

# CONTRACT PERFORMANCE DURING THE GLOBAL OUTBREAK OF CORONAVIRUS

## FORCE MAJEURE LAW AND PRACTICE THE NETHERLANDS

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A photograph of a woman with long brown hair, wearing a white long-sleeved top and black pants, leaning on a glass railing on a modern staircase. The staircase has a grey metal frame and glass railings. The background shows a modern interior with a white ceiling and a wall with a grid of light fixtures. The overall scene is brightly lit and has a clean, architectural feel.

**HOUTHOFF**

## INTRODUCTION

The spread of the coronavirus has led globally to great human cost. Many countries have taken various prevention and control measures to reduce the risk of transmissions. These measures include restricting business activities and flights, closing borders and even the lockdown of certain cities. Although the Dutch response towards the coronavirus has been relatively mild, with no forced lockdowns, measures taken elsewhere also affect the performance of international commercial sales contracts involving one or more Dutch contract parties. Delays in production, supply and transportation may result in delay or failure to perform a contract. This article focuses on force majeure from a Dutch law perspective. It touches upon other possible remedies or measures that an enterprise may rely on if there is an impediment to performance and aims to provide general guidance for enterprises that are in need of this. This article is divided into the following four chapters: 1) the concept of force majeure under Dutch law; 2) the conditions for invoking force majeure and the burden of proof; 3) the consequences of force majeure; and 4) measures that Chinese enterprises can take.

## 1. THE CONCEPT OF FORCE MAJEURE UNDER DUTCH LAW

According to the Dutch Civil Code ("**DCC**"), there is force majeure if the failure to perform an obligation is neither the non-performing party's fault, nor is it for its account under the law, a legal act or common opinion<sup>1</sup>.

Force majeure can be agreed upon by the parties to a contract (the 'legal act'). If a contractual force majeure clause has been agreed, in principle it will no longer be tested against fault, law or common opinion.

### 1.1 Force majeure clauses in contracts

Parties to a contract usually include force majeure clauses in the contract. Force majeure is generally defined as an event or circumstance that is unforeseen and beyond the control of the parties, and which has the effect of preventing, hindering or delaying the performance of their obligations. Contracts usually include a list of force majeure events, including events such as natural disasters, wars, government acts, etc. If a force majeure event occurs, the obligation of an affected party to perform the contract will be suspended. In general, the party invoking the force majeure clause must also comply with a notification mechanism and provide written notice of the force majeure event to the other party.

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<sup>1</sup> Article 6:75 DCC.

If a 'pandemic' or 'epidemic' is deemed to be 'force majeure' or a circumstance beyond a party's control in a contract, it is obvious that the coronavirus will be covered by the contractual clause. In the absence of such an explicit reference, it will have to be examined on a case-by-case basis whether a failure caused by the coronavirus, or measures taken by the authorities in this context, are covered by the force majeure clause. What the parties have included in an agreement or the applicable general terms and conditions needs to be interpreted in accordance with the 'Haviltex standards' established by the Dutch Supreme Court.<sup>2</sup> The decisive factor is the meaning that the parties may reasonably attribute to the provisions of the agreement under the given circumstances and what they may reasonably expect from each other.

## **1.2. Force majeure in the absence of a contractual provision (statutory provisions)**

In addition to the above-mentioned contractual arrangements (the 'legal act'), whereby force majeure clauses are expressly agreed upon, force majeure can also be invoked by relying on various grounds under the statutory provisions of the DCC such as the absence of fault, attribution under the law or based on common opinion.

### Absence of fault

A party may invoke the absence of fault if it claims and proves that it cannot be personally blamed for the failure to perform. The failure must not be the result of an impediment or its consequences which the non-performing party should and could have prevented. If, for example, there are government regulations due to the coronavirus pandemic which mean that a party cannot fulfil its obligations, it cannot invoke the absence of fault if it did not use available alternatives.

### Attribution under the law

Non-performance can be attributed to the defaulting party under the law. In the context of the coronavirus, Article 6:76 DCC, which imposes vicarious liability, is particularly important. This means that if an auxiliary person, such as a subcontractor, has been engaged by a party to the contract and this auxiliary person cannot comply because of the coronavirus, this will be the responsibility of the principal party to the contract, unless there is a case of force majeure. Force majeure on the part of the auxiliary person also constitutes force majeure on the part of the principal party to the contract.

### Attribution on the basis of common opinion

The last ground to be discussed on which force majeure can be assumed is common opinion, meaning the views on the distribution of risks that are prevalent in practice. The usual insurances or guarantees can be a starting point for this. The problems relating to the coronavirus are unique, and at the time of writing and to the best of our knowledge, there is no Dutch case yet on whether

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<sup>2</sup> Supreme Court 13 March 1981, [ECLI:NL:HR:1981:AG4158](#), NJ 1981/635 (Haviltex).

the coronavirus constitutes force majeure. However, decisions in past cases may be useful for understanding whether the coronavirus may be considered to be force majeure.

In principle, there is no force majeure in the event of:

- the presence of alternatives;<sup>3</sup>
- foreseeability of the impediment;<sup>4</sup>
- adverse economic position of non-performing party and inability to pay;<sup>5</sup>
- illness of the non-performing party, unless the performance could only be performed by this specific party. In principle, if that party has an increased susceptibility to illness, this does not constitute force majeure, because it is foreseeable;
- other impediments that are the non-performing party's responsibility (e.g. entrepreneurial risk).<sup>6</sup>

In principle, a situation of force majeure exists in the event of:

- unforeseeable government measures that prevent all means of performance;<sup>7</sup>
- unforeseeable contamination of natural materials;<sup>8</sup>
- objective danger to the life, health or liberty of the non-performing party or their family, if this danger was unforeseeable and no imputable act by the non-performing party has taken place;
- extreme weather conditions that the non-performing party did not have to be prepared for.<sup>9</sup>

Whether government measures in the context of the coronavirus constitute force majeure has to be analysed on a case-by-case basis. In principle, force majeure applies in the event of unforeseeable government measures that prevent all forms of performance (if the contract does not exclude this). At the moment, however, the coronavirus is foreseeable, and it is obvious that many measures that the Dutch government is currently taking<sup>10</sup>, or will be taking in the future can

<sup>3</sup> E.g. 's-Hertogenbosch Court of Appeal 7 May 2013, [ECLI:NL:GHSHE:2013:BZ9854](#), Limburg District Court 13-03-2013, [ECLI:NL:RBLIM:2013:BZ5189](#), Zutphen District Court 12 March 2012, [ECLI:NL:RBZUT:2012:BV8603](#).

<sup>4</sup> E.g. Rotterdam District Court 30 May 2016, [ECLI:NL:RBROT:2016:4089](#).

<sup>5</sup> E.g. Arnhem District Court 24 October 2008, [ECLI:NL:RBARN:2008:BG3630](#), Oost-Brabant District Court 23 March 2020, [ECLI:NL:RBOBR:2020:1763](#).

<sup>6</sup> E.g. Arnhem-Leeuwarden Court of Appeal 17 September 2019, [ECLI:NL:GHARL:2019:7612](#), Overijssel District Court 23 February 2016, [ECLI:NL:RBOVE:2016:787](#), 's-Hertogenbosch Court of Appeal 19 December 2006, [ECLI:NL:GHARN:2006:AZ9788](#), Zutphen District Court 19 October 2005, [ECLI:NL:RBZUT:2005:AU5519](#).

<sup>7</sup> E.g. District Court of The Hague 22 October 2019, [ECLI:NL:RBDHA:2019:11877](#), Arnhem District Court 4 May 2005, [ECLI:NL:RBARN:2005:AT6050](#).

<sup>8</sup> E.g. 's-Hertogenbosch Court of Appeal 13 September 2016, [ECLI:NL:GHSHE:2016:4087](#).

<sup>9</sup> E.g. 's-Hertogenbosch Court of Appeal 7 June 2011, [ECLI:NL:GHSHE:2011:BQ7625](#), 's-Hertogenbosch Court of Appeal 4 December 2018, [ECLI:NL:GHSHE:2018:5105](#), Noord-Nederland District Court 6 May 2015, [ECLI:NL:RBNNE:2015:2180](#).

<sup>10</sup> Such as closing restaurants, cafes, beauty salons, fitness centres, theatres, cinemas, schools, daycare etc. and limiting social life by urging people to work from home and keeping 1.5 metre distance.

also be considered foreseeable. Government aid measures could possibly reduce the damage suffered by one of the contracting parties or both contracting parties and have an impact on the possibility of invoking force majeure.

A foreign government measure may also constitute force majeure under certain circumstances, for example if an unforeseen export ban or transportation method in a certain country prevents the delivery of goods from that country to the Netherlands. However, if an alternative method of performance is possible, like another transportation method, force majeure may not be assumed, even if the alternative is more expensive. For agreements to which Chinese law applies, the fact that a certificate of force majeure has been issued by the China Council for the Promotion of International Trade may be relevant. However, the Dutch courts are not bound by this and the value of the certificate will depend on the manner in which it came about. For agreements to which Dutch law applies, a court will have to examine whether, according to Dutch standards, there is force majeure.

## 2. CONDITIONS FOR INVOKING FORCE MAJEURE AND THE BURDEN OF PROOF

In the event of an impediment to performance, the statutory provisions of force majeure may be invoked if there are no relevant force majeure clauses set out in the contract. The law does not require that performance is actually impossible, but as a rule this must be wholly or partly – or temporarily – the case. The impediment may also be that performance is too difficult in practical terms for a party, i.e. if performance costs the party so much effort or sacrifice that it must be regarded as impossible in practical terms.

If the (non-attributable) non-performance is only temporary, in principle force majeure is only temporary as well. However, if the moment of fulfilment was an essential part of the performance, a temporary impediment could lead to permanent force majeure. This will generally speaking be the case in the event of the supply of perishable goods. During temporary force majeure, the obligation to perform will be suspended. In that case, the other party will not be able to claim performance and, in principle, will not be able to claim damages either, although this depends on the contractual arrangements. As a rule, as soon as the impediment is over, the commitments resume.

In light of the current circumstances, a situation will often arise where a party invokes force majeure because, as a result of the coronavirus outbreak and subsequent government measures, it is temporarily unable to fulfil its contractual obligation. If there is force majeure and therefore no alternatives are available, the other party will, in principle, have to cooperate (depending on the contractual arrangements).

The obligation to furnish facts and the burden of proof for force majeure rests with the party that invokes force majeure. There is no obligation in law to inform the other party about the force majeure situation. This obligation to provide information may, however, be regulated by agreement.

### 3. CONSEQUENCE OF FORCE MAJEURE

The consequences of force majeure depend in the first place on the contractual arrangements. Failing this, Dutch civil law provides for the following consequences. If the non-performing party succeeds in invoking force majeure, it does not have to pay damages for the non-performance.<sup>11</sup> However, if the non-performing party who invokes force majeure enjoys an advantage in connection with the failure to perform that it would not have had if there was proper performance, the other party may claim damages from the non-performing party based on the unjust enrichment, up to a maximum of the amount of this advantage.<sup>12</sup>

Force majeure may also prevent the other party from claiming performance, if the performance is actually impossible.

However, force majeure does not deny the other party the possibility to suspend its own performance or to fully or partially terminate the contract, unless the failure, in view of its special nature or minor importance, does not justify this termination with its consequences.<sup>13</sup> It is possible that the consequences of the coronavirus pandemic and the government measures issued on this ground will prevent termination, for example if a party wishes to comply after the government measures have been withdrawn.

### 4. MEASURES THAT CHINESE ENTERPRISES CAN TAKE

Due to the impact of the coronavirus outbreak, Chinese enterprises may consider the remedies and measures below if there is an impediment to performance.

#### 4.1. Invoking force majeure

An enterprise may invoke the force majeure clause set out in the contract or under the DCC, by collecting and submitting evidence. Particular attention should be paid to alternatives for the hindered performance.

#### 4.2. Use of reasonableness and fairness standards

Under special circumstances, a force majeure clause does not apply in so far as this would be unacceptable according to the standards of reasonableness and fairness, for example, if the damage is due to intent or deliberate recklessness on the part of the non-performing party or

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<sup>11</sup> Article 6:74 and 6:75 DCC.

<sup>12</sup> Article 6:78 DCC.

<sup>13</sup> Article 6:265 DCC.

persons in charge of the business.<sup>14</sup> The words 'in so far as' mean that reliance on a force majeure clause can be limited in whole or in part. The court applies this test cautiously.

### 4.3. Unforeseen circumstances

Dutch law offers each party the possibility to claim amendment or partial or complete termination of an agreement in court if unforeseen circumstances arise. This means circumstances that occur after the conclusion of the agreement and that have not been taken into account in the agreement.<sup>15</sup> This must be an unforeseen circumstance of such a nature that, according to the standards of reasonableness and fairness, the parties cannot expect the agreement to continue unchanged. This criterion will only be met in very exceptional cases, since reasonableness and fairness demand faithfulness to what has been agreed and only allow deviation from it in very exceptional cases. In principle, a guarantee does not preclude reliance on unforeseen circumstances. However, the guarantor relying on unforeseen circumstances has a serious obligation to furnish facts and reliance on its part will be honoured only in very exceptional cases. It should be noted that changes to the agreement based on unforeseen circumstances can only be introduced by the courts, not unilaterally by one of the parties.

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### For further information, please contact:



**WALTER VAN OVERBEEK**  
ADVOCaat | PARTNER

T +31 20 605 61 61  
M +31 6 5160 8209  
w.van.overbeek@houthoff.com



**JETTY TUKKER**  
ADVOCaat | PARTNER

T +31 20 605 65 18  
M +31 6 5339 7433  
j.tukker@houthoff.com



**GLORIA HUANG**  
CHINESE LAWYER  
(NON-PRACTICING) | CHINA  
PROJECT MANAGER

T +31 20 605 64 91  
M +31 6 1296 5890  
g.huang@houthoff.com

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<sup>14</sup> Supreme Court 18 June 2004, [ECLI:NL:HR:2004:AO6913](#), NJ 2004/585 (*Kuunders v. Swinkels*), Supreme Court 24 March 2006, NJ 2007/377, [ECLI:NL:HR:2006:AU7492](#) (*Municipality of Geldermalsen v. Plameco*).

<sup>15</sup> Article 6:258 DCC.