractual obligation. Also in the absence of contractual provisions force majeure can be invoked, under the Belgian Civil Code. Parties remain free to regulate the application and consequences of force majeure contractually and to derogate from the statutory regime. Under the influence of international and foreign contractual practices, parties sometimes list the events that are considered as cases of force majeure. Classic examples are natural disasters, exceptional weather conditions, war, fire, etc. Should epidemic diseases find their place on that list?

What is an epidemic? It is generally admitted that there is an epidemic when a disease occurs clearly in excess of normal expectancy within a given population. According to the WHO, the number of cases indicating the presence of an epidemic varies according to the agent, size, and type of population exposed, previous experience or lack of exposure to the disease, and time and place of occurrence. Sciensano is the body that monitors epidemics in Belgium. According to this body, the annual seasonal influenza epidemic occurs, for example, when 20% of the samples tested positive for the virus. Such influenza epidemic would most of the times as such not constitute a case of force majeure. In the case of corona. It are rather the lock-downs, social distancing and other measures that lead to the force majeure situation.

Contractual provisions can list incidents as examples and at the same time stipulate that conditions as unforeseeability, unavoidability and impossibility must

also be fulfilled. In such case adding a list of incidents does not change anything to the legal regime. It might help in some cases to establish that a certain incident is to be considered as a case of force majeure in the contractual relationship. The degree of impossibility can also be qualified: must the debtor make every effort to fulfil the obligation or are unreasonable efforts not expected from the debtor to fulfil the obligation?

If contractual provisions stipulate that listed incidents are always to be considered as force majeure cases (even if they do not make it impossible to execute the contract), the classical force majeure concept is emptied. The contractual provisions then serve a different purpose: contract annulation or contract variation. Such contractual clauses make sense, but should not be seen through the lens of force majeure. In addition, at this moment the test of unforeseeability in the case of the Covid-19 epidemic is problematic, as the possibilities of more stringent lockdowns after the loosening of the present lockdowns are already well-known.

Rather than negotiating a force majeure clause, the economic balance of new contracts can be taken into account through annulation clauses, suspension clauses and guaranteed payment clauses. There is no one-size-fits-all solution and simply including epidemics as a case of force majeure is not always the right vaccine.



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