

Whitepaper

International Commercial contracts and the Corona Crisis

Madelon van Breemen

Leeman Verheijden Huntjens Advocaten



We are now experiencing what the measures implemented by the Dutch government mean to our daily business and how this Corona crisis is forcing the economy and businesses to start thinking in a different way. Everyone is caught by the Corona crisis, it is affecting every single facet of society.

The world is changing before our eyes and the challenge is to be flexible enough to survive this storm.

LVH Advocaten has set up a Corona help desk especially for the SME non-Dutch speaking market. Please press [here](#) and you will be forwarded to the relevant page on the internet site. LVH Advocaten updates the information on the Corona help desk on a daily basis, so watch that space. Furthermore, LVH Advocaten will issue white papers from time to time to inform you on certain aspects affecting your business enterprise, and to advise you of the options that you may have before you.

In this paper I will address one aspect being (international) commercial contracts and how they may be affected by the Corona Crisis. What happens if your business enterprise can no longer perform its services and/or deliver goods, and what happens if your business enterprise can no longer make the payments because your turnover has plummeted?

First, I will summarise your rights under Dutch law and what possibly may be covered in the commercial contract with your customer, supplier etc. Second, I will then give you some specific Corona crisis issues that need to be addressed before going to the next step. Third, based on those two other issues, I will set out which remedies can be applied in order to help you and to ensure that your company remains flexible in this current crisis. Flexibility is key here, for the business enterprise and also for the attorneys.

Each party will have legal rights, either by contract and/or by law, but what can you do with these rights in a situation as this? The Corona crisis is forcing attorneys to be flexible in finding a solution within the legal parameters before us in this changing world. The advice in this white paper does not only concentrate on your rights but also what is achievable and desirable in the circumstances in which we are living today. Today, the world has turned upside down, which means that the thinking that has worked in the past will no longer work in the future. This calls for being flexible, listening carefully to what the problem is and actively suggesting different solutions. That is what LVH Advocaten stands for, flexibility, goal driven with the ability to listen and analyse the real underlying issue.

Your legal position as a SME under the Dutch Civil Code

The first question is whether the commercial contract is entered into between two professional parties with an international character? If the commercial contract is entered into with a professional party that is registered or trading from another country, then it may well be that the Vienna Convention (UN Convention on the Sale of Goods (CISG)) is applicable. It could well be that the CISG was excluded in the commercial contract which means that the applicable law clause in the commercial contract needs to be consulted to see which law is applicable. Please check the commercial contract to find out whether the CISG is applicable and I can advise your company accordingly.

The second question is which law is applicable if the parties operate in different countries. The commercial contract generally deals with the applicability of law. However, in the event that there is no choice of law clause, then the general international private law legislation will apply to determine which law is applicable. For the purposes of this white paper, I will assume that Dutch law is applicable where the CISG is excluded from the commercial contract.

Dutch law provides for a situation where one of the parties to the commercial contract can no longer perform as a result of the Corona crisis. It could be that your company is the supplier and you can no longer supply the goods and/or services or it could be that you are the customer that has bought the goods and/or services and your business enterprise can no longer pay for the goods and/or services bought.

The non-performance, whatever the form, may be a breach of commercial contract. A breach of contract has certain formalities to comply with under de DCC. The DCC also gives you other options, being force majeure and unforeseen circumstances. Both of which, if successful, are not considered to be a breach and provide for a number of suitable remedies, such as rescission of the contract or amending its terms and conditions.

Force majeure and Corona

In case of a breach of contract, it is possible for the debtor to invoke force majeure. The DCC stipulates that the force majeure can be invoked when the breach cannot be attributed to the debtor and does not fall within the debtor's risk based on the law, legal act or accepted practice. Whether the failure to perform is considered to be a case of force majeure within the definition of the DCC will be decided taking into consideration all the facts and circumstances. Your company must be in the situation where it is impossible to perform or where performance is too burdensome. The Corona crisis may mean that performance may breach the restrictions imposed by the Dutch government.

Burden of proof on party claiming force majeure

Please do not forget that the burden of proof is on the party claiming force majeure and your company will need to prove that performance is impossible, the impossibility is outside of her control, the consequences cannot within reason be prevented, the contracting parties did not foresee this situation at the time of entering into the commercial contract and last but not least there is no circumstance in the DCC or in the commercial contract that places it a risk of the party wanting to invoke the force majeure.

If this has been proven, then there is no obligation to perform or no obligation to pay damages because even though formally speaking there is a breach of the commercial contract, the breach cannot be attributed. Also, consult your commercial contract to see whether there is a clause dealing with force majeure. If there is, then this clause may prevail over the conditions set out in the DCC.

Unforeseen circumstances and Corona

The DCC enables the suffering party to apply for the consequences of the commercial contract to be amended or for the contract to be rescinded as a result of unforeseen circumstances. The article on unforeseen circumstances in the DCC is a specific elaboration of the test of reasonableness and fairness. The first thing to check is whether the commercial contract contains such a clause dealing with unforeseen circumstances. If so, then the second thing to do is read this clause in conjunction with the provision in the DCC as part of the provision is compulsory law. If there is no provision in the contract, then the provision in the DCC will be your primary focus.

Issues that need to be considered regarding unforeseen circumstances:

- The unforeseen circumstances should lie in the future. It should be an event that has taken place after the contract has been entered into;
- The Parties have not covered this event in the commercial contract;
- The event is so serious that the suffering party cannot reasonably be expected to meet the conditions of the contract;
- The event is so unique that it cannot be considered to be the normal commercial risk of a business enterprise.

How to exercise the right of unforeseen circumstances when Dutch courts are closed due to Coronavirus?

How do you exercise this right when the Dutch courts are closed and when your turnover has reduced as a result of the Corona crisis? The first thing to do is contact the supplier and inform him or her about the situation. Secondly, try to start a dialogue with the supplier and consider the alternatives. Thirdly, once you have reached a solution, the contract will need to be amended to reflect the changes. Finally, if you have the same issue with other suppliers, contact these and approach them in the same way.

Please contact me if you need advice on whether your company can exercise these rights under the DCC. There is a substantial burden of proof on the suffering party when it comes to force majeure or unforeseen circumstances and I can advise you on which right is most appropriate and likely to succeed.

Breach of contract due to Corona crisis

In the event that the non-performance is not a force majeure situation or unforeseen circumstance, then it could be that this non-performance is considered to be a breach of the commercial contract for which the debtor is liable. The DCC sets out certain formal requirements that need to be met in order for the breach to trigger certain rights. I can check whether these requirements have been met based on the terms of the commercial contract etc. If they have then the DCC enables the party to rescind and/or revoke the commercial contract, the latter remedy is referred to below.

Rescission and/or revocation of the commercial contract

Rescission is where parties end the agreement and obligations to undo arise. This is different than revocation, which does not end the agreement like with rescission, but annuls the contract with retroactive effect, so it is like the agreement has never existed. There is a subtle difference between the two.

If the will of one of the parties to conclude the contract has been determined in an imperfect or impure manner, that party may invoke the revocation of the contract on the grounds of a will-defect, as said party would probably not have entered into the commercial contract if there was no will-defect. The DCC makes a distinction between four different types of will-defects, being threat, deception, mistake (misinformation) or abuse of circumstances.

This white paper will assume for this moment that there is no such will-defect. Nevertheless, as the Corona crisis continues, a trend may develop where a party is abusing the circumstances.

The interpretation of the commercial contracts in light of the Corona crisis

The Corona crisis is unique in the sense that it affects every single person in the world, and therefore also the other contracting party. As it affects all of us, we all have a common interest, which is to survive and join forces. Flexibility is the key here. Being flexible in taking in your position and also flexible in what your company wants to achieve.

Once you know your rights, what do you want to achieve as everyone is suffering from the Corona crisis?

In order to answer this question, the client will need to do some soul searching and answer the following questions:

1. What does the company in question want to achieve? Do you need the goods and/or services to do your business? If the answer is yes, then carry on reading.
2. Does the company in question trade frequently with the other party, is there a form of dependency?
3. What are you most afraid of?

The answers to these questions will point your company in the right direction of what you can do.

Below you will find a list of remedies:

1. Communicate with the other party
2. Communicate with the other party, that is probably the most important step that you need to take before you start taking legal action.
3. Consult with your attorney on the do's and don'ts with respect to communication. For example, when do you put something in writing and when do you not? Remember written communication is strong evidence, and could also be interpreted in different ways.

Postponement of payment or performance of the agreement

Under the DCC, the other party may have the right to postpone payment if the other party cannot perform. There needs to be a reasonable connection between the non-performance and the postponement. However, it could be that this right has been amended or extended in the contract or in the general terms and conditions of the commercial contract. Postponement of payment or performance may have such a large impact on the other side, and if possible, discuss this with the other side first.

Termination, rescission or revocation of the commercial contract

Termination, rescission or revocation of the commercial contract are different ways ending the agreement, and the commercial contract and applicable law should be considered carefully. What is the difference and what applies to which situation? The DCC makes a distinction between different ways of ending a commercial contract, being termination, dissolution or rescission.

Rescission of the commercial contract applies when there is a formal breach of the agreement in accordance with the conditions set out in the DCC or in the commercial contract, if any. Formal breach is where the requirements of the DCC have been met, the DCC has very strict requirements that need to be met before a party is in breach, hence the reason for the use of formal breach. With rescission, the parties are placed in the situation where the performance of the commercial contract is reversed. As a result of the rescission, the agreement terminates and the parties are obliged to undo the services they have already provided. The parties must restore each other to the old situation as much as practicable. Rescission is often excluded in commercial contracts, so please check the commercial contract.

Entered commercial contract based on a mistake

Revocation of the commercial contract may also be a remedy in certain circumstances in the event that the commercial contract was entered into based on a mistake, whereby if the correct circumstances would have been disclosed at the time of entering into the agreement, the party in question would not have entered into the agreement. Revocation means that parties are put in the situation as if the commercial agreement had never existed.

Damages in case of a formal breach in contract due to the Corona crisis

Damages are due and payable in the event that one of the parties are in formal breach in accordance with the requirements of the DCC. The DCC defines the scope of damages, and if there is a clause in the commercial agreement dealing with damages, then this clause could prevail over the DCC. The DCC enables punitive damages to be claimed in addition to other damages such as financial loss and loss of profits, reasonable costs for mitigating the damage reasonable costs to determine or limit damage and liability and extra-judicial legal costs to determine the damage and extra-judicial costs to exercise your rights.

However, in the event that there is a clause in the agreement dealing with the scope of damages, then this will change the situation, as this principle in the DCC can be deviated on in the agreement. It is quite common for the damages clause in the agreement to exclude the right to pay punitive damages, so it is important that the relevant clause is analysed carefully from a legal point of view.

Based on the above, there are many steps to take by your attorney in order to determine your rights. The facts and circumstances are vital here. Once your rights have been established, then there are other issues to be considered. The Corona crisis forces everyone to think outside the box and be flexible, as we are all in the same boat.

The Corona crisis forces your company to find a solution that is most beneficial to the continuation of your business and to find a solution that is workable in this Corona crisis. This is how the legal team at LVH Advocaten distinguish themselves.

Legal Corona help desk in The Netherlands

LVH Advocaten consists of attorneys that they are there to solve your problem in the current situation so that you can continue your business as usual. If you cannot do business then we cannot do business. For questions and/or advice please contact Madelon van Breemen on (+31) (0)10 209 27 56 or by e-mail vanbreemen@lvh-advocaten.nl.