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A NEW REGIME ON ABUSIVE CLAUSES IN BELGIUM AS FROM 1 DECEMBER 2020 – QUO VADIS?

On 1 December 2020, the new Belgian regime on abusive clauses in B2B contracts will enter into force. Pursuant to the new regime, certain clauses will automatically be presumed to be abusive, while others may be struck down if they create an imbalance between the parties. The new regime has been subject to extensive criticism as it is unclear what clauses may be considered to be abusive under the new law, and disputes as to its interpretation and application are expected in the years to come. As the regime will only apply to contracts entered into, amended or renewed from 1 December 2020, companies may therefore wish to finalise any contracts they are currently (re)negotiating before this date. While certain steps can be taken to reduce the risk of clauses in contracts entered into after that date being considered to be abusive under the new law, it remains to be tested whether this will be sufficient to avoid disputes. The COVID-19 pandemic may furthermore prompt certain parties to seek to invoke the new law to try to escape their contractual obligations.

Key issues

- The new Belgian regime on abusive clauses enters into force on 1 December 2020.
- This regime provides for a general prohibition of abusive clauses, as well as for specific lists of clauses that are presumed to be abusive.
- This regime will only apply to contracts entered into, amended or renewed on or after 1 December 2020.
- However, courts may already be 'inspired' by the new law when reviewing contracts entered into under the old regime.
- The sanction of an abusive clause is, in principle, the nullity of such clause. Other remedies may also be available.

On 1 December 2020, the new Belgian regime on abusive clauses in B2B contracts will enter into force. The regime was inserted into the Economic Law Code pursuant to a law of 4 April 2019. It is modelled after the prohibition on abusive clauses in B2C contracts deriving from the Directive 93/13/CEE on unfair contract terms in consumer contracts. By introducing this regime, the Belgian legislator has followed the French and German legislators, who had already introduced similar regimes sanctioning certain clauses in B2B contracts.

The law applies to agreements entered into between "enterprises" (*entreprises/ondernemingen*), i.e. any natural or legal person which pursues an economic aim on a durable basis. It does not apply to contracts relating to financial services and public tenders, which have expressly been carved out from the scope of the law. There are, however, separate sets of rules sanctioning certain types of clauses in financing agreements with SMEs.

The most important innovation introduced by the new regime is that it provides for two lists of contractual clauses that are presumed to be abusive and may be annulled by a court. The first list (the "**black list**") contains the clauses that are irrefutably considered as abusive: when a contract contains a clause that belongs to a category on this list, that clause must be declared abusive and evidence to the contrary is not admitted. The "black list" contains the following types of clauses:

(i) clauses subject to a condition, which depends on the sole will of the promising party ("**potestative clauses**");

(ii) clauses including a unilateral right for a party to interpret one or more clauses of the contract;

(iii) clauses pursuant to which a party waives all recourse *vis-à-vis* the other party(ies);

(iv) clauses pursuant to which a party acknowledges that it is aware and/or it adheres to clauses of the contract while that party was not in a position to be aware of such clause before entering into the contract.

The second list (referred to as the "**grey list**") lists certain types of clauses that are presumed to be abusive. However, contrary to the blacklisted clauses, the presumption that these clauses are abusive is rebuttable.

Clauses on the grey list are:

(i) clauses enabling a party to unilaterally alter the terms of the contract without a valid reason specified in the contract;

(ii) clauses automatically extending or renewing a contract for a fixed duration without specifying a reasonable notice for termination;

(iii) clauses unreasonably transferring or placing the burden of the economic risk of the contract on a party although this risk normally belongs to another party;

(iv) clauses excluding or limiting the rights of a party *vis-à-vis* another party in the event of the total or partial non-performance by the latter party of its contractual obligations;

(v) clauses pursuant to which the parties are bound by a contract of indefinite duration without a right to terminate it with reasonable notice;

(vi) clauses exonerating a party of its fraud (*dol/bedrog*), its gross negligence or the non-compliance by it with the essential obligations of the contract;

(vii) clauses unduly restricting the means of proof that a party may use; and

(viii) penalty clauses (*clauses pénales/strafbedingen*) providing for a disproportionately high penalty in comparison with the damages actually suffered.

Apart from the aforementioned lists, the new law also imposes a requirement for clear and comprehensive drafting of contractual clauses and also provides for a catch-all prohibition on clauses which, taken on their own or in combination with one or more other clauses, create a manifest imbalance

between the rights and obligations of the parties. The abusive nature of a clause is assessed taking into account the subject matter of the agreement, the relevant circumstances at the time of the conclusion of the agreement, the general structure of the agreement, the trade practices, or any other clauses of the agreement or of a related agreement.

The aforementioned general criterion to assess whether a clause is abusive does not apply to any potential economic imbalance between the respective commitments of the parties. Therefore, the courts cannot review the essential obligations of the agreement such as, notably, the object of the agreement, the price, and any other element which may be considered as essential for the parties, provided always that the relevant clauses are drafted clearly and comprehensively and do not fall within the scope of the black or grey lists.

If a clause is found to be abusive, it can be annulled by the courts upon the request of a party to the contract. The courts can therefore not annul an abusive clause of their own motion. The agreement itself will not be annulled if it can survive without the abusive clause(s). Some authors have rightly supported that, if possible, the court can also limit itself to the reduction of the clause to the extent it ceases to be abusive or even replace the abusive clause with an equivalent non-abusive clause.

The nullity of an abusive clause is in any event without prejudice to any other remedies, such as the possibility for a party to claim damages for any harm suffered as a result of abusive clauses.

Transitional law

The new provisions of the law of 4 April 2019 on abusive clauses will only apply to contracts that are entered into, amended or renewed on or after 1 December 2020. As a result, if enterprises wish to replace an existing contract or conclude a new contract, they may wish to consider doing so before the entry into force of the new law to avoid any disputes in relation to the application of the new regime. That said, it remains to be seen whether the courts may be 'inspired' by the new law and rule that it is abusive for a party to invoke certain clauses which – under the new law – are expressly sanctioned. Even if a court could not annul these clauses based on the provisions of the new law, it may still sanction the behaviour of a party by precluding it from invoking certain contractual rights, or "mitigating" the effects of its behaviour, in circumstances where this would be abusive based on the general principles of Belgian contract law.

Initial assessment of the new regime and expectations

The new regime has been subject to a deal of criticism. A number of the provisions of the new law are considered to be unclear and incompatible with the general principles of Belgian contract and civil law. For instance, during the parliamentary preparatory work of the Law of 4 April 2019, it was indicated that "clauses requiring a party to consent to arbitration" should be considered as abusive, as they would fall under the category of clauses containing a waiver by a party to all recourse. Legal doctrine is unanimous as to the fact that this statement is simply wrong and goes against the well-established case law of the highest courts, in light of which it cannot reasonably be sustained that an alternative dispute resolution clause amounts to a waiver of legal recourse.

The press also recently reported that the criticism in relation to the new law is shared by a number of economic actors, which have appealed to the government to revise the law before it enters into force.

In light of the above-mentioned lack of clarity and uncertainty surrounding the interpretation of the new law, it is to be expected that disputes will arise as to the interpretation of a number of provisions on the black and grey lists in the years to come. Parties are increasingly seeking to guard against the effects of the new law, e.g., by inserting general disclaimer wording in contracts aimed at emphasising the fact that the agreement is the result of negotiations and the parties consider it to be balanced, or to keep track of pre-contractual negotiations and concessions made. However, it remains to be seen whether this will be sufficient to prevent the courts from striking out certain provisions based on the new law.

Moreover, the COVID-19 pandemic is likely to increase the risk of disputes regarding the application of the new law. Indeed, the pandemic and the unprecedented measures taken by the government to combat it have had a fundamental impact on contractual relationships, and have given rise to a number of discussions/disputes with regard to contractual risk allocation and the performance in good faith of agreements (e.g., with respect to lease agreements, construction contracts, transport and delivery agreements). It is to be expected that, for contracts falling within the scope of the new law, parties may seek to argue that certain clauses which aim to shift certain contractual risks (e.g., force majeure clauses) create an imbalance and must be annulled, or that their effects must be mitigated.

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