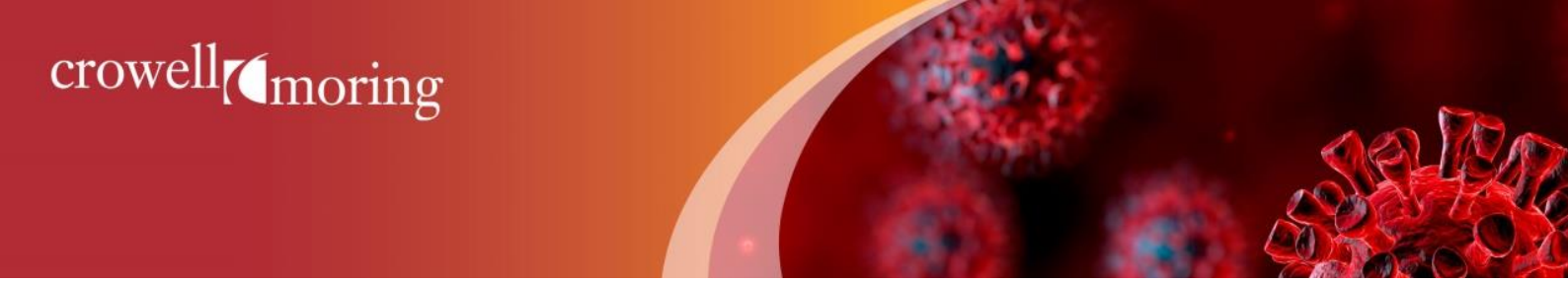


The Impact of COVID-19 on Contracts and Corporate Activities in Belgium: Your Questions Answered

Q. 1: Can I suspend or terminate a contract without penalty as a result of COVID-19?

Many clients have contacted us wanting to know if they, or their suppliers or customers, can temporarily or permanently stop the performance of certain contracts.

In principle, the contract is "the law between the parties," which means that you have to comply with what was agreed upon. However, in certain situations, and in most jurisdictions, you can invoke "force majeure" or "hardship" to suspend or terminate a contract.

Below we outline the rules under Belgian law; similar rules exist in other jurisdictions, but there may be certain differences and the first thing you should do is check what the applicable law is for the contract in question.

1.1. What is 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:

- is unavoidable
- is unforeseeable at the time the agreement is entered into
- cannot be attributed to the defaulting party
- renders the reasonable performance of the obligation impossible.

Whether or not a specific event or circumstance constitutes force majeure has to be evaluated on a case by case basis. This is true for COVID-19, and you cannot simply presume that it amounts to force majeure for your contract (*see below*).

1.2. What happens when there is force majeure?

If you can prove that force majeure applies, you can temporarily suspend your obligations for the duration of the force majeure, without having to pay damages.

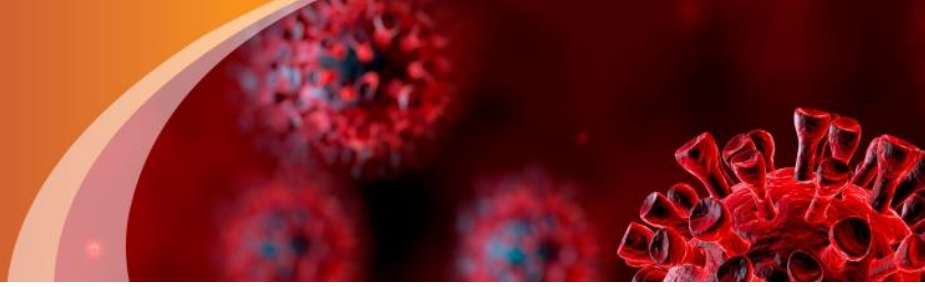
If the force majeure renders performance definitively impossible, or if, because of the temporary suspension of the contract, performance becomes without interest for the other party, you will be definitively released from your obligations.

When force majeure is validly invoked by a party and therefore performance is no longer required the other party is left "empty handed."

When the commitment is unilateral – *i.e.,* only one party had obligations – the party that invokes force majeure will be relieved from its obligation. If, on the other hand, both parties to the contract have obligations, the obligations of the party that has not invoked force majeure will also be suspended (temporary force majeure) or canceled (definitive force majeure).

1.3. Contractual clauses regarding force majeure

Note that if you have included a force majeure clause in your contract, this provision will apply between the parties. It is therefore very important to check the contract first. Such clause may, for instance, describe what



circumstances are considered to constitute (or not constitute) force majeure in the context of your specific contractual relationship. It may also include an obligation to notify the other party of the force majeure, either immediately or within a certain deadline, and in a certain way (for instance, by registered mail), and it may provide rules on when a temporary impossibility to perform will be considered permanent between the parties (hence triggering the right to terminate without indemnity).

1.4. Application to COVID-19

There is no one-size-fits-all answer to the question whether COVID-19 can be considered to be a force majeure that allows a party to temporarily suspend or permanently stop the performance of its obligations.

The first thing to do is to check which law applies to the contract and whether or not a force majeure clause has been included. Assuming Belgian law applies, if no force majeure clause is included, the general rules will apply. If a force majeure clause is included you must look at its content.

If the general rules apply, you need to decide whether COVID-19 (and/or its consequences) make the contract performance absolutely impossible (with, however, a degree of reasonableness to be included in that evaluation), and whether this was unforeseeable at the time the contract was entered into.

In many cases, the COVID-19 situation may not in itself make contract performance impossible. However, its consequences, including relevant governmental decisions (so called “fait du Prince”) may make performance, at least temporarily, impossible. We advise you, therefore, to be careful in the language that you use when drafting your notice to invoke force majeure.

If the contract includes a force majeure clause, this clause will have to be carefully evaluated, and you must comply with its provisions.

1.5. Hardship

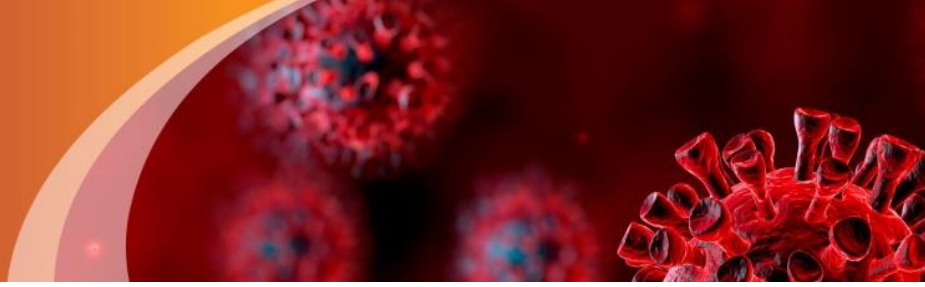
If facts or circumstances do not render the performance of a contract impossible, but only make it more onerous, this does not in principle allow you to invoke force majeure.

In such scenario, you could consider invoking “hardship.” This is designed to address extraordinary and unforeseeable circumstances that cannot be attributed to one of the parties and that render the performance of the contractual obligations for one party more onerous. In other words, these circumstances affect the economic balance between the parties.

Although hardship can be invoked without contractual basis in some jurisdictions, this is not the case in Belgium, and Belgian courts have tended to reject claims based on hardship.

In certain circumstances, however, some courts have allowed these arguments, albeit under a different name. In this way, a court may accept that it is an “abuse of contractual rights” to insist on contract performance when your contractual partner is confronted with extraordinary and unforeseeable circumstances that cannot be attributed to one of the parties and that render the performance of the contractual obligations more onerous. The court may indeed decide that the advantage that a party intends to obtain by insisting on the contract performance causes a higher prejudice to the defaulting party.

By way of example, back in 2001 we were able to help a client break a long term lease agreement because of the bad economic climate in the telecom sector at that time (the “telecoms crash”), which forced our client to significantly reduce its Belgian operations. The Court agreed that the landlord’s insistence on the performance in



full of the contract for the entire contract term constituted an "abuse of law" and that the landlord had to accept an early termination of the lease against payment of a reasonable termination indemnity.

We note here, that in contracts subject to the UN Convention for the international sale of goods, hardship can be invoked. Similarly, in contracts under Belgian law that explicitly include a hardship clause, parties can invoke this as a contractual right (although it is rather rare for such clauses to be included.)

Finally, you should be aware that under the current draft article 5:77 of the new Belgian Civil Code, hardship will be recognized under Belgian law. This legislation has not yet been adopted so cannot solve any COVID-19 issues, however, it is something to take into account for future contract drafting.

1.6. Lease agreements

Article 1722 of the Belgian Civil Code ("CC") holds that if the leased premises is destructed, the lease will be dissolved by law and, if the leased premises is partially destructed, the lessee can, depending on the circumstances, claim a reduction of the price, or the dissolution.

It has already been accepted by Courts in the past that the "destruction" in article 1722 CC can concern a "legal" destruction. More in particular, have already been accepted by case law as "legal destruction":

- Expropriation
- Refusal of a renewal of an exploitation license
- Public road works that prevent the use of the premises

In the current COVID-19 scenario, a lessee (for instance in the retail sector) that is confronted with a government decision that forces the lessee to close its shop, could hence try and defend that the landlord (for reason of force majeure – "toeval" / "cas fortuit" in article 1722 CC) fails to provide the "quiet enjoyment" of the premises ("legal destruction" of the premises), and that hence the lessee does not have to pay rent (partially or entirely) as long as it can no longer use the premises for its original purpose (i.e. a shop or other purpose, such as a bar or restaurant). We do not exclude that in certain cases, a judge can be convinced by this argument. However, as always in these matters, a lot will depend of the specific circumstances of the case (for instance: is the leased premises exclusively used for the retail activity concerned, or also for other purposes, such a storage?).

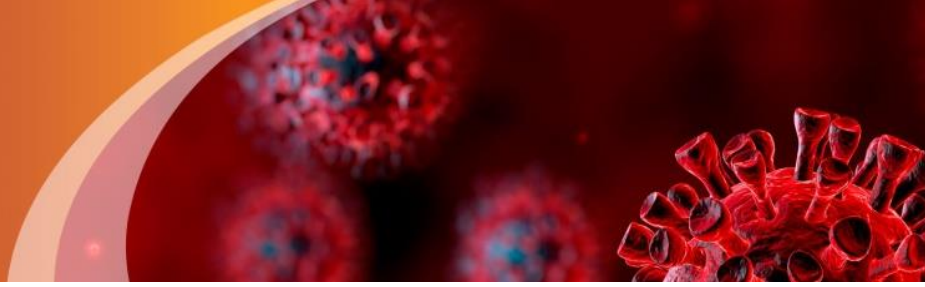
Q. 2: How Can I Hold General and Board Meetings That Respect Social Distancing?

Belgian company shareholders are required to approve the company's annual accounts within six months of the end of the financial year.

The annual accounts then have to be filed within 30 days after their approval and, at the latest, within seven months of the end of the financial year.

As many companies close their financial year on December 31, their by-laws provide that the general meeting of shareholders has to take place on a certain date during the first six months of the following year.

In light of the COVID-19 measures, it will be hard, if not impossible, for many companies to organize a general meeting in person. The same issue arises for physical board meetings.



There are a few alternatives to holding a physical meeting, which we will discuss hereafter.

However, the Belgian government has made use of the special powers that have been granted by the Belgian Parliament to take certain urgent measures in light of COVID-19. Our Minister of Justice has made use of these special powers in order to temporarily allow companies (and associations) to organize general meetings (and board meetings) in a more flexible way. This has been done via a special Royal Decree of 9 April 2020, which was amended by the Royal Decree of 28 April 2020, extending the application period of the Royal Decree.

The provisions of this Royal Decree are of limited duration and now apply for the period between 1 March 2020 (retroactively) and 30 June 2020. This period may be extended depending on the evolution of the pandemic.

A general meeting or a board meeting convened before 30 June 2020 (or any other date in the event of extension) may be held in accordance with the provisions of the Royal Decree, even if it is held after that date.

The alternatives offered by the Royal Decree are of an *optional* nature. Entities that choose not to make use thereof must fully comply with the regime that would otherwise apply to them in this respect.

The Royal Decree does not retroactively apply to meetings that were already held before it came into place.

In short, the government provides two options for general meetings, and this irrespective of whether or not the articles of association allow this. On the one hand, the general meeting can be held without physical attendance. On the other hand, the general meeting can be postponed to a later date.

Hereunder we discuss the alternative options that were already available before the publication of the Royal Decree of 9 April 2020. We will indicate to what extent the new legislation broadens the existing options.

1. Shareholders' meetings

1.1. Written decision-making

You can implement a written decision-making procedure, even if the articles of associations do *not* specifically authorize it.

The following conditions need to be met:

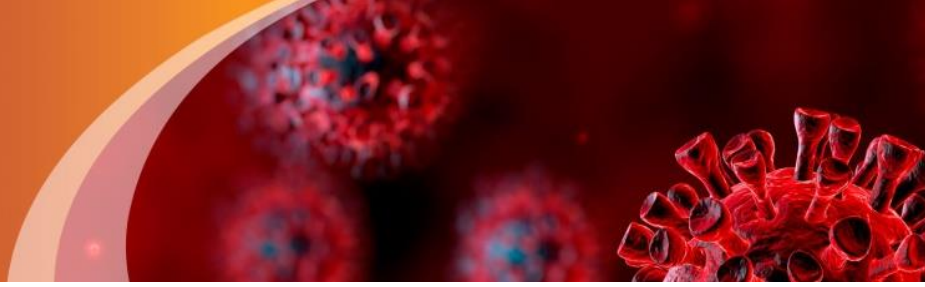
- *All* shareholders must take all decisions *unanimously* and in writing.
- *All* decisions fall within the competence of the general meeting.

It should be taken into account that the unanimity requirement means that effectively there must be agreement among the shareholders with regard to the agenda items to be discussed.

An exception is made for decisions that require the involvement of a notary. In that case, you must organize an extraordinary general meeting. This is the case, for example, for a capital increase or reduction, a merger or any another amendment to the articles of association.

1.2. Electronic decision-making ("remote participation")

For general meetings, the situation at present is that the articles of association have to expressly authorize the remote participation of shareholders. The following conditions need to be met:



- The notice convening the general meeting must mention the possibility of remote participation and provide a detailed description of the procedure for electronic participation. T
- All shareholders must be identifiable and every shareholder must take part in real time.
- The minutes of the general meeting must consist of a transcript of the (video)call (*i.e.,* mention what was discussed and what was decided) and must mention any technical problems and incidents that disrupted participation in the general meeting.

Electronic participation allows shareholders participating remotely to cast their votes in real time during the meeting via the electronic means made available by the company.

The only difference with the ordinary decision-making process is that the participants are not physically together. The virtual meeting will take place via Skype, Zoom, etc.).

It is not allowed for the members of the bureau, the directors and the statutory auditor to make use of this electronic possibility . The persons holding these positions must be physically present.

1.3. Proxies

In order to limit the number of participants at a physical meeting, shareholders may grant proxies. The articles of association do not have to authorize this. This means that a shareholder may grant a proxy to another shareholder, or to a third party, to attend the meeting and vote on their behalf. Note, however, that the articles of association may put certain limits on this.

The new Royal Decree allows for the board to decide that the shareholders can only exercise their rights by means of a proxy under the rules foreseen in the Companies and Associations code. It furthermore foresees that an additional condition can be imposed, namely that the administrative body can decide who can be the proxy holder and may impose specific voting instructions for all proposed decisions.

1.4. Temporary rules under the new Royal Decree

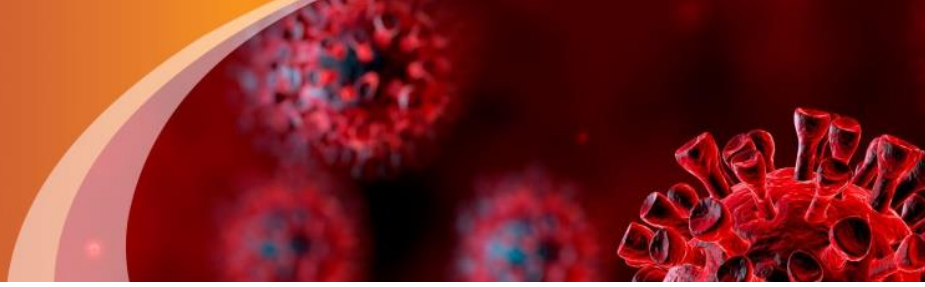
1.4.1. Under the new Royal Decree it is possible, even when the articles of association do not allow this:

- to impose the participants (shareholders of a company / members of an association) to vote from a distance before the general meeting is held, via a form that is made available by the board; or
- to grant a proxy before the general meeting, where the board can impose that the proxy holder is a person that is appointed by the board (subject to rules on conflicts of interest).

The board can also prohibit that participants participate by being physically present and can oblige the participants to only ask questions in writing.

Moreover, the Royal Decree equally allows for the members of the bureau, the directors and the statutory auditor to remotely take part in the meeting (such as via tele- or videoconference).

1.4.2. The new Royal Decree also makes it possible to postpone the general meeting. The meeting can be postponed for up to a maximum of ten weeks after the latest date on which the meeting should have been held (which for many companies is June 30 as this is the latest possible date legally allowed). If the meeting invitation has already been sent out, a new invitation can be sent.



In certain specific cases postponement remains impossible (*e.g* the "alarmbell procedure")

2. Board Meetings

2.1. Written decision-making

The new Belgian Code on companies and associations no longer requires "urgency" to be proven for use to be made of a written decision-making procedure (although the chances are high that COVID-19 would satisfy a requirement of "urgency"). The board can, therefore, take written resolutions freely, except when the articles of association provide otherwise.

Under normal circumstances you should check what your company's articles of association provide for in this case. In particular, companies that have not yet adapted their articles of association to reflect the new Code may still have articles of association that refer to the old legislation.

2.2. Electronic decision-making

For board meetings, electronic participation is possible even if the articles of association do not expressly authorize it.

The following conditions need to be met:

- As in the case of a physical meeting, the formalities for convening the meeting must be complied with.
- There must be a real discussion.
- The minutes must consist of a transcript of the (video)call (*i.e.,* mention what was discussed and what was decided) and must be signed by the president of the board.

2.3. Proxies

In order to limit the number of participants at a physical meeting, board members may grant a proxy, but only to another director. The articles of association may put certain additional limits on this.

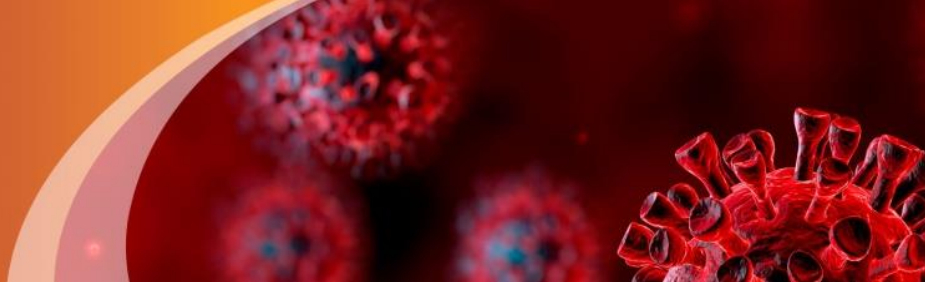
2.4. Temporary rules under the new Royal Decree

The new Royal Decree allows that a collegial board takes decisions unanimously in writing, even if this is not provided for in the articles of association.

It also confirms that each meeting of a collegial board can, even without this being allowed by the articles of association and notwithstanding any other contrary provision, be held by a telecommunication means that allows for a common discussion between the members, such as tele- or videoconferene.

Q. 3: What measures have been taken by the Belgian federal and regional governments to support businesses?

Crowell & Moring Brussels has launched a "COVID-19 Virtual Assistant". This virtual tool allows you to navigate the rapidly evolving regulations adopted by the Belgian federal and regional governments in the wake of the pandemic.



This Virtual Assistant is free of charge and can be consulted via our Coronavirus Resource Center on our website: https://www.crowell.com/Practices/Coronavirus-COVID-19-Resource-Center/Belgian-COVIC-19-Legal-Assistant.

Q. 4: How Can My Company Sign Contracts Remotely?

The eIDAS Regulation 910/2014 sets the legal framework for electronic signatures in the EU.

1.1. Various types of e-signatures under the eIDas

The eIDAS Regulation makes a distinction between three kinds of electronic signatures:

- The standard “electronic signature" (also referred to as SES) is defined as “data in electronic form which is attached to or logically associated with other data in electronic form and which is used by a signatory to sign”. This is for example a scan of your handwritten signature that you include in a pdf document. There is no indisputable proof of who signed the document.

- The "advanced electronic signature" (AES) is an SES with a number of additional guarantees. It is an SES that meets the following requirements:

    - it is uniquely linked to the signatory (the individual who signs the document)
    - it identifies the signatory
    - it is created using electronic signature creation data that the signatory can, with a high level of confidence, use under his/her sole control
    - it is linked to the data signed in such a way that any subsequent change in the data will be detectable.

  This second-level electronic signature is considered more trustworthy than an SES but does not ensure optimal reliability.

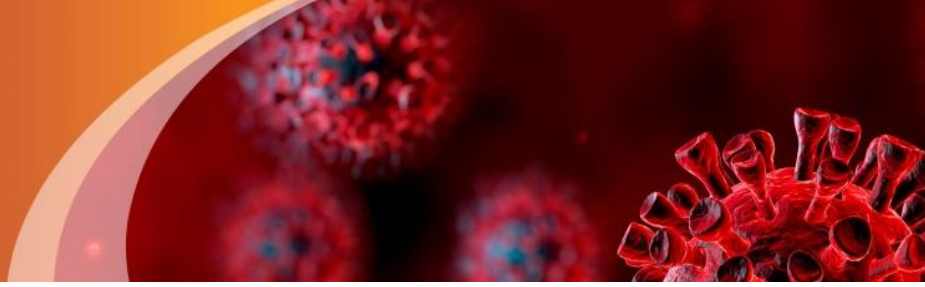
- The "qualified electronic signatures" (QES) is an AES that is created by a qualified electronic signature creation device, and which is based on a qualified certificate for electronic signatures. It requires independent accreditation by an approved certification body.

1.2. Value of the e-signatures under the eIDAS

The eIDAS Regulation gives a QES the same legal effect as a handwritten signature and ensures that a QES recognized in one member state of the EU is *de facto* recognized in every other member state.

For the other two types of e-signatures (SES and AES) the legal consequences are to be determined by applicable national law.

Under Belgian law, article 1322 of the Belgian Civil Code confirms the validity of electronic signatures. Specifically, article XII.15 of the Belgian Code of Economic Law provides that the explicit or implicit



requirement to have a contractual signature via electronic means is complied with if the signature meets the conditions of an SES or a QES.

Under the new Civil Code (Book 8), which will enter into force on November 1, 2020, new definitions are inserted and an electronic signature will be described as a signature in conformity with articles 3.10 to 3.12 of the eIDAS Regulations (hence covering an SES, AES or QES).

1.3. Which e-Signature Should I Use for a Commercial Agreement?

When choosing which of the three types of e-signature to use, you should consider the level of legal certainty you require to be attached to that signature, *i.e.,* this relates to its enforceability and whether or not it can be challenged.

When using the SES method (*e.g.,* by sending a contract by e-mail with a scanned signature), it is more likely that the enforceability of that agreement could be challenged (*e.g.,* has the contract actually been signed by the person concerned?).

We advise that when using an SES you take measures to confirm as far as possible that the document has been signed by the correct person (for instance, by accompanying the scanned contract with detailed identification, such as the copy of an ID, and by sending the original contract afterwards by regular mail).

For important or strategic contracts, we recommend that you use a QES (or, at the very least, an AES).