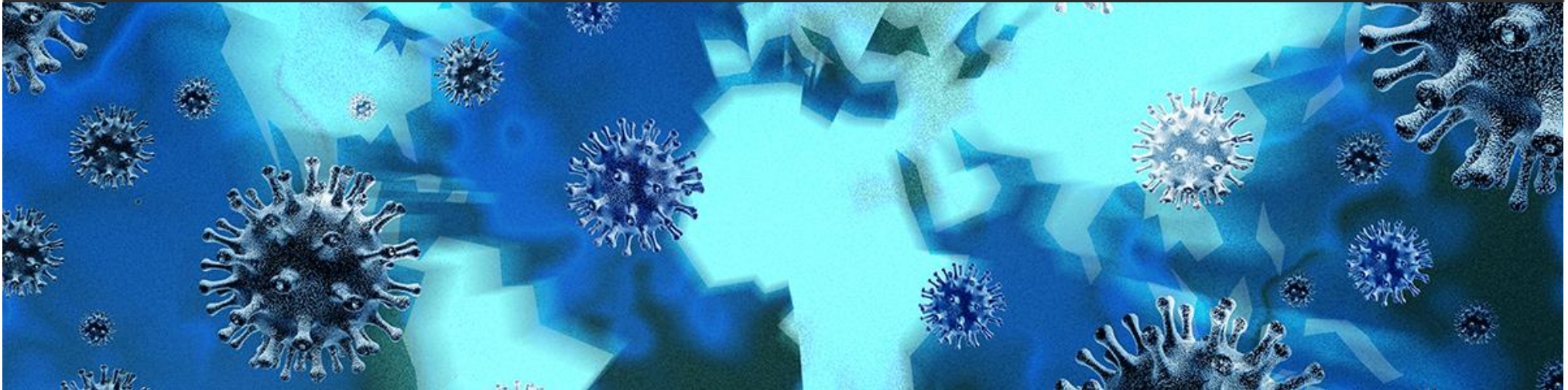


**Alert | Health Emergency Preparedness Task Force:
Coronavirus Disease 2019**



April 2, 2020

Navigating Dutch Legal Information During the COVID-19 Pandemic

Legal Information and Tools in Times of a (Financial) Crisis

Both the COVID-19 pandemic and the measures taken by governments have led to unprecedented legal questions that require immediate attention and solutions. These are challenging times. We have therefore prepared the following overview of some of the pertinent legal questions and the answers to consider, in the hope they provide useful preliminary guidance.

Topic	Main issues in relation to the risk of director liability
Question	<i>When may directors be held liable and what actions should directors take in this time of crisis?</i>
Legal	<p>The managing directors of a Dutch company are responsible for the strategy (<i>beleid</i>) of the company, conducting the company's day-to-day management and representing the company in dealings with third parties. The managing directors should perform their duties in accordance with Dutch law, the company's articles of association – in particular its object clause – and ensure they act in the interest of the company – and any applicable regulations and Dutch rules of public order. In general, managing directors have broad discretionary powers when setting out the strategy of the company and in determining what is in the interest of the company and its stakeholders. In times of financial distress, however, managing directors should take the interests of creditors into account.</p> <p>Under Dutch law there is a distinction between internal director liability (i.e., toward the company) and external director liability (i.e., toward third parties). In principle, directors of a company can only be held personally liable for improper performance of their duties (<i>onbehoorlijk bestuur</i>) in the event of serious negligence (<i>ernstig verwijt</i>); liability issues generally arise if a director has acted in a manner no other director would have reasonably acted under the same circumstances.</p> <p>In financial distress situations, a specific ground for liability arises in the event a director continues to bind the company to new obligations while the director knew or ought to have known that the company would not be able to fulfil such obligations, i.e., where the company is technically insolvent.</p> <p>Although a company may pay its creditors in any order, in times of financial distress directors should exercise extra caution when making selective payments, especially to affiliated parties.</p> <p>In case the company is declared bankrupt, the directors can be held liable for the shortfall in the bankruptcy estate if the board of directors: (i) has evidently improperly performed its duties (<i>kennelijk onbehoorlijk bestuur</i>) and (ii) such improper performance was an important cause of the bankruptcy. Again, as a general rule, directors are only liable if under the same circumstance no director acting reasonably would have managed the company in a similar way.</p> <p>Special attention must be paid to the obligation to keep the (financial) administration up to date in accordance with the applicable accounting rules and the obligation to timely publish the company's annual accounts. If one of these obligations has not been complied with it is presumed that the directors improperly performed their duties, which substantially increase the risk for a director to be held personally liable for the shortfall in the bankruptcy estate.</p>

	<p>Directors must also inform the tax authorities in a timely manner of a possible inability of the company to perform its payment obligations.</p> <p>In conclusion, but subject to decisions that may be issued in the current situation, directors of a company can only be held personally liable for improper performance of their duties (<i>onbehoorlijk bestuur</i>) in the event of serious negligence (<i>ernstig verwijt</i>). In that regard, attention is generally be given to whether a director has acted in a manner in which no other director would have reasonably acted under the same circumstances.</p>
Tools	<p>The board should consider:</p> <ul style="list-style-type: none"> • whether the strategy or planning should be adjusted and if yes, do so as a matter of urgency; • doing everything in its power to ensure, and more closely monitor, whether the company is expected to continue to make payments as they are due, taking the current and expected financial consequences of the pandemic into account. Frequently updated cash flow overviews help monitor the company’s financial situation; • documenting all decisions and considerations on a frequent basis in which it is clearly recorded why and on what basis certain payments were made and certain transactions were entered into (the corporate benefit considerations must form part of this documentation); and • keeping track of and documenting how government measures and events have affected or will affect your or your counterparty’s business.

Topic	Force majeure and unforeseen circumstances in the COVID-19 pandemic
Question	Does COVID-19 justify non-performance, in whole or in part, by a party of its contractual obligations on the basis of force majeure?
Legal	<p><i>Force majeure</i> (<i>overmacht</i>) refers to a situation where performance of a contractual obligation is definitively or temporarily impossible due to an event that is beyond the control of any of the parties. Such an event would (temporarily) relieve the debtor from performing its contractual obligations and would release such debtor from liability for damages or other contractual remedies for breach of contract. It will depend on the relevant contract and all the circumstances of the matter at hand whether the COVID-19 pandemic may be characterised as a <i>force majeure</i> event and thus justifies non-performance. Certain commercial contracts include a <i>force majeure</i> clause that determines which events would qualify as a <i>force majeure</i> event and the related consequences. If such clause mentions disease, an epidemic or pandemic it may be possible to rely on <i>force majeure</i>. If a commercial contract does not include a <i>force majeure</i> clause, or if such clause does not specifically mention disease, an epidemic or pandemic, the law governing the contract will determine whether a party can invoke <i>force majeure</i>.</p> <p>Dutch law generally allows a debtor to invoke <i>force majeure</i> if the debtor was not at fault and is not accountable for such breach by virtue of statutory law, or generally accepted principles. However, depending on the circumstances, under Dutch law, the threshold for invoking <i>force majeure</i> is generally high. For example, financial inability to pay debts may not, by itself, qualify. Nor may one</p>

	<p>necessarily rely on a default by sub-contractors or suppliers. Furthermore, if the debtor could have prevented non-performance by ensuring performance in a different manner than agreed, then <i>force majeure</i> is generally not available.</p> <p>The measures taken by the Dutch and other governments in the context of COVID-19 could result in an inability to perform contractual obligations. There is, however, no general rule available to determine such inability. Therefore, whether these governmental measures result in an inability to perform the relevant contractual obligations is to be determined on a case by case basis. The party invoking <i>force majeure</i> would need to provide evidence that its inability to perform is due to such measures.</p> <p>In conclusion, if the contract mentions disease, an epidemic or pandemic as a <i>force majeure</i> event it will in principle be possible to rely on <i>force majeure</i>. If the contract does not contain a <i>force majeure</i> clause or if such clause does not specifically mention disease, an epidemic or pandemic there is no certainty that a party may rely on <i>force majeure</i>. This will depend on all the facts and circumstances of the matter at hand.</p>
Tools	<p>Things to consider:</p> <ul style="list-style-type: none"> • assessing which measures can be taken to avoid the risk of a breach (remote working, professional distancing of (production) personnel, work in a different manner etc) and implement such measures; • determining the importance of the relevant commercial relationship for the company’s business before determining the appropriate measure or remedy to invoke. For many long-term commercial relationships, it may be more beneficial to proactively discuss and address any anticipated problems as early as possible in an effort to maintain the good commercial relationship. This requires a thorough assessment of the company’s rights and obligations under the relevant contract and keeping track of what action is required to protect the company’s interests, such as the giving of (default) notice in a timely manner or, if commercially appropriate or desirable, granting the counterparty more time to perform its obligations; and • keeping track of and documenting how (government) measures have affected or will affect your or your counterparty’s business and the ability to perform under the applicable contract. <p>Note that certain governments and authorities have issued <i>force majeure</i> certificates (e.g. the China Council for the Promotion of International Trade) or have assumed force majeure (such as the French government for small companies) to provide businesses with this evidence to assist them in claims of exemption from liability for breach of contract. Other governments and authorities may follow in providing similar tools.</p>
Question	<p><i>Is there a possibility to amend commercial contracts based on unforeseen circumstances considering the COVID-19 pandemic?</i></p>

<p>Legal</p>	<p>In the case of a Dutch law contract, parties may request the court to amend such contract based on the statutory provision of <i>unforeseen circumstances (onvoorziene omstandigheden)</i>.</p> <p>At the request of a party to a contract, the court can modify the legal effects of a contract or terminate the contract in whole or in part, if there are unforeseen circumstances of such a nature that the other party to the contract, according to principles of reasonableness and fairness, cannot expect an unmodified continuation of the agreement. Whether a party can successfully claim modification of a contract based on unforeseen circumstances will depend on all circumstances of the case and on the wording of the contract. Determinations are made on a case-by-case basis. However, a very high threshold applies, and courts are generally cautious in awarding such claims.</p> <p>‘Unforeseen’ generally does not require a situation which could not have been contemplated by the parties, but rather in which the contract itself does not provide for an arrangement or remedy to deal with the particular circumstances. However, courts generally do not modify or dissolve contracts if they conclude that, under the circumstances, the consequences of the unforeseen circumstances should be borne by the party seeking the amendment or dissolution of the contract. Whether this is the case will be determined on the basis of the contract or on the commonly held opinion if the contract is silent on the matter.</p> <p>If a party is successful, the court has a broad discretion to modify the legal effects of the relevant contract. Modifications may be made in whole or in part, permanently or temporarily or amend or terminate the contract with retroactive effect. The purpose is to restore the balance of the original contract in light of the changed circumstances. The court will therefore as much as possible try to maintain the allocation of risk of the original contract.</p> <p>In conclusion, there are not many cases permitting the statutory right to amend an agreement; and whether that will be possible will depend on the particular contract and circumstances involved.</p>
<p>Tools</p>	<p>Things to consider:</p> <ul style="list-style-type: none"> • keeping track of and documenting how (government) measures have affected or will affect your or your counterparty’s business and the ability to perform under the applicable contract, which is relevant for the next 2 bullets; • that if a company is faced with an inability to perform its contractual obligations, or the performance of these obligations has become highly unfavourable, due to the COVID-19 crisis, to first try and re-negotiate the contractual obligations with the other party. A temporary agreed suspension of payment or obligations could offer a solution more quickly than court proceedings.; and • If no agreement can be reached and the contract does not provide for (an allocation of risk in) these circumstances, court proceedings to claim a modification of the legal effects of a contract based on unforeseen circumstances could offer a solution. The burden of proof will be on the party claiming modification.

Topic	Financial room to breathe
Question	What can businesses do to (temporarily) hold off creditors?
Legal	<p>Outside insolvency proceedings, there currently is no legal framework to bind creditors to a composition without the cooperation of all creditors. A draft bill on the confirmation of private plans currently lies with the Dutch parliament for approval, which introduces such possibility, keeps the debtor in possession and will also allow the debtor to request a moratorium. Insolvency specialists have urged the parliament to implement this draft bill as a matter of urgency in light of the COVID-19 crisis.</p> <p>As a result, the draft bill has now been scheduled for parliamentary debate on 6 April 2020 and the Dutch government has indicated in its letter to parliament that ideally the bill should be implemented no later than 1 July 2020.</p> <p>In summary, a restructuring of debt currently requires consent by all creditors that are affected by such restructuring. However, a bill on the confirmation of private plans may be implemented no later than 1 July 2020. The bill provides the possibility to bind all or a group of selected creditors to a composition plan without cooperation of all such creditors and allows the debtor to request a moratorium.</p>
Tools	<p>(i) The Dutch government has taken several measures over the last few weeks to provide companies with some financial breathing room. These measures consist not only of deferral of taxes and rental payments and reduction of employee working hours, but the government has also taken measures to expand the access to credit for businesses. For small- and medium-sized enterprises (SME) and larger companies these consist of:</p> <p>(a) For SMEs: the conditions under the Suretyship SME-loans (<i>Borgstelling MKB-kredieten (BMKB)</i>) have been relaxed as of 16 March 2020. Under this measure, businesses can borrow funds from banks under more favorable conditions. The BMKB is accessible for businesses with a maximum of 250 employees and an annual turnover of EUR 50 mln or balance total of EUR 43 mln; and</p> <p>(b) SMEs and larger companies can make use of the Guarantee Entrepreneur Financing-measure (<i>Garantie Ondernemersfinanciering-regeling (GO)</i>). Under this measure, the state will guarantee 50% of the loan. The aggregate maximum guaranteed amount has been increased from EUR 400 mln to EUR 1.5 bln, the maximum guaranteed amount per business to EUR 150 mln.</p> <p>(see the Chamber of Commerce website for more information in Dutch);</p> <p>(ii) Banks have indicated that they will automatically grant SMEs (with loans up to EUR 2.5 mln) a six months deferral of interest and amortisation payments.</p>

	<p>(iii) Some banks have indicated that they will grant businesses with a loan up to EUR 50 mln a temporary stay of payments under such loans if their financial distress is caused by the COVID-19 crisis (contact your bank for the specific relief they can offer).</p> <p>(iv) For larger loans, agreements can be entered into with banks (requests may be made for waivers or standstill agreements or that the banks maintain a voluntary moratorium).</p> <p>(v) If no agreement can be reached with the major creditors, the company can file for a suspension of payments.</p> <p>Things to consider:</p> <ul style="list-style-type: none"> • keeping track of and documenting how government measures and events have affected or will affect your or your counterparty’s business and the ability to perform under the applicable contract, which may help in discussions with creditors; • checking if you qualify for the government measures set out above; and • contacting your bank for the specific relief measures they offer.
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Topic	Government measures
Question	<i>Which tax measures has the Dutch government taken?</i>
Legal	<p>Dutch taxpayers affected by the economic consequences of the coronavirus may apply for an extraordinary deferral of payment of corporate income tax, income tax, VAT, and wage tax. As soon as the request is received, collection of outstanding tax debts will be suspended for a period of three months. If a deferral of payment is requested for a period of more than three months, the Dutch tax authorities will require specific information evidencing the relation of the payment difficulties to COVID-19. Taxpayers requesting an extraordinary deferral of wage tax payments should file a notification about the inability to pay wage tax (<i>melding betalingsonmacht</i>) to avoid statutory inversion of the burden of proof for director liability.</p> <p>As a second tax measure, taxpayers may request a reduced preliminary corporate income tax assessment without further substantiation. All requests for a reduced preliminary tax assessment will be granted by the tax authorities.</p> <p>Thirdly, the collection interest rate and the tax interest rate will temporarily be reduced. The collection interest rate will be reduced from 4% to 0.01% as of 23 March 2020, applicable to all tax debts. The tax interest rate will be reduced from 8% for corporate income tax and 4% for all other taxes, to</p>

	<p>0.01%, applicable to all taxes for which tax interest may become due, as of 1 June 2020 (only for personal income tax, the decreased rate will apply as from 1 July 2020).</p> <p>The government announced that it will do everything to avoid misuse. The legal framework for the emergency measures should be published shortly. At this moment, it is not clear if there will be any repercussions for taxpayers who wrongfully filed for extension of payment, such as penalties.</p>
Tools	<p>Requests for deferral of tax payment for periods up to three months should be filed with the Dutch tax authorities. No written evidence of the payment difficulties is required.</p> <p>Requests for deferral of tax payment for periods exceeding three months must contain specific information evidencing the relation of the payment difficulties to COVID-19.</p> <p>Taxpayers requesting a deferral of wage tax payments should also file a notification about the inability to pay wage tax (<i>melding betalingsonmacht</i>). Such notification should be filed separately from the request for deferral of payment within two weeks after the deadline for filing the applicable wage tax return.</p> <p>Requests for a reduced provisional income tax assessment should be filed with the Dutch tax authorities through the regular channels.</p>
Question	<p><i>Which measures in relation to employment and employees has the Dutch government taken?</i></p>
Legal	<p>The Emergency Bridge Measure for Conservation of Work (<i>Tijdelijke Noodmaatregel Overbrugging voor Werkbehoud</i>), also known as the Emergency Measure, was introduced on 17 March 2020.</p> <p>Under the Emergency Measure, an employer can apply for a compensation of the wage costs over the period 1 March -31 May 2020 for its employees, with the Employee Insurance Agency (<i>Uitvoeringsinstituut Werknemersverzekeringen</i>, the UWV), up to a maximum of 90% depending on the loss of turnover. Such compensation can be requested for loss of turnover for a consecutive period of three months between 1 March 2020 – 31 July 2020, with a possibility to extend – potentially based on other conditions than the initial period - for another three months.</p> <p>Compensation for wage costs can also be requested for employees in relation to whom the employer has no obligation to continue salary payments, such as employees with zero-hour contracts and on-call contracts.</p> <p>Employers can apply for compensation of wage costs under the Emergency Measure:</p>

	<ul style="list-style-type: none"> • If the employer expects a minimum loss of 20% of turnover; and • On the condition that during the compensation period the employer will not dismiss any employees on the basis of business economic grounds. <p>It is expected that compensation applications can be filed via the website of the UWV as of 6 April 2020.</p>
Tools	<p>The UWV will – if the compensation is awarded – pay 80% of the requested compensation in advance.</p> <p>The Dutch Government has currently announced the following examples (to be prorated as the case may be) in relation to the calculation of compensation:</p> <ul style="list-style-type: none"> • if 100% of the turnover is lost, the compensation amounts to 90% of the total amount of the wage costs of an employer; • if 50% of the turnover is lost, the compensation amounts to 45% of the total amount of the wage costs of an employer; and • if 25% of the turnover is lost, the compensation amounts to 22.5% of the total amount of the wage costs of an employer. <p>The Dutch Government has indicated that for compensation above a certain threshold amount– which amount is to be determined at a later stage - an audit opinion will be required. It has furthermore indicated that for the determination of the total wage costs, in principle the amount of wage tax plus the national insurance contributions indicated in the employer’s tax declaration of January 2020 will be used.</p>

Topic	Formal insolvency proceedings – bankruptcy and suspension of payments
<i>Question</i>	<i>When can a creditor file for the bankruptcy of its debtor?</i>
Legal	A creditor of a company, but also the company itself, may file for the bankruptcy (<i>faillissement</i>) of such company, if it has ceased paying its debts, meaning that the company has at least two creditors, one of the debts is due and payable and the company has stopped making payments. The court will appoint a bankruptcy trustee whose main task is to liquidate the debtor’s assets and distribute the proceeds thereof to its creditors. There is no balance sheet insolvency test in the Netherlands.
Tools	Within bankruptcy proceedings it is possible to offer a composition plan and cram down ordinary (i.e., non-preferred and non-secured) creditors. This may, however, also take the form of a liquidation plan.
<i>Question</i>	<i>Is there an obligation for the board of directors to file for the bankruptcy of the company?</i>

Legal	No, a director or a board of directors has no legal obligation to file for bankruptcy when the company is technically insolvent; however, continuing to bind the company when the directors knew or ought to have known that the company would not be able to fulfil its debts may lead to director liability (please see above under <i>liability of directors</i>).
Tools	See above under <i>liability of directors</i> for further information.
Question	<i>When can the company file for a suspension of payments?</i>
Legal	<p>A company can file for a suspension of payments (<i>surseance van betaling</i>) in the event it anticipates that it will not be able to continue to pay its debts due. In a suspension of payments, the company is given temporary relief against demanding creditors, in order to achieve, by way of reorganisation, continuation of its business and/or, ultimately, (partial) satisfaction of creditors by way of a composition. Note that this procedure only binds non-preferred and non-secured creditors.</p> <p>A provisional suspension of payments is usually granted immediately upon the filing of a request. Upon granting the (provisional) suspension of payments, the court will appoint an administrator (<i>bewindvoerder</i>) who can only act together with the company (i.e., the board of the company) in relation to the estate of the company and vice versa. Generally, although not mandatory, the court will also appoint a supervisory judge. The creditors of the company are invited to file their claim with the administrator. The court will set a date to hear the creditors. At this hearing a definite suspension of payments will be granted unless there are grounds for refusal of such a definite suspension of payments. A suspension may be granted for a maximum period of 18 months and may be extended without limit at the request of the company for successive 18 months periods.</p> <p>During the suspension of payments, the company cannot be forced to make payments that are due. In the case of a definite suspension of payments attachments made by creditors on assets of the company are automatically lifted. However secured and preferred creditors are not affected by this procedure and may thus still exercise their rights.</p>
Tools	If a creditor files for bankruptcy in this time of crisis where the company is in fact still viable but has payment difficulties solely due to the COVID-19 crisis, it may immediately file for a suspension of payments to give itself some time to sort out its financial distress. A request for a suspension of payments suspends the bankruptcy filing.
Question	<i>What is the impact of the closure of the courts on the filing for bankruptcy or a suspension of payments?</i>

Legal	<p>To further stop the spread of COVID-19, all district courts, courts of appeals, and special tribunals closed their doors on 17 March 2020. In principal the handling of cases will be put on hold through 28 April 2020. The handling of some urgent cases, however, cannot be put on hold, for instance, when a deadline will soon expire within which a court must rule on the case. See below for an indication of relevant issues which will be handled by the courts.</p>
Tools	<p><u>Preservation attachment (<i>Conservatoir beslag</i>)</u></p> <p>It may still be possible to submit a request for a preservation attachment (<i>conservatoir beslag</i>). In ruling on such a request, the court will take the current pandemic and the economic circumstances and situation that have arisen as a result thereof into account. It is possible that in light thereof the court may require a further justification and reasoning to substantiate the request, on top of other questions that may arise in connection with the request. You may receive notice thereof through the usual channels of the relevant court.</p> <p><u>Insolvency cases</u></p> <p>For insolvency cases: all bankruptcy hearings, suspension of payment requests, appeal cases, emergency requests and requests for moratoria and provisional measures are considered urgent and will in principle continue to be handled by the courts. All such cases will as much as possible be handled in writing.</p>

This GT Alert is limited to non-U.S. matters and law.

For more information and updates on the developing COVID-19 situation, visit [GT's Health Emergency Preparedness Task Force: Coronavirus Disease 2019](#).

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