Force Majeure, Frustration of Contract, and Impossibility in Dutch Law

by Nigel Margetson and Nick Margetson, Margetson Lawyers

Articles | Law stated as at 28-Apr-2020 | The Netherlands

This article provides guidance on the Dutch law equivalents of force majeure, frustration of contract and impossibility in the context of the 2019 novel coronavirus disease pandemic (COVID-19).

Force majeure, Frustration of contract, and Impossibility in Dutch law

Lawyers in common law and English-speaking countries are accustomed to deploying clauses in their contracts setting out the events to be deemed *force majeure*, and the consequences to follow the occurrence of such events.

This is unusual in contracts subject to Dutch law because the Dutch Civil Code (DCC) provides for *force majeure*-type exceptions to the performance of contractual obligations, which apply as a matter of national law unless specifically varied by the parties in their contract (*Article 6:75, DCC*).

There are no separate, additional concepts of frustration of contract and impossibility in Dutch law. Broadly, Article 6:75 DCC (together with other Articles relating to statutory rights of termination, suspension, and amendment of a contract) are the Dutch law equivalents of *force majeure*, frustration of contract, and impossibility.

Dutch Civil Code

Article 6:75 DCC provides that an obligor is not liable for a failure to perform its obligations, if the failure is not its fault, and not otherwise attributable to it pursuant to (i) the law, (ii) any legal act, or (iii) generally held views.

Examples of the attribution of fault under Article 6:75 DCC might be:

- Vicarious liability and strict liability-type attribution by law under Articles 6:76 and 6:77 DCC.
- Attribution by the legal act of giving a guarantee – an obligor who gives guarantees around its performance might then no longer benefit from the protection of Article 6:75 DCC (although the meaning of a guarantee could still be subject to a court's interpretation).

- Attribution based on generally held views as to the normal business practices and conventions of an industry or profession.

Effect of the force majeure defence under Article 6:75 DCC

The *force majeure*-type defence available under Article 6:75 DCC has the effect of releasing an obligor from the performance of its obligations to the extent that it is prevented from performing them, and for the duration that it is prevented from performing them. Moreover, the defence releases the obligor from liability for the failure.

Conditions around application of the Article 6:75 DCC defence

An obligor can only rely on the defence when it is genuinely prevented from performing its contractual obligations. If performance of the obligations is not impossible, but merely objectionable or more onerous, the obligor cannot rely on the Article 6:75 DCC defence.

The burden of proving that a *force majeure* event prevented the performance of a contractual obligation is upon the party seeking to rely upon the Article 6:75 DCC defence. Courts have a discretion to decide whether or not the evidence submitted is sufficient to meet this burden.

Obligations of counterparties around force majeure events

An obligee is not automatically released from its obligations when performance by an obligor is prevented due to *force majeure*. Generally, an obligee remains obliged to perform under the agreement (for example, to make payments), although it may suspend performance during the period the obligor is prevented from performing (*Article 6:262, DCC*). If the obligee wishes to be released from its obligations altogether, it must send a notice of termination to the obligor. Article 6:265 DCC permits the obligee to terminate the contract in such circumstances.

Other rights and obligations of an obligor

Article 6:75 DCC might typically be relied upon at the outset of some unforeseen *force majeure*-type event. Where the circumstances prevent contractual performance in more enduring or permanent ways, an obligor can request a court to terminate the contract under Article 6:258 DCC. Courts have powers to declare terminations where unforeseen circumstances are of such a nature that it is unfair or unreasonable for an obligor to remain bound to the contract.

However, if the *force majeure* event is temporary, the obligor's performance is merely suspended for the duration of the *force majeure* event. When the *force majeure* event passes the obligor is again obliged to perform its contractual obligations, unless of course the contract has by then already been terminated.

Where an obligor that cannot perform its obligations due to *force majeure* enjoys an advantage it would not otherwise have had, it will be liable in damages to the obligee to the extent of that advantage (*Article 6:78, DCC*). An example might be costs forgone as a result of not having to perform contractual obligations.

Further, Dutch law principles of reasonableness and fairness may, in certain circumstances, infer an obligation on a party to mitigate the consequences of a *force majeure*-type event (*Article 6:248, DCC*). Thus, a contractual term might not be applicable if in the specific circumstances of the case it would be unacceptable, according to standards of reasonableness and fairness, for the term to apply. Based on this Article, parties to a contract could be obliged to re-negotiate the terms and conditions of their agreement (*Vodafone vs ETC, Supreme Court of the Netherlands, 19 October 2007, NJ 2007, 565*).

COVID-19, Article 6:75 DCC, and The Netherlands

In the context of the 2019 novel coronavirus disease pandemic (COVID-19) it is highly likely that legal restrictions imposed by government authorities which prevent an obligor from performing its contractual obligations will amount to *force majeure* within the meaning of Article 6:75 DCC. We base this view on a court decision arising from H5N1 "Bird Flu". During an H5N1 outbreak in 2003, authorities in The Netherlands prohibited the transportation of chickens and chicken eggs. This resulted in a buyer of eggs not being able to perform its contractual obligation to take delivery of eggs. The seller sued the buyer for damages and the buyer invoked Article 6:75 DCC in its defence. The court held for the buyer, finding that the buyer's failure to take delivery of the eggs was due to the official prohibition on the transportation of eggs. The failure could not be attributed to any fault on the part of the buyer. Further there was no law, legal act or generally held view by which fault might otherwise be attributed to the buyer (*Maetskip Span-Heidstra v Vleeskuikenintegratie Lagerwey B.V., Court of Arnhem, 4th December 2005, ECLI:NL:RBARN:2005:AT6050*).

Application of the Article 6:75 DCC defence – practical measures

Lawyers from common law and English-speaking countries are accustomed to notices invoking a *force majeure* defence/remedy, and notice provisions in a *force majeure* clause. While there is no direct equivalent in Dutch law it is generally accepted that an obligor wishing to rely on the Article 6:75 DCC defence must invoke it (courts will not automatically apply the defence in favour of an obligor in default).

Contracts with an international element

It is very common for Dutch parties to international agreements in English language to agree contract terms which include "boilerplate" clauses typically used in common law, English-speaking jurisdictions, including typical *force majeure* clauses with *force majeure* notice requirements. When Dutch law applies, a question then arises as to whether and how such clauses take effect. A court would have to decide whether the *force*

majeure clause limits or expands upon the scope of application of Article 6:75 DCC, and whether the notice requirements also apply to a defence based on Article 6:75 DCC.

Under Article 6:248 DCC, an agreement has the legal effects agreed by the parties and those that can be inferred from the nature of the agreement, the law, common practice or the standards of reasonableness and fairness. A contractual term will not be applicable if, in the specific circumstances of the case, it would be unacceptable according to standards of reasonableness and fairness.

Further, under general rules of interpretation of contracts formulated by the Supreme Court of The Netherlands (*Haviltex, March 1981, NJ 1981, 635*) terms might be implied into a contract, or agreed terms might be excluded, if deemed appropriate in the circumstances.

Thus, while it might be the case that *force majeure* clauses agreed in a contract subject to Dutch law might have effect, it cannot be certain that they will. In reality, Article 6:248 DCC and the Supreme Court's *Haviltex* rules of interpretation mean that any contractual clause can be open for discussion. Dutch law considers the written words of a contract to be just one of various factors to be taken into account when establishing what the parties have agreed.

Official actions being taken in The Netherlands in response to the COVID-19 pandemic

While the Dutch government is preparing new legislation to provide a more solid legal basis for measures to prevent the spread of the virus, this is not expected to vary the position in Dutch law described in this article. Beyond this, the official response to problems arising in consequence of the pandemic centre on financial measures to support those most affected.

END OF DOCUMENT

