COMMERCIAL CONTRACTS AND CORONA

OPPORTUNITIES FROM A CONTRACTUAL LAW PERSPECTIVE

1. CONCLUDING CONTRACTS NOW

1.1 Important considerations

Introduction

Any party entering into an agreement now must take into account the consequences of the corona virus as they are known at this time, but also (insofar as possible) the consequences that cannot yet be foreseen. At this moment, the corona virus is an important factor in determining which obligations parties can still take on. This is not only important in relation to the question of which obligations a company is able to fulfil, but also, as a corollary, with respect to the liability position of the directors of that company. A director who knows (or should know) that, due to the pandemic, the company will be unable to fulfil the obligations it has taken on (or provide an opportunity for the recovery of damages) is privately liable for the damages resulting from noncompliance.[1] Therefore, more now than ever, the company has to consider carefully the obligations it can take on. Concluding contracts is to look ahead.

[1] Supreme Court 8 December 2006, *NJ* 2006, 659 (*Ontvanger/Roelofsen*).

Future contracts

Companies must check which obligations they can take on at this time, and also check to what extent they can continue to fulfil those obligations in the future. The current uncertainty means that more short-term contracts might be concluded (instead of contracts with a longer initial duration). It also means that the uncertainty might become a factor in the provisions of the contract. In terms of content, more emphasis will have to be placed on, for example, force majeure clauses, the (nature of the) terms, suspension possibilities, obligations to renegotiate and changes clauses. The parties will also have to give more thought to the best way of dispute resolution (and not, for example, blindly agree to complicated arbitration clauses). Specifically on the subject of possible future amendments of contracts, there will be a need for quick clarity and there will generally not be time for protracted (arbitration) proceedings. Parties will also have to be able to escalate conflicts towards a solution, even if it is only a temporary one. In order for this to work, parties must be spared the process of going through endless obligated negotiation rounds when it becomes clear that they are unable to work things out mutually. In those cases, an arbitrator should, for example, be given the authority to amend the contract on a provisional basis at the request of one of the parties in anticipation of, in short, the final judgment by the arbitrators adjudicating the merits of the case. Parties might also explicitly agree that a temporary power to make amendments be given to the judge in preliminary relief proceedings (also in order to impose amendments pending the outcome of the main proceedings (see below, paragraph 3.1).

1.2 Rather terminate?

Negotiations already initiated? Termination is allowed, unless…

If the parties cannot come to a mutually agreed amendment of the text of the draft agreement in relation to the consequences of the corona virus, negotiations could, in principle, be terminated. The parties may have already made arrangements upfront about the allocation of costs in the event of termination of the negotiations. We will not discuss that situation here. In general, parties are free to terminate negotiations without any liability for compensation. This will only be different if this is unacceptable on the basis of the legitimate expectation of the other party (the party not terminating). That is a high threshold. Starting point is: termination is allowed, unless. Furthermore, the parties have to take into consideration to what extent and in what way the terminating party has contributed to the expectation of the nonterminating party. In answering the question of legitimacy of the termination, it may also be relevant whether any unforeseen circumstances have occurred during the negotiations.[2] It is obvious that in many cases, the corona virus qualifies as such an unforeseen circumstance. However, it is not always the case. We will explain.

Unforeseen and unforeseen

When negotiations are terminated, unforeseen circumstances are defined somewhat differently than when an existing agreement is amended (on the basis of article 6:258 of the Dutch Civil

[2] Supreme Court 12 August 2005, ECLI:NL:HR:2005:AT7337, *NJ* 2005/467 (*CBB/JPO*).

Code). When negotiations are terminated, unforeseen is taken to mean that unforeseen circumstances have occurred, but that they only occurred during the negotiations. When a contract is amended on the basis of unforeseen circumstances, unforeseen (merely) means that the circumstances were not factored into the contract. There is no requirement that the circumstances concerned have to have been unforeseen in absolute terms. The previous means that it may be difficult, starting negotiations now, to terminate them later while invoking the corona virus as an unforeseen circumstance. Incidentally, parties will be well advised to record, already at the start of their negotiations, that the consequences of the corona virus cannot be grasped (as yet) and that they explicitly may be grounds to break off the negotiations at a later stage (in that case, it is advisable to cover the question of any obligation to pay compensation for negotiation costs incurred etc.) as well.

Termination and liability for compensation

There is only liability for compensation if the terminating party acts in an unacceptable manner in the termination of the negotiations. There are certainly parties who will wrongly use the corona crisis as an excuse to terminate ongoing negotiations. That is of course unacceptable. If a party is liable for compensation due to the termination of negotiations, there may be an obligation to compensate for (i) lost revenue (for example lost profits), (ii) costs incurred (for example costs incurred for the negotiations and (iii) the damages the aggrieved party is suffering because the other party takes advantage of information provided within the framework of the negotiations.[3]

2. ONGOING CONTRACTS

2.1 Reasonableness and fairness

Introduction

It is therefore sensible, when dealing with ongoing negotiations and negotiations still to be initiated in relation to contracts, to consider the known and (insofar as possible) unknown consequences of the corona virus. However, it is not inconceivable that this has not, or not sufficiently, been done in existing contracts. Who would have ever anticipated a crisis of this magnitude, let alone incorporated provisions for it in their contractual relations? What about ongoing contracts and the consequences of the corona virus?

Firstly: reasonableness and fairness

Dutch law of obligations (which includes contract law) is governed by the principle of reasonableness and fairness (articles 6:2 and 6:248 Civil Code). The effect of the principle of reasonableness and fairness cannot be excluded. Contracting parties stand opposite each other in a legal relationship governed by good faith. True, the agreements made between them and the legal obligations are applicable, however, it does not stop there. The principle of reasonableness and fairness has a restrictive and an additional effect (article 6:248 paragraph

[3] A.S. Hartkamp and C.H. Sieburgh in Asser 6-III 2014/197.

1 and 2 Civil Code). On the one hand, this means that an agreement may compel the parties to take on more obligations than agreed upon in writing, for example the duty to renegotiate (additional effect, paragraph 1). On the other hand, the principle of reasonableness and fairness may also lead to a situation where the parties cannot rely on what they have explicitly agreed upon in writing, for example unaltered performance, if this would be unacceptable under the principle of reasonableness and fairness (restrictive effect, paragraph 2). The same reasonableness and fairness also entail that parties, including commercial parties, must consider each other's legitimate interests (Supreme Court 19 October 2007, NJ 2007/565 *(Vodafone/ECT)*). Reasonableness and fairness also play an important role, for example, in the question whether a contract should be amended as a consequence of unforeseen circumstances, or in the question whether continuing performance contracts can be cancelled (for example as a consequence of an unforeseen circumstance) and if so, in what way.

The above means that it is pretty safe to say that we expect the principle of reasonableness and fairness to play an important role in the question of what legal authority contracting parties will have in relation to the corona virus (for example: terminating, cancelling and/or amending) and in particular in what way they will be able to make use of that authority (for example: dissolving only partially, cancelling with compensation of damages or amending under certain conditions). Therefore, this expressly applies to the authorities agreed upon by the parties in their contracts as well. The following must be interpreted while bearing the above in mind: the principle of reasonableness and fairness may restrict or expand contractual and statutory authorities of contracting parties. Much is possible. Whether you are a debtor or a creditor. We will give you an overview.

2.2 Suspension, failure and termination

Suspension

Before we address the possibilities in the event of a failure to perform by the other party, we will briefly discuss a power with a provisional effect, namely suspension. Contractually, nothing is dissolved or terminated in that case. The contract is maintained unchanged, it is only the performance that is suspended (either wholly or in part). This does require that the suspending party has a claim that is due and payable (the other party must therefore perform first) and there must be sufficient coherence between that claim and its own obligations (article 6:52 Civil Code). Suspension is often excluded contractually but even then this may be unacceptable pursuant to the principle of reasonableness and fairness under the circumstances. It is more difficult for the debtor, who has to perform first, while fearing that the other party will not perform afterwards. However, the law also offers a solution here (article 6:263 Civil Code, the exception of non-performance). In short: if party A has to perform first, but after the conclusion of the agreement has good reason to fear that the other party will fail to perform at a later stage on the basis of a(n) (unforeseen) circumstance, he is entitled to suspend. Please note that suspension is intended as a temporary measure. As soon as the reason for suspension ceases to exist,

performance of the obligations is required again. Suspension is not meant to be used in cases where it is clear that performance will no longer take place at all.

Failure

Failure is when the performance of a debtor does not meet the requirements of what was agreed. For instance: a company supplies machinery components to a Dutch manufacturer and imports those parts from Italy. Due to export and/or import measures resulting from the corona crisis, the agreed parts cannot be delivered to the Dutch manufacturer. This constitutes failure. The same goes for when an event organiser has to cancel an event (take, for example, the Eurovision Song festival) as a result of the corona crisis. The agreements with, for example, caterers or security companies are not fulfilled. This constitutes failure. Also if the event is merely rescheduled. After all, the concerned agreements were concluded on the premise that the Song festival would take place in May 2020.

Failure – termination – change in value

In the event of failure, the creditor can still claim fulfilment of the commitment at hand. It is, however, not inconceivable that fulfilment has become temporarily or permanently impossible as a result of the corona crisis. For that reason, in the event of failure to perform, the creditor is, in principle, entitled to terminate the agreement (either in full or in part) (article 6:265 and further Civil Code). Invoking termination can be done judicially or extrajudicially and is not prescribed by regulation. Termination leads to the obligation to undo. Any performances already delivered must be undone. This is not always possible. If this is no longer possible due to, for example, the nature of the performance (delivered fuel has been used, parts have been incorporated into machinery), the value of the performance at hand must be compensated. Note: it concerns the value of the performance at the time of receipt and not the value at the time of undoing (article 6:272 paragraph 1 Civil Code, for instance, fuel prices have significantly fallen recently). Article 6:278 Civil Code provides for correction mechanisms in those cases where the value of the performance has changed, especially if it is clear that the termination is prompted by the change in value ratio of the obligations. It would go too far to go into this any further here, but it will certainly have to be a factor to consider when deciding to terminate or not. Incidentally, the right to terminate is not an absolute right, even if the parties have made contractual agreements to that effect. Under certain circumstances, for example, it may be more beneficial for a contract not to be terminated in full, but only in part, or for the contract to be amended (see also paragraph 3.1).

Failure attributable?

The question of failure is separate from the question whether such failure can also be attributed to the debtor. The debtor may argue that the failure cannot be attributed to him, however, this is irrelevant for the question if failure has occurred at all. In order to terminate an agreement, the existence of failure in itself is sufficient (attributability is therefore not a requirement). If there is also *attributable* failure, the creditor is entitled to damages as well. The question is then what damages he is suffering due to the fact that the performance is not delivered. Take, for instance,

the profit the manufacturer could have realised if he had sold machinery that would have been (but now is not) produced by him.

Termination and compensation

In the event of termination on the basis of (non-attributable) failure, compensation cannot be claimed as a consequence of that failure. What *is* possible in such cases, is for damages to be compensated because termination takes place (and performances have to be undone) instead of performance (article 6:277 Dutch Civil Code). In this case, insofar as the failure cannot be attributed to the debtor (for example in the event of force majeure) the debtor is only obligated to compensate the damages insofar as he gains an advantage from the failure that he would not have had otherwise. An example of this is an insurance payment to the debtor as a consequence of the crisis (see article 6:277 in conjunction with 6:78 Civil Code). If the ratio of the value of the cancelled obligations has been changed, it could also lead to correction (see above in relation to article 6:278 Civil Code).

2.3 Notice of default, omission and force majeure

Notice of default and omission

Both in the event that the creditor wishes to claim damages (which requires an attributable failure) and when the creditor wishes to terminate the agreement (for which attributability is not a requirement), the debtor has to be in default. In order for default to occur, a notice of default is required in principle (article 6:81 and further Civil Code). This is a written statement addressed to the debtor urging him to meet the obligations of his performance within a reasonable term, given in the statement. The term must be reasonable given the circumstances of the matter. If the debtor fails to meet his obligations as stated in the notice, the default will commence at the given time. Incidentally, the notice is not required if the debtor is temporarily unable to perform his obligations or if his attitude makes it clear that any notice given would be futile. In that event, a mere written notice holding the debtor liable is sufficient. Default can also occur without a notice of default, if the final deadline is exceeded or if it can be derived from a statement of the debtor that he will fail in the performance of the obligation (the so-called ‘anticipatory breach’).

If performance of the agreement has become permanently impossible there is no need for a notice of default and the creditor can apply for damages and/or claim termination at an early stage (meaning immediately). It is therefore important to assess which terms of a contract qualify as final deadlines and whether the debtor will be able to perform after all (or not at all). The obvious thing to do for the parties would be to hold consultations in order to see which performances can still be delivered and which cannot (and to what extent deliverance of those performances may become possible at a later stage). There is nothing preventing the parties from making further arrangements in this respect.

Force majeure

If a debtor wants to argue that a certain failure cannot be attributed to him, he will plead force majeure (article 6:75 Civil Code). A successful reliance on force majeure removes the *attributability* of a failure and thereby the liability for compensation of the debtor. Again, this does not affect the creditor's right to claim performance (insofar as still possible) or (partial) termination of the agreement. A debtor can *only* claim force majeure in the event that performance has become impossible through no fault of his, and it is not his responsibility by law, legal act or commercial opinion (article 6:75 Civil Code). Also, there must be an impediment to the performance in itself.[4] The machinery components that cannot be delivered or the event that is cancelled. A plea to force majeure will not succeed if the change does nothing but disturb the contractual balance. Think, for example, of machinery parts that can also be produced by another branch of the supplier (for example, in Germany), but at much higher costs. In that situation, invoking force majeure is not possible. In that case, an appeal to unforeseen circumstances might be possible (see below under paragraph 2.4).

In order to assess whether the corona crisis qualifies as a force majeure in the given circumstances, it is important to examine if any force majeure clause has been agreed contractually. If such a clause mentions a pandemic and/or government measures, there is a good chance that the corona virus falls into that clause (or at least its consequences). However, this is notwithstanding the (subsequent) requirement of an obstruction of the performance itself. The execution of that performance needs to have become impossible, not (temporarily) harder or more expensive.

2.4 Unforeseen circumstances

Unforeseen circumstances

If there is 'merely' a disturbance of the contractual balance as a consequence of the corona crisis, there is *no* justification to plead force majeure. However, the debtor may be entitled to invoke unforeseen circumstances (article 6:258 Civil Code) in order to facilitate (temporary) changes or (partial) termination of the contract in that way. This may offer a solution. Therefore, we will look into this in more detail. We already mentioned that to successfully invoke unforeseen circumstances, it is not a requirement that the concerned circumstances were entirely unforeseeable at the time of entering into the contract. A pandemic such as the current one is not entirely unforeseeable per se, since pandemics have been a recurring phenomenon throughout history. The question is, however, did the contracting parties consider a situation as the current one when they entered into the contract. It is not very likely that contracting parties took (the consequences of) the current pandemic into account when they entered into the contract (it is also worth noting in this respect that the legislature qualifies natural disasters as possible unforeseen circumstances).[5] The assumption can probably be made that the corona crisis in general qualifies as an unforeseen circumstance. Of course, this is different for contracts

[4] Asser-Sieburgh 6-I (2016), no. 340.
[5] Parliamentary history. Book 6, p. 976-977.

that are being concluded now, after the outbreak of the pandemic. The presence of an unforeseen circumstance is much harder to establish in that case. See paragraph 1.1 in this respect.

Criterium

The changed circumstances must be of such a nature that the other party cannot require unaltered maintenance of the agreement according to the criterion of reasonableness and fairness. This situation does not occur often. One of the starting points of Dutch contract law still remains *pacta sunt servanda* (a contract is a contract).[6] Unforeseen circumstances pleas were rejected by judges more often than not during the 2007/2008 credit crisis.[7] Also when there were serious financial consequences at stake. Regular entrepreneurial risks remain at the risk of the entrepreneur. Only when the entrepreneur finds himself in serious financial trouble under an unaltered contract due to the changed circumstances, can an appeal to unforeseen circumstances succeed. So if the supplier of the machinery parts from our example is only able to purchase those parts elsewhere at a much higher price, causing his profit margin to plummet so much that he faces bankruptcy, he might be able to plead unforeseen circumstances successfully. Incidentally, this also depends on the terms of the contract and the risk distribution agreed upon therein by the parties.

Contractual starting points

Sometimes a contract itself offers a starting point for what the parties can do if the other party fails to perform due to force majeure or unforeseen circumstances. Many commercial contracts contain standard clauses to that effect, so-called *hardship or material adverse change* (*MAC*) clauses. Those standard clauses are often no more than starting points in actual practice, because – as other clauses in commercial contracts – they have to be interpreted on the basis of the Haviltex standard. That standard entails that the actual interpretation of the clauses depends on the meaning the parties could reasonably assign to those clauses under the given circumstances and what they could reasonably expect from each other in that respect. This is often a ground for debate and a point of contention. The interpretation of the clauses determines the scope of the clauses and, therefore, if the corona virus is included, and what the legal consequences will be. Those legal consequences can cover a great variety of legal options: suspension, mandatory renegotiation, (partial) termination, notice of termination or changes in the obligations under the contract. See below under paragraph 3.1.

If the contract does not offer those options or does not offer them to a sufficient degree, the contracting parties can still invoke them. If need be, before a judge. Particularly in long-term relationships, renegotiation, suspension or partial termination are preferred over complete dissolution. Those measures are, by nature, less invasive and they are intended to remedy the

[6] For example, Supreme Court 20 February 1998, *NJ* 1998,493 (*Briljant Schreuders/ABP*).
[7] For example, Den Bosch Court of Appeal 30 May 2017, ECLI:GHSE:2017:2229 and Amsterdam District Court 5 December 2012, ECLI:NL:RBAMS:2012:BY7459.

unforeseen circumstance – the temporarily disturbed balance between the contractual performances.

The contractual balance

For all the above-mentioned measures it is important to keep in mind that they are intended to restore the (temporarily disturbed) contractual balance. Therefore, the contract as such will remain leading in that sense, that the balance agreed upon in the contract, which sometimes comes out more favourable for one party over the other, is retained. Changes on the basis of unforeseen circumstances are not intended to reshape this initially agreed balance. If the contract can no longer be leading, because the contract has become meaningless or performance thereof virtually impossible, more rigorous measures, such as termination, are more likely.

3. AMENDMENT OR TERMINATION?

3.1 Amendment by a judge

Introduction

If the parties do not succeed in amending the agreement in mutual consultation, a judge may be asked to do so. The parties (or one of the parties) also have the option of dissolving the agreement in this case. See on this subject paragraph 3.2. Article 6:258 Civil Code stipulates that a judge can amend the consequences of an agreement at the request of one of the parties. A judge can also terminate the agreement in full or in part, or apply a combination of both. Furthermore, a judge can attach full or partial retrospective effect to an amendment or termination. Article 6:260 Civil Code stipulates that a judge may also attach conditions to an amendment or termination. Therefore, much is possible. Since we believe much can be expected from this article, particularly when it comes to long-term relationships, we will discuss the subject in more detail.

Mandatory law

Firstly: the articles 6:258 and 6:260 Civil Code are mandatory legal provisions (see article 6:250 Civil Code). Parties can therefore *not* deviate from them in the agreement (article 6:250 Civil Code). What they can do is make allowance for certain circumstances in the agreement, for example by placing certain risks with one of the parties. In doing that, the parties can in fact limit the scope of applicability of article 6:258 Civil Code. Such a risk allocation can also be implied. Risk allocation is widely applied in contracts. Whether corona qualifies as such a negotiable circumstance, is a matter of interpretation of the concerned provision. The literal meaning of a provision is not the only consideration.

What is possible? Amendments, dissolution, retroactive effect and conditions

As mentioned, a party invoking article 6:258 Civil Code before a judge can request amendments or full or partial termination of the agreement. This can be done by way of issuing a summons, but also by submitting a statement of defence.[8] In some form, amendments and termination can occur alongside each other. Parliamentary history mentions as an example a tenancy agreement that can be dissolved for the future, while the rental price is adjusted for a period in the past.[9] This will not only be important for the real estate branch, but for all long-term agreements.

Amend or terminate?

Termination is generally more invasive than amendment. In the past, it has been argued in literature that termination only comes up if amending proves not to be an acceptable option. We also feel that the primary focus would have to be on the preservation of the contractual relationship (in a changed form) instead of termination thereof. This is of course different if the purpose of the agreement can no longer be fulfilled at all. Incidentally, termination of an agreement that is already fulfilled in full will seldom be considered to be in accordance with the principle of reasonableness and fairness[10]

Retroactive effect – consequences for previous failures

A judge can also attach a retroactive effect to an amendment or termination. This is an important tool and it can have several consequences. Keep in mind that the starting point is that an amendment or termination does *not* remove the nature of failure from any possible breach that has occurred before the court ruling, nor from the moment that a contracting party invokes article 6:258 Civil Code. *Neither* the occurrence of the unforeseen circumstance *nor* the appeal to article 6:258 Civil Code provides a contracting party with a power to suspend. He will remain obligated to fulfil his obligations, meaning he can find himself to be in default and will be liable for compensation on the basis of article 6:74 Civil Code (unless in the event of force majeure).[11]

However, a judge can undo all these consequences by attaching retroactive effect to the amendment or termination. This may have important consequences: what constituted as failure before, has ceased to be so in retrospect; compensation already paid can be reclaimed as paid unduly.[12] In long-term agreements in particular (which dictate continuous performance) it is likely that a judge will not apply retroactive effect to the amendment or termination beyond the moment the unforeseen circumstance occurred. The occurrence of the unforeseen circumstance should not have an effect on failure from before that moment. That will continue to exist.

[8] As a defence; a counterclaim is not required, Parliamentary history Dutch Civil Code. Inv. 3,5 and 6 Book 6 1990, p. 1128.
[9] T-M, Parliamentary history., p. 970.
[10] Arnhem District Court 24 February 2009,ECLI:NL:GHARN:2009:BH7552.
[11] Only when the conditions of article 6:263 Dutch Civil Code (exception of non-performance) are met, does the unforeseen circumstance provide the debtor with a power to suspend. See above under paragraph 2.2.
[12] Asser/Hartkamp & Sieburgh 6-III 2018/455, Valk, *Rechtshandeling en overeenkomst*, no. 291.

Returning goods or redelivering?

If an amendment or termination also relates to the past, it means that the parties are obligated to reverse all performances already delivered on the basis of the agreement. If a judge attaches retroactive effect to the amendment or termination, the parties hold a claim on the basis of undue payment. For example, if the ownership of a good has been transferred (for example, the machinery parts) the title of that transfer will be cancelled as a consequence of retroactive effect and the machinery parts can be reclaimed. If a judge does not attach retroactive effect to an amendment or termination that also applies to the past, an analogous application of article 6:271 Civil Code seems likely, creating obligations to undo (and in the event of ownership transfer, obligations to re*deliver*). Incidentally, a judge can also impose requirements to the scope and form of the undoing, on the basis of the conditions attached by him (pursuant to article 6:260 Civil Code). A lot of tailor-made solutions are possible. But again, give a precise description of what you want (and why that is reasonable and proportional).

What discretion does a judge have?

That discretion is mostly determined by the parties. A judge cannot amend the consequences of the agreement if complete termination is claimed. Nor can he amend the agreement in any other way than is requested. It is therefore important to think carefully about which amendments and/or degree of termination is necessary and whether certain conditions need to be attached thereto. The parties' obligation to furnish facts is subject to strict requirements, but so is a judge's obligation to state reasons (if the request is granted). Pursuant to article 6:258 Civil Code, a judge is bound to what the parties wish to submit to him. A judge has more freedom when it comes to the conditions he can attach to an amendment on the basis of article 6:260 Civil Code. That is his discretionary power. A judge amending or terminating an agreement, can also rule that the parties (or one of them) are allowed to terminate the agreement (amended by the judge) within a certain term after the ruling, to be determined by him (article 6:260 paragraph 2 Civil Code).[13] In this way, the parties could get out of the agreement if the amendment would have too much impact. However, it is more likely that the parties give a clear and substantiated indication of their boundaries with respect to the amendment of the agreement beforehand.

Inform the judge of what is necessary

Parties will therefore do well to address any conditions a judge may impose in advance, in order to avoid surprises afterwards. A personal appearance of the parties is a good opportunity to exchange opinions with the judge on the subject. There is no rule of thumb on how a judge must decide if both parties submit different claims (one is requesting for termination, the other merely for an amendment under certain conditions). How a judge must decide, is not provided for in article 6:258 Civil Code. The question of what modification the agreement will be subjected to, depends on the circumstances of the matter, where the nature of the agreement and the interests involved in the agreement are important, considered in light of the principle of reasonableness and fairness. The judge's decision will have to tie in closely with what the parties

[13] Valk, T&C, note 2 under article 6:260 Dutch Civil Code, with reference to MvA II, *Parliamentary history.*, p. 987.

have already provided for in terms of legal consequences or what is incorporated in the agreement.[14] A judge must endeavour to accomplish that result. The parties must inform the judge well on this. The amendment of the agreement also cannot go beyond what is necessary in light of the unforeseen circumstance, which is the corona crisis in this case. Article 6:258 Civil Code cannot be used to also change other elements of the agreement that are in no way related to the unforeseen circumstance. Only '*need to change'* and not '*nice to change'*. The parties have to pay careful attention to that when they assess each other's amendment applications.

Suffering the disadvantage: 50/50% amendment?

If the requirements of article 6:258 Civil Code are met and an amendment and/or termination is applicable, this does *not* mean that the parties must bear the negative consequences in equal measure (50/50%). The basis is that the unforeseen circumstance must be paid by the affected party *insofar* as it does not exceed his normal contract risk (his entrepreneurial risk), and that *both* parties will split only the extra costs. Also in this respect, things can be different if the parties have agreed a specific risk distribution in their contract. In light of the corona crisis, there is something to be said (as a starting point) for a 50/50% division of the financial disadvantage. That equal division can be achieved in several ways. It does not have to be done only through price reductions, but can also be done, for example, by applying gradual price reductions or suspended payments. Within this framework, Dutch banks have (voluntarily) offered to waive the obligation of repayments and interest payments on business loans during the coming six months.

In interlocutory proceedings?

A judge *cannot* amend an agreement in interlocutory proceedings, because amendment of an agreement is not a preliminary measure. It is, however, feasible that a prohibition on full performance is requested in interlocutory proceedings pending the main proceedings, where article 6:258 Civil Code is invoked (or perhaps, that the agreement is temporarily amended pending the main proceedings, by way of a temporary provision). Depending on the urgency and the interests involved, much can be achieved through interlocutory proceedings.

3.2. Termination

Introduction

The parties (or one of them) can also opt for a termination of the agreement. Below, we will briefly discuss the situation where one of the parties wishes to terminate and the other does not. There can also be a concurrence of events: one party seeks termination of the agreement from a judge, while the other party has, for example, given notice. Naturally, those claims can be addressed in the same proceedings.

[14] MvA II, *Parliamentary history.*, p. 974.

Manner of termination

Agreements can come to an end by way of, briefly put, (i) giving notice, (ii), termination or (iii) annulment (for example because of error or deceit). We will not discuss annulment here. The difference between giving notice and termination is, broadly speaking, that termination requires the occurrence of failure and giving notice does (as a general rule) not (under certain circumstances, a reason is required, but that reason does not have to be failure by the other party). What is more, termination leads to an obligation to undo (see above), while giving notice leaves the past unaffected and only has an effect on the future.

Contractual possibilities to terminate

Agreements often contain termination provisions. Consider, in that respect, provisions relating to termination in the event of failure or certain special circumstances, such as bankruptcy or force majeure. It can be agreed that a contract will be terminated in the event of untimely delivery. An appeal can be made on these contractual provisions. Incidentally, such an appeal can be set aside if the appeal appears to be unacceptable according to the principle of reasonableness and fairness (article 6:248 paragraph 2 Civil Code). That does not mean that termination cannot take place *at all*. It means that both interests will have to be considered, taking the fact that the parties have knowingly agreed in their contract that certain circumstances will give cause for termination as an important starting point. The judge will not dismiss this easily. There are also termination provisions that do not require a specific reason. This may be the case in termination provisions that allow termination without giving reasons, but do require a notice period. If appropriate, a contract can also be terminated in part. Also in the event of termination, the termination (and its conditions) may always be checked against article 6:248 paragraph 2 Civil Code (and by that, whether it would be unacceptable according to the principle of reasonableness and fairness to continue to apply the agreement in full).

Non-contractual

If the parties have not agreed to any termination provisions, the law will be leading. The law offers the option of (partial) termination in the event of failure. See paragraph 2 in this respect. Furthermore, if the contract does not include any termination provisions, the contract can still be terminated if this is implied by the additional effect of the principle of reasonableness and fairness (article 6:248 paragraph 1 Civil Code). It is important for the terminability to distinguish between contracts with a fixed period and an indefinite period. Contracts with a fixed period are generally not terminable and contracts with an indefinite period are (either by giving reasons and/or offering a notice period and/or (partial) compensation for damages). However, the current crisis also causes such a disturbance of the contractual balance in contracts with a fixed period, that (partial) termination should be possible.

3.3. Connected agreements

Introduction

Lastly. In certain cases, an agreement can be so closely connected to another agreement, that an occurrence in one agreement can also impact the other agreement. In reality, companies do not operate in a sealed environment. So, if one agreement is terminated or amended as a consequence of the corona crisis, this may also have consequences for another, connected agreement. Some brief observations in this respect.

Connected agreements

Starting point is that an agreement only binds its parties. In principle, third parties will not be able to derive any rights in this respect. However, it follows from case law that in some situations, an agreement can be so closely connected to another agreement, that an event occurring under one agreement can have an effect in another agreement. This can be an agreement between the same parties, but also, partly, between different parties.[15] Whether there is such a connection between agreements must be assessed by interpreting the legal relationship in light of the circumstances.[16] The interpretation of both agreements in relation to one another by the application of the Haviltex standard is important here. Relevant circumstances are, for example, the actual financial connection between the performance of the involved parties and the mutual relationship and capacity of the parties.[17]

Consequences of the connection

The first step, therefore, is to assess whether there is a strong enough connection between two (or more) agreements. Step two is to assess the consequences of this connection. The termination, (partial) dissolution or amendment of one agreement may lead to a second (or third, fourth, etc.) agreement requiring amendments (perhaps to a different extent). Aside from that, non-performance under the first agreement may result in a wrongful act towards a third party, who is a party to the second agreement.[18] However, the interests of this third party must be so closely connected to the proper performance of the first agreement, that the parties to the first agreement must respect the interests of this third party. [19]

[15] See also Mr. M.I. Nijenhof-Wolters and mr. A.Z. Lankhaar, The end of an agreement does not (alw ays) lead tot he end of the connected agreement, *Bb* 2018/70.
[16] Supreme Court 14 September 2018, ECLI:NL:PHR:2018:514, w ith note from. A-G B.J. Drijber under no. 4.3.
[17] See M.J. van Laarhoven, *Samenhang in rechtsverhoudingen* (diss. Tilburg), WLP: Nijmegen – 2006, p. 90-94.
[18] Compendium Nederlands vermogensrecht 2017/506a.
[19] See also Supreme Court 24 September 2004, ECLI:NL:PHR:2004:AO9069 (*Vleesmeesters/Alog*).

4. CONCLUSION

This paper gives a basic overview of the key legal consequences of the corona crisis for commercial contracts and the possibilities to your disposal to respond adequately. Although the individual position of your company firstly depends on the content of your contract and the specific circumstances of your situation, the principle of reasonableness and fairness may play an important additional or restrictive role, especially under special circumstances such as the corona crisis. The situation of you and your contracting party is certainly not black and white. We have demonstrated that much is possible, depending on the specific circumstances of the situation; ranging from complete termination to tailor-made amendments.

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