



Laga Newsflash

New law introduces unfair terms prohibition in B2B relations

A new impactful Belgian law has recently been adopted without raising much media interest. It introduces the general principle that any clause creating an obvious imbalance in the rights and obligations of contractual parties can be cancelled.

As a result, this principle, already known in business-to-consumer (B2C) contractual relationships, is extended to business-to-business (B2B) contractual relationships. It goes without saying that this new law will have important consequences for company relationships by questioning the legality of several contracts.

Significantly, the new law foresees a list of clauses which are automatically considered unfair (black list) and clauses which, unless proven otherwise, are null and void (grey list). The unfairness of a term is assessed by taking into account the nature of the products which are subject to the contract and by referring, at the time of the conclusion of the contract, to all circumstances surrounding its conclusion, to the general economy of the contract, the commercial uses that apply and to all other clauses of the contract or other contracts on which it depends.

The new law will apply only to new contracts as well as to contracts that are renewed or modified after its entry into force. To avoid any legal uncertainty, the contracts in progress will not be subject to the law.

Black list (automatic nullity)

The following terms are automatically considered to be unfair if they:

1. provide for an irrevocable commitment by the other party, while the performance of the company's services is subject to a condition whose realisation depends solely on its will;
2. provide the company with the unilateral right to interpret any term of the contract;
3. waive the right of the other party to sue the company in the event of a dispute; and
4. irrevocably record knowledge or adhesion of the other party to terms with which it did not effectively have the opportunity to become acquainted before the conclusion of the contract.

Grey list (possible nullity)

Furthermore, the following terms can be considered unfair if they:

1. authorise the company to unilaterally amend the established price, the characteristics or the conditions of the contract without valid reasons;
2. extend or tacitly renew a fixed-term contract without specifying a reasonable termination period;
3. place the economic risk on one party when the other company or the other contractual party should be accountable;
4. improperly exclude or limit a party's legal rights in the event of total or partial non- or defective performance by the other company of one of its contractual obligations;
5. bind the parties without specifying a reasonable period of termination, without prejudice to article 1184 of the Civil Code;
6. release the company of its fraud or serious fault liability; or release the liability of the company employees; or, except in case of force majeure, release the company of its liability in case of non-performance of its contractual obligations;
7. limit the means of proof that the other party may use; and
8. fix damage amounts, in the event of non-performance or delay in the performance of the other party's obligations, which clearly exceed the extent of the damage likely to be suffered by the company.

Sanctions

Unfair terms are prohibited and void. The contract however remains binding for the parties if it can survive without the unfair terms.

Possibility of obtaining a ruling for draft contracts between companies

The Advisory Committee specialised in “Unfair Terms” can be called upon by the competent Ministers to obtain a ruling on draft contracts.

Exclusions

The law excludes financial services and public procurement from its scope. An extension is however authorised if provided for by Royal Decree.

Coming into force

The provisions relating to unfair terms will come into force on the first day of the eighteenth month following the publication of the law in the Belgian Official Journal, expected to occur shortly.

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