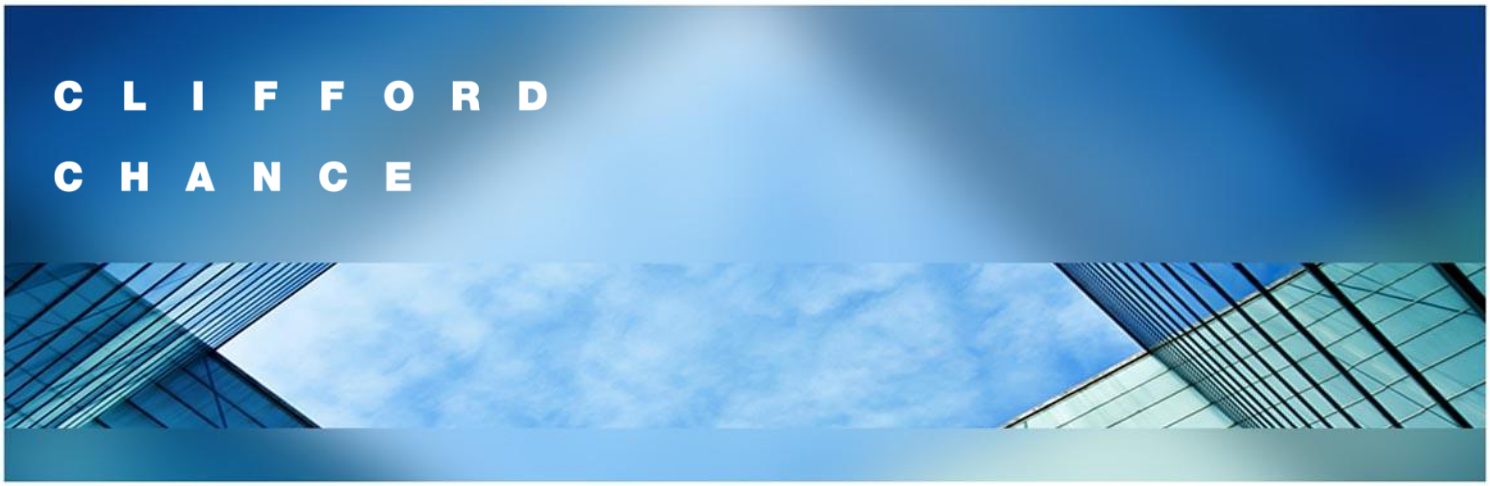

CAUGHT IN THE CROSSFIRE OF "BOOK 6": NAVIGATING NEW LIABILITY RISKS

Introduction

The new Book 6 of the Belgian Civil Code on extra-contractual liability will enter into force on 1 January 2025 and will apply to extra-contractual claims relating to wrongful acts committed from that date onwards. This is arguably also the case for any tort committed after 1 January 2025 in the performance of a contract entered into prior to that date.

The new rules significantly alter the current Belgian tort liability regime for directors and companies. The key change is that, under the new regime, a party will be able to bring extracontractual claims against its contract parties and against any agents of its contract party involved in the performance of a contract (so-called "auxiliaries").

This briefing outlines the impact which some of these changes may have for companies and directors, both in terms of directors' liability and from a contracting perspective. We also reflect on what steps can be taken to mitigate these impacts.

Directors in the line of fire – R.I.P quasi-immunity of auxiliary agents

The key – and most hotly debated – change brought about by the new regime is that it abolishes the current regime which prohibits extra-contractual claims if there is a contractual relationship between the parties (the so-called "prohibition of *cumul*").

This regime also prevents contract parties from bringing extra-contractual claims against auxiliary agents of their contracting party, the so-called "quasi-immunity".

An auxiliary is a person or entity entrusted by the debtor of a contractual obligation with the full or partial performance of that obligation. This concept includes employees, (sub-)contractors, and directors.

Under the current regime, a director cannot be held liable by a contracting party of the company, whether on a contractual or extra-contractual basis. However, exceptions exist for extra-contractual claims in cases of (i) a criminal offence, (ii) a fault that could be qualified as both contractual and extra-contractual, provided it caused damages other than those purely due to the non-performance of the contract, (iii) pre-contractual faults, and (iv) certain specific bankruptcy-related offences, e.g. a director's manifest gross misconduct that significantly contributes to the company's bankruptcy.

The new Book 6 also endorses the prevailing case law and confirms that legal persons are strictly liable for damages caused by directors' faults to third parties.

Key issues:

- Book 6 of the New Belgian Civil Code fundamentally alters the liability regime, enabling extra-contractual claims between contracting parties.
- Additionally, contracting parties will be able to bring extra-contractual claims against the auxiliaries of their counterparties, such as sub-contractors and directors.
- Various mitigation measures are available, such as invoking contractual defences, the liability caps in the Belgian Code on Companies and Associations, or appropriate contractual design.
- Contracting parties can also derogate from or modify the legal regime.
- These changes are likely to lead to more, and more complex, disputes and litigation.
- Therefore, it will be crucial for contracting parties to consider and address the new liability regime when drafting contracts, especially in the case of complex contractual chains, to avoid unexpected surprises

The abolition of the quasi-immunity means that a company's contracting parties will now be able to bring a far wider range of claims in case of non-performance of a contract involving certain mistakes committed by directors, i.e.:

- a direct claim against the company based on contractual liability;
- a direct claim against the company based on extra-contractual liability; and
- a claim against the directors or other representatives of the company based on extra-contractual liability.

To bring a claim, the contracting party will still need to prove that a fault/tort was committed by the directors concerned and that the conditions for extra-contractual liability are satisfied. That being said, the new regime will significantly expand the possibility for third parties to bring claims against companies and directors alike, depending on factors such as how much nuisance they wish to create and which regime may be more attractive (e.g. in terms of statute of limitations). Overall, the regime will increase the risk of liability claims and litigation in general.

SOS – how to mitigate the liability risk?

Several factors mitigate the increased liability risk for directors:

- If the misconduct is limited to a contractual shortcoming by the company, the director will not be personally liable to the contracting party. Likewise, the director cannot be held liable if the third party fails to prove that it has suffered harm as a result of the fault committed by the director;
- Book 6 of the Civil Code allows auxiliaries, including directors, confronted with an extra-contractual claim from a contracting party of their principal, to invoke both the contractual defences arising from their own contract with the principal/company and those arising from the contract concluded between the contracting party and the principal/company. As further set out in the following section, and considering that the parties can deviate from the new liability regime, it is possible for the parties to mitigate or even largely exclude the extra-contractual liability of directors towards contracting parties of the company; and
- The directors' liability regime and the caps provided for in the Belgian Code on Companies and Associations ("BCCA") continue to apply. Prior exonerations or indemnification commitments by the company that aim to limit or exclude the extra-contractual liability of directors are, however, prohibited under the BCCA and may therefore be invalid. Nevertheless, a director can be further protected by (i) the limitation of liability clauses in the contract between third contracting parties and the company (see above), (ii) directors' and officers' (D&O) liability insurance, (iii) professional liability insurance, and (iv) a parent company undertaking to indemnify the directors. Where a company has given discharge to its directors, this could potentially also limit potential claims based on tort.

To contract or not to contract, that is the question

As set out above, the new tort liability regime will allow contracting parties to (i) "pick-and-choose" whether they wish to bring an extra-contractual claim or a contractual claim against their counterparties in case of non-performance of

a contract and (ii) claim against auxiliary agents with whom there is no contractual relationship.

Overall, these changes open the door to complex liability discussions and increase the risk of disputes and litigation.

The main way to address this risk is to reflect on what claims might be brought between which parties at an early stage and to think about the appropriate contract design and drafting to address these:

- As the parties can derogate from the extra-contractual liability rules, it is possible to exclude extra-contractual liability for contractual breaches altogether (subject to certain limitations, e.g. where the damage is caused by a violation of someone's physical or psychological integrity, or in cases of fraud or intentional misconduct). Thus, in Share Purchase Agreements (SPAs), management representations and warranties, and Transitional Service Agreements (TSAs), the parties tend to provide for specific liability clauses and limitations. It therefore makes sense to provide that no other (extra-contractual) claims will be possible or to clarify the "sole remedies" clause in that respect in case of doubt. For complex projects or projects using SPV structures (e.g. in project finance), it may likewise be advisable to include broad blanket exclusions of extra-contractual liability throughout the entire contractual chain to avoid unexpected surprises.
- It is also possible to exclude or limit the liability of auxiliaries (subject to the same limitations). As mentioned, this is possible both in the contract entered into between a principal and its contracting parties (where the principal contracts for the benefit of its auxiliaries) or in the agreement between the auxiliary and the principal. In both cases, the limitations will be enforceable and can be invoked against the contracting party of the principal.
- While contractual design is allowed, it may introduce new challenges. In a complex or extended contractual chain, some parties may exclude extra-contractual liability while others do not, leading to potential inconsistencies and discussions in case of a dispute. This will likely lead to a surge in requests to provide documents to receive a full view of the contractual chain with auxiliaries and limitations to be considered. This, in turn, may conflict with the confidentiality arrangements included in some of the relevant contracts and lead to further discussions that may ultimately have to be settled before the courts.
- Contractors may also be well-advised to require their counterparties to insert similar exclusion or limitation of liability provisions in the agreements with their subcontractors to avoid any remaining liability exposure.
- Parties will in any event have to carefully consider their interests and whether or not it makes sense to exclude extra-contractual liability claims (with respect to auxiliaries) and to what extent, depending on the specific circumstances and contractual set-up. Depending on whether the auxiliary person is an external party (e.g. a subcontractor) or an internal party (e.g. an employee or director), distinctions may have to be made regarding who is included in these protective provisions against extra-contractual liability. For very straightforward contracts, e.g. a simple sale contract, exclusions might be overkill.
- One further point to consider is the reciprocity of any clauses limiting or excluding extra-contractual liability. Any unilateral exclusion or limitation of

liability could give rise to a challenge and be deemed invalid based on the rules on abusive clauses in B2B relationships or based on the general regime included in Book 5 of the Civil Code.

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