J.A. Tuinman and T.Q. de Booys[1]

The corona pandemic and commercial leases: *don't believe the hype*

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1. Introduction

The corona pandemic – the worldwide outbreak of the coronavirus SARS-CoV-2 in the spring of 2020 – has resulted in a sequence of large-scale consequences for people and society in just a few weeks. The focus of the consequences – leaving aside the dramatic effects it has had on the health of many – has been on the comprehensive measures, most of which restrict people's freedom, which the government has taken to manage the pandemic and combat the further spread of the virus. This article refers to the governmental measures that are being taken to combat the corona pandemic and the social and economic consequences of those measures collectively as the 'corona crisis'. The measures taken by the Dutch government fall into two categories. The first category consists of the compulsory measures for which there is a statutory basis.[2] This category includes the ban on opening facilities such as cafés, restaurants, gyms, educational institutions and childcare centres; the ban on practising professions that involve physical contact and the ban on events which must either be reported to the authorities or for which permits are required.[3] The measures also include the ban on gatherings in public areas of groups of three or more persons who do not stay 1.5 metres from one another. The second category consists of urgent recommendations for which there is no basis in statutory law. This package of measures is often referred to as 'social distancing': the call to stay home as much as possible, including for work, and to stay 1.5 metres from other people at all times.[4] Research as shown that, overwhelmingly, people are complying voluntarily with these measures.[5]

Many companies (including SMEs) have been heavily impacted by the corona crisis. The companies and skilled trades falling within the first category of governmental measures were subject to mandatory closure. Collective social distancing is also having major consequences for those businesses which are permitted to stay open. Footfall in shopping areas has evaporated.[6] Although supermarkets and DIY stores have seen increases in turnover, many others have seen sharp decreases. As a result, they have been forced to close or limit their opening hours for economic reasons. Locatus, a real estate research firm, estimates that such decisions have been made for between 15,000 and 20,000 retail outlets.[7] As a result, many businesses are having serious liquidity problems. In practice, rent is one of the most significant overhead costs that businesses are continuing to incur.[8] For that reason, the past few weeks have seen large numbers of commercial tenants making moral (and legal) appeals seeking to have land-

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1 Jurjen Tuinman (jurjen.tuinman@florent.nl) and Tim de Booys (tim.debooys@florent.nl) are lawyers at Florent, Amsterdam. They would like to thank Frank van der Hoek, Menno Griffiths and Aemile van Rappard for their useful comments to a draft of this article.

2 In this respect, the minister has advised the security region chairpersons, pursuant to Article 7 Public Health Act, read in conjunction with Article 39(1) Security Regions Act, to make the measures prescribed by the minister mandatory by issuing an emergency ordinance pursuant to Article 176 Municipalities Act.

3 Decrees of the Minister for Medical Care and Sport of 13 March 2020, no. 1662578-203166-PG, of 15 March 2020, no. 1663097-203238PG and of 17 March 2020, no. 1663666-203280-PG; the decrees of the Minister of Public Health, Welfare and Sport of 20 March 2020, no. 1665126-203432-PG, of 23 March 2020, no. 1665182-203445-PG, and of 24 March 2020, no. 1666478-203555-PG.

4 https://www.rijksoverheid.nl/onderwerpen/coronavirus-covid-19/veelgestelde-vragen-over-de-aanpak-van-het-nieuwe-coronavirus-in-nederland.

5 99% of those surveyed indicated that they were staying 1.5 metres from others and 93% were staying home as much as possible, according to I&O Research in partnership with the University of Twente, https://www.ioresearch.nl/actueel/nederlanders-houden-zich-aan-corona-regels-vooral-jongeren-eenzaam/.

6 https://locatus.com/blog/corona-virus-binnensteden-leeg-maar-wijkwinkelcentra-profiteren-van-hamstergedrag/.

7 https://locatus.com/blog/schatting-locatus-15-000-tot-20-000-winkels-inmiddels-dicht/.

8 Depending on the tenant's industry, the rent would ideally equal an average of between 3% (supermarkets) and 30% (hotels) of the turnover to be expected under normal conditions. See also: W. Raas, 'Het hoe en waarom van een omzethuur en waarom een wetswijziging nodig is', *TvHB* 2010/1.

lords relax their obligation to pay rent and to implement temporary rent reductions.[9] Perhaps spurred on by a flood of online publications from law firms, estate agents and property advisers, among others, informing both landlords and tenants of which rights they can enforce in connection with the corona crisis, tenants are relying on unforeseen circumstances (Article 6:258 of the Dutch Civil Code or DCC); *force majeure* (Article 6:75 DCC); or (to a much lesser extent) the existence of a defect (Article 7:204(2) DCC).[10] Commercial landlords feel as though they are being put on the spot and note that some tenants are attempting to abuse the situation. Leaving aside the fact that many landlords feel morally obligated to lend their tenants a helping hand, they have recently begun wondering aloud what their legal position is in this respect.

Keeping in mind that the full scope of the corona crisis remains unclear, this article makes an initial attempt to outline the impact which the corona crisis is having on the rights and obligations of commercial landlords and tenants. Section 2 addresses the issue of whether the governmental measures implemented in both categories (or the consequences thereof) constitute a defect in the meaning of Article 7:204(2) DCC. Section 3 discusses the rights a tenant can enforce against a landlord if such a defect exists. Section 4 addresses the issue of whether the corona crisis constitutes an unforeseen circumstance as meant in Article 6:258 DCC. Section 5 describes whether a tenant can 'suspend' its obligations to pay and to operate a business by relying on *force majeure* (pursuant to Article 6:75 DCC). The article ends with a brief conclusion (section 6).

2. Does the situation constitute a defect as meant in Article 7:204(2) DCC?

2.1 Introduction

One question that is relevant to tenancy law is whether the governmental measures constitute a 'defect' as defined in the law; for example, because the tenant may, in principle, demand a proportional reduction of the rent in case of a defect.[11] Pursuant to Article 7:204(2) DCC – and to the extent relevant here – a defect is a condition or characteristic of the property or another circumstance that is not attributable to the tenant which results in the tenant being unable to exercise the right of enjoyment which it was entitled to expect when the lease was concluded.[12] It was the legislature's express intention that the legal meaning of the term 'defect' would be interpreted more broadly in tenancy law than it would be when used in normal language.[13] Specifically, a defect need not involve a defect in the physical characteristics of the property, but may consist of any circumstance which impairs enjoyment.[14] Conversely, tenants generally are not entitled to assume that no external circumstances will ever change.[15] When a tenant's expectations preclude external factors from being qualified as defects differs from case to case.[16]

The key question at hand is whether the corona crisis – the governmental measures and the consequences thereof – fall within the scope of Article 7:204 DCC. The parliamentary history explicitly stated that unforeseen governmental measures that interfere with the use of

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9 National Retail Council of the Netherlands (*Nederlandse Winkelraad*) (NRW), Association of Institutional Property Investors in the Netherlands (*Vereniging van Institutionele Beleggers in Nederland*) (IVBN), VastgoedBelang (an association of private landlords), VastGoedOverleg (a platform for retail property managers and advisers) & Detailhandel Nederland (an association promoting retailers' interests), '*Oproep aan alle huurders en verhuurders van winkelruimte in Nederland*', https://www.ivbn.nl/actueel-artikel-detail/oproep-aan-alle-huurders-en-verhuurders-van-winkelruimte-in-nederland. See also: '*De huur betalen als je omzet weg is*: *'Betalen of je riskeert ontruiming*'', https://nos.nl/artikel/2328892-de-huur-betalen-als-je-omzet-weg-is-betalen-of-je-riskeert-ontruiming.html; '*Horeca langer dicht, maar de huur moet betaald worden*', https://www.deondernemer.nl/corona/coronavirus/horeca-langer-dicht-maar-de-huur-moet-betaald-worden~2070609.

10 Internet publications often refer to these three options, see e.g. Koninklijke Horeca Nederland (an organisation representing hospitality businesses in the Netherlands), https://www.khn.nl/kennis/update-huur-khn-helpt-en-geeft-tips; Kennedy Van der Laan, https://kvdl.com/artikelen/huurrecht-bedrijfsruimte-en-het-corona-virus-wie-draagt-de-risicos and Bleinheim, http://www.advocaten-amsterdam.nl/1649/sluiting-horeca-overmacht-corona.

11 Article 7:207(1) DCC. See par. 3.2, below.

12 In the remainder of this provision, the tenant's legitimate expectations upon entering into the lease are objectified by defining these as what the tenant "is entitled to expect from a well-maintained property of the same type as the property to which the lease relates". This objectification is subjectified in the general provisions for commercial accommodation published by the Real Estate Council of the Netherlands (*Raad voor Onroerende Zaken*) (ROZ). The nature of the corona pandemic, which no one expected, means that there is no difference in the outcome regardless of whether the objectified or subjective approach is used.

13 *Parliamentary Papers II*, 1999/2000, 26 089, no. 6, p. 6; Asser/Rossel & Heisterkamp 7-II 2017/30; J.A. Tuinman, *T&C Huurrecht*, Article 7:204, annotation 3, under b.

14 See *Parliamentary Papers II*, 1997/98, 26 089, no. 3, page 14.

15 Asser/Rossel & Heisterkamp 7-II 2017/34.

16 Supreme Court 27 April 2012, ECLI:NL:HR:2012:BV7337, WR 2012/84 (*Municipality of The Hague/Strandpaviljoen Zuid*).

leased property must be considered to constitute a defect as meant in Article 7:204 DCC.[17] These in any case include the compulsory governmental measures in the first category. In addition, the literature indicates that the second category – governmental measures for which there is no statutory basis but which have the same *de facto* consequences – is equated with the first.[18] Tenants which are put at a fundamental disadvantage by these measures are also precluded from the enjoyment they were entitled to expect when the lease commenced.

Many of the online publications and newsletters that have been issued recently argue that the corona crisis does not constitute a defect.[19] The arguments asserted for these are generally one of the following three:

(i) the governmental measures qualify as an actual disruption by a third party who does not claim an no interest in the leased property;
(ii) the normal standards of society dictate that the consequences of the corona crisis be borne by tenants;
(iii) to the extent that normal standards of society do not dictate that the consequences of the corona crisis be borne by tenants, they would still be responsible under the lease in the vast majority of cases.

We address these arguments in more detail below. In doing so, we reach the conclusion that these arguments do not preclude considering the corona crisis to constitute a defect as meant in Article 7:204(2) DCC.

2.2 Do the governmental measures constitute an actual disruption as meant in Article 7:204(3) DCC?

Article 7:204(3) DCC provides that an actual disruption by a third party who does not claim an interest in the leased property (as meant in Article 211 DCC) does not constitute a defect. This begs the question of what the scope of 'an actual disruption by a third party' is. Parliamentary history indicates that this scope is limited to direct nuisance or interference by third parties, such as noise, a ball smashing through a window or a disturbance of the peace.[20] The rationale underlying this is that, generally, tenants may and must confront the responsible party directly.[21] Furthermore, the case law assumes that nuisance in the leased property resulting from third-party defects occurring outside the leased property – such as a burst water pipe – are also actual disruptions.[22] In the latter category, only direct interference qualifies as an actual disruption; damage to the leased property caused by the actual disruption does indeed constitute a defect.[23] Other circumstances that impair enjoyment do not qualify as actual disruptions. For example, property development that impedes a tenant's view and external factors that prevent a tenant from accessing the leased property do not constitute actual disruptions.[24] The governmental measures cannot be fit into these accepted categories of actual disruption, which means that Article 7:204(3) DCC does not apply.

2.3 Must the consequences of the governmental measures be attributed to the tenant?

Generally speaking, the online literature asserts two arguments for the position that generally accepted viewpoints dictate that tenants bear the risk of the corona crisis. The first argument is that the corona *pandemic* is an 'act of God'[25] which – since it cannot be attributed

[17] "The Committee's question as to whether the present article [210, ed.] also applies if an unforeseen governmental measure interferes with the use of the property must be answered in the affirmative. This, after all, involves a defect, as meant in Article 204, which renders the enjoyment that the tenant was entitled to expect impossible", *Parliamentary Papers II*, 1999/2000, 26 089, no. 6, p. 9, and "… a statutory requirement which, perhaps in combination with the condition of the property – for example, insufficient size – prohibits a certain use", *Parliamentary Papers II*, 1997/98, 26 089, no. 3, p. 13.

[18] Asser/Sieburgh 6-I 2016/359; H.N. Schelhaas & J.H.M. Spanjaard, 'Contract en corona crisis', *NJB* 2020/881, pp. 963-964.

[19] See Dentons at https://www.dentons.com/en/insights/newsletters/2020/march/19/commercial-real-estate/ams-the-real-estate-industry-during-corona-times/rent-reduction-legal-impossibilities-and-possibilities and https://www.propertynl.com/Nieuws/Dentons-Alle-winkels-sluiten-wegens-corona--wie-betaalt-de-huur/707feb84-ac7f-4de6-a318-a25e3e474481; Loyens & Loeff at https://www.loyens-loeff.com/nl/nl/nieuws/nieuwsartikelen/het-coronavirus-en-het-huurrecht-3-veelgestelde-vragen-n18638/ and https://www.vastgoedmarkt.nl/financieel/nieuws/2020/03/het-coronavirus-en-het-huurrecht-3-veelgestelde-vragen-101152581; and Houthoff at https://www.houthoff.com/insights/News-Update/Real-Estate-Maart-2020---News-Update.

[20] *Parliamentary Papers II*, 1997/98, 26 089, no. 3, p. 14. See also the examples in H.J. Rossel, *Huurrecht Algemeen* (R&P no. VG4) 2013/4.3.5.1.

[21] *Parliamentary Papers I*, 2001/2002, 26 089, no. 162, p. 16.

[22] For an overview see AG Rank-Berenschot's advisory opinion for Supreme Court 2 June 2017, ECLI:NL:PHR:2017:486.

[23] Asser/Rossel & Heisterkamp 7-II 2017/37.

[24] Asser/Rossel & Heisterkamp 7-II 2017/37.

[25] Under the common law of England and Wales, an act of God is a situation of *force majeure* which is due exclusively to natural causes without human intervention and one which could not have been

to landlords – falls within the scope of risk to be borne by tenants.[26] The second argument cites the judgment in *Amicitia*, which supposedly implies that the corona *crisis* must be attributed to tenants.

2.3.1 Attribution as an element of 'defect'

Attribution according to generally accepted viewpoints is rooted in *force majeure* as meant in Articles 6:75 and 6:58 DCC, with 'attribution' playing the role of allocator of risks. The complication in this respect is that generally accepted viewpoints do not provide a uniform answer to the question of the allocation of risks since society does generally not hold clearly delineated perceptions and interpretations.[27]

Although the assumptions that that generally apply in situations of *force majeure* may offer some guidance in determining whether a restriction of the right of enjoyment is attributable to a tenant,[28] 'attributability' as meant in Article 7:204(2) DCC serves a different purpose than it does in the case of *force majeure* (pursuant to Article 6:75 DCC). Within the framework of Article 7:204 DCC, the non-attributability to the tenant is used to determine whether the situation involves a failure to perform by the tenant's counterparty: the landlord.[29] Attributability to the landlord pursuant to Article 6:75 DCC only comes into play when determining whether the landlord is liable to pay damages (cf. Article 7:208 DCC).[30] This system entails that, based on Article 7:204(2) DCC, a circumstance that restricts enjoyment, such as a natural disaster or an economic crisis, may fall within the scope of risks borne by the landlord, but that Article 7:208 DCC shifts the resulting losses to the scope of risks borne by the tenant. The difference in the delineation of the scope of risks for each remedy is derived from the system of the general law of obligations. After all, a situation of *force majeure* may entitle a creditor to claim dissolution (*ontbinding*),[31] suspension[32] and set-off,[33] but it does not entitle that creditor to specific performance[34] or damages.[35]

The parliamentary history implies that the legislature generally intended that any circumstance that restricted enjoyment would constitute a defect, unless the circumstance was one that personally affected the tenant.[36] Such circumstances must be attributed to the tenant and are excluded from the definition of 'defect'. Two examples were used to illustrate this during the parliamentary debates. First, the legislature makes two references to the example of a leased home which the tenant cannot access, perhaps due to illness, inclement weather, strikes or governmental measures aimed at the tenant.[37] Second, the legislature refers to the Netherlands Supreme Court's judgment of 17 June 1949 in *AKU/Stalen Steiger*,[38] in which AKU wished to use scaffolding, which had been properly provided by the Haarlem-based company Stalen Steiger, at its plant in Arnhem, an aim that was thwarted by the evacuation of Arnhem in the Second World War. The Supreme Court held that, in this context, the evacuation of Arnhem was "a circumstance that personally affected" the tenant, AKU.[39]

prevented by any amount of foresight reasonably to be expected of a defendant. See e.g. *Transco plc v Stockport Metropolitan Borough Council* [2003] UKHL 61.

26 See e.g. Loyens & Loeff at https://www.loyens-loeff.com/nl/nl/nieuws/nieuwsartikelen/het-coronavirus-en-het-huurrecht-3-veelgestelde-vragen-n18638/.

27 P. Memelink, *De verkeersopvatting* (diss. Leiden 2009), p. 131.

28 Supreme Court 1 February 2008, ECLI:NL:HR:2008:BB8098, NJ 2008/85, WR 2008/38 (*Amicitia*), para. 3.4.2

29 See A.M. Kloosterman, 'Gebreken en ingebrekestelling' *WR* 2007/53; Court of Appeal of The Hague 22 January 2013, ECLI:NL:GHDHA:2013:BY9447.

30 There is a difference of opinion in the literature regarding this 'double' attributability test in the provisions on mandatory remedy of defects. Cf. e.g. para. 13 of AG Huydecoper's advisory opinion for Supreme Court 1 February 2008, ECLI:NL:PHR:2008:BB8098, WR 2008/38 (*Amicitia*); J.L.R.A. Huydecoper, 'Schade en Schande', WR 2015/78 and: A.M. Kloosterman, 'Reactie op Artikel van Huydecoper', WR 2015/79.

31 Article 6:258 DCC; PG DCC Book 6, p. 1010.

32 Asser/Sieburgh 6-I 2016/273.

33 Article 6:79 DCC.

34 D. Haas, *De grenzen van het recht op nakoming* (R&P no. 167) 2008/5.2.2.

35 Article 6:74, *in fine*, DCC.

36 See Parliamentary History *Huurrecht*, De Jonge, De WIjkersloot, pp. 164-168: Houwing's draft Explanatory Memorandum alone leads one to deduce that the legislature foresaw that there were dozens of circumstances outside the physical condition of the property that could impair enjoyment of a leased property. These included the location of the property (view, orientation, accessibility) and statutory provisions which, possibly in combination with the physical characteristics of the property, preclude a certain use. Only restrictions of enjoyment that affect the tenant personally and actual disruption by a third party with no interest in the leased property fall outside the scope of the definition of 'defect'. For more on this, see also Explanatory Memorandum, *Parliamentary Papers II*, 1997/98, 26 089, no. 3, p. 13.

37 Asser/Rossel & Heisterkamp 7-II 2017/33.

38 Supreme Court 17 June 1949, *NJ* 1949/544 and 545 (*AKU/Stalen Steiger*).

39 See the article by J.M. Heikens in this publication (WR 2020/49) for an extensive explanation of the context and reasons why this constituted a circumstance that personally affected AKU. Parliamentary History *Huurrecht*, De Jonge, De WIjkersloot, p. 169 (no. 3). See for more information Asser/Sieburgh 6-I 2016/297 and C.A. Streefkerk, *Schuldeisersverzuim* (*Monografieën BW* no. B32c) 10.5 and the authors cited there, regarding the question of whether this

2.3.2 Must the corona pandemic be attributed to the tenant as an act of God?

We do not believe that there is any generally accepted rule that entails that acts of God such as 'natural disasters' must specifically be attributed to one party or the other in a landlord/tenant relationship involving commercial property. After all, the hallmark of an act of God is that it cannot be blamed on one of the parties.[40] In light of the parliamentary history, we consider it implausible that an unforeseen economic crisis or a natural disaster must be interpreted as 'a circumstance that affects the tenant personally' such that the tenant would have to bear the expense associated with that circumstance. The governmental measures that have been taken to contain the corona pandemic are not personally aimed at the tenant leasing the commercial property but rather at society in a broad sense; therefore, it does not seem as though these measures can be attributed to the tenant based on Article 7:204(2) DCC. Furthermore, the fact that the corona pandemic also cannot be attributed to the landlord is irrelevant to determining whether a defect exists.

2.3.3 Does the judgment in Amicitia imply that the corona crisis must be attributed to the tenant?

According to the second argument discussed above, the *Amitcitia* judgment supposedly implies that reduced footfall is an entrepreneurial risk which generally accepted viewpoints dictate must be borne by the tenant. This presumed principle supposedly also applies to a situation in which trade ceases as a result of unforeseen governmental measures.[41] We believe that that judgment must be interpreted with more nuance. The Supreme Court allowed the Court of Appeal's ruling – that decreased footfall 'in itself' did not offer a sufficient premise for presuming the existence of a defect – to stand. In that specific case, generally accepted viewpoints dictated that, in principle, the 'disadvantages' related to the layout and location of a new shopping centre 'that were expressed in disappointing footfall' must be borne by the tenant (pursuant to Article 6:75 DCC).[42]

The main issue in *Amicitia* was the circumstance that shoppers found a new shopping centre unappealing. Even though footfall determines a commercial tenant's enjoyment of the space it leases in a shopping centre, generally accepted viewpoints dictate that the tenant bear the consequences of a disappointed expectation that the public would visit that shopping centre, as this is part and parcel of the tenant's entrepreneurial risk. A retailer purchasing a certain clothing line bears a similar risk when counting on that line appealing to shoppers.[43] Normally speaking, therefore, expectations relating to turnover or profit and the possible disappointment about the ultimate result are typically "circumstances that personally affect" the tenant. This does not alter the fact, however, that disappointing footfall may very well be caused by a defect as meant in Article 7:204(2) DCC. This means that, based on the judgment in Amicitia, it cannot generally be asserted that excessively low footfall is an entrepreneurial risk that is categorically borne by the tenant.

2.3.4 Interim conclusion

The system provided for by Article 7:204(2) DCC is premised on non-attributability to the tenant, with attribution being an exception. We understand that the corona crisis seems to be too far removed from the performance to be expected from the landlord and that it must thus be attributed to the tenant.[44] Upon further consideration, however, it must be concluded that the corona crisis is not a circumstance that affects the tenant personally. The parliamentary history explicitly states that unforeseen governmental measures that obstruct use constitute a defect. In our view, therefore, the broad definition of the term entails that the corona crisis constitutes a defect as meant in Article 7:204(2) DCC if a tenant's enjoyment is noticeably impaired.

2.4 Can the corona crisis be attributed to the tenant based on the lease?

In principle, the corona crisis constitutes a defect. We say 'in principle' because the possibility cannot be excluded that the lease stipulates that the risk of just such

situation actually constitutes creditor's *force majeure* or the impossibility of exercising a right, which is governed by Article 6:258 DCC.

40 See also: Huydecoper, in *GS Huurrecht*, Article 7:204, annotation 34, where the author argues that the determination of whether a particular act of God must be attributed to the landlord or to the tenant must be made based on generally accepted viewpoints.

41 See e.g. Dentons, note 19.

42 Supreme Court 1 February 2008, ECLI:NL:HR:2008:BB8098. WR 2008/38 (*Amicitia*) para. 3.4.2. Incidentally, in its judgment of 20 February 1998, ECLI:NL:HR:1998:ZC2587 (*Weena-Zuid; Briljant Schreuders/ABP*), the Supreme Court allowed a ruling that such disappointing expectations for footfall had to be borne by a tenant relying on unforeseen circumstances.

43 Cf. para. 10 of AG Huydecoper's advisory opinion for Supreme Court 1 February 2008, ECLI:NL:PHR:2008:BB8098, WR 2008/38 (*Amicitia*).

44 Cf. *Parliamentary Papers I*, 2000/2001, 26 089, no. 162, pp. 11 and 12.

an impairment of enjoyment must be borne by the tenant.[45] Whether a tenant has accepted the risk entailed by the corona crisis must be determined based on the relevant lease and, if necessary, the application of the *Haviltex* standard.[46]

As stated, online publications argue that the risk entailed by the governmental measures – or, in a broader sense: the corona crisis – can be attributed to the tenant based on the model leases and general provisions of the Real Estate Council of the Netherlands (ROZ). For that reason, as well, the measures would not constitute a defect – if those conditions were applicable.[47] The rationale underlying this position is that the ROZ system attributes the risks inherent in the contractually designated use – the use of the leased property – to the tenant.[48] Upon further examination of the general provisions, however, this view should be nuanced.

The allocation of risks ensuing from the ROZ provisions is based on two obligations on the part of the tenant. First, the ROZ provisions require tenants to investigate whether the property is suitable for its contractually designated use *before* concluding a lease.[49] What the tenant should have discovered on that occasion must be attributed to that tenant based on the lease, precluding a claim of defect. Naturally, this duty to investigate is meaningless in the context of the corona pandemic. Second, the ROZ provisions place the public-law aspects of the contractually designated use within the scope of risk borne by the tenant. This is limited, however, to 'the required permits, exemptions and licences' relating to the contractually designated use.[50] The risks that regulatory amendments may result in the preclusion of any use at all do not shift to the tenant.[51] In short: the provisions in the ROZ model contracts and the general provisions which apply to them do not attribute either the governmental measures or the consequences thereof to the tenant. This means that a defect as meant in Article 7:204(2) DCC may be deemed to exist even if the ROZ provisions are applied. Contrary to what one might initially think, this need not have detrimental consequences for the landlord because the landlord can (and will) disclaim liability for any defects that arose after the lease was concluded. For more on this topic, see section 3.

2.5 Summary

In principle, the corona crisis constitutes a defect as meant in Article 7:204(2) DCC to the extent it impairs the tenant's enjoyment of the leased property. It is not inconceivable that there will be specific cases in which the lease nevertheless attributes the consequences of the corona crisis to the tenant. The model contracts of the ROZ do not – or at least do not unambiguously – attribute this risk to the tenant. This means that, in the absence of any clause to the contrary in the special provisions, the crisis constitutes a defect as meant in Article 7:204(2) DCC.

3. What are the consequences of the qualification as a defect?

3.1 General

The question that then arises is what rights a commercial tenant can exercise against its landlord if the corona crisis qualifies as a defect in a given case. Title 7.4 DCC confers certain rights upon the tenant: remediation (Article 206), rent reduction (Article 207), damages (Article 208) and dissolution if enjoyment is precluded altogether (Article 210).[52] Given that it will be impossible for the landlord to eliminate the governmental measures and the consequences of those measures,[53]

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45 *PG Book 6 DCC* 1982, pp. 264-265 and the fact that, for example, Wimbledon specifically insured itself against loss resulting from a global pandemic provide that B2B contracts sometimes take this risk into account: https://www.theguardian.com/sport/2020/apr/02/wimbledon-chief-says-tennis-may-not-return-until-2021-due-to-coronavirus.

46 Supreme Court 13 March 1981, ECLI:NL:HR:1981:AG4158 (*Ermes/Haviltex*).

47 For example, as we understand Houthoff's article at https://www.houthoff.com/insights/News-Update/Real-Estate-Maart-2020---News-Update.

48 J.J. Dammingh, 'Drafting tips & skills: het gebruik van een modelcontract bij de verhuur en de verkoop van bedrijfsruimte en de publiekrechtelijke bestemming', *ORP* 2020/3; J. van Lochem, 'Geschiktheid van het gehuurde/ definitie gebrek in de ROZ modellen', *TvHB* 2016/1; A. de Fouw & W. Lever, 'De verantwoordelijkheid voor de bestemming van het gehuurde', *TvHB* 2016/1.

49 For 290 business space in Clause 4 of the 2003 version; in Clause 4.1 of the 2008 version; and in Clause 2.3 of the 2012 version. For 230a business space in Clause 4 of the 2003 version and Clause 2.3 of the 2015 version.

50 For 290 business space in Clause 6.8.1 of the 2003 version; in Clause 5.2 of the 2008 version; and in Clause 4.3 of the 2012 version. For 230a business space in Clause 6.7.1 of the 2003 version and Clause 4.3 of the 2015 version. 'Announcements' have been added to this list in the most recent versions; the word 'licences' does not appear in earlier versions.

51 Cf. the strict interpretation of this provision in Court of Appeal Amsterdam 10 May 2011, ECLI:NL:GHAMS:2011:BQ4844, WR 2011/109 (*JC Decaux/Villa Betty*).

52 According to Article 7:205 DCC, these rights apply in addition to the rights conferred by Book 6 DCC.

53 If the landlord is a public-law legal entity which encompasses the competent authority, Article 206 may be relied on under certain

the tenant cannot require the landlord to remedy the defect.[54] Article 7:208 DCC precludes the tenant from being awarded damages based on the corona crisis. The defect arose after the lease was concluded and, as discussed, the governmental measures cannot be attributed to the landlord. Unless the landlord has guaranteed the possibilities for use without reservation, commercial tenants will not be able to claim damages successfully. There is a significant chance that, where a regular long term lease is involved, the temporary nature of the governmental measures will preclude reliance on termination pursuant to Article 7:210 DCC.[55] The situation will be different in the case of leases for very short terms, such as the lease of a pop-up restaurant or venue or hall for an event that cannot be held due to the measures.[56]

3.2 Rent reduction

Based on Article 7:207 DCC, commercial tenants are entitled to a proportionate rent reduction if the corona crisis constitutes a defect in their particular case and their right of enjoyment is being substantially impaired. The amount of the reduction thus depends on the degree to which the right of enjoyment remains unimpaired. This will strongly depend on the circumstance of the case, particularly where the tenants involved are not being affected by compulsory governmental measures.

Rent reduction is a *specialis* of the right to partial termination (Article 6:265 DCC).[57] The rationale underlying this *specialis* is that by terminating the lease, the tenant may free itself from the obligation to pay for enjoyment that did not materialise.[58] The fact that rent reduction is a form of termination entails that the tenant is also entitled to exercise this right if the landlord is being affected by a situation of *force majeure*.[59] In principle, therefore, the tenant is entitled to a rent reduction. The fact that the corona crisis is just as unattributable to the landlord[60] does not diminish this.[61]

It is allowed to deviate from or exclude Article 7:207 DCC in commercial leases, and in leases between professional parties the right to a rent reduction is generally excluded as a matter of course – to the extent such exclusion is possible.[62] The general provisions of the ROZ models also exclude the right to a rent reduction, except in certain instances of a failure to perform on the part of the landlord.[63] To the extent relevant in this context, the ROZ provisions stipulate that a tenant can only claim a rent reduction if the defect arose as the result of a attributable serious failure to perform on the part of the landlord. In the corona crisis, this could only occur under extremely exceptional circumstances. Furthermore, the governmental measures were taken after the lease was concluded and do not constitute a defect which the landlord knew about, or should have known about, prior to concluding the lease and the restrictions ensuing from Article 7:209 DCC do not play any role.

Most commercial landlords will therefore be able to rely successfully on the exclusion of the right to a rent reduction. There are only two conceivable exceptions in this regard: either reliance on the exclusion would be unacceptable under the standards of reasonableness and fairness (see section 3.3) or the lease would have to be amended on this point due to unforeseen circumstances (see section 4).

3.3. Reliance on the restrictive effect of the principles of reasonableness and fairness

The premise is that contracts must be performed. This premise is the cornerstone of the law of obligations and applies all the more to contracts concluded between commercial parties, as is usually the case when commercial space is being leased. This means that the bar for successful reliance on the restrictive effect of the principles of reasonableness and fairness (pursuant to Article 6:248(2) DCC) or – if the tenant's limited size so permits[64] – unreasonable onerousness (pursuant to Article 6:233(a) DCC) is set high.[65] In order to succeed, it

circumstances; see, e.g., District Court of The Hague 17 January 2017, ECLI:NL:RBDHA:2017:415, WR 2017/63 (*Neeltje Jans*).

54 See J.A. Tuinman, *T&C Huurrecht*, 2018, Article 7:206, annotation 2, and the Court of Appeal of The Hague 16 February 2007, ECLI:NL:GHSGR:2007:BA1581 (public law impediment precludes remediation).

55 *GS Huurrecht* (Heikens), Article 7:210 DCC, annotation 6.

56 Cf. Amsterdam Court of Appeal 10 May 2011, ECLI:NL:GHAMS:2011:BQ4844, WR 2011/109 (*JC Decaux/Villa Betty*).

57 *Parliamentary Papers II* 1997/98, 26 089, no. 3, page 7.

58 Supreme Court 6 June 1997, ECLI:NL:HR:1997:ZC2389 (*Van Bommel/Ruijgrok*).

59 *GS Huurrecht* (Huydecoper), Article 7:207 DCC, annotation 4.

60 *GS Verbintenissenrecht* (Keirse & Beukers), Article 75, annotation 8.8.

61 Schelhaas & Spanjaard 2020, p. 963 advocate in this context that the additional effect of the principles of reasonableness and fairness entail an adjustment to the amount of the rent reduction.

62 Asser/Rossel & Heisterkamp 7-II 2017/50.

63 For 290 business space in Clause 11.6 of the 2003 version; in Clause 11.3 of the 2008 version; and in Clause 11.3 of the 2012 version. For 230a business space in Clause 11.6 of the 2003 version and Clause 10.3 of the 2015 version.

64 See Article 6:235 DCC.

65 Supreme Court 21 March 2003, ECLI:NL:HR:2003:AF2683, NJ 2003/34, annotated by J.K. Six-Hummel (*Westerheide/Van Wageningen*). See also the equation of "unreasonably onerous" with

must be shown that the unabridged application of a rule would be *unacceptable* under the standards of reasonableness and fairness. When answering the question of what the principles of reasonableness and fairness entail, account must be taken of generally recognised legal principles, the legal opinion prevailing in the Netherlands, and the social and personal interests involved in the case (Article 3:13 DCC). The fact that a lease is a continuing performance contract (*duurovereenkomst*) is also relevant.[66] The result of the analysis differs from contract to contract, which means that all the circumstances of a given case are relevant.[67] The question of whether a landlord's reliance on the contractual exclusion of the right to a rent reduction for the loss of enjoyment due to the corona crisis would be unacceptable under the standards of reasonableness and fairness is a difficult one to answer in general terms. This will seldom be the case however, given the Supreme Court's restrictive principles for reviewing exoneration clauses.[68] After all, landlords cannot be blamed for the corona pandemic. The exclusion of Article 7:207 BW is also common practice within the industry.[69] This means that the applicable standard creates a high threshold for any attempt by the tenant to escape an exoneration.

3.4 Conclusion

As a rule, tenants will achieve little by qualifying the corona crisis as a defect. Remediation and damages are not possible. In principle, tenants do have a right to a rent reduction, but in practice all leases exclude that right. This does not diminish the relevance of qualifying the corona crisis as a defect, because this could affect the assessment of whether a tenant can seek amendment of the lease due to unforeseen circumstances.

4. Unforeseen circumstances

4.1. General

Contracting is a game in which the stakes are determined not only by the benefits to be achieved, but also by – the no less important – creation of certainty.[70] The premise that contracts must be performed[71] does have limits. Contracting parties must take one another's legitimate interests into account and cannot demand the impossible of one another, regardless of what they have agreed. Article 6:258 DCC enables courts to award a tenant's claim to amend the lease due to unforeseen circumstances which have made full performance impossible or exceedingly onerous. To rely on Article 6:258 DCC successfully, it must be shown that the future circumstances were not provided for when the lease was concluded[72] and the circumstances must be 'of such nature that, under the standards of reasonableness and fairness, the counterparty cannot expect the lease to remain in force unchanged' (first paragraph). In addition, the nature of the agreement or generally accepted viewpoints may preclude that the tenant does not bear the risks associated with these circumstances. The corona crisis could be an obvious example of such an unforeseen circumstance. The mandatory nature of Article 6:258 BW implies that the tenant may rely on this provision even if the corona crisis qualifies as a defect or the fact that the lease includes exoneration clauses that preclude a rent reduction or dissolution.

4.2 Can the corona crises be considered an unforeseen circumstance as meant in Article 6:258 DCC?

Although the possibility of a catastrophe is taken into account in some leases and although some contracts might even contain a specific provision for a flu epidemic, it is difficult to imagine that there are parties who had foreseen the present worldwide crisis when concluding their leases. There is no precedent in modern history involving governmental measures which, at both national and international level, have made it legally or actually impossible to use, or at least have severely restricted the use of, virtually any SME commercial space. Given this, it is easy to imagine that the corona crisis will have been a circumstance that parties would not have taken into account when concluding a

"unacceptable under the standards of reasonableness and fairness", AG Langemeijer's advisory opinion for Supreme Court 14 June 2002, ECLI:NL:PHR:2002:AE0659 (*Bramer/Colpro*).

66 M.M. van Rossem, 'Onvoorziene omstandigheden en redelijkheid en billijkheid', *THvB* 2019/5, p 352 et seq.

67 In general, the Supreme Court refers to circumstances such as the severity of the counterparty's liability, the nature and severity of the foreseeable loss or harm, the manner in which the clause was agreed, the purport of the clause, and the party's conduct with regard to the defects or the loss or harm resulting from the defects, see, *inter alia*, Supreme Court 19 May 1967, ECLI:NL:HR:1967:AC4745 (*Saladin/HBU*) and Supreme Court 20 February 1976, ECLI:NL:HR:1976:AC5695 (*Pseudo-vogelpest*).

68 Supreme Court 15 October 2004,ECLI:NL:HR:2004:AP1664 (*GTI/Zürich*) NJ 2005/141, para. 3.5; W.L Valk, 'Tien jaar redelijkheid en billijkheid', WPNR 2002/6472; Supreme Court 12 December 1997, ECLI:NL:HR:1997:ZC2524, NJ 1998/208 (*Gemeente Stein/Driessen*) and Supreme Court 31 December 1993, ECLI:NL:HR:1993:ZC1202, NJ 1995/389 (*Matatag/De Schelde*).

69 Cf. H.N. Schelhaas, 'Redelijkheid en billijkheid aan de Amstel', *Tijdschrift Overeenkomst in de Rechtspraktijk* 2018, p. 20 et seq.

70 J.H. Nieuwenhuis, *Confrontatie & Compromis*, Kluwer 1997, p. 36,

71 The doctrine of *pacta sunt servanda* was codified as follows in the former DCC: "All legally made agreements are legally binding on the parties to those agreements" (former Article 1374(1) DCC).

72 Asser/Sieburgh 6-III 2018/441 and 442.

lease, given that it was still a future event when the lease was concluded.[73]

4.3 Amendment of the lease

The requirements for the application of Article 6:258 DCC are stringent, so that it will only be met in exceptional cases.[74] The threshold to be met in this respect is high, just as it is when it comes to the restrictive effect of the principles of reasonableness and fairness.[75]

The fact that the situation involves a risk relating to the obligation to pay rent, which the law (Article 7:204(2) DCC) in principle allocates to the landlord, generally works in the tenant's favour. It may also be asserted that parties who conclude leases will also not have been aware of the extent of the implications of an exclusion of the right to a rent reduction and how this would play out in the corona crisis. In fact, neither party will have been able to foresee that a tenant would not only have to bear its own losses, but would also have to pay the full amount of rent despite the fact that an unforeseen circumstance temporarily was precluding its use of the property. The governmental measures strike at the heart of an agreement, as it were, and unabridged performance could, over the course of time, prove to be disproportionate. As a defence, the landlord will contend that the exonerations in question are clauses that are commonly used in the industry.[76] If the parties have not opted for an amount in rent that is linked (or partly linked) to turnover, that encompasses a risk allocation which was accepted by two commercial parties. The landlord would also not be entitled to raise the rent should there be an economic boom; this means that the risk that little or no turnover will be realised for a given period of time is not one that can easily be shifted to the landlord.

In each specific case, an examination must be made of whether the unforeseen circumstance has made the situation so onerous that the agreement cannot be allowed to stand unchanged. That is something that will depend on the circumstances of each case. This examination will take into account the same factors that play a role when the derogatory effect of the principles of reasonableness and fairness are reviewed: the nature and magnitude of the interests at stake (what is the tenant's loss of turnover on an annual basis; to what extent is the landlord dependant on the rent, for example, to pay financing expenses, etc.); the amount of the negligence; the social position and the parties' relative bargaining power (major retailer or sole proprietorship as the tenant versus an institutional or private investor as a landlord); and generally accepted viewpoints.[77] The interest of the public also plays a role. Dealing with the corona crisis will also involve examining whether the tenant has been affected by a governmental measure from the first category (mandatory closure) or the second category (loss due to large-scale compliance with urgent advice). This will make it difficult to formulate uniform guidelines. We do expect, however, that under certain circumstances, there will be claims based on unforeseen circumstances (pursuant to Article 6:258 DCC) in relation to which the risk relating to the corona crisis will not be allocated, or at least not allocated in full, to the tenant. Tjittes has asserted in this vein that the major financial consequences of the corona crisis are not normal business risks which generally accepted viewpoints would dictate should be borne by the injured party.[78] Schelhaas and Spanjaard contend that the reason for the measures – the protection of public health – and the scope of the consequences of those measures call for prudence in classifying them as entrepreneurial risks.[79] The IVBN, an institutional landlords interest group, asserts in its statement of 20 March 2020 that, depending on the circumstances, the major financial consequences of the corona crisis should be shared by

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[73] The situation is different for leases that were concluded when the consequences of the corona pandemic could be foreseen. Schelhaas en Spanjaard (2020) advocate using the date of the first infection in the Netherlands, 28 February 2020, as the cut-off date, see p. 965.

[74] *PG BW Boek 6* 1982, p. 974. See also: Asser/Sieburgh 6-III 2018/444; 20 February 1998, ECLI:NL:HR:1998:ZC2587 (*Weena-Zuid*); Supreme Court 13 October 2017, ECLI:NL:HR:2017:2615 (*Gemeente Bronckhorst*).

[75] Asser/Sieburgh 6-III 2018/456 and 457.

[76] Supreme Court 15 October 2004, ECLI:NL:HR:2004:AP1664, NJ 2005/141 (*GTI/Zürich*), para. 3.5 and Supreme Court 31 December 1993, ECLI:NL:HR:1993:ZC1210 (*Matatag/De Schelde*).

[77] Supreme Court 19 May 1967, ECLI:NL:HR:1967:AC4745, NJ 1967/261, annotated by GJS (*Saladin/HBU*). See also Supreme Court 20 February 1976, ECLI:NL:HR:1976:AC5695, NJ 1976/486, annotated by GJS (*Pseude-Vogelpest*).

[78] R.P.J.L. Tjittes, '*Commerciële contracten en corona: uitgangspunt 50/50 verdeling nadeel*", 17 March 2020, https://www.linkedin.com/pulse/commerciële-contracten-en-corona-uitgangspunt-5050-nadeel-tjittes/. See also J.H. Nieuwenhuis, '*Vernietigen, ontbinden of aanpassen*', *WPRN* 1995/6165, p. 40 et seq. and M.E.M.G. Peletier, *Rechterlijke vrijheid en partijautonomie* (diss. Amsterdam 1999), p. 149 who also argue that the detrimental effect of unforeseen circumstances must generally be borne equally by the parties.

[79] Schelhaas & Spanjaard 2020, p. 966.

landlords and tenants.[80] The question remains whether a 50/50 split would actually be an equitable solution in the case in question.[81]

Courts have broad discretion when assessing a claim to amend an agreement, and may even implement that amendment with retroactive effect.[82] This discretion is not unlimited, however. Courts must take into account what would qualify as the parties' normal entrepreneurial risks based on the agreement if the unforeseen circumstances had not arisen.[83] Obviously, if the tenant was already in rough financial waters before the corona crisis, it cannot shift its existing problems onto the landlord's shoulders by relying on the governmental measures. Finally, we note that an amendment need not involve reducing the rent or setting the rent at nil. The court may also change the instalment due dates[84] and/or may limit or exclude contractual indebtedness for interest or penalties.

4.4 No amendment in case of rent-specific governmental measures

At the time this article was written, reports appeared in the media stating that the government is considering the possibility of imposing rent deferrals or rent reductions by means of emergency legislation.[85] This legislation will be reflected in the leases and will have as a consequence that the lease will provide for this circumstance from the moment the legislation comes into effect.[86] In that case, it will generally not be possible to amend the lease due to unforeseen circumstances anymore.[87]

4.5 Obligation to negotiate

Lastly, it is important that the landlord and tenant are aware that the requirements of reasonableness and fairness may involve an obligation to negotiate/renegotiate. This obligation stems from the rule that the parties must, in the performance of the agreement, determine their conduct in part by the legitimate interests of the other party.[88] It is based on the supplemental effect of the principles of reasonableness and fairness.[89] An obligation to negotiate may therefore also exist if not all the conditions of Article 6:258 DCC are met. As a rule, an obligation to negotiate will only exist if the corona crisis places a particularly heavy burden on a party. At the negotiating table, that party will also have to take into account the interests of the other party.[90] The court may take this into account in the way in which the agreement is amended.[91] For example, a tenant who refuses a reasonable offer from the landlord cannot then demand an amendment of the lease. In the extreme case, the reluctant party will be liable for damages.[92] A landlord or tenant therefore takes a concrete risk when refusing to conduct reasonable negotiations during the corona crisis.

5. Suspension

5.1 Suspension of payment obligation

Many tenants have recently relied on *force majeure* against their landlords as a justification for suspending rent payments. Tenants are relying on, among other things, inability to pay as a result of *force majeure*. In that case, strictly speaking, there is no question of suspension within the meaning of Section 6.1.7 DCC Instead, tenants are relying on the rule that the landlord cannot demand performance in the event of *force majeure* on the side of the tenant. A generally accepted principle in the legislative history and the literature is that inability to pay does not justify reliance on *force*

80 IVBN, '*Maatwerk door corona-crisis in de retail*', 20 March 2020, https://www.ivbn.nl/actueel-art.-detail/maatwerk-door-corona-crisis-in-de-retail.

81 C.E. Drion, 'Corona en het recht', *NJB* 2020/761.

82 Article 6:258(1), second sentence, DCC.

83 *GS Verbintenissenrecht* (Bakker) Article 6:258 DCC, annotation 14.2.1.

84 The court may imbue the suspension of payment with retroactive effect.

85 'Den Haag zet druk op pandeigenaren om huurverlaging winkeliers te slikken', *Het Financieele Dagblad*, 3 April 2020.

86 Cf. Den Bosch Court of Appeal 25 June 2019, ECLI:NL:GHSHE:2019:2283, where, in respect of the application of the "discounting criterion", emphasis is placed on the question of whether the contractual relationship provides for a certain circumstance. For the equation, see also: *PG DCC Book 6* 1982, p. 973.

87 In this context, see the discussion between the parliamentary committee and the Minister which explicitly addressed that Article 6:258 DCC can only be applied if the legislature decided not to create a general arrangement, *PG DCC Book 6* 1982, pp. 971-976. Cf. Explanatory Memorandum by E.M. Meijers, *PG DCC Book 6*, p. 968 et seq., emphasising that the court is obliged to take the statutory allocation of risk into account.

88 Supreme Court 19 October 2007, ECLI:NL:HR:2007:BA7024 (*Vodafone/ETC*).

89 R.P.J.L. Tjittes, 'Spoediger wijziging van commerciële duurcontracten', *Contracteren* 2012-3, pp. 95-98.

90 Schelhaas & Spanjaard 2020, p. 964.

91 Asser/Sieburgh 6-III 2018/445.

92 In the general provisions of the ROZ models after 2003, the limitation of the landlord's liability has been included only for damage resulting from a defect, so not for damage resulting from any other failure. For 290 business space see Clause 11.3 of the 2008 and 2012 versions and for 230a business space see Clause 10.3 of the 2015 version.

majeure.[93] Such a circumstance must, according to generally accepted viewpoints, be attributed to the debtor. The cause of the inability to pay is not considered relevant in this respect. Some tenants did not rely on inability to pay, but rather on *force majeure* in respect of the operation of the leased property. This does not justify suspension of payment. Irrespective of the legal qualification, the authority to suspend the payment obligations is excluded in most leases. Such exclusion is permitted.[94] The general provisions of the ROZ models also contain such a suspension prohibition.[95] As a rule, tenants are not authorised to suspend rent payments. In practice, a large share of landlords are prepared to respond to the call from various interest groups for a temporary relaxation of payment terms; representatives of landlords and of retail organisations have called for this as well.[96] Such arrangements are the result of negotiations. Tenants are not unilaterally authorised to impose a suspension or payment arrangement on the landlord. Tenants who do so anyway run the risk of assuming liability. This applies to a greater extent to larger tenants who can be expected to have sufficient cash and cash equivalents at their disposal.

5.2 Temporary cessation of operation

Many leases, including the general provisions of the ROZ models, impose on the tenant the obligation to actually use the leased property during the entire term of the lease,[97] specified for retail business space as 'at the agreed-upon or customary opening hours'.[98] Many tenants have indicated that they will "suspend" compliance with this operating obligation. Since the operating obligation is a continuing obligation, suspension is impossible by its very nature. The suspended obligation cannot be performed at a later time.[99]

In order to be released from the operating obligation for the duration of the closure, the tenant will have to partially dissolve the lease on the basis of Article 6:265 DCC. In our opinion, the presence of a defect is a failure to perform that is serious enough to justify such a partial dissolution.[100] This is a failure on the part of the landlord to perform a continuing obligation, as a result of which default is not required.[101] However, a written statement by the tenant is required and partial dissolution will not have retroactive effect.[102] The general provisions of the ROZ models do not limit or exclude the statutory authority to partially dissolve the operating obligation.[103] Tenants who, due to the corona crisis, are legally or commercially forced to close the leased property temporarily are therefore in a strong position.[104]

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93 Explanatory Memorandum by E.M. Meijers (*PG BW Boek 6* 1981), p. 265; Asser/Sieburgh 6-I 2016/355; *GS Verbintenissenrecht* (Cauffman & Croes), Article 6:75 DCC, annotation 8.4; Memelink 2009, pp. 67-68. In the context of the current pandemic, C.E. Drion talks about 'hardly ever successful' in: 'Corona en het recht', *NJB* 2020/761.

94 Supreme Court 21 December 2012, ECLI:NL:HR:2012:BX0345 (*ANVR et al./IATA-NL*).

95 For 290 business space in Clause 18.1 of the 2003 version; in Clause 26.1 of the 2008 version; and in Clause 25.1 of the 2012 version. For 230a business space in Clause 18.1 of the 2003 version and Clause 23.1 of the 2015 version.

96 See Association of Institutional Property Investors in the Netherlands (*Vereniging van Institutionele Beleggers in Nederland*) (IVBN), INretail, VastgoedBelang (an association of private landlords), Detailhandel Nederland (an association promoting retailers' interests), the Dutch Ministry of Economic Affairs and Climate, the Netherlands Bankers' Association (NVB) & VastGoedOverleg (a platform for retail property managers and advisers), 'Steunakkoord voor en door de Nederlandse retailsector' (Support agreement for and by the Dutch retail sector), https://www.inretail.nl/Uploaded_files/Zelf/200410-steunakkoord-retailsector-10-april-2020.cb6bdf.pdf and previously: 'Oproep aan alle huurders en verhuurders van winkelruimte in Nederland' (Calling on all tenants and landlords of retail space in the Netherlands), https://www.ivbn.nl/actueel-artikel-detail/oproep-aan-alle-huurders-en-verhuurders-van-winkelruimte-in-nederland.

97 For 290 business space in Clause 6.1 of the 2003 version; in Clause 6.1 of the 2008 version; and in Clause 5.1 of the 2012 version. For 230a business space in Clause 18.1 of the 2003 version and Clause 23.1 of the 2015 version.

98 Clause 6.4 of the 2003 version; in Clause 9.7 of the 2008 version; and in Clause 9.7 of the 2012 version.

99 Arnhem-Leeuwarden Court of Appeal 7 August 2018, ECLI:NL:GHARL:2018:7133, *WR* 2019/9, annotated by J.A. Tuinman.

100 See Article 6:270 DCC in conjunction with Supreme Court 28 September 2018, ECLI:NL:HR:2018:1810, *WR* 2018/143 (*Eigen Haard/K*; 'unless' judgment). See also: J.P. Heering, 'Herijking van het ontbindingsrecht (art. 6:265 BW): het Tenzij-arrest', *WR* 2019/92.

101 A.M. Kloosterman, 'Gebreken en ingebrekestelling' *WR* 2007/53.

102 Articles 6:267 and 6:269 DCC.

103 There may be an exception to this in the event of the applicability of the general provisions version 2003 for 290 business space and 230a business space. Clause 11.6 thereof excludes the right to 'dissolve the lease' in the event of loss of enjoyment under a lease as a result of defects. However, this exclusion does not affect a partial dissolution and by the looks of its formulation is intended solely for the prevention of the tenant disposing of the entire lease. See: H.K. Strikwerda, 'Sluit een verbod op ontbinding de mogelijkheid van gedeeltelijke ontbinding uit?', *V&O* 2008/7-8, p. 142. Dissenting: M.J.E. van den Bergh, 'Uitsluiten van ontbinding en vernietiging in overnamecontracten', *Contracteren* 2018/1, p. 16.

104 The tenant affected by measures in the first category may additionally invoke absolute impossibility of performance. In case of impossibility, the landlord cannot demand performance, see:

It should be noted that, in our opinion, partial dissolution does not seem necessary in the case of governmental measures in the first category. In the ROZ provisions, the operating obligation is described as the duty to "comply with any requirements that may still be imposed by the government including requirements relating to the use of the leased property".[105] This description will relate in particular to the regulated opening hours and will have to be interpreted in the light of the new circumstances. In a literal reading of this provision, however, the tenant meets the obligation to comply with the applicable government regulations with the temporary cessation of operation.

6. Conclusion

Following this exploration of the legal implications of the corona crisis on the lease of business space, we arrive at the following six main conclusions:

(1) The corona crisis qualifies as a defect within the meaning of Article 7:204(2) DCC for the tenant of business space who is adversely affected by the governmental measures.

(2) If the corona crisis constitutes a defect, the tenant may cease operations temporarily (possibly after partial dissolution).

(3) The qualification as a defect is without prejudice to the fact that the right to a rent reduction and to suspension of rent payment are validly excluded in most leases. Suspending the payment obligation without absolute necessity may – also during the corona crisis – result in a serious failure to perform, with all consequences this entails for the tenant. Larger tenants should be extra cautious in this respect.

(4) There are high bars to set aside the contractual exclusion of the right to a rent reduction and to suspension of rent payment by invoking the restrictive effect of the principles of reasonableness and fairness.

(5) Similar high bars apply in case of invoking unforeseen circumstances. However, we consider a successful reliance on unforeseen circumstances to be possible if, for example, relatively smaller tenants have been unable to use the leased property altogether due to governmental measures in the first category.

(6) Landlord and tenant must take each other's legitimate interests into account – especially during the corona crisis. This may require the parties to enter into negotiations in which the parties might have to make concessions in departure from the initial agreement.

It should be borne in mind that a solution by legal means will be difficult to achieve in the short term. Since 17 March 2020, the courts have only been opened for 'urgent' matters.[106] A claim to collect rent arrears will not be urgent enough to qualify for preliminary relief proceedings. In cases that are urgent enough to be dealt with in preliminary relief proceedings, preliminary relief courts will be reluctant to depart from contractual agreements (partly for fear of creating a precedent). For the time being, therefore, the parties' main recourse is to arrive at an amicable agreement and it would be wise for them to enter into discussions with each other. How successful or promising the negotiations are in the specific case will depend, in full or in part, on the balance of power between the parties, but above all on their attitude.[107] Lastly, we advise everyone to be careful with the many well-meaning corona-related advices circulating on the Internet. Or rather: "*Some media is the whack… don't believe the hype".*[108]

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Asser/Sieburgh 6-I 2016/355; Asser/Sieburgh 6-II 2017/344; Supreme Court 27 June 1997, ECLI:NL:HR:1997:ZC2401 (*Budde/Tao Moa Cruising Limited*). A tenant in the second category may invoke relative impossibility if performance can only be rendered by means of sacrifices which, all circumstances considered, can reasonably be demanded of the tenant, see Supreme Court 21 May 1977, ECLI:NL:HR:1976:AC5738 (*Offerhuis/Unigro*) and N. van Deinsen, 'De afdwingbaarheid van een contractuele exploitatieverplichting - Remedies bij het schenden van contractuele exploitatieverplichtingen', TvHB 2019/3, 189-198.

105 Omissions are not displayed for the sake of readability.

106 https://www.rechtspraak.nl/Paginas/COVID-19-Algemene-regeling-zaaksbehandeling-Rechtspraak.aspx

107 P.S. Bakker and J.W. de Groot, 'Onvoorziene omstandigheden: de stand van zaken', WPNR 09/2797, p. 371 who point out that constructive behaviour in this situation strengthens the position and indifference weakens the position, with reference to other literature.

108 Public Enemy, *It Takes a Nation of Millions to Hold us Back*, track no 3: Don't Believe the Hype, 1988.

* Monthly journal for case law in and academic articles on residential and commercial tenancy law, published by Wolters Kluwer, https://www.wolterskluwer.nl/shop/online/wr-tijdschrift-voor-huurrecht/NPWRTSHUU/.