# CLIENT ALERT

## B2B Relations in the Events Industry in Europe and the COVID-19 Pandemic: Force Majeure Q&A for the Belgian Sector

**May 4, 2020**

*This Crowell & Moring series of alerts provides practical information and professional commentary, rather than specific legal advice, on the legal ramifications for events industry stakeholders in Europe of the COVID-19 pandemic. For further information, please contact the lawyers listed on this alert. To view other alerts in this series, please click here.*

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Companies affected: 3,200 companies; jobs at risk: approximately 100,000, and the current COVID-19 damage: estimated at 5 billion EUR. And so the stage is set for Belgian event organizers and their suppliers. To speak with one voice to the Belgian government and other policy makers, their respective trade associations have organized themselves as the Alliance Belgian Event Federations. What has been described by the sector as a "*tidal wave of solidarity*" does not prevent several stakeholders having major concerns about their legal rights and obligations in the weeks and months to come Those that we have spoken to genuinely fear that this wave of solidarity will at some point break and turn into a 'tsunami' of legal claims. During those conversations, some of our interlocutors not only used "*force majeure*" as a buzzword, they also clearly thought of it as an all-areas pass, something that would guarantee free entry, or rather a free exit. Crowell & Moring Brussels recently published some general guidance on force majeure under Belgian law. This alert is a follow up on that earlier text, with a specific focus on the Belgian events sector and inspired by some of the questions we have received from industry stakeholders.

**Q. 1: The WHO declared the COVID-19 outbreak a pandemic and the Belgian government has imposed very strict measures. Does this mean I can successfully invoke force majeure?**

The prime question to be answered here is whether the consequences of the COVID-19 outbreak are *per se* qualified as a force majeure. The answer, and this is probably the clearest of all the answers in this alert, is no. Whether the COVID-19 crisis qualifies as force majeure and can be used to end, suspend or renegotiate your contract will always depend on the specific situation that you and your contractual counterpart find yourselves in. The fact that the current crisis has been qualified as a pandemic or a national disaster, or that strict governmental measures have been taken, does not necessarily imply that you or your contractual counterpart will be able to successfully invoke force majeure.

Indeed, only if a number of strict conditions are met will a company be able to invoke force majeure. Under Belgian law, even if the contract does not include a force majeure clause, parties can invoke force majeure on the basis of the Belgian Civil Code and case law. Force majeure is defined as an event or circumstance that (i) is outside of the parties' control and not their fault, (ii) is unforeseeable, (iii) is unavoidable, and (iv) renders the reasonable performance of the obligation impossible. For most contracts that were concluded before the mainstream media started covering the COVID-19 outbreak there will be little discussion about this pandemic objectively being (i) external and (ii) an unforeseeable event. However, as will be discussed further in this alert,

whether its effects (iii) cannot be avoided by appropriate measures and (iv) prevent the performance of an obligation will have to be assessed on a case-by-case basis and this leaves room for discussion.

**Q. 2: We heard of a very similar case to ours where the court ruled that there was force majeure. Can we therefore successfully invoke force majeure as well?**

Although a favorable precedent is obviously a plus, it is never a good idea to base your commercial or negotiation strategy on a single precedent. When it comes to force majeure, this principle applies even if you have knowledge of several precedents. Indeed, the same event, under the same law, could give rise to quite different legal consequences. The first question to ask is whether there is a force majeure clause in the contract concluded between the parties. If there is, then the legal consequences will *i.a.,* depend on the wording of the contract, as well as on the specific circumstances surrounding the case. (Is the contractual definition of force majeure wider than the legal definition (see Q. 1)? Are certain facts contractually excluded as force majeure?) Secondly, and in particular if parties cannot rely on a contractual definition of force majeure, your particular circumstances need to be considered. As is often the case, here the devil is in the detail. Facts that may look the same to a lay person can be qualified as legally completely different. Or an apparently irrelevant detail can be turned by a skillful lawyer into the decisive argument for a court ruling. Finally, if parties do not agree, it will be up to a court to decide, and this will by definition involve an element of personal, subjective appreciation by the judges. In this regard, reference can be made to dozens of decisions where courts have had to decide if the impact of storms qualified as force majeure and where literally a few additional km/h of wind speed have made all the difference between successfully invoking force majeure or not.

**Q. 3: One of our key clients has postponed the majority of their conferences to Q4/2020. Several of our suppliers may be bankrupt by then. What if we cannot guarantee performance of our contract as a result? Can we refuse to accept the new dates; or can we accept them and only later, if supplier problems do occur, refuse to execute the new agreement?**

The answer to this question will again mainly depend on what is stated in your contract. In principle, your client cannot unilaterally impose a change of conference date due to a force majeure without also agreeing to renegotiate other terms of the agreement. Just as for any right, the right to invoke force majeure must be exercised in good faith and parties cannot abuse the rights granted to them. Even if a change of the conference date is permitted by the contract or under the general principles of force majeure, your client is still obliged to mitigate your damages, unless the contract has anticipated such possibility and placed the risk in this respect entirely on you. Further, there is case law in which the disappearance of a party's key supplier has been successfully invoked as a force majeure. Perhaps this case law could be relied upon to escape liability due to the bankruptcy of certain irreplaceable suppliers. However, if the postponement of the conference was actually negotiated and agreed upon after the start of the pandemic, it is likely that you will be deemed to have anticipated the possible disappearance of certain suppliers. Finally, if your suppliers can be replaced but the new suppliers are more costly, force majeure will not, in principle, apply. The fact that a contract becomes more expensive/costly to perform as a consequence of changed circumstances is not in itself a force majeure situation.

**Q. 4: We have postponed our annual industry convention but kept the same location. The venue owner wants us to pay at least part of the costs related to complying with 'social distancing' rules and other imposed measures. Are we obliged to do this?**

Here, again, the facts of the matter will often dictate the legal position of each party. Even if your contract does not contain a force majeure clause, it might contain provisions about additional or unexpected expenses or a clause that allows for a deviation from the estimated budget by a certain amount. Indeed, parties are typically free to decide who will have to pay for unplanned expenditures. Even if there are no specific provisions, the contract as such could still have an impact on your legal position. Is your contract a mere rental agreement or is it a services agreement under which you have outsourced all the logistics of your convention? There is, for instance, a whole body of case law related to the cost of making a leased venue compliant with new governmental regulations. Generally, courts have ruled that costs incurred prior to the concluding of the lease in order to make the venue fit for its intended use are to be borne by the owner. If the lease has already been signed, the subsequent costs are typically the responsibility of the party that rented the venue. In the context of services agreements, however, the case law is less clear on this issue and force majeure or hardship arguments seem to be more frequently invoked. On one aspect, though, the case law is unanimous: the party that is held responsible to pay for the works gets to decide how these works will be executed (what techniques, what contractors, etc. will be used). The other party is allowed to disagree, but can then be held liable to pay for any additional expenses generated by, for instance, insisting on the use of more expensive, but equally efficient measures.

**Q. 5: We have already paid for an annual subscription with a specialized communication agency for the promotion of our mass sports events on social media. However, because of COVID-19, it's possible that no more publicity will be needed until the end of the year. Can we reclaim part of the paid fee?**

Once again, there is no standard answer to this. Even if a party can successfully invoke force majeure, this does not always relieve that party of every possible contractual obligation or risk. For example, the discussion will be quite different if the promotion of the events was the only object of the agreement or merely part of a much broader agreement also covering, for instance, the general online presence of your company. The latter will virtually always be possible, even in times of COVID-19 restrictions. Even if the communication company can successfully rely on force majeure to no longer fulfill its obligations, you as an events' organizer may be able to claim a refund. You could argue, for example, that the object of the contract (here, the promotion of summer events on social media) has disappeared and that the contract is therefore deemed terminated as of the moment it became without object. For this you could rely on legal precedents where it has been successfully argued that termination of a contract in these circumstances entails the right to claim a refund. As always, this is possible only if there are no contradictory contractual provisions, such as, for instance, a clause excluding any right to refunds.

**Conlcusion**

There is no doubt that force majeure will play a role in many of the legal issues that the Belgian events industry is and will be facing. However, the nature of that role will depend on the specific factual and legal circumstances of each case. Parties to a discussion should not base their argumentation solely on force majeure and should also take into account the chance of a possible counterclaim should they raise the force majeure argument. Success does not necessarily come to those that wait. Rather, it comes to those that are well prepared and have made a careful analysis of their legal options both under their agreement and according to Belgian law.

The answers to the questions discussed above are of a general nature and should not be considered to be comprehensive legal advice on specific questions and/or cases. Do not hesitate to contact one of the authors or your usual contact at Crowell & Moring LLP if you have any specific questions or would like any advice with regard to a concrete situation, or if you would like to obtain the references to the case law referred to in our answers, or receive any other information in relation to the above.

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