

Corona and Dutch Contract Law

Harriet N. Schelhaas*

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1. Introduction

The Corona-virus caused a humanitarian and economic disaster that is unequalled, at least the last century or so. Unlike other economic crises the last decades, this crisis is rooted in public health and caused by a worldwide and fast spreading pandemic, that forced coun-

* Prof. dr. HN Schelhaas is professor in Private Law, Erasmus School of Law, Rotterdam, the Netherlands (schelhaas@law.eur.nl).

tries to lock down social life, thereby limiting the economy considerably. This may also have major influences on contracts. What happens, for instance, if a company just placed a big order for spare parts in China, which could not be delivered due to trade restrictions: is he still obliged to pay the purchase price or is it possible to terminate the contract? And the consumer, wishing to go on holidays, but discovers that his journey has been cancelled due to travel bans: is it possible to claim a refund, or is he obliged to accept a voucher for future travels?

These are just a few examples of contractual problems caused by government measures related to the Corona-virus. In this paper on the influence of Corona on Dutch contract law, I will first outline the measures Dutch government issued as a consequence of the Corona-virus and its possible consequences on contract law (Para 2). Subsequently, general Dutch contract law will more deeply be analysed (Para 3). It will be discussed whether it is possible to claim specific performance if the Corona-measures rendered performance impossible or difficult due to government restrictions (Para 3.1), after which it will be analysed whether the debtor, unable to perform due to the corona-measure, may invoke *force majeure* in order to escape from liability (Para 3.2). Furthermore, it will be discussed whether parties may terminate the contract for breach if the other party simply does not perform its obligations since corona-measures made it impossible to do so (Par 3.3), after which the doctrine of unforeseen circumstances or frustration in the context of the Corona-crisis will be analysed (Para 3.4). The last part of this paper will be devoted to contract clauses related to the Corona-pandemic (Para 4), followed by a conclusion (Para 5).

2. Government measures in response of the Corona-virus

2.1. Overview of regulations

Dutch government took a number of measures to restrict the spreading of the Corona-virus. On 12 March 2020 the government prohibited events having more than hundred visitor such as concerts and public sport events¹, three days later followed by an overall prohibition on the operation of hotels, restaurants and cafés, supplemented by the temporary closure of schools, childcare centers and sports clubs². It was recommended to work from home and not to make use of public transport, unless strictly necessary and people should observe a 1,5 metre distance from each other. On the 23rd of March the government issued a prohibition of all public meetings. Moreover, contact professions such as hairdressers

¹ See <https://www.rijksoverheid.nl/actueel/nieuws/2020/03/12/nieuwe-maatregelen-tegen-verspreiding-coronavirus-in-nederland>.

² See <https://www.rijksoverheid.nl/documenten/kamerstukken/2020/03/15/covid-19-nieuwe-aanvullende-maatregelen>.

were not allowed until further notice³. Also, entry bans for foreign travelers into the Netherlands were issued. Though most shops and companies were allowed to stay open, it was in many cases decided to temporarily close the doors, since due to the Corona-restrictions there were no customers. From Mid-May onwards, government measures have been relaxed, resulting in the reopening of schools, restaurants, cafes and hotels, provided that a safe distance of at least 1,5 metres from one another was maintained⁴. In December 2020, measures were restricted again, schools, restaurants, cafes, hotels and non-necessary shops were closed and an evening clock starting at 9 PM until 4.30 was installed. These government restrictions, resulting in severe restrictions of social and economic activities, were combined with a substantial financial support package by the government for companies suffering from the Corona-measures⁵. Companies that suffered a loss in turnover due to the Corona-crisis of at least 20% were granted an allowance for labour costs to preserve employment⁶ and for other structural costs. Vital companies for the Dutch economy, such as the Dutch airline KLM, were granted state aid.

Moreover, some emergency laws were issued, for instance to make it possible to have online court hearings, to enable online voting in company law, and also to make it possible to temporarily extend the term of rental agreements during the corona crisis⁷.

2.2. Consequences for Dutch contract law

The aforementioned Corona-measures issued by the Dutch government obviously influenced contracts that had been concluded prior to the Corona-crisis. For companies that had to close their businesses it meant that some contracts could not be concluded anymore. It was for instance not possible anymore to conclude or execute contracts for certain types of professions, for events in cafes and restaurants or for big events such as the Eurovision Song Festival in Rotterdam. In these cases performance of contractual duties were rendered permanently or temporarily impossible in fact or in law.

Moreover, the Corona-measures also indirectly influenced contract law. In many cases, performance or concluding of contracts was technically possible, but companies and con-

³ Letter to the House of Representatives, dated 23 March 2020, <www.rijksoverheid.nl/onderwerpen/coronavirus-covid-19/nieuws/2020/03/23/aangescherpte-maatregelen-om-het-coronavirus-onder-controle-te-krijgen> accessed 1 December 2020.

⁴ Rijksoverheid, *Corona-aanpak, de volgende stap* <www.rijksoverheid.nl/onderwerpen/coronavirus-covid-19/nieuws/2020/05/19/corona-aanpak-de-volgende-stap> accessed 1 December 2020. For an overview of the measures <www.rijksoverheid.nl/onderwerpen/coronavirus-covid-19> accessed 1 December 2020.

⁵ <www.rijksoverheid.nl/onderwerpen/coronavirus-financiele-regelingen/overzicht-financiele-regelingen> accessed 1 December 2020.

⁶ Tijdelijke Noodmaatregel Overbrugging Werkgelegenheid and Tijdelijke Ondersteuning Noodzakelijke Kosten (TONK) <www.rijksoverheid.nl/onderwerpen/coronavirus-financiele-regelingen/overzicht-financiele-regelingen/now> accessed 1 December 2020.

⁷ Under regular tenancy law this is not possible and a renewal of temporary rental contracts would result in an open-ended contract: <www.rijksoverheid.nl/documenten/kamerstukken/2020/03/15/covid-19-nieuwe-aanvullende-maatregelen> accessed 1 December 2020.

sumers choose themselves not to execute or not to conclude them anymore for reasons of health or of a lack of consumers. Think of retail chains or service providers that voluntarily closed their shops and did not conclude any contracts any longer. This also caused pressure on contracts that already had been concluded, but were economically not viable anymore. Think of a restaurant chain which concluded a long-term contract for food supplies, but had to close his doors and did not need these supplies anymore. Another example is the company, wishing to do an investment in its own or other companies and concluded contracts prior to the Corona-crisis. The Corona-crisis caused a sharp decrease in turnover in its own company and in the economic value of the target companies. Will he be able to escape from its contractual duties?

From these examples it becomes apparent that the Dutch Corona-measures may have had a major influence on contracts. In the next paragraph I will discuss how Dutch contract law may respond to the Corona-measures and the (in)direct consequences thereof.

3. General Dutch contract law

3.1. Performance and impossibility

A first question that needs to be answered is whether someone can be compelled to perform its duties under a contract that was concluded before the Corona-crisis, but the Corona-measures made performance impossible or financially burdensome. As a matter of principle, Dutch contract law accepts a right to performance for any breach⁸. It is not necessary that the non-performance is attributable to the debtor nor that there is any form of *culpa*. However, some exceptions exist that may be helpful for a debtor not wanting or not being able to perform due to the Corona-measures. One exception is the situation that performance is absolutely impossible, legally or *de facto*, irrespective of whether the reason for this impossibility is imputable to the debtor⁹. So if the government prohibited certain activities or sectors, making it legally impossible to perform, the debtor cannot be compelled to perform. The same holds true if there is an import or export restriction due to the Corona-crisis, making it *de facto* impossible for a seller to deliver its products.

A second exception to the right to performance is the situation where performance is *relatively* impossible: performance is *de facto* possible but it has become excessively burden-

⁸ In Dutch law the basis for this remedy is Art 3:296 Dutch Civil Code ('DCC') and Arts 7:21 and 7:22 DCC for the sale of goods. Unlike the remedy of claiming damages, it is not necessary to put the other party in default (Art 6:82 ff DCC).

⁹ CH Sieburgh, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 6. Verbintenissenrecht. Deel II. De verbintenis in het algemeen, tweede gedeelte* (Wolters Kluwer 2017) no 344. See also Dutch Supreme Court 27 June 1997, ECLI:NL:HR:1997:ZC2401, *Nederlandse Jurisprudentie* 1997/641 (*Budde v Tao Moa*) and Dutch Supreme Court 15 April 2016, ECLI:NL:HR:2016:667, *Nederlandse Jurisprudentie* 2017/122 (*Bouten v ABC*).

some for the debtor to perform¹⁰. If the legitimate interests of the debtor carry considerably more weight compared to the interests of the party claiming performance, this claim will be denied¹¹. In the context of the Corona-crisis, one may think of the company that voluntarily closes its business for reasons (in)directly linked to the Corona-measures. Also, the situation that a company promised to resell for a certain fixed price a certain product such as a mouth mask that he normally imported from China may serve as an example. Import restrictions and an increased demand for this product caused the prices to increase considerably, thereby making the obligation to resell the product for the original price unreasonably burdensome.

3.2. Damages: force majeure

If the debtor is nevertheless obliged to perform and he refuses to do so, the question arises whether he is obliged to compensate the other person for the damages he suffered. Under Dutch law (Art 6:74 Dutch Civil Code, ‘DCC’) every failure in performance of an obligation shall require the debtor to repair the damage which the other party suffers therefrom, unless the failure is not attributable to the debtor¹². Non-performance is attributable to the debtor if (Art 6:75 DCC, which in effect defines the concept of ‘force majeure’) it is due to his fault, or if it is for his account ‘pursuant to the law, a legal act or generally accepted principles’. So in case of ‘force majeure’, no obligation to compensate for damages exists. Whether there is a situation of force majeure is dependent on the type of obligation that is not performed. If the debtor does not perform an obligation to pay the contract price, since the Corona-crisis put him in a financially vulnerable position, force majeure will generally not be accepted¹³. But if it is an obligation to deliver services that are not performed due to the corona-measures, this may be different. For instance, the hairdresser which was not allowed to operate his business and could not perform its services undertaken before the Corona-crisis can invoke the concept of *force majeure* and will not be liable for damages. But this may be different if, on the contrary, a company was not prohibited but voluntarily closed his doors for reasons of health risk for its personnel, or because there was a substantial decrease in its turnover due to the Corona-measures. In this case, it may be argued that this is according to common opinion at the risk of the debtor, since this is ultimately its own deliberate choice. This would result in a debtor fully liable for the damages of the other party. In the context of the Corona-crisis it is however argued in literature

¹⁰ Zie D Haas, *De grenzen van het recht van nakoming* (Kluwer 2008), Para 6.1 and 6.2.

¹¹ See Haas (2008), Para. 6.2 and 6.3.4.3 and see Dutch Supreme Court 5 January 2001, ECLI:NL:HR:2001:AA931, *Nederlandse Jurisprudentie* 2001/79 (*Multi Vastgoed v Nebtouw*).

¹² If performance is still possible, the non-performing party shall be put in default first (Art. 6:74 (2) DCC). This usually means that the creditor has to send a written notice of default, granting the other party an additional period of time to perform (see Art. 6:81 ff DCC).

¹³ Harriët Schelhaas & Jan Spanjaard, *Contract & Coronacrisis*, 2020 *Nederlands Juristenblad* 14, p 959-960; Coen E Drion, *Corona en het recht*, (2020) *Nederlands Juristenblad* 12, p 761.

that a more proportionate solution should be considered, where the burden caused by the Corona-measures should be more proportionately shared by the debtor and creditor ('share the pain')¹⁴. The reason behind this proposition is the idea that the Corona-crisis is no-one's fault and hits the whole society and should therefore be borne by the whole society.

3.3. Termination of the contract

3.3.1. Termination for breach

The corona-crisis may also result in the possibility to terminate the contract. Under Dutch law (Art. 6:265 DCC) a contract may be terminated¹⁵ for any breach of contract¹⁶, unless the non-performance, given its special nature or minor significance, does not justify the setting aside of the contract and the consequences flowing therefrom¹⁷. The onus to prove that a contract may not be terminated since the non-performance is for instance insignificant, is on the non-performing party. If, for instance, the non-performing party proves that there was only a brief delay in the payment of the contract price that did not sufficiently harm the interests of the innocent party, he may usually avert termination of the contract¹⁸. *Culpa* is not required: a contract may be terminated for breach even if there was *force-majeure* on the side of the non-performing party. So, in the context of Corona, it is not relevant what the reason is for the non-performance, a strict government prohibition, the closure of borders by another country, or the choice to temporarily discontinue the operation of a business, as long as the Corona-crisis lasts. In all these cases the contract may be terminated, resulting in a claim to refund the payment of the contract price.

3.3.2. Termination of continuing performance contracts

In cases of continuing performance (or long term contracts), in which parties did not include a clause making it clear that this contract may be terminated early, an additional possibility to terminate the contract is possible. According to established case-law, such contract may in principle be terminated, but depending on the specific facts and circumstances of the case sometimes a serious reason for termination is required and/or a notice period should be observed. Sometimes, the party terminating the contract also has to

¹⁴ Schelhaas & Spanjaard (2020), p. 967-968.

¹⁵ A contract may be terminated in whole or in part. This may for instance result in a partial payment of the contract price if the other party only partially performs its duties to deliver goods.

¹⁶ According to Art 6:265 (2) DCC the right to terminate the contract arises in cases where performance is not permanently or temporarily impossible only if the obligor is in default.

¹⁷ Art 6:265(1) DCC.

¹⁸ CH Sieburgh, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 6. Verbintenissenrecht. Deel III. Algemeen overeenkomstenrecht* (Wolters Kluwer 2018) no 684 ff.

compensate the other party for damages resulting from this termination¹⁹. In literature it is argued that the existence of the Corona-crisis²⁰ may be regarded as a sufficient ground for termination.

3.4. Unforeseen circumstances

The last question that needs to be answered is whether it will be possible to invoke the doctrine of unforeseen circumstances or frustration, in order to adjust a contract. Dutch contract law provides the court with tools to amend the contract (i.e. modify the effects of a contract or set it aside in whole or in part) if there are unforeseen circumstances “(...) which are of such a nature that the other party, given those circumstances, cannot expect, in accordance with generally held standards of reasonableness and fairness, the unaltered contract to continue to be valid and enforceable” (Art 6:258 DCC). Three requirements must be met in order to successfully request the court to amend the contract: (i) the specific circumstances must be prospective at the time the contract was concluded (i.e. the contract was concluded before the Corona-outbreak), (ii) parties did not include a provision in their contract related to this pandemic (i.e. it is not decisive whether this pandemic was foreseeable), and (iii) unaltered maintenance of the contract is according to the standards of reasonableness and fairness unacceptable²¹. Assuming that the Corona-crisis was a future circumstance, the question arises whether parties took a pandemic as the Corona-crisis into account. This is a matter of interpretation of the contract. If parties devoted a provision on the contractual consequences of a pandemic, it may generally be concluded that Art 6:258 DCC does not play a role here: the situation of a pandemic was included in the contract. But what if parties only agreed that no liability exists if an epidemic should occur, or in case of an economic crisis? Case-law indicates that the Dutch Supreme Court interprets these clauses quite extensive²², which may result in the non-applicability of Art. 6:258 DCC²³. The third requirement of the concept of unforeseen circumstances, the reasonableness and fairness, is applied strictly²⁴. The severe 2007 economic crisis was therefore not considered to be a circumstance that should trigger the concept of unforeseen circumstances: it was considered to be part of the normal entrepreneurial risk²⁵. In relation to the Corona-crisis it is, however, argued that Art. 6:258 DCC should be applied, since this

¹⁹ Dutch Supreme Court 28 October 2011, Nederlandse Jurisprudentie 2012/685 (De Ronde Venen v Stedin).

²⁰ Coen E Drion, ‘Corona en het recht’, (2020) Nederlands Juristenblad 2020 12, p 781; Schelhaas & Spanjaard (2020), 960-961.

²¹ In addition, Art. 6:258 DCC provides that the court shall not apply this provision if “the person invoking the circumstances is accountable for them pursuant to the very nature of the agreement or pursuant to generally accepted principles.”

²² Dutch Supreme Court 13 October 2017, ECLI:NL:HR:2017:2615 (Gemeente Bronckhorst).

²³ Schelhaas & Spanjaard (2020), p 965.

²⁴ Dutch Supreme Court 20 February 1998, Nederlandse Jurisprudentie 1998/493 (Briljant Schreuders v ABP).

²⁵ A.T.G.M. Venrooij & P.S. Bakker, *Contractuele gebondenheid in het licht van de krediet- en economische crisis*, (2013) *Contracteren* 4, p 122-125; Ton Hartlief, *Crisis? What crisis?*, (2013) *Nederlands Juristenblad* 27, p 1603.

crisis is very much different from a normal economic crisis and it cannot be said that this is a normal entrepreneurial risk. Solidarity between creditor and debtor should be relevant here too, it is submitted²⁶. Also, it is argued that the unforeseen Corona-pandemic should give rise to an obligation to renegotiate the terms of the contract²⁷.

4. Dutch contract clauses and Corona

Several contract clauses that are quite common in use, may be used to amend or terminate contracts for reasons related to the Corona-crisis²⁸. First, termination clauses often appear in contracts. Though they not often provide for a possibility to terminate a contract in case of a pandemic or other cases of force majeure, they sometimes do²⁹. Second, commercial contracts may contain force majeure clauses, which provide for a solution (for instance amendment or termination of the contract) if *force majeure* causes difficulties in performing contractual duties. So, the General Terms and Conditions of the Rotterdam Terminal Operators' Association, applied to services provided in the Rotterdam harbor, entitles terminal operators to suspend their activities if there is a natural disaster or a government disaster³⁰. Samsungs general conditions for services include a provision that Samsung is not liable and creates a right to suspend its obligations if an epidemic occurs³¹. In B2B contracts, these clauses are generally valid and enforceable, subject to the boundaries of reasonableness and fairness (Art 6:248 DCC) and the provision that general conditions may not be unreasonably onerous (Art 6:233 sub a DCC). Which, however, cannot be invoked by large commercial parties addition, force majeure clauses in B2C general conditions that effectively limit or exclude liability of a professional party, are considered to be unreasonably onerous and may be declared void (Art 6:237 sub f in conjunction with Art 6:233 sub a DCC).

²⁶ Schelhaas & Spanjaard (2020), p 965-966; Coen E Drion, 'Corona en onvoorziene omstandigheden', 2020 Nederlands Juristenblad 20, p 1251. In the first case where Corona was the cause of invoking the concept of unforeseen circumstances in a B2B-contract, this solidarity principle was underlined, but ultimately Art 6:258 DCC was not applied: Netherlands Commercial Court (Court of Amsterdam) 29 April 2020, ECLI:NL:RBAMS:2020:2406, NCC 20/014 (C/13/681900). In a second case, the application of Art. 6:258 in relation to the Corona-crisis was denied too: Court of Amsterdam 14 May 2020, ECLI:NL:RBAMS:2020:2644.

²⁷ Rieme-Jan Tjittes, 'Commerciële contracten en Corona: uitgangspunt 50/50 verdeling nadeel', <www.linkedin.com/pulse/commerciële-contracten-en-corona-uitgangspunt-5050-nadeel-tjittes> accessed 1 December 2020. Also Schelhaas & Spanjaard (2020), p. 964.

²⁸ Schelhaas & Spanjaard (2020), p. 960, 965, 967.

²⁹ Art 9.9 General Conditions ANVR Package Travel: a contract may be terminated if an exceptional circumstance at the place of destination occurs <www.anvr.nl/consumentenvoorwaarden.pdf> accessed 1 December 2020.

³⁰ Arts 7.1 and 7.2 <myservices.ect.nl/SiteCollectionDocuments/vrtoen.pdf> accessed 1 December 2020.

³¹ Art 19.8 Samsung General Terms and Conditions <www.samsung.com/nl/info/legal/#verkoop> accessed 1 December 2020.

5. Conclusion

Dutch contract law provides for tools to mitigate the consequences of the Corona-crisis: (i) performance may not be enforced if the Corona-measures renders performance legally or practically impossible, (ii) force majeure may prevent liability if a person is not able or not willing to perform, (iii) contracts may be terminated if the other party does not perform its contractual duties for reasons related to the Corona-measures, and (iv) the court may when requested amend or terminate a contract in certain circumstances by applying the concept of unforeseen circumstances.

In addition, contract clauses making it possible to amend or terminate a contract, will generally be upheld. The magnitude of the Corona crisis both in humanitarian and economic terms is in both Dutch legal literature and case law regarded as so far-reaching and extraordinary that exceptions to the criterion of *pacta sunt servanda* is in many situations accepted.