

The impact of the war in Ukraine on contracts under Belgian law

Q&As for companies - March 2022



B2B Contracts

1. Is the war in Ukraine a force majeure event?

A contract party does not incur liability if the non-performance of its contractual obligation is caused by an event of “force majeure”¹. Under general contract law (which may be deviated from in a force majeure clause (**question 2**)), conditions to invoke force majeure are:

- **An extraneous event** - The event may not be imputable to the contract party invoking it. The Ukraine war clearly meets this condition.
- **An unforeseeable event** - The condition of the event being unforeseeable when entering the contract is generally applied in a flexible way. The war in Ukraine should meet this condition with respect to contracts entered into before the Russian invasion.
- **Impossible performance** - The event must prevent the performance of the obligation of the contract party invoking force majeure.

Even if one may expect that case-law will use the flexible criterion of what is *reasonably or humanly* impossible, the condition of impossible performance will still not be met easily, apart from the cases where international trade prohibitions (**question 3**) and actual shortage of raw materials (without alternatives) make performance impossible. In most cases the war in Ukraine will not prevent contractual performance but render it more onerous or difficult, which does not suffice to qualify as force majeure but could fall under a hardship clause (**question 4**). Mere delays (**question 7**) are more likely to be excused by force majeure.

If the impossibility to perform is temporary, the contract will not be terminated, but the prevented obligation is suspended until

its performance becomes possible again. In the meantime, the reciprocal obligations of the other party are suspended as well. If the impossibility to perform is permanent (or if its delayed performance will be useless) the contract is automatically terminated and both parties are definitively relieved from their obligations.

2. Does a force majeure clause relieve a party affected by the war in Ukraine ?

Commercial contracts generally contain a force majeure clause, specifying, restricting or alleviating the conditions for force majeure (often with examples). Even though “war” is generally one of the listed events, the mere occurrence of a war does not create force majeure. More important is the clause’s wording regarding the impact of the event on the specific obligations. Does the clause specify that the force majeure event should “prevent” performance of an obligation (as in general contract law) or is it broader and does it apply as soon as the event “affects” performance? The scope of the force majeure clause should be assessed on a case-by-case basis. Force majeure clauses also often specify the notification obligations (term and formalities) and the duration after which force majeure entitles a party to terminate the contract.

3. What happens with transactions prohibited by international sanctions?

In response to the crisis in Ukraine, the EU adopted restrictive measures², including a prohibition on transactions with certain state-owned enterprises, on export of certain goods (dual-use goods, technology, aerospace, luxury goods, ...), on new investments in the Russian energy sector, on import of steel and aluminium products, etc. The measures specify if and to what extent there are exceptions for the performance of

¹ Articles 1147 and 1148 of the Old Civil Code.

² <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-ukraine-crisis/>

existing contracts. US sanctions, which may have extraterritorial effect, should also be considered.

Any contract performance incompatible with the sanctions should be suspended. These sanctions constitute a force majeure excusing such temporary non-performance. Note however that the other party shall be temporarily relieved of its reciprocal (payment) obligation as well. Since the sanctions will not be lifted soon, the force majeure might not only cause temporary suspension of the performance but may constitute a permanent force majeure, causing the overall termination of the contracts.

Any agreement entered into after the sanctions whose object is a prohibited transaction, will be null and void³.

4. Is a contract party relieved if the contract contains a hardship clause?

A hardship clause typically provides that when an unforeseeable and inevitable event substantially affects the contractual balance between the parties to such extent that its performance can no longer reasonably be demanded, the affected party may request a renegotiation in good faith. If no agreement is reached the clause generally provides that the terms can be adapted by a third party, court or arbitrator, or that the contract can be terminated.

If a contract contains a hardship clause, it is likely to be triggered by the war in Ukraine assuming it has a substantial impact on the contractual balance. Parties should refer to the clause and check all conditions, required notifications (including terms and formalities) and consequences.

5. What if there is no hardship clause?

Under current general Belgian contract law (and apart from the special cases of international sale of goods (**question 6**) and public procurement contracts (**questions 14 to 18**), hardship does not alter the contractual obligations and does not entitle a contract party to claim partial or total relief, renegotiation or termination of the contract. However, the general principle of prohibition of abuse of rights (**question 13**) exceptionally leads to similar results.

It is also important to confirm which law is applicable, as the laws of many other countries (such as Germany, France and the Netherlands) do provide a general hardship rule, providing in relief for the impacted party. The foreseeability requirements, threshold of severity required, and the legal consequences vary however from jurisdiction to jurisdiction.

Hardship will become standard contract law under the new Belgian Civil Code, to be voted soon, and to enter into force six

months after publication. It will however only be applicable to contracts entered or renewed thereafter.

6. What about international sale of goods?

Performance of international sale of goods can possibly be prevented by force majeure (**question 1**), such as due to international sanctions (**question 3**). In addition, it may be possible to invoke hardship in international sale of goods agreements governed by the UN Convention on the International Sale of Goods ("CISG"), even without a specific hardship clause.

The CISG applies to most contracts of sale of goods between parties whose places of business are in different contracting states or when the law of a contracting state applies, and unless the parties have excluded its application. Belgium, most EU member states, the US, Ukraine and the Russian Federation are contracting states⁴. The United Kingdom is the most noteworthy absentee.

Article 79 of the CISG provides that a party is not liable for a failure to perform if the failure was due to an impediment beyond his control and he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences. In recent years, the international legal opinion increasingly supports that parties may invoke mere hardship as a justification for such non-performance. There is hardship when the change of circumstances makes performance excessively onerous, but not impossible. Therefore, this may also include input material price hikes, or sourcing difficulties caused by the war in Ukraine, if the conditions are met.

Legal scholars and rulings differ widely in what they would consider excessively onerous. In one Belgian ruling a rise in the price of steel by 70% was considered excessively onerous for a supplier of steel tubes⁵, but legal doctrine often advances higher thresholds. It is more likely that courts and arbitral tribunals will weigh all the relevant circumstances rather than relying simply on numerical considerations.

Invoking article 79 of the CISG requires that the party whose performance is affected gives notice to the other party of the impediment within a reasonable time after that party knew or ought to have known of the impediment. It is debated whether the impeded party is simply excused for the duration of the impediment, or whether the parties should seek to restore the contractual equilibrium through renegotiation, the latter being the approach of the Belgian Supreme Court (*Cour de cassation / Hof van Cassatie*).⁶

Article 79 of the CISG is not mandatory, therefore the parties are allowed to derogate from these principles. A so-called "hell or high water" clause imposing that the parties must perform

³ On the basis of Articles 6 and 1133 of the Old Civil Code.

⁴ The complete list can be found here: <https://iicl.law.pace.edu/cisg/page/cisg-list-contracting-states>.

⁵ Antwerp 29 June 2006, confirmed by [Cass. 19 June 2009, C.07.0289.N.](#)

⁶ [Cass. 19 June 2009 C.07.0289.N.](#)

regardless of any difficulties faced, would therefore prevent a recourse to these principles.

7. Are delays in performance excusable because of the war in Ukraine?

If the Ukraine war causes one party (for example a contractor) to be delayed and it is considered as force majeure, then the term for performance is extended. The contractor will normally not incur liability or penalties because of the delays. Except if the contract contains a hardship clause (**question 4**) or another cost-allocation clause (**question 11**), the contractor will normally support the additional cost incurred as a consequence of the delay. Each party thus carries its own part of the detrimental consequences. The client supports a delayed completion, the contractor supports extra costs, both without compensation by the other party.

8. What about contracts entered into after the start of the Russian invasion?

Whether or not there is a force majeure or a hardship clause, the condition of unforeseeability will be extremely hard to meet for contracts entered into after the Russian invasion, hence the use of price adjustment clauses (**questions 9 to 11**) or other adaptation, suspension or termination mechanisms.

It should be determined on a case-by-case basis whether, even after the start of the crisis, the contract parties could have or should have anticipated the consequences (such as shortages) and their intensification, and taken mitigating measures (such as securing supplies). Even though shortages and restrictions were at some point foreseeable, their effects are so significant that even normally prudent and cautious contract parties will be affected. It is expected that courts will not be excessively severe as to the mitigating measures that a contract party ought to have taken between the start of the crisis and the actual impact on its obligations.

9. Can automatic price adjustment clauses protect against severe price fluctuations?

In principle, in contracts between private undertakings, the price that is agreed at the time of conclusion of the contract, will remain applicable regardless of (even extreme) fluctuations in the costs to perform the contractual obligations. Hence, many undertakings choose to include a price adjustment clause in their contracts to protect against price fluctuations.

The Law of 30 March 1976 regarding economic recovery measures restricts (automatic) price adjustment clauses⁷:

- **Condition 1**: the price adjustment must be limited to 80% of the final price. In other words: 20% of the final price must remain fixed.
- **Condition 2**: the price adjustment clause must refer to parameters (indices) that represent actual costs.
- **Condition 3**: each such parameter can only be applied to the proportion of the price that is linked to the cost represented by such parameter.

This generally results in a price adjustment clause relying on a formula similar to the following⁸:

$$p = P_0 \left(a \frac{R_0}{r_0} + b \frac{R_1}{r_1} + \dots + z \right)$$

In this formula p is the new price, and P_0 is the initial price. For each cost component, the parties must define:

- a **relevant parameter** (r, R) that is intrinsically linked to the cost component (condition 2). In the example formula, for the first cost component, R_0 is the new parameter value at the time of adjustment, and r_0 is the same parameter's initial value at the time the initial price was agreed.
- a **weighting coefficient** (a, b, \dots) which must be equal to or lower than the proportion that the cost component represents in the total price (condition 3). For example, the weighting coefficient for a cost component would be 0.4 or less if the cost component represents 40% of the price. The parties must ensure that the total sum of the different weighting coefficients does not exceed 0.8 (condition 1). The non-adjusted part of the price is represented by z , which should be minimum 0.2.

The Agoria reference wages is a common parameter for labour costs.⁹ As relevant parameters for input material costs, parties tend to refer to the material prices established by the Commission for Market Prices of Materials (FPS Economy)¹⁰. Indices conventionally used for price adjustment formulae are often only published on a monthly basis and are generally only available after the month to which they refer to. Therefore, parties could consider referring to more regularly updated parameters, such as private benchmark price sources, or developing purchasing strategies to ensure the price paid for input material reflects the average monthly indices.

⁷ Article 57, §2 of the Law of 30 March 1976 refers to "price adjustment clauses", a rather broad term. Article 57, §1 as well as the preparatory works reveal the intention of the legislator to principally target *automatic* price adjustment clauses and/or clauses which link the price to formulae or indices.

⁸ For similar clauses see: Agoria note on Price Revision Clauses (<https://www.agoria.be/en/node/50201>); FPS Economy note on applying price adjustment clauses <https://tinyurl.com/prijsherzieningsformule>.

⁹ See : <https://www.agoria.be/en/services/data-research/reference-wages>.

¹⁰ At the time of publishing, the following link provides the prices: <https://economie.fgov.be/nl/themas/ondememingen/specifieke-sectoren/bouw/prijsherzieningsindexen/mercuriale-index-i-2021>.

10. Are there exceptions to these restrictions on automatic price adjustment clauses?

The above limitations of the Law of 1976 do not apply to agreements with a foreign element, unless they pertain to obligations to be performed within Belgium and are concluded between persons residing in Belgium. Furthermore, the limitations do not apply to *“rents, salaries, social contributions or benefits and emoluments and fees relating to services provided by members of the liberal professions”*. The Minister of Economic Affairs is allowed to deviate from the 80% limit on a sector-wide basis.

11. What other price variation clauses could be contemplated?

If a price adjustment clause within the statutory confines does not sufficiently cover the risk of extreme price fluctuations, a hardship clause (**question 4**) defining extreme price fluctuations as a case of hardship may be contemplated, but such hardship clause will require the parties to agree on a price or a court or arbitrator to determine a price. This may not be the most appropriate way to adapt prices swiftly in times of cost volatility.

A contract may also entitle the supplier itself to adapt the price in case of cost increase. Such clauses sometimes grant a termination right to the customer if the price increase exceeds a certain threshold. Other options, such as only offering short term or punctual contracts, or working with a cost-plus system or a specific price determination mechanism rather than the adjustment of an initially agreed price, can also be considered.

The validity of such price determination or adjustments clauses should be assessed under the rules on unfair b2b terms in the Code of Economic Law. If the cause for a price increase is objective and the clause is not misleading, then it is not likely to be manifestly unbalanced.

12. Can one (be forced to) sell at loss as a consequence of inflating costs?

Sudden cost increases after a contract was concluded can lead to the contract price being even lower than the cost of performance, and leave the supplier with a loss. Article VI.116 of the Code of Economic Law contains a prohibition of sale at a loss, meaning any sale at a price which is not at least equal to the price at which the enterprise purchased the product or would have to pay to replenish its stock. This condition should be assessed at the moment of the agreement rather than at the time of its performance. If the loss is not inherent to or foreseen at the time of the agreement but is a result of purchases becoming excessively expensive during performance, then there is no “market practice” of selling at a loss but merely an incidental loss caused to the supplier because of unforeseen circumstances (just like the supplier could receive an

unexpected extra benefit in case of suddenly cheaper purchases). Therefore, the supplier should normally not be able to invoke article VI.116 of the Code of Economic law, which is not intended to protect an enterprise against loss, but to protect its competitors against unfair practices. A purchaser should normally be entitled to request the supplier to abide by the contract price, irrespective of a possible loss.

However, hardship clauses (**question 4**), the CISG (**question 6**) or abuse of rights (**question 13**) could offer alternative means to the supplier against a purchaser’s claim for an unaltered performance of the sale. Relieving the supplier from the agreed price should however remain exceptional, considering all circumstances, such as the whole duration of the agreement (not only the period where possible loss is incurred), the importance of the products for the customer, the availability of alternatives, ...

13. Is claiming unaltered performance of a contract amidst changed circumstances an abuse of rights?

An abuse of rights is the exercise of a right (such as a contractual claim) in such a manner that it evidently exceeds the limits of the normal exercise of that right by a normally prudent and careful contract party. An indicator of abuse of rights can be the lack of balance between the advantage obtained by the claim and its inconvenience experienced by the other party.

In some circumstances where strictly speaking a contract party cannot invoke force majeure or hardship and should perform its obligations, one could consider that, given the exceptional and unforeseen circumstances of the war in Ukraine and the mutual interests of the parties, the party that is refusing any adjustment and is claiming forced unaltered performance instead of tempering its claim or accepting to renegotiate, is not acting in good faith. The claim may then be rejected or reduced on the basis of abuse of rights. Some case law for example ruled that the financial burden as a consequence of the governmental measures in the covid-19 crisis ought to be shared equally between the parties, which have an obligation to negotiate accordingly.

Determining whether there is an abuse of rights should take into account all circumstances on a case-by-case basis, such as:

- whether the risk of a change of circumstances was implicitly assumed by either party;
- whether the contract is of a speculative nature;
- whether and to what extent there have been previous market fluctuations;
- the duration of the contract;
- whether either party has hedged against market changes.

Public Procurement Contracts

14. What happens in case of important disturbance of the balance in a public procurement contract?

Both the awarding authority and the contractor have the option to invoke the concept of unforeseen circumstances (article 38/9 of the Royal Decree of 14 January 2013) in order to have the terms of execution of the assignment adjusted. Note that even in the current Ukraine and supply crisis, the usual formal notification requirements continue to apply.

The contractor will therefore need to report the unforeseen circumstances that result in execution difficulties in writing and within a period of thirty days following the unforeseen circumstances to the awarding authority. The contractor will have to explain how the contractual balance between parties has been disturbed to his disadvantage. Therefore, the relevant events should not have been foreseeable at the time his quote was submitted. The contractor will also have to demonstrate that he could not avoid the consequences of the events, despite he did everything within his power to do so. However, it is not required that the execution of the contract is absolutely impossible, an important disturbance of the balance is sufficient.

15. Can an awarding authority suspend the execution of a public procurement contract?

The awarding authority could indeed unilaterally decide to suspend the execution of a public procurement contract. However, such a decision should be duly motivated.

16. Can a contractor claim compensation due to a suspension of a public procurement contract by an awarding authority in the context of the Ukraine and supply crisis?

Not necessarily. The right to compensation on the grounds of article 38/12 of the Royal Decree of 14 January 2013 does not necessarily apply here as a suspension due to the Ukraine and supply crisis is beyond the control of the awarding authority. It is therefore advisable to clarify this in advance with the awarding authority.

17. Can a public procurement contract be modified in order to adapt it to the current Ukraine crisis and supply issues?

Yes, as long as the modifications made to the contract are non-essential. The Royal Decree of 14 January 2013 contains the criteria for determining whether or not a modification is essential.

18. Will a contractor that is unable to perform with the time delays due to the Ukraine and supply crisis, be fined for delays in execution of a public procurement contract?

It seems inevitable that some public procurement contracts will be delayed in the current Ukraine and supply crisis. The policies of the different awarding authorities on respecting the time delays can differ. It is advisable for the contractor to consult the awarding authority and agree on a modification of the execution deadlines.

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