LOYENS & LOEFF

REAL ESTATE

New Civil Code
Book 1 and Book 5

In this edition

Introduction

This last edition of our Real Estate Update 2022 is dedicated to the Book 1 (general principles) and Book 5 (contract law) of the new Civil Code that will enter into force on **1 January 2023**.

Although it is true that these new books mainly codify the basic principles laid down in the old Civil Code, Supreme Court's case law and long-established legal doctrine, their importance cannot be underestimated. The new legislation is more than just a modernization of our nearly 200 year-old Civil Code. New concepts are introduced (e.g., hardship), the legislation is better structured and uncertain legal situations are clarified (e.g., conflicting general terms).

Together with Book 3 (goods and property rights) that entered into force on 1 September 2021, the new contract law creates a completely new legal framework for real estate transactions. The goal of this Real Estate Update – Special edition is to provide an overview of these newest changes that are relevant for you as a Real Estate practitioner.

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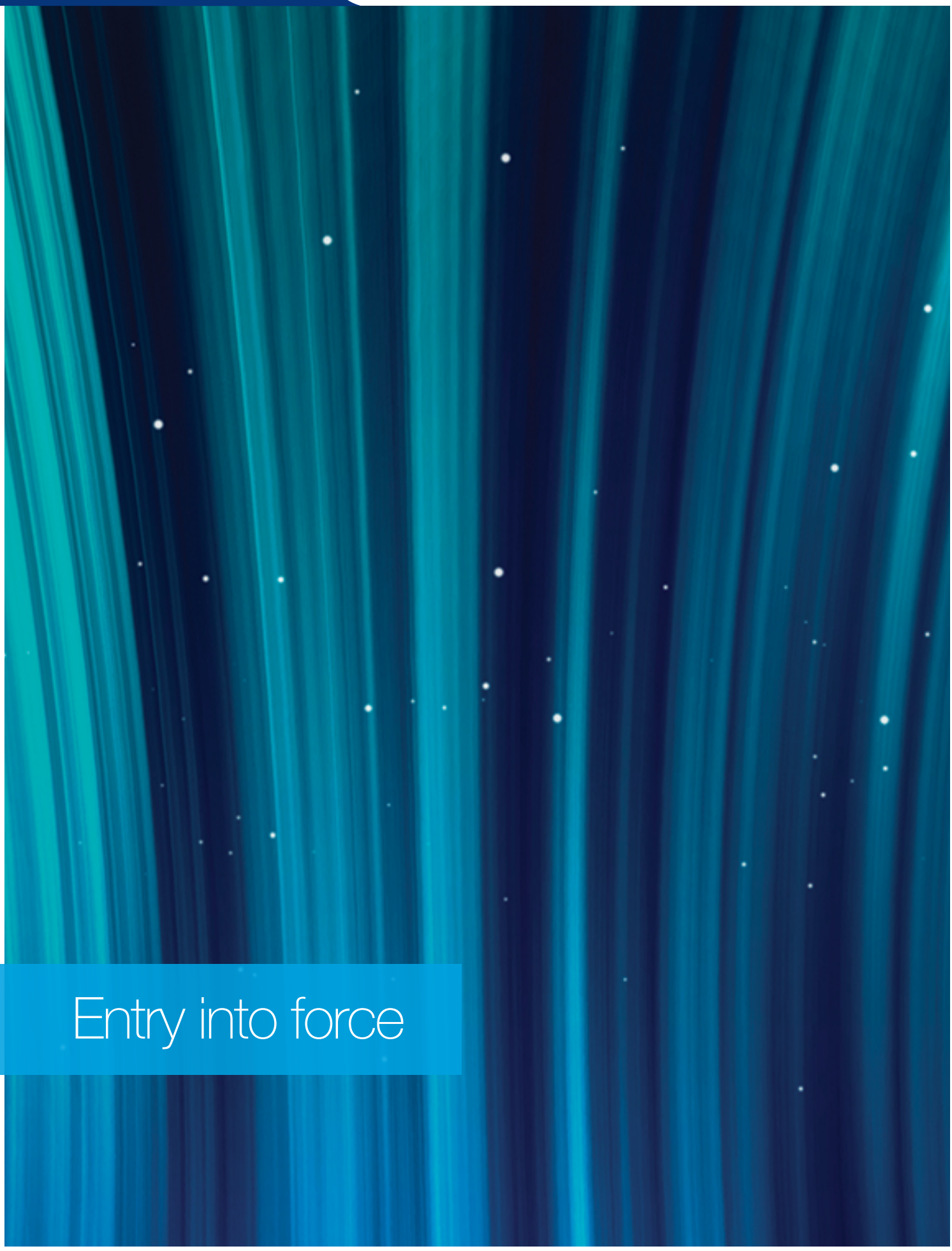

Entry into force

Entry into force

The new Book 1 (general principles) and Book 5 (contract law) will enter into force on **1 January 2023**. But as a matter of principle the new legislation will only apply to agreements concluded as from that date. So, what about the contracts concluded before 2023?

Principle

The law introducing Book 5 of the new Civil Code on contract law was published in the Belgian Official Gazette on 1 July 2022. That law provides that the provisions of the new Book 5 will become applicable from the first day of the sixth month after publication, hence 1 January 2023. The same is true for Book 1 that was published together with Book 5.

But at the same time, the law explicitly provides that the new legislation will only be applicable to "legal acts" (contracts but also unilateral legal acts) and legal facts (e.g., errors committed) occurring after **1 January 2023**.

Contracts concluded before ("pre-2023 contracts") continue to be regulated by the old Civil Code. In other words, the old Civil Code remains applicable on the future effects of pre-2023 contracts. The legislator excludes altogether the application of the new law to future effects of previous situations, even when they are provisions of mandatory law (*droit impératif / dwingend recht*) or public policy (*ordre public / openbare orde*).

At first sight, this rule seems rather simple, but in practice you might be surprised by some of the consequences. Let's take two examples:

- If you have a pre-2023 contract, any amendment to or extension of the contract is regulated by the old Civil Code. Moreover, amendments made in 2023 do not make your contract a "post-2022" contract. The contract will still fall under the old Civil Code.
- A payment, made after the entry into force of Book 5, of an obligation that had already arisen before the entry into force of Book 5, is regulated by the old Civil Code.

As the main obligation was agreed before 1 January 2023, the old Civil Code should also remain applicable, in case of:

- a performance contract following a pre-2023 framework contract;
- the renewal of a contract concluded before the entry into force of Book 5;
- the transfer of a claim concluded after the entry into force of Book 5 based on a pre-2023 obligation;
- the extinction of a pre-2023 contract or obligation as a result of a termination, annulment or dissolution for non-performance occurred after the coming into force of Book 5, as well as the refunds resulting from it.

In all these cases, the legislator decided, out of a concern for legal certainty, that the old Civil Code remain fully applicable.

> "Book 5 of the new Civil Code becomes applicable as of 1 January 2023 and only for the future"

From a real estate angle, one can however question the applicability of the old Civil Code in case of renewal of a contract (e.g., a long-term lease or a lease). With respect to property rights of use (*droits réels d'usage / zakelijke gebruiksrechten*), Book 3 makes a clear distinction between the extension and the renewal, the latter leading to the conclusion of a new agreement subject to e.g., formalities of publicity. With respect to (commercial) lease agreements, it is also fair to say that the renewal leads to a new contract and e.g., transfer taxes. For those contracts, one should also bear in mind that a new set of rules (i.e. Book 7 of the new Civil Code) relating to special contracts (*contrats spéciaux / bijzondere overeenkomsten*) is also awaited. Parties should therefore be prudent in case of renewal of existing agreements.

Exceptions

Parties should bear in mind three things in relation to this general rule of entry-into-force:

- Firstly, parties can always decide to apply Book 5 to a pre-2023 contract. This might e.g., clarify the legal position in case of renewal (and fully allow the parties to agree that certain new provisions do not apply).
- Secondly, note that Book 5 ‘only’ contains the legal provisions on general contract law. But often, specific legislation is (also) applicable. For instance, in case of a private lease, there is a specific set of rules that applies to lease agreements. The same applies to B2B contracts. The new Book 5 does not overrule these sets of legislation.
- Thirdly, even when the old provisions remain applicable, it is not excluded that judges would already take into account the new provisions of Book 5.

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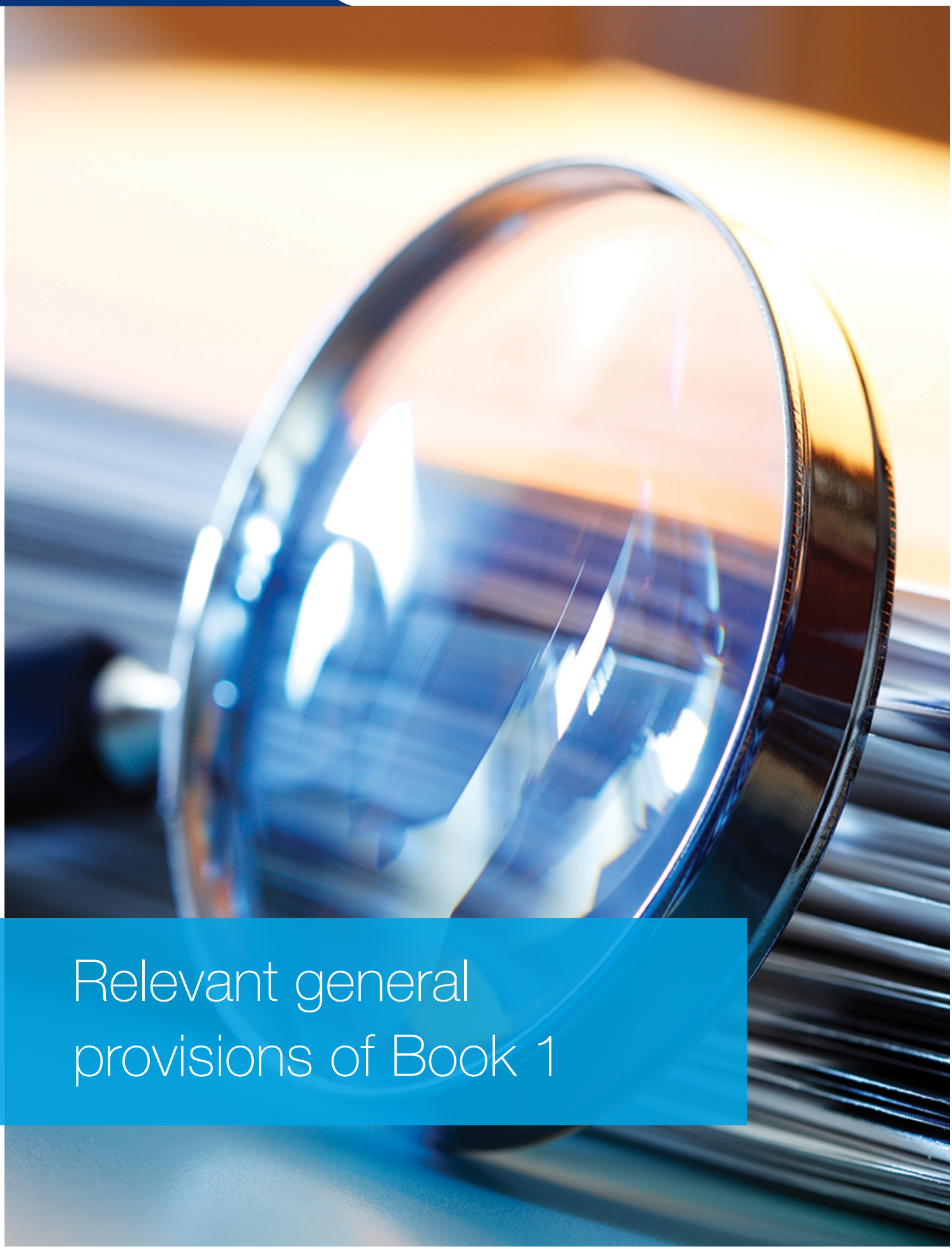


Relevant general provisions of Book 1

Representation

Where the old Civil Code contains only a few articles regarding the mandate (*mandat / lastgeving*), the new Book 1 now defines the concept of representation and partially codifies the principles we know from case law and legal doctrine.

Definition

Book 1 defines the concept of "representation" as occurring when a person is authorised to perform a legal act with a third party on behalf of another person.

Representation can originate from a legal act (e.g., a mandate), from law (apparent representation or the organ theory for companies (the companies are represented by their directors)) or from a court decision (e.g., the appointment of a provisional administrator).

The "legal act" is rather a broad notion, and it can be for instance to conclude a contract, handle negotiations, make a payment, etc.

The concept of representation might seem rather theoretical, but it is not. We can for example think of negotiations handled by an asset manager on behalf of an investor. If in that example, the asset manager had no powers to negotiate with the third party or exceeds the powers granted to it by the investor, it can have some serious consequences.

Perfect representation

The representation is considered as "perfect" (*représentation immédiate ou parfaite / onmiddelijke of volkomen vertegenwoordiging*) when the representative performs the legal act in the name and on behalf of the represented person (who is called the principal). In that case, the legal act performed by the representative will be directly attributed to the principal and will have effects between the principal and the third party.

For example, the mandate, where a person acts in the name and on behalf on another person, is considered as a "perfect representation".
In case, however, the representative performs a legal act that exceeds the powers granted by the principal, the principal is not bound, unless he ratifies it. The ratification will have retroactive effect to the date on which the legal act was performed, without prejudice to the rights acquired by third parties.

In the example previously mentioned, if the asset manager who had no powers to negotiate with a third party, signed a letter of intent on behalf of the investor, the investor is in theory not bound by this letter of intent, unless it ratifies it.

Apparent representation

It can however be that the represented person is still bound by a legal act performed by an agent (e.g., the asset manager) without authority if (i) the appearance of sufficient authority is attributable to the principal and (ii) the third party could reasonably have taken that appearance to be true in the given circumstances.

The appearance will be attributable to the principal if it has freely contributed to the creation or maintenance of the appearance by his statement or behaviour.

In our example, the appearance will be attributable to the investor if for instance the investor made believe somehow that the asset manager could represent the company during the negotiations with the third party. In that case, the investor will be bound by the letter of intent with the third party even though the asset manager had no power to represent it.

Imperfect representation

In case the representative acts on behalf of the represented person but in his own name, there is an imperfect representation (*représentation médiate ou imparfaite / middellijke of onvolkomen vertegenwoordiging*).

Name lending (*contrat de prête-nom / naamlening*) and commission (*commission / commissie*) are two examples of imperfect representation.

In that case, no direct attribution will take place between the principal and the third party with whom the representative (e.g., the commission agent) has acted. The legal act performed by the representative will have effect between the representative and the third party.

Conflict of interests

The legislator also added a new general principle in Book 1 which forbids the agent to act as a counterparty or intervene in case he has a conflict of interests with the represented person. The concept of conflict of interest is however not defined, leaving the interpretation of this new rule with some uncertainties.

Any legal act performed by an agent who had a conflict of interest will be null and void unless the represented person has expressly or tacitly consented to it. However, if the represented person was aware of the conflict of interest (e.g., because it was notified by the representative) and the represented person did not or could not be expected to oppose (e.g., by not replying to the representative's notification within a reasonable period of time), this will not lead to the nullity of the legal act.

> "Any legal act performed by an agent who had a conflict of interest with the represented person will be null and void unless the represented person has expressly or tacitly consented to it."

This new provision raises many questions from a corporate law perspective since the Belgian Companies and Associations Code (BCAC) also provides for a regime regarding conflict of interests.

The preparatory works clarify that the new provision of Book 1 does not affect the special rules of corporate law and that the relevant provisions of the BCAC must therefore be considered as *lex specialis* taking precedence over the *lex generalis* of the Civil Code.

The BCAC provides, for certain forms of legal entities, a definition of the conflict of interests and the procedure to be applied within the administration body in case of such a conflict. The definition of the BCAC refers to an interest of a financial nature which is directly or indirectly opposed to the interest of the legal entity regarding a decision to be made by the administration body. It does not cover moral, functional (e.g., the fact that the conflicted director is also a director of the counterparty of the legal entity) or other non-financial conflicts of interests.

One may wonder whether the new general rule on conflict of interests in the Civil Code is entirely ruled out by the BCAC or is intended to apply on top of it insofar as compatible. This could have an important impact as there is a risk of nullity of the legal act concerned. Therefore, as long as no clarification is available on the interaction between the two rules, when there is a conflict of interests between a legal entity and its director or other representative which does not fall within the definition of the BCAC but may be covered by article 1.8 of the Civil Code (e.g. a non-financial conflict), it is advisable to follow the stricter approach and obtain (and document) the consent of the legal entity represented (e.g., in the minutes of the meeting of the administration body).

In that case, no direct attribution will take place between the principal and the third party with whom the representative (for example, the commission agent) has acted. The legal act performed by the representative will have effect between the representative and the third party.

Prohibition of abuse of rights

Abuse of right (*abus de droit / rechtsmisbruik*) is now formally embedded in Book 1 of the new Civil Code. What are the practical consequences for the real estate practice, e.g. when calling upon a bank guarantee in certain circumstances?

Definition of abuse of rights incorporated in the new Civil Code

Article 10 of Book 1 of the new Civil Code confirms the prohibition of abuse of rights: "Whoever exercises his right in a manner which manifestly exceeds the limits of the normal use of that right by a prudent and reasonable person placed in the same circumstances, commits an abuse of his right". This way, the principle of the prohibition of abuse of right established by case law is confirmed.

> "The codification of the prohibition of 'abuse of rights' in the Civil Code and its sanction, confirms the application thereof in established case law."

In addition, Book 5 formalizes the most fundamental pillars of Belgian contract law, namely the binding force of contracts, together with the complementary effect of good faith (*bonne foi / goede trouw*) and the prohibition of abuse of rights. The judge has discretionary power to rule whether the conditions of abuse of rights are united given the specific circumstances of the case. The sanction mentioned in Book 5 also confirms current case law: the mitigation of the right in question (i.e., the right that was abused) to its normal legal exercise, without prejudice to the repair of the damage which was caused by the abuse.

The prohibition of abuse of rights has numerous applications, some of which are now explicitly anchored in Book 5 of the new Civil Code, e.g., the article relating to abusive out-of-court dissolution (*resolution non-judiciaire / buitengerechtelijke ontbinding*), the article regarding abuse of rights in restitution and the article on abusive performance in kind.

Practical consequences for the real estate sector

The question arises whether the codification of the principle of abuse of rights, although applied in case law since many years, will lead to more legal proceedings where abuse of rights might be applicable. In principle, the content of the definition has not changed.

As seen in the Covid-19 lease case law, judges ruled in several cases that the landlord, requiring full payment of the rent during the lock-down period imposed by the governmental measures, commits an abuse of his rights since it causes an imbalance in the economics of the contract in the very exceptional circumstances of the coronavirus pandemic. On the basis thereof, judges often decided (on a case-by-case basis) for example on a 50% rent reduction during the months of closure.

We can also refer to existing case law regarding the exercise of bank guarantees in the context of leases. In principle, a first demand bank guarantee requires the bank to unconditionally and irrevocably pay the landlord upon receipt of his request. Of course, the landlord may not abuse his right. This is for example the case if the bank guarantee is called upon only because of the bankruptcy of the debtor, where, at the time of the declaration of bankruptcy, the contract had been executed and there was only a very small amount of the contract price disputed between the parties.

In another case, the judge ruled that the call upon the bank guarantee was prima facie abusive because it was called for obligations that were not covered by the guarantee (e.g. in the event of multiple agreements). Such judgement shows that correctly defining the object of a bank guarantee is essential.

Waiver of right

The new Books 1 and 5 confirm the principle that holders of a right can waive their right. Waiving a right is a unilateral legal act. What are the rules when waiving a right in rem or break options under the Retail Lease Act?

Codification of the waiver of rights in Book 1 and Book 5

Article 1.12 of the new Civil Code confirms the principles regarding a waiver of right (*renonciation / afstand*): "Waiver of right is not presumed. It can only be derived from facts or acts that are not open to any other interpretation." Waiving rights is a unilateral legal act emanating from one party; in principle it must not be accepted by another. This principle was already established in case law.

Book 5 also confirms the possibility to waive a right. Indeed, article 5.253 of the new Civil Code provides that the creditor of a debt can, by his mere will, waive his rights to claim (*droits de créance / vorderingsrechten*).

Of course, one can only waive his right in case it is allowed to waive the underlying right. For example, if the underlying right is of mandatory law (*droit impératif / dwingend recht*) in favor of its holder, the holder can only waive the right as soon as the right exists, but not in advance.

Book 1 and Book 5 change little or nothing to the existing principles on waiver of rights. A waiver of right:

- is a unilateral legal act (the creditor alone decides, the debtor does not have to accept);
- is not presumed (it must be clear that this is the creditor's intention - which does not necessarily mean that it has to be recorded in writing, but advisable for legal certainty purposes);
- must be interpreted restrictively: the creditor must waive his right in a clear manner and that waiver is then limited to that.

But what about the specific regime of waiving rights in rem and waiving termination rights under the Retail Lease Act?

Specific regime of waiver of rights in rem in Book 3

Book 3 of the new Civil Code entered into force on 1 September 2021. Book 3 contains, amongst others, new rules on property rights of use (*zakelijke gebruiksrechten / droits réels d'usage*).

What rules apply in case the holder of a right in rem waives such right?

Book 3 provides that the waiver of a right *in rem* is a general ground for termination of this right. To be enforceable towards third parties acting in good faith with a competing right on the immoveable property concerned, such a waiver must be notarized and transcribed at the competent Office for Legal Certainty.

Book 3 however makes clear that the waiver of a right in rem has only relative effect. This means that the termination of a right in rem as a result of a waiver cannot affect the rights of third parties acting in good faith with a competing right on the immoveable property concerned. In addition, Book 3 provides that the waiver of a right *in rem* only operates for the future. It being understood that if the right in rem was granted for a consideration, the waiver does not affect the holder's present and **future** obligation to pay such consideration.

Consequently, a distinction must be made between:

- the obligation(s) that constitute(s) the consideration of the granting of the right in rem (e.g., the payment of a yearly fee): for these obligations, the holder remains responsible, both for the present and the future;
- the other obligations resulting from the right in rem (e.g., the obligation to repair): for these obligations, the holder of the right in rem is released from his future obligations.

Let us briefly explain the above rules using the following example:

X grants a long-term lease right (*erfpacht / emphytéose*) on an office building, on and with land, to Y for a period of 60 years. Subsequently, Y mortgages his long-term lease right to the benefit of Z. After year 20, Y unilaterally waives his long-term lease right. This is possible as the waiver occurs after the expiry of the minimum term of 15 years. However, such waiver shall only have relative effect and the mortgage granted to Z shall continue to exist. In addition, if the long-term lease right was granted for a consideration, the fact that Y waives his right, and the long-term lease right consequently ends, will not result in the release of the Y's obligation to pay the consideration to X until the 'normal' termination date of the long-term lease right.

Book 1 and Book 5 change little or nothing to the existing principles on waiver of right but in this article we will lay out the specific regime of waiver of rights in rem and waiver of termination rights under the Retail Lease Act.

Specific regime of waiver of termination rights under the Retail Lease Act

Under the Retail Lease Act, the tenant is entitled to terminate the lease at the end of each 3-year period, by giving notice by registered letter or by bailiff's writ, no later than 6 months prior to the end of the 3-year period. This tenant's break option is of mandatory law (*de droit impératif / van dwingend recht*), in favour of the tenant. Consequently, the tenant is entitled to exercise his break option at the end of each 3-year period, even if the lease agreement does not explicitly mention it and even if the lease agreement would exclude this right.

Considering the above and in view of the Covid-19 commercial discussions, the question arises to which extent the tenant can waive his break option in advance and what are the risks for both parties.

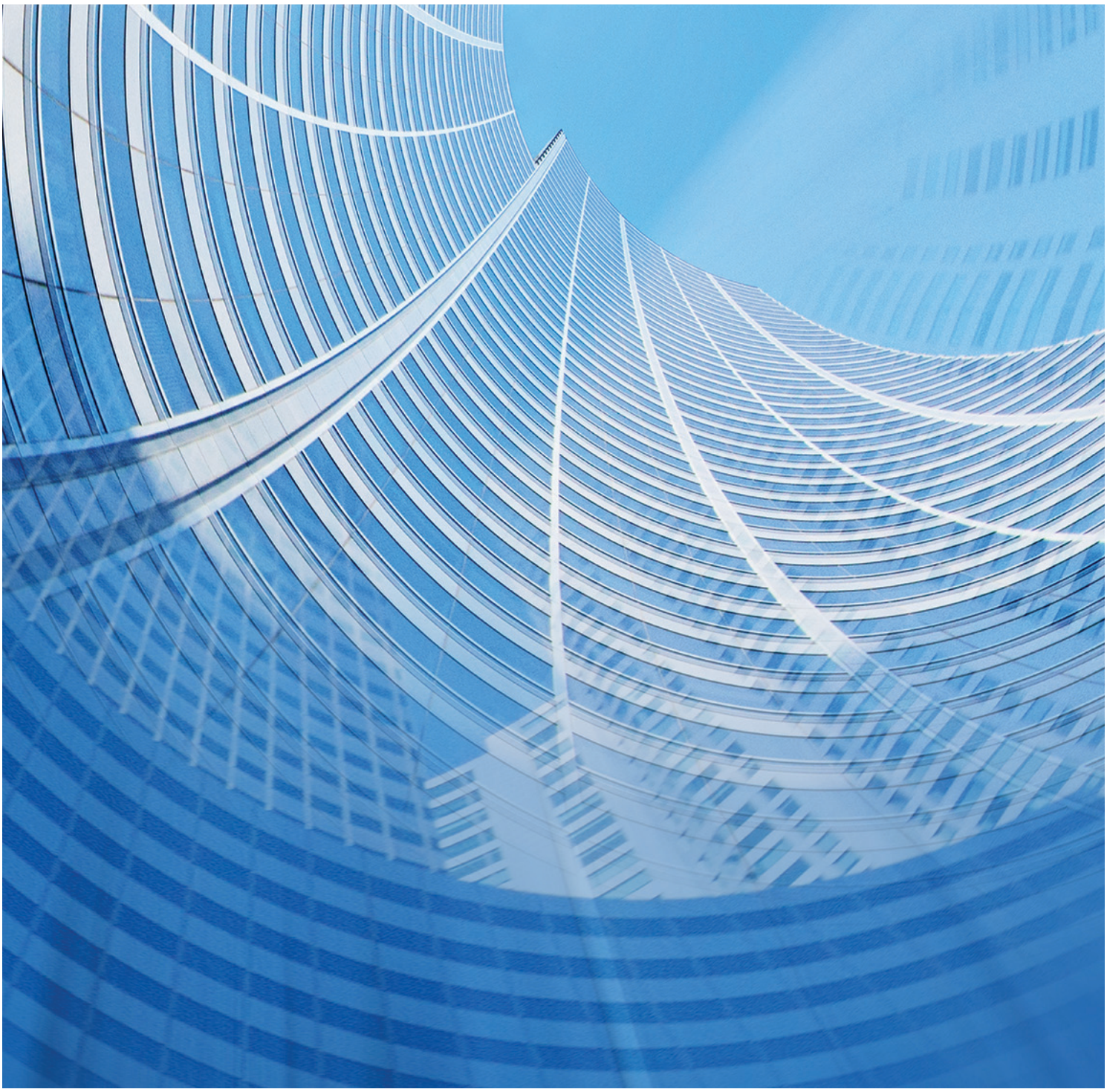
As set out above, it is only possible to waive a right in case it is allowed to waive the underlying right. If the underlying right is of mandatory law in favor of its holder, the holder can only waive his right as soon as the right exists, but not in advance. Consequently, the question is: when does the tenant's break option right exist?

We have not found any case-law in relation to the moment or period during which the tenant can waive the break option. In our view, one can refer to the Supreme Court's case law concerning the tenant's right to request a renewal of the commercial lease, which **must** be exercised between the 18th and 15th month before the termination of the lease. This provision of the Retail Lease Act is of mandatory law in favor of **the landlord**. The Supreme Court has ruled that the landlord cannot waive the benefit of this protection before the 18th month prior to the termination of the lease.

It should be concluded that the right of the landlord exists as from the 18th month prior to the termination of the lease (and until the end of the 15th month) and that during this period the landlord can validly waive its right. In our view, the same reasoning should apply concerning the tenant's break option: the **tenant** is protected, and can validly exercise his break option, for a period starting after the execution of the lease agreement and ending 6 months before the end of each 3-year period.

During this period, the tenant should be able to validly waive his right to request the termination of the lease agreement. Indeed, arguing that a tenant can only waive his break option just after the period during which it can exercise it (i.e., after 2 years and 6 months), would be a denial of the possibility of a waiver since, at that moment, the right to break does not exist anymore. This however assumes that the waiver is unilateral, and thus not subject to any agreement between parties, and is not anticipated, i.e., the tenant's right to break must exist. Therefore, the waiver can only be valid for the current 3-year period (and not for subsequent tenant's break). There is however no case law on this subject.

Taking into account the above, there is however a risk in relation to the waiver of the tenant's break: in case the tenant can demonstrate that the unilateral waiver of the tenant's break option was in fact part of a global agreement between parties (e.g., in return for a specific rent-free period or other tenant's incentives). In such a case, we believe the waiver could be considered null and void, as not being a unilateral voluntary act but a contractual derogation to the tenant's mandatory break option.



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Contract formation

Freedom to contract and ... not to contract

Wrongful termination of negotiations

Whereas the old Civil Code does not discuss the dynamic conclusion of a contract, the new Book 5 codifies the current doctrine regarding pre-contractual liability. During pre-contractual negotiations, parties may be held liable for wrongful termination of the negotiations. What does this codification mean for the real estate practice?

Freedom of contract and freedom of negotiations

One of the main principles that applies during the pre-contractual phase is the freedom of contract. This principle includes for everyone the right to contract with whom he wants, on what terms and conditions he wants, without having to justify the reasons of his choice. The freedom of contract has now been codified in Book 5.

Embedded in the principle of freedom of contract is also the principle of freedom of negotiations. Parties are free to initiate negotiations, to conduct and to terminate them. In doing so, they must act in accordance with the requirements of good faith. What "acting in accordance with the requirements of good faith" exactly means, must be assessed on a case-by-case basis, considering all the specific circumstances of the case.

As the negotiation phase is in principle of suppletive law, nothing prevents the parties from regulating it by the conclusion of "pre-contracts". In the absence of such arrangements, the new Civil Code confirms that the liability incurred in this phase is of an extra-contractual nature.

Wrongful termination of negotiations

The freedom to negotiate is not unlimited. Firstly, this freedom to negotiate, especially as regards the choice of a counterparty, applies to a lesser extent to public authorities that are bound by all kinds of specific rules when contracting, such as public procurement rules. Secondly, when party A wrongly breaks off negotiations with party B, that is where pre-contractual liability comes in. What qualifies as a "wrongfully termination of negotiations" is not specified in Book 5, but it is clear that the termination must be at fault. However, Book 5 does emphasise that the freedom **to terminate** the negotiations remains the basic principle, so some restraint seems to be in order.

"Freedom of contract is a key principle that has now been codified in Book 5"

Consequences

In case of wrongful termination of the negotiations, the injured party can claim damages to cover the so-called negative contract interest (*intérêt négatif / negatief contractsbelang*), meaning that the injured party is put back in the situation he would have been if the negotiations would not have taken place. In this sense, for example, costs incurred in relation to the contract negotiations are eligible for compensation. The loss of an opportunity to win a contract with a third party may also be eligible for compensation. Expenses that would have been made anyway, on the other hand, are not eligible for compensation.

Exceptionally, where there was a legitimate expectation for the injured party that the contract would be concluded "without any doubt", the injured party can claim damages to cover the so-called positive contract interest (*intérêt positif / positief contractbelang*). This means that the injured party may claim damages to cover the loss of the expected **net** benefits from the non-executed contract, as this party is placed in the position as if the contract had indeed been entered into. Whether the contract would have been concluded "without any doubt" must be assessed on a case-by-case basis, taking into account all the specific circumstances. In our view, this could be the case when a contract is fully negotiated and one of the parties does not come to the closing. Note that only the net benefits are eligible for compensation: in other words, in case the injured party would conclude with a third party at a lower price, only the difference should be compensated.

Note that, depending on the drafting of the contract, its subject and the concrete circumstances of the case, the non-defaulting party could be able to request the specific performance (*exécution forcée / gedwongen uitvoering*).

Conclusion

The codification in Book 5 of the wrongful termination of negotiations is in the first place a confirmation of the existing case law and legal doctrine: the freedom of contract (incl. the fact of not entering into an agreement) and the freedom of negotiations (incl. the fact to terminate the negotiations) remain the basic principles under Belgian contract law.

Within the bounds of good faith, a party is allowed to terminate negotiations, and in case of wrongful termination, the non-defaulting party can seek damages. Whether the party who decides to terminate the negotiations has committed a fault will depend on factual circumstances, incl. the moment the termination occurs and the underlying reasons. Most of the time, these damages would aim at compensating the negative contract interest, e.g., the costs borne by the non-defaulting party in negotiating the agreement. In exceptional circumstances, when the non-defaulting party had the “legitimate expectation” that the contract would be concluded “without any doubt”, then he can claim the positive contract interest, i.e., the compensation for the net benefits he would have derived from this contract.

The duty to inform in the context of due diligence

Book 5 imposes an obligation on the parties to adequately inform each other during the pre-contractual phase. Breaches of the duty to inform can lead to pre-contractual liability and even worse, to the nullity of the contract. To avoid these undesirable consequences, it is of utmost importance to understand this duty and its scope.

The seller's duty to inform and the buyer's duty to investigate

The duty to inform can be defined as the duty to provide information to the counterparty prior to the conclusion of a contract, or even during the performance of the contract, as well as after its termination. In this article, we only deal with the duty to inform in the context of the negotiations and conclusion of the contract.

Book 5 confirms that there is **no general duty to inform**: parties are not obliged to communicate all the information they possess prior to the conclusion of the contract. The basic principle was and remains that each party must perceive its own interests. Book 5 confirms, in line with the well-established case law and legal doctrine, that the starting point of perceiving your own interests can be derogated from, and pre-contractual information duties can result from law, good faith and custom, considering the capacity of the parties, their reasonable expectations and the subject matter of the contract. For real estate matters, it is for example required by law to provide a soil certificate or town planning information when selling an immovable property.

"There is no general duty to inform the counterparty but there are limits to this principle"

The extent of the information to be provided depends on the circumstances of the case, such as the degree of competence of the parties, the quality of the parties, the needs expressed by the parties and the conditions under which the agreement is concluded. It is generally assumed that the duty to inform is less broad when the contracting parties are professionals and/or assisted by professionals than in case of a contract concluded with a consumer. But it all depends on the specific circumstances of the case.

Once the information is provided, for example by a seller when selling an immoveable property, the other party must also **duly verify the information received**. A buyer should for example ask the necessary questions as part of his due diligence or conduct the necessary searches regarding the property concerned. As with the seller's duty to inform, the buyer should consider whether a normally prudent buyer placed in the same circumstances would have asked the necessary questions or conduct the necessary searches. Here too, the professional capacity of the buyer plays a role.

Consequences

Breaches of the duty to inform can lead to **pre-contractual** liability of the party who breaches his information obligation, but also to the **nullity of the contract** if it generates defects of consent, namely error, fraud and abuse of circumstances.

In several cases, the legislator has explicitly provided for a nullity sanction for the violation of certain information obligations. This is the case, for example, with the information obligations concerning the soil certificate. The acquirer of an immoveable property can claim the annulment of the purchase agreement if the content of the soil certificate is not provided prior to the conclusion of the purchase agreement.

Conclusion

Book 5 obliges parties to adequately inform each other during the pre-contractual phase. On the other hand, there is no general obligation to inform: parties must also inform themselves and are not obliged to communicate all information to each other. They must only communicate the information required by **law**, **good faith** (which also means that they have to answer the questions raised) or **custom**. This must be assessed on a case-by-case basis, considering all specific circumstances of the case, bearing in mind that a breach of a duty to inform can lead to pre-contractual liability or even the nullity of the agreement in the hypothesis enumerated by law.

However, the establishment of a commission is only the very beginning of a legislative process. An effective reform is therefore not yet for tomorrow.

Consent in the new Civil Code

A contract is created by the exchange of will of the parties. This is the principle of consensualism. If there is no consent of the parties, then there is no agreement. There are four cases where Book 5 provides that there is no "consent", i.e., in case of error, fraud, violence and abuse of circumstances. The latter is new and fits one of the objectives of Book 5 being the balance between the parties' autonomy and the role of the judge as guardian of the interests of the weak party.

Well-known defects in consent

Violence

Violence is the most obvious defect in consent. It requires that the injured party enters into a contract under "unlawful coercion" on the part of the counterparty that causes the injured party to fear significant impairment of his physical or moral integrity or his assets or those of his relatives.

Error

Error is a defect in consent only if (a) the party invoking it excusably misunderstood an element that was decisive for it to enter into the contract, and (b) the other party knew or should have known about it.

The "excusable misrepresentation" means that a "prudent and reasonable person" placed in the same circumstances would also have made the same error under the same circumstances. In case law and legal doctrine, this is also presented as a comparison between a duty to inform on the part of one party and a duty to investigate on the part of the other. This concept of "error", in transactions, is closely related to the pre-contractual (information) phase.

Note also that although reference is made to an objective "prudent and reasonable person" standard, courts will rule based on the specific circumstances of the case, e.g., professional knowledge of both parties, assistance from professionals.

Error can relate to facts but also to law. Some case law accepts error if the injured party was unaware of a legal requirement, although this should only apply in very specific situations.

Are not considered as error:

- error concerning the person with whom one wants to contract (unless the contract relates precisely to this person);
- error concerning only the value of an object or service or the price (unless the error arises from a mistake concerning a decisive element of the subject matter of the contract).

Fraud

Fraud is a defect in consent if a party was misled by deliberate deception on the part of the counterparty. The deliberate withholding of pre-contractual information that had to be disclosed is expressly mentioned in the law as a form of deceit. Fraud is not presumed but must be proven. In case the fraud leads to an error, the latter does not have to be excusable.

New « abuse of circumstances »

Limitation to the principle of the parties' autonomy

The "abuse of circumstances" is introduced as a new defect in consent, which will allow a judge to order the modification of a contract, or even its annulment, in the event of abuse by one of the parties, at the time of the conclusion of a contract, of the weak position of the counterparty.

However, this provision raises several questions, mainly of interpretation. Therefore, all precautions must be taken when signing contracts with counterparties who could potentially be considered as "weak".

Conditions

The new Book 5 gives the judge the power to correct a contractually unbalanced situation under certain conditions, inspired by the case law on qualified lesion (lésion qualifiée / gekwalificeerde benadeling).

- Manifest disproportion between the parties' contractual obligations. According to the case law applicable to the qualified lesion, the economic disproportion between the parties' obligations must be **significant and certain** and cannot just be an unfavourable transaction which may arise from the normal play of economic relations.
- Abuse of circumstances relating to the weak position of the counterparty. According to the parliamentary works, the weak position may arise from:
    - personal characteristics of the "weak" counterparty (e.g., ignorance, inexperience, financial need). If some agreements, such as share purchase agreements, are sometimes easier or more difficult to negotiate than others, it is partly (or even mainly) because of the counterparty to the transaction. This counterparty may be a private person or a company, a real estate professional or not, and accompanied or not by professional legal, tax, financial or technical advisers.
    - economic superiority of the "abusing" party (e.g., monopoly, position of strength). While Book 5 refers to the abuse by one party of the counterparty's position of weakness, this must also be understood as the abuse by one party of its position of strength. In this respect, Book 5 provides that abuse of circumstances, in the same way as fraud or violence, may also be caused by a third party who is an accomplice of the counterparty or of a person for whom he is responsible. In transactions, the financial position of sellers and purchasers in a share purchase agreement is rarely similar and may sometimes be significantly imbalanced. The manifest imbalance in the financial position of the parties does not, however, affect their obligations; it would still be necessary to prove that (i) the counterparty abused this position of strength position and (ii) an imbalance in the parties' contractual obligations was caused by this abuse.
- A causal link between the alleged abuse and the manifest disproportion between the parties' contractual obligations. Book 5 does not provide that these circumstances must necessarily be attributable to the counterparty. According to the legal doctrine related to the qualified lesion, the imbalance of power may also be due to external circumstances.
- Disproportion and abuse of circumstances at the time of conclusion of the contract. Unlike hardship, which allows the judge to correct an unbalanced situation throughout the life of the contract, the abuse of circumstance allows the judge to correct a disproportion at the time of conclusion of the contract.

"The new Book 5 gives the judge the power to correct a contractually unbalanced situation under certain conditions."

How to avoid or at least limit the risks of the application of the abuse of circumstances?

In general, and since the B2B Law, it is recommended to properly document the negotiations.

To avoid or at least limit the risks of the application of the abuse of circumstances, as the provisions of the new Civil Code are suppletive in the absence of any contrary provision, we advise to include in the contracts adequate provisions.

Although many real estate transactions take place between real estate professionals, generally surrounded by all the experts necessary, the presence of a private person or a non-professional real estate company and/or a private person calls for caution. The prospective seller shall ensure that the prospective purchaser who would be considered as "weak" has received all the information necessary to enter into the contract (a vendor due diligence could, for example, be drawn up for this purpose), and, in any event, that the purchaser has had the opportunity to surround himself with all the counsels and experts he wished to have involved in the conclusion of the transaction.

Nullity

The above defects in consent are ground for nullity but do not automatically lead to the annulment of the contract. Indeed, the sanction is, in principle, relative nullity of the contract (i.e., the nullity can only be invoked by the protected party). Consequently, it is the protected party who must invoke the nullity. In case the protected party also suffers additional damage, he can also claim compensation for damages.

In addition, note that the annulment for abuse of circumstances is only possible if the abuse was decisive, i.e., if it can be shown that the affected party would not have entered into the contract if there was no abuse. If the abuse was not decisive, the weaker party can go to court and ask for an adjustment of his commitments. This is an important novelty to keep in mind.

Nullity of a contract

Book 5 codifies the conditions of validity of a contract and will then specify that a contract that does not meet the validity requirements is null. Under the old Civil Code, the nullity of a contract was already available as a sanction for different types of unlawful behavior of parties. But Book 5 adds structure and clarity in principles confirmed by case law.

Grounds of nullity – Partial nullity

The main rule is that a contract is null if it does not meet all validity requirements. These requirements are:

- the free and deliberate consent of each party
- the ability of each party to enter into contracts
- a definable and licit object
- a licit cause

Any breach of any of these validity requirements at the time of the conclusion of the contract may in principle lead to the nullity of the contract. The new Civil Code however now explicitly stipulates that a partial nullity is possible. Annulment may be limited to:

- certain terms of the contract (material divisibility)
- certain parts of a term (theory of mitigation)
- in case of a multiparty contract: the legal relations between certain parties (personal divisibility)

> "Breach of validity requirements does not necessarily lead to nullity of the complete contract"

The divisibility of a contract must be assessed based on the intention of the parties. In principle, this means that if the parties included an indivisibility clause in their contract, the contract would be completely void if one of the requirements is not met. But the court is then still entitled, based on the purpose and scope of the violated standard, to allow the contract to survive in part anyway.

Choice of law and dispute resolution clauses (e.g., choice of forum clause, clause of arbitration, clause of conciliation or mediation) are in principle divisible from the rest of the contract and as a result will survive the annulment of the contract.

Note that the nullity is not always "the" solution as the law explicitly mentions that the contract remains valid when it appears from the circumstances and considering the norm that has been infringed that the nullity would manifestly not be appropriate.

Triggering of the nullity

In principle, nullity never takes effect by law. In other words, a contract affected by a nullity ground is not void by law, but rather annullable. This remains as before.

Also as before, Book 5 makes the distinction between an amicable or judicial annulment of the contract.

- An amicable annulment presupposes that the ground for nullity actually exists. If there is no ground for (amicable) annulment of the contract, the annulment itself is void and can be requalified as a termination by mutual consent of the parties.
- Judicial annulment is the ordinary mode of contract annulment.

But Book 5 now adds a third option: the **annulment by notice**. The reasoning behind the introduction of out-of-court annulment is that it may be unreasonable to oblige the party who has grounds to invoke nullity to wait for the outcome of court proceedings.

Therefore Book 5 allows the holder of the nullity claim to trigger that nullity by giving notice to the other contracting party. This notice must be given in writing.

> "Out-of-court annulment by notice is possible but at the risks of the issuing party"

Important: the out-of-court annulment by notice is done at the risks of the party issuing it. The nullity can always be challenged in court. If the court finds that the contract has been declared void on unfounded grounds, it actually means that the contract never came to an end. If, in the meantime, the person who served the notice has ceased to perform the contract, this may give rise to termination of the contract at his expense.

Note that an out-of-court annulment by notice is not possible if the contract is established by an authentic deed.

Retroactive

The annulment as a retroactive effect: the contract is null as from its conclusion. In a specific real estate context, it should be stressed that the annulment eliminates the effects of the transfer, establishment, modification or extinction of the rights in rem that were the subject of the contract. This means, for example, that if a sale is void, and the buyer has meanwhile sold the property to another person, the latter also has no longer a right to that property. Note that there are other third-party protection mechanisms that mitigate the consequences of annulment for the last buyer or for a bona fide third party disposing of a competing right (e.g., a mortgagee). Here we can refer to a recent ruling of the Supreme Court and to article 3.17, §1 of the Civil Code, stating that some termination grounds of rights in rem only have "relative" effect and cannot affect the rights of third parties acting in good faith with a competing right on the immoveable property concerned. Annulment, however, is not explicitly listed as a termination ground with relative effect.

Restitutions

As mentioned, the annulment has a retroactive effect, and thus the legitimate question is how to undo the performances already executed between conclusion and annulment. Book 5 introduces a uniform set of rules regarding restitutions. Keep in mind that these rules do not only apply in case of annulment, but also in case of termination for non-performance, realisation of a condition subsequent and impossibility of performance that is not attributable to the debtor.

In principle, restitutions cover everything **received** under the contract that has been annulled. Depending on the performance agreed, it consist of (i) giving something, (ii) guaranteeing a performance, (iii) doing something or (iv) not doing something.

Incidentally, services rendered are covered, both those in performance of the contract and, more broadly, those rendered pursuant to the contract (such as the handing over of an object for the formation of a business contract).

In case of restitution due to the nullity of the contract, the following rules apply:

From when?
The reference date is the date on which the performance was performed. In case of annulment of a contract, the reference date, for example, the refund of the price is the day on which the price was paid.

What?
The main principle in the restitution in kind. In case the restitution is kind is impossible or abusive, then the debtor must give back the equivalent in value, estimated on the day of the restitution.

How much?
In addition to the object of the performance, or its equivalent in value, the debtor (i) must return all proceeds, interest (at the legal interest rate) and value of the enjoyment as from the moment he ceases to be in good faith and (ii) must be reimbursed for the costs borne to maintain the object and for the expenses that have increased the value of this object up to the estimated capital gain at the moment of the return.

Illicit cause and/or illicit object

The new Civil Code contains several clauses redefining the legality (*geoorloofdheid / licéité*) of a contract. Both Book 1 and Book 5 introduce a set of rules assisting in the verification of the legality of contracts.

Object and cause of a contract

Under Belgian law, the validity of a contract is inherently connected to its object and its cause. If a contract has a cause or an object that is contrary to (a) provision(s) which is/are of public order or of imperative law, the contract will in principle be considered null.

However, not every violation of a mandatory provision will render the contract null. The reference date is the moment the contract has been concluded. If at the time of conclusion, the contract had an illicit object or cause, the nullity can be invoked. On the contrary, if the breach of a mandatory provision occurs during the term of the contract, the nullity of the contract will in principle not be triggered.

To avoid the nullity of the contract it is essential to understand how the concepts of 'illicit object' and 'illicit cause' are defined in Book 5.

Illicit object

Regarding the illicit nature of the object, Book 5 provides that: "the performance is illicit when it creates or sustains a situation that is contrary to the public order or imperative legal provisions." It should be noted that this provision refers to "performance", which codifies the existing case law that the legality of the object must be judged on the obligation itself, being the performance. The performance may consist of doing something, abstain from doing something, giving something or guaranteeing something.

> "The question to be asked is whether the contract is a tool to create or maintain an illicit situation"

Based on this definition enshrined in Book 5, there should be a close connection between the illicit object and the creation or preservation of an illicit situation. The question to be asked is whether the contract is a tool to create or maintain an illicit situation.

For instance: an architect agreement pertaining to the construction of a building without permit. Constructing a building without permit violates the public order. Therefore, this agreement should be considered null. Indeed, the performance of the contract would result in the creation of an illicit situation.

Another example could be the conclusion of a settlement agreement in which one party tolerates a building infringement. The settlement agreement preserves a situation contrary to the public order (i.e., the preservation of a building encumbered with a building infringement) and could therefore be considered null.

On the contrary, it could be argued that a contract pertaining to the sale of an immovable asset encumbered with a building infringement does not have an illicit object. The sale does not create an illicit situation nor does the sale perpetuate an illicit situation. The transfer of the immovable asset has no legal implication regarding the status of the asset. It merely changes who owns the asset. It must however be noted that case law has been numerous, and divided, on this subject. We nevertheless still believe that purchasers ending in such a situation and discovering an infringement after the sale should further proceed based on consent (which could have been vitiated) instead of arguing that the object is illicit.

Illicit cause

Regarding the illicit nature of the cause, Book 5 provides that "*the cause is illicit if it is contrary to the public order or imperative legal provisions*". This article codifies the existing definition mentioned in the old Civil Code, however the reference to good morals has been removed. According to the legislator, good morals are already included in the notion of public order.

> "What matters are the decisive motives for concluding the contract."

What matters are the decisive motives, for each party, for concluding the contract. To ascertain the decisive motives, we must ask whether the contract would also have been entered into without the obligations that violate the public order or an imperative legal provision. The judge has a wide appreciation power in this regard.

For instance, in case of price concealment to evade transfer taxes for a part of the purchase price when selling a property, the court held that the decisive motive for entering into the purchase agreement was not the evasion of transfer taxes, but rather the desire to acquire the property, respectively to receive the purchase price. The agreement to conceal the correct price in the purchase agreement is contrary to public order and therefore null, but the sale is not. Case law seems however to remain unpredictable on this subject as in another case it was judged that an agreement, stamped as the rendering of services (to be able to subject it to VAT and recover input VAT) instead of an ordinary lease (which would have precluded the subjection to VAT and the recovery of input VAT) had an illicit cause and was therefore null – while it seems to us that the determinative motive of the parties was to put at disposal and to use premises.

An innovation by Book 5 is the definition of 'cause'. The Supreme Court's case law was unclear in the past regarding the definition of this term but Book 5 now ends the ambiguity and includes the following definition: a cause is defined as "*the determinative motives that led each party to enter into the contract to the extent that these were or should have been known by the other party*". As you can imagine, the "should have known" is important here and might be a source of discussions in the future.

Conclusion

In general, the articles of Book 5 pertaining to illicit cause and illicit object are in line with the established regime under the old Civil Code and the corresponding case law. By giving a legal basis to the theories developed in the case law, the uniformity of the interpretation of these concepts will be enhanced. In addition, Book 5 provides for a modernization of the concepts of illicit object and illicit cause. In particular, the definition of the concept 'cause' under Book 5 should be stressed.

LOYENS & LOEFF

Contract execution

Hardship – Change in circumstances

What happens in the situation where, after the entry into force of a contract, the circumstances change and make the performance of it more costly, but not impossible? It is especially relevant in these particular times we live in since a few years with the Covid-19 crisis, the Ukrainian war and the consequent inflation and increase of energy prices.

Potential examples of hardship

This type of situation is more frequent than you might expect. For example:

- a contract where one party has to execute some reparation works to a building but the price of the raw materials significatively increased between the time of conclusion of the contract and the execution thereof;
- a lease agreement with an indexation clause;
- a share purchase agreement with differed signing and closing or deferred payment with an earn-out clause;
- a joint-venture agreement with put/call options to be exercised at a later date;

Hardship was not recognized under Belgian law

Until now, the hardship principle was not recognized under Belgian law, meaning that the parties had to execute the contract, even if the general balance of it was modified due to an extraordinary change in circumstances beyond their control.

For example, the contractor still had to execute the reparation works, even if this meant that the raw materials price was higher than the price the other party paid as consideration. Except for one decision, case law also denied the application of hardship invoked by tenants to request a decrease of the rent during the Covid-19 crisis.

It was only if the change in circumstances made it impossible for the debtor to perform his obligations, that he could invoke the force majeure principle, exonerating him from the obligation to perform.

When the change in circumstances only entailed an increased cost of performance or a decreased value of counter-performance, the parties had, in theory, to execute the contract.

Attenuation in practice by case law and explicit contractual protection

Case law progressively reduced the consequences of the non-acceptance of the hardship theory under Belgian law – either by applying the principle of the abuse of right prohibition, or by assessing with more flexibility the condition of impossibility required to apply the force majeure principle. This however led to many uncertainties since it entirely depended on the judge subject to a final ruling of the Supreme Court.

The parties could also decide to insert contractual protection to deal with any adverse consequences of unforeseeable circumstances in their contract. For example, in the transaction practice, it is usual that the parties expressly include in their contract MAC (material adverse change) or MAE (material adverse effect) clauses. This type of clauses gives (one of) the parties the right to terminate the agreement if material adverse changes occur between signing and closing.

Book 5 now recognises the principle of hardship

Book 5 now recognises the principle of hardship for **exceptional cases** where a change in circumstances would make the performance of the obligations of the contract **excessively costly**, such that demanding contract performance would be unreasonable.

Under the new provisions, the debtor has the right to request the creditor to renegotiate, either to amend the contract or to terminate it, if the following conditions are cumulatively met:

- a change in circumstances makes the performance excessively onerous to such an extent that the performance cannot be reasonably required;
- the change was unforeseeable at the time of the conclusion of the contract;
- the change is not imputable to the debtor;
- the debtor did not assume that risk; and
- the law or the contract does not exclude this possibility to renegotiate.

For example, in case a lease agreement would become extremely onerous for the tenant because of the indexation of the rent, the tenant could ask the landlord to renegotiate the contract and to agree on a cap on indexation.

It is important to note that during the renegotiations, the parties must **continue to perform the contract** as initially concluded – for example, the tenant must continue to pay the rent.

If the renegotiations fail within a reasonable period of time, one of the parties (who is not necessarily the debtor) can decide to initiate summary proceedings in front of a judge. The judge has the power to adapt the contract to align it with what the parties would reasonably have agreed to at the time the contract was concluded if they had taken the change in circumstances into account. The judge can also decide to terminate the contact, in whole or in part, as of a date not prior to the change in circumstances and according to modalities to be determined by the judge.

Supplementary regime

This new regime is of supplementary law and the parties can decide to exclude the hardship entirely from their contractual relationships. Such exclusion could however be considered as an abuse of rights if one party is stronger than the other – it is likely that case law will probably rule about this in the next few years. The parties could also specify, in their agreement, the key conditions required to apply the principle of hardship. They could for example qualify the concept of “excessively onerous” and decide that it only applies if the performance of its obligation by one party is of x % more onerous than the estimated cost at the time of conclusion of the contract.

Anticipatory breach

The doctrine of anticipatory breach allows the creditor, under certain conditions, to unilaterally terminate the contract when there is an anticipated non-performance by the debtor. For a long time, Belgium did not recognize the possibility of terminating a contract because of the fear of a (not yet realized) breach of contract by the other party. Early termination of a contract is now made possible in Book 5. Let's see what it implies in practice.

Introduction in the new Civil Code

Under the old Civil Code, the creditor could only apply the sanctions of non-performance when the non-performance was completed.

Even if the creditor had serious concerns about the debtor's ability or willingness to perform on time, he had to sit back and wait for the effective non-performance, otherwise he would be liable for a wrongful termination. For example, the principal who, even before the work is completed, knows or has good reason to believe that the contractor will not finish the works on time.

Inspired by the early termination regime established by the Vienna Convention, Book 5 now provides that "*the contract may also be terminated, in exceptional circumstances, where it is clear that the debtor, after having been given notice to give, within a reasonable time, adequate assurances of proper performance of its obligations, will not perform on the due date and the consequences of such non-performance are sufficiently serious for the creditor*".

Conditions

Manifest nature of the debtor's non-performance on the due date

The slightest doubt on the part of the creditor as to the reliability of the other party cannot justify the early termination of the contract to his detriment: it must be clear that the debtor will not perform, and therefore this new regime applies in exceptional circumstances.

The creditor's conviction must therefore be based on concrete elements, such as the debtor's declaration that he will not perform, or circumstances that demonstrate his inability to perform. This condition will be assessed on a case-by-case basis.

Need for prior notice to provide sufficient assurances

Before unilaterally terminating the contract, the creditor must have given notice to the debtor to provide sufficient assurances of the proper performance of its obligations.

The "sufficient assurances" to be provided by the debtor also depend on the circumstances and do not necessarily have to take the form of a security interest. A demonstration by the debtor that he has the necessary means to perform or even, in some cases, an explanation of how he intends to perform may suffice.

Sufficiently serious consequences for the creditor

The requirement that the consequences of non-performance must be "sufficiently serious" for the creditor is the counterpart of the requirement that the default must be "sufficiently serious" to justify termination when the claim is due.

Suppletive nature

As this provision is of a suppletive nature, parties are free to specify or even change the conditions required. They may also exclude the application of the anticipatory breach from their contract.

Extrajudicial replacement of a defaulting counterparty

In the construction sector, the default of a (sub-)contractor can have huge negative consequences on the construction program in terms of timing, planning, and budget. Once a construction project faces difficulties due to a defaulting (sub-)contractor, the principal or (general) contractor has every interest in remedying the default to avoid delays or (late) penalties. In case of persistence of the default, the contractual relationship feels as a trap, and rapidly the thought crosses the mind of a principal or (general contractor): "Which other contractor is able to carry out the defaulting (sub-)contractor's mission?".

General

The mechanism of judicial replacement is not new and already existed under the old Civil Code. In addition, this was also sometimes contractually agreed upon in construction agreements. Book 5 now introduces and regulates the possibility of an extrajudicial or unilateral replacement. The principle of extrajudicial replacement remains the same although the conditions are tempered: the replacement can take place without the prior intervention of a judge at the risk of the principal or (general) contractor, subject to judicial review.

Book 5 codifies the mechanism of extrajudicial replacement

According to the mechanism of judicial replacement, the creditor is allowed – in case of failure by his counterparty in the performance of an obligation – to request the judge to have the obligation performed by a third party, at the costs of the defaulting counterparty.

When the old Civil Code was adopted, only judicial replacement was codified, which meant that the prior authorization of a judge was legally required to replace the defaulting party by a third party. Failing this, the costs of the replacement were to be borne by the creditor.

Over the years, the replacement mechanism has frequently been used in construction law, especially in construction agreements. Because of the cumbersome nature of the judicial replacement mechanism, parties agreed in their agreement that principals faced with a defaulting contractor unilaterally decided to replace him, without going to court first.

In recent years, it has become established case law that, in case of urgency or exceptional circumstances, a principal is entitled to unilaterally replace the defaulting contractor by a third party and to recover the costs from the defaulting contractor, without the prior intervention of a judge. A posteriori judicial review remains possible if the defaulting party does not agree with the (payment of the) replacement costs.

> "Extrajudicial unilateral replacement in case of breach by a (sub-)contractor always takes place at the principal's or general contractor's own risk."

Book 5 codifies this mechanism: extrajudicial (unilateral) replacement in case of breach of a contractual obligation by the counterparty is possible, provided that certain conditions are met.

Mitigation of the formal and substantive conditions

Book 5 provides that extrajudicial replacement can only be applied in case the following cumulative conditions are met:

- "in case of urgency or other exceptional circumstances"
- "after taking the necessary steps to establish the debtor's default"
- "by a written notification, which sets out the breaches of which the debtor is charged and the circumstances which justify the replacement".

These conditions are important, because they allow a judge to verify - a posteriori – whether the extrajudicial replacement of the debtor was justified.

Sanctions in case of (mis)use of the extrajudicial replacement

The unilateral replacement in case of breach by a contractor always takes place **at the principal's or general contractor's own risk**.

The replacement of the defaulting (sub-)contractor during the construction phase is often more expensive for the principal or general contractor than if the defaulting (sub-) contractor had performed his obligations. The additional cost is not only due to the context (the principal or general contractor must quickly find a replacement to step in), but also to the fact that a third party, who is not a party to the initial contract and does not know the construction site, must step-in and continue the works previously done by the defaulting (sub-)contractor.

In principle, additional replacement costs should be borne by the defaulting (sub-)contractor. However, in most of the cases, the defaulting (sub-)contractor will, after being notified of the replacement, subsequently refuse to reimburse or dispute the (costs relating to the) extrajudicial replacement. Under these circumstances the principal or general contractor will not be able to avoid judicial proceedings: the defaulting (sub-)contractor will go to court and ask the judge a posteriori to consider whether the extrajudicial replacement and the costs claimed from him are justified. But at least it was possible for the principal or general contractor to unblock the situation without waiting for a court decision.

Of course, the principal or general contractor can only invoke extrajudicial replacement to the extent that it was justified and thus to the extent that the above conditions were met. If this is not the case, the court may decide that the "defaulting" contractor does not have to pay the claimed costs (in full) and, if the defaulting contractor has suffered damages, may order the principal or general contractor to pay damages to the latter.

Conclusion

Despite the risk incurred by the principal or general contractor who takes the initiative to unilaterally replace the defaulting (sub-)contractor, the mechanism of extrajudicial replacement is useful in the construction sector, where delays in construction works due to a defaulting (sub-) contractor and the legal proceedings initiated as a result, could have many damaging consequences. It must, however, remain an exceptional procedure, subject to strict conditions.

Price reduction in development projects: what is the VAT impact?

Book 5 introduces a new sanction in case of an attributable breach by a counterparty of its contractual obligations: the right to claim a price reduction. In itself, the right to claim a price reduction is not new: it is well known in commercial law, international law,... but as a sanction in common contract law, it is new. What are the tax consequences if the sanction of price reduction is applied, for example in development projects?

Price reduction as an autonomous sanction

Book 5 provides for a new sanction mechanism consisting of the right to claim a price reduction. This sanction, which aims to restore the balance of performance, cannot be qualified as a rescission of the contract (which presupposes a sufficiently serious non-performance) nor as compensation (which compensates the damage suffered by the creditor) or as a plea of non-performance (which is a temporary defense): it has different implications and specific application conditions.

The creditor wishing to invoke the price reduction as sanction may claim it in court or may apply the price reduction unilaterally through a written and reasoned notice stating the reason for the price reduction to the debtor. The default may be either quantitative (e.g., a supplier that under-delivers) or qualitative (e.g., a contractor that delivers a building that is of poor quality).

The price reduction that can be claimed is equal to the difference, at the time of conclusion of the contract, between the value of the performance received and the value of the performance agreed upon. The purpose of the sanction is to rebalance the mutual commitments of the parties. Additional damage recovery is only possible for items other than those compensated by the price reduction.

Quid VAT?

Article 28, 2° VAT Code provides that "*the taxable amount shall not include: price discounts and rebates granted by the supplier to his co-contractor and obtained by the latter at the time VAT becomes chargeable*".

Article 77, §1, 2° VAT Code mentions that "*(…) the VAT due or paid in respect of supplies of goods or services or intra-Community acquisitions of goods shall be refunded accordingly where a price reduction is granted to the co-contractor*".

> "If a price reduction is applied before the supplier has issued his invoice, the price reduction will not be part of the VAT tax base."

This means that if the price reduction is applied before the supplier has issued his invoice, this price reduction will not be part of the taxable amount for VAT purposes. If the price reduction is agreed by the parties or pronounced by the court after the invoice has already been issued, the supplier has the right to issue a credit note and reclaim the VAT on the disputed part of the price from the VAT authorities.

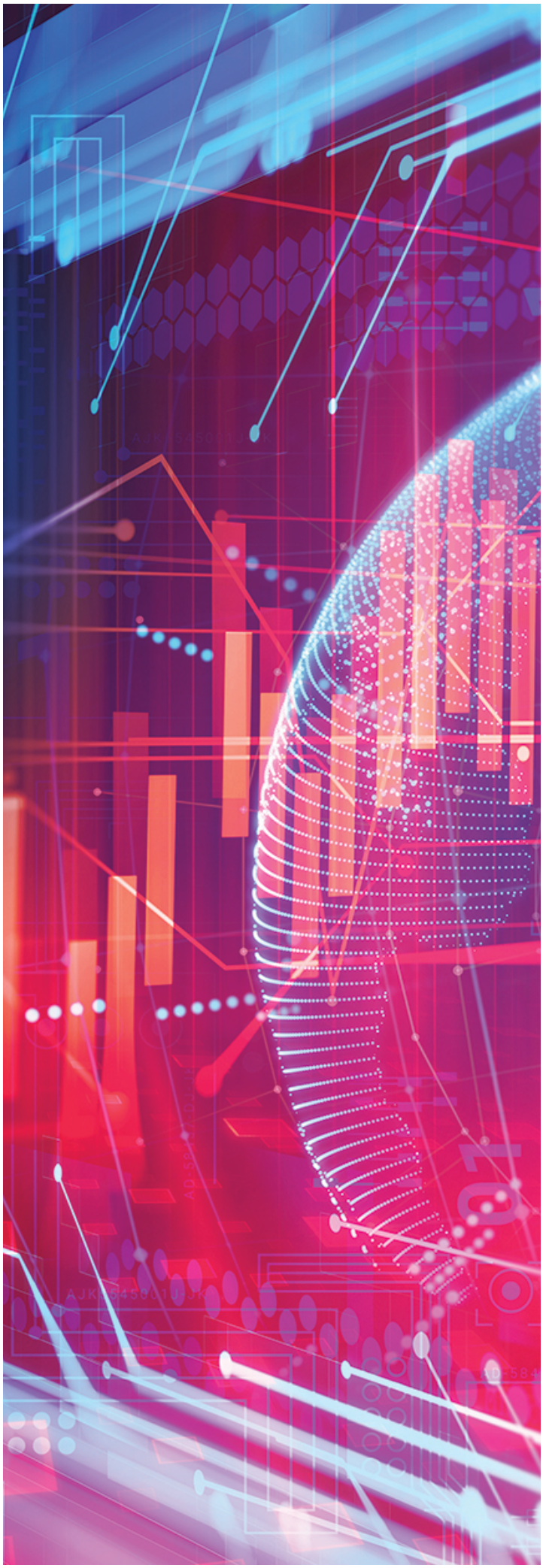
The claim for a VAT refund is time-barred after the expiry of the third calendar year following that in which the cause for refund (the price reduction) occurred. Consequently, the claimant can exercise his right to a VAT refund in one of the declarations filed before the expiry of the third calendar year following that in which the price reduction occurred.

Compensation for non-performance is not a price reduction

The price reduction must be distinguished from the sanction that consists in compensating damages that have been suffered. A compensation for damages falls **outside the scope of VAT** in the absence of consideration.

A penalty clause allows the parties to fix, on a flat-rate basis, a compensation that the debtor will owe in case of an attributable non-performance of an obligation. The non-performance may consist of a failure to perform or delay in performance and the clause may aim to compensate all types of damage.

It follows that e.g., penalties for delay, which fulfil both a deterrent and a remedial function, are not to be regarded as price reductions so that these amounts do not affect the taxable amount for VAT.



Does abolishing quasi-immunity open the door to more liability claims?

Under current Belgian law, creditors are limited in their recourse against auxiliaries (i.e., persons appointed by their debtor to perform their contractual obligations towards the creditor). This is particularly important in the context of project development, where (main) contractors often subcontract part of their work to subcontractors. Book 5 together with the draft Book 6 (Extra-contractual Liability) seem to change this situation.

Principal's position under current Belgian law

Under current Belgian law, subcontractors enjoy far-reaching protection vis-à-vis the principal (so-called "quasi-immunity"):

- the principal cannot hold the subcontractor(s) liable on a contractual basis, since they are third parties with respect to each other and no contract exists;
- the principal has only *extra-contractual* recourse against the subcontractor(s) if the following (cumulative) conditions are met: (i) the alleged breach of to the subcontractor violates not only his contractual obligation, but also the general duty of care (there is a so-called mixed fault), and (ii) the damage suffered is different from that the one resulting from the poor performance of the contract (there is so-called mixed damage).

These (strict) conditions, especially the requirement of mixed damages, are often not met in practice so that the principal has often no recourse against the subcontractor(s).

Ready for the revolution?

It seems that the Belgian legislator now wants to address this thorny position of the principal. Indeed, the draft Book 6 (Extracontractual Liability) of the new Civil Code abolishes the quasi-immunity of auxiliaries. Consequently, the principal will have (direct) recourse against the subcontractor – extra-contractually or contractually, at his own discretion.

> "The draft Book 6 (Extracontractual Liability) of the new Civil Code abolishes the quasi-immunity of auxiliaries. Consequently, the principal will have (direct) recourse against the subcontractor."

If implemented, this reform will cause a shockwave within the Belgian real estate and construction sector, given the far-reaching consequences for both the liability of and the (additional) remedies available to the construction actors involved.

Third-party effect of exoneration clauses under Book 5

Book 5 contains a new provision, i.e., article 5.89 of the Civil Code, according to which subcontractors may invoke certain limitations of liability agreed between the principal and the main contractor: "*If the debtor relies on performing agents for the performance of the contract, they may invoke against the principal creditor the exoneration clause agreed between him and the debtor.*" By allowing auxiliaries to rely on limitations of liability agreed between the principal debtor and the creditor, the legislator is already anticipating the fact that the quasi-immunity of auxiliaries will be abolished with Book 6. In order to give auxiliaries some protection anyway, the legislator has included the abovementioned provision in Book 5. The idea is that when a party limits his liability, he also does so for its auxiliaries who will help him executing his contractual obligations.

General rules on exoneration clauses

Indeed, parties are sometimes confronted with contractual breach(es) by their counterparty (e.g., late payment, defective execution, etc.). In principle, they can hold the counterparty liable for this. However, parties can opt to limit or even exclude their liability, which is often done in practise in contractual terms and conditions by including an exoneration clause.

The new Book 5 now provides for the first time a comprehensive regulation of exoneration clauses:

- on the one hand, the legislator confirms the current case law: exoneration clauses by which a debtor fully or partially excludes his/her own liability and/or the liability of his/her auxiliaries are valid as a matter of principle. In addition, codified are (article 5.89 of the Civil Code): (i) the possibility to exonerate oneself for a "serious" fault committed by oneself or through an auxiliar, (ii) the prohibition of exoneration for own intentional misconduct and (iii) the prohibition of eroding the meaningfulness / essence of the contract.
- on the other hand, the legislator introduces some new restrictions that limit the parties' leeway. The exoneration prohibition for intentional misconduct is extended to auxiliaries. The same prohibition applies when the fault affects someone's (not necessarily the counterparty) life or physical integrity.

Conclusion

It has become clear that Book 5 and 6 draft Book 6 (Extracontractual Liability) of the new Civil Code, and more specifically (i) the proposed acceptance of the concurrence (*samenloop*), between contractual and extra-contractual liability and (ii) the abolishment of the quasi-immunity of auxiliaries will bring about a paradigm shift within the construction and real estate world. Parties should be aware that no longer (exclusively) the contractual agreements prevail, but the extra-contractual rules in principle also govern their relationship. Book 5 chooses to somewhat mitigate this loss of immunity against extra-contractual claims via the third-party effect of exoneration clauses.

As regarding the exoneration clauses, the (general) limitations of exoneration clauses, i.e. no exemption for own intentional misconduct and not eroding the meaningfulness / essence of the contract, are codified, but also further tightened under Book 5: an exoneration prohibition will (also) apply for (i) intentional misconducts(s) by auxiliaries and (ii) when the fault affects someone's (not necessarily the counterparty) life or physical integrity.

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Miscellaneous topics

Multiple parties
what about allocation of liability?

Although there are some new features, Book 5 is mainly a codification of existing law, as interpreted by case-law and legal doctrine, rather than an innovation. The rules relating to obligations with multiple subjects is a good illustration of this.

Codification

If one could still get lost between the different concepts of division, several liability (*solidarité / hoofdelijkheid*) or indivisibility, Book 5 reclarifies and defines these concepts.

Many contracts that seek to establish several liability provide for a wording according to which the sellers or the guarantors are jointly and severally liable. Book 5 reminds us that this wording is not terminologically correct, as the terms are contradictory (joint liability refers to the concept of division while the several liability refers to the concept of solidarity) and provides clear choices in this respect.

Practical application in real estate transactions

When negotiating a share purchase agreement in the presence of several sellers or a joint venture, the question of the several liability between the sellers is a key negotiation item for any purchaser. This issue may also arise later in the negotiations, should the sellers wish to insure their liability under the agreement by several external guarantors.

Principle of division and the exceptions

Book 5 distinguishes:

- the division of obligations as a general rule applicable by default
- two exceptions to the principle of division which must derive from law or contract: several liability between debtors and indivisibility between debtors.

Principle of division of obligations

The principle of automatic division of obligations between different debtors (sellers and/or guarantors), already accepted by case law and legal doctrine, is the general rule applicable by default: in the absence of any contrary contractual (or legal) provision, the obligation binding several debtors is divided by operation of law between them, in equal parts.

According to this general rule, in case of several sellers/guarantors, the purchaser can only sue each of the sellers/guarantors for their share in the claim. The purchaser therefore bears the risk of insolvency of one of the defaulting co-sellers/guarantors as he cannot claim the amount due by the defaulting seller/guarantor to another seller/guarantor.

For example, if you, as purchaser, are entitled to claim an amount of 1,200,000 EUR from three sellers following a claim raised under a SPA, in absence of specific contractual provisions in this respect, you will be entitled to claim the same amount of 400,000 EUR from each of the sellers (assuming they had the same number of shares in the capital). You will have to assume the risk of insolvency or other non-performance of one of the sellers for its share, without recourse against any of the other sellers.

Exceptions

The main exception to division is **several liability between debtors**. Book 5 provides that "there is several liability between debtors where they are bound to the same performance and that the creditor may require each of them to pay in full". Several liability has the advantage that it allows the purchaser to seek full performance or compensation from one of the sellers, and therefore the purchaser will not bear the (potential) risk of insolvency or default of other sellers.

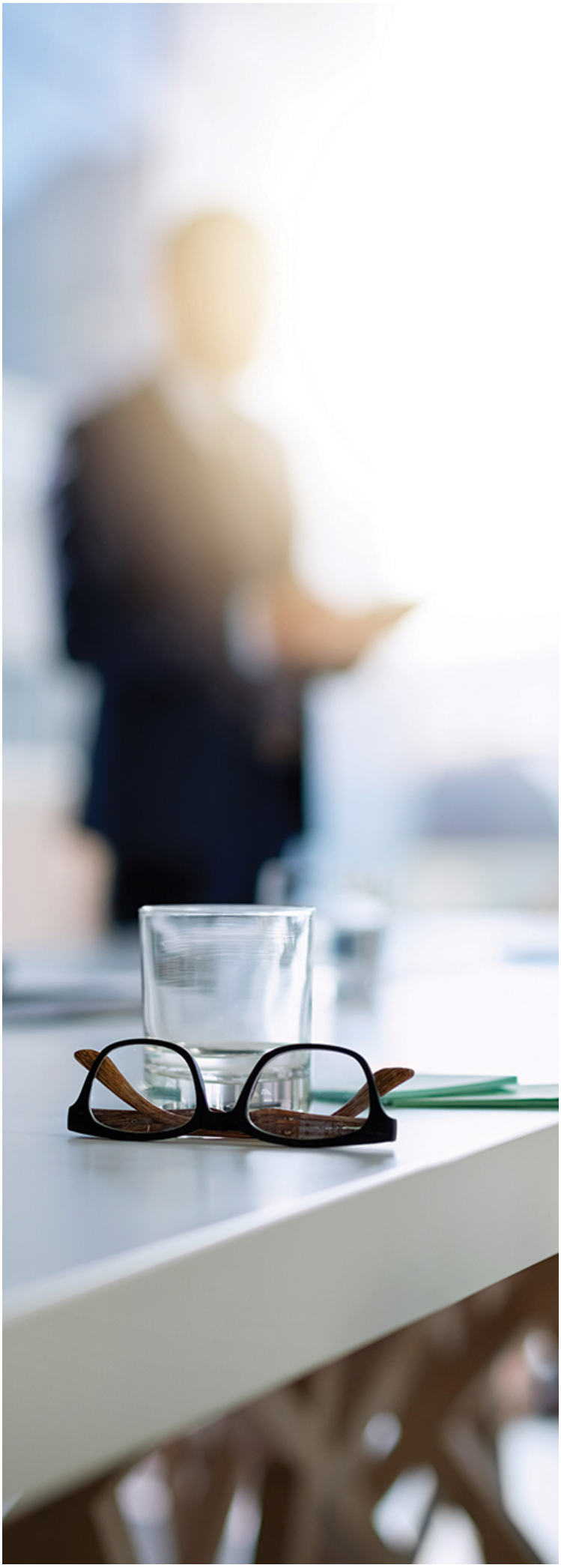
Book 5 specifically provides that several liability arises from law or contract and is **not assumed**: there may not be any doubt that the sellers/guarantors have accepted to be bound severally. To avoid any discussion, the parties may also refer explicitly to the new provision of the Civil Code. In case of natural persons, note that in the event of the death of one of the co-sellers, the debt transferred to his heirs is divided between them.

Indivisibility between debtors is the second exception to the principle of division. This is a case of several liability, but where the related obligation is indivisible. The new Book 5 provides that there is "*indivisibility between debtors when they are liable for the same indivisible performance and the creditor may require each of them to pay the whole amount*".

Even if the performance can by nature be divided (for example the payment of a sum of money), the parties can nevertheless contractually provide that this performance is indivisible, it being understood that the will of the parties must also be established with certainty: "indivisibility cannot be deduced from the mere stipulation of several liability". The effects of indivisibility between debtors are similar to several liability, except that indivisibility survives the death of the debtor.

Contractual implementation

In case of multiple parties, it is recommended to negotiate allocation of liabilities, be it for the payment of a price (multiple purchasers) or a claim (multiple sellers) at an early stage. Book 5 clearly distinguishes the different regimes to which the parties should explicitly refer. Depending on the quality of the parties (natural person / legal person) and/or their financial robustness, the parties should explicitly refer to one or the other of these regimes.



Transfer of contract, transfer of receivable, transfer of debt

Book 5 of the new Civil Code regulates not only the transfer of receivable(s), but also the transfer of debt(s) and contract(s), based on recent developments in case law and legal doctrine. Parties involved in real estate transactions should pay extra attention to the effects of such transfers, especially on security interests.

Transfer of receivables

It is generally agreed that a "transfer of receivable(s)" is an agreement by which a creditor, called the assignor, transfers the claim he has against his debtor (called the assigned debtor) to a contractor (called the assignee) who collects it. The latter becomes the creditor of the assigned debtor, independently of any consent of the assigned debtor.

Article 5.174 of the new Civil Code recognizes that receivables are in principle assignable, unless the law or their nature and scope preclude any assignment. Preparatory works retain wage receivables, under certain thresholds, among the receivables that are not assignable by law, or receivables that are highly personal in nature (*intuitu personae*) for the creditor as not assignable by nature.

The assignment may relate to one or more future receivables, provided that they are definite or determinable, or to part of a receivable if the latter is not indivisible.

The assignment of a receivable **includes all accessory rights and securities relating to it**, such as a pledge, a mortgage, a collateral and executory titles. In this respect, the transfer of accessory rights (e.g., mortgage mandate or direct action against the subcontractor) to the assignee is automatic. Such rights are deemed to be included in the assignment, but the rule is suppletive. Following the Civil Code, the transfer is enforceable towards third parties as from the conclusion of the contract. Note however that specific legislations, and in particular the Mortgage Law, impose **additional requirements** to make the transfer enforceable towards third parties; in particular the **transfer of the mortgage** must be transcribed. It should be noted that, according to Article 92[2] of the Code of Registration Duties, the transfer of a mortgage following the transfer for consideration of the secured receivable is subject to a **registration fee of 1%** (unless exception, e.g., transfer between credit institutions or of a "grosse à ordre").

While the conclusion of the assignment entails, in principle, the enforceability of its external effects against all third parties by operation of law, the assignment is **enforceable against the assigned debtor only from the time of its notification to or acknowledgement** by the assigned debtor. Note that publicity requirements for transfer of rights in rem remain applicable.

> Pay attention to specific legislations, in particular the Mortgage Law, that impose supplementary requirements to make a transfer of receivable enforceable which may lead to taxes.

Finally, assignment or transfer in breach of a contractual prohibition of assignment is not enforceable against the debtor if the assignee can be considered as a third-party accomplice. In this respect, the assigned debtor may not refuse to pay the assignee who has notified him the assignment on the pretext that the assignor has violated a non-assignment clause unless he shows that the assignee knew or should have known of the non-assignment clause. In the latter case only, the assigned debtor may refuse to perform in the hands of the assignee.

Transfer of debt

While the old Civil Code was not regulating the transfer of debt, it is now explicitly regulated and allowed (subject to creditor's consent) by Book 5, which takes back the concepts of "complete assignment" (*cession parfaite de dette / volkomen overdracht van schuld*) , "incomplete assignment" (*cession imparfaite de dette /onvolkomen overdracht van schuld*), and "internal debt assumption" (*reprise interne de dette / interne overname van schuld*) developed by case law and legal doctrine.

Under the "**complete assignment**", the assignee intends to commit towards **the creditor who has given its consent**. If the creditor has given his consent in advance, the assignment of the debt is not effective until the contract between the assignor and the assignee is notified or acknowledged.

According to Article 5.188 of the new Civil Code, the assignor is **released for the future**, unless otherwise agreed with the creditor. For debts already due and payable prior to the assignment, the original debtor remains liable, unless otherwise agreed. This clarification is relevant in the context of a contract with successive performances, such as a lease, or in case several debts are assigned.

> "The transfer of debt and the transfer of contract receive a legal basis in the Civil Code."

The release of the assignor leads to the **extinction of the security interests**, except in case the grantor of the security interest consents to maintain the latter. In this respect, an assigned creditor who agrees to an assignment of debt should therefore be cautious and seek the consent of the grantor of the security interest (either the debtor or a third party) to maintain this collateral. We however doubt of the application of this new legal provision when the security interest is a **mortgage**. The mortgage is indeed a property right accessory to a receivable; the receivable itself does not extinguish and therefore the mortgage should be maintained.

Under the "**incomplete assignment**", the assignee intends to commit towards **the creditor who has not given its consent**. The assignee and assignor are then jointly and severally liable towards the creditor. In terms of contribution to the debt, the assignor is a joint debtor not involved in the debt; if he is called upon to pay by the creditor, he has recourse for the whole against the assignee.

In this respect, the intention of the assignee is presumed if it notifies the assignment to the creditor. The assignment can become "complete" in case of a subsequent consent from the creditor.

Since the debt of the assignor is not extinguished and the original debtor is not discharged, the securities are maintained.

Under the "**internal debt assumption**", the assignee does not intend to commit towards the creditor. This commitment is only effective between parties. The creditor shall have the right to refuse payment if he has a legitimate reason resulting from his interest in the obligation being performed by the debtor himself, having regard to its nature or scope (e.g., intuitu personae).

Transfer of contracts

Book 5 now explicitly regulates the transfer of contract, subject to the consent of the contracting party. This concept includes the **transfer of the entire "contractual position" of the assignor**. Preparatory works specify in this respect that an assignment of contract is more than just a sum of debts and receivables but constitutes the unchanged assignment of the entire contractual relationship, so that the assignee takes over not only the rights and obligations, but all the contractual capacities and competences.

According to Article 5.193 of the new Civil Code, the assignor is **released for his future debts**, unless otherwise agreed between parties. When the underlying contract relates to a property right, this new principle is overruled by the provisions of Book 3 governing property rights: the transfer of a right in rem does not release the transferor for his future debt that were the consideration for the granting of the property right (e.g., a yearly fee under a long-term lease right). If the other party has given his consent in advance, the assignment of the contractual position is only effective after notification or recognition of the contract between the assignor and the assignee. Same rules applicable to transfers of receivables and debts apply then.

Preference contracts and option contracts

key takeaways in the context of real estate transactions

Book 5 codifies two particular types of contracts: preference contracts (*pacte de préférence / voorkeurscontract*) and option contracts (*contrat d'option / optiecontract*) or contracts containing a unilateral contract promise (*promesse unilatérale de contrat / eenzijdige contractbelofte*). For both types of contracts, Book 5 foresees three types of sanction in case of breach of a preferential right by a third party accomplice.

Concept of preference and option contracts

Book 5 defines the concept of a **preference contract** as a contract by which a party undertakes to give priority to the beneficiary if it were to contract. This definition was not included in the old Civil Code, leaving it up to jurisprudence and legal doctrine to define the term. Although the latter tended to make a distinction between preference right and preemption right, it appears that the definition included in Book 5 is formulated in a broader way, making it applicable without any distinction and regardless the qualification given by the parties.

The concept of an **option contract**, or **unilateral promise of contract**, is defined as a contract whereby (i) a party grants to the beneficiary the right to decide to conclude a contract with the former, (ii) of which the essential and substantial elements have been agreed upon and (iii) for whose formation only the consent of the beneficiary is missing.

For both types of contracts, Book 5 provides sanctions in case of breach of the preferential right, either against the counterparty or against the third-party accomplice (*tiers complice / derde-medeplichtige*). Indeed, the beneficiary of the preferential right can seek damages against the counterparty, but can also pursue the third-party accomplice, via one of the following sanctions:

- the compensation of the damage suffered;
- the unenforceability of the contract concluded with the third-party accomplice; or
- claiming to take the place of the third-party accomplice in the concluded contract (substitution).

Purchaser as third-party accomplice?

Book 5 defines the term "third-party complicity in the disregard of a contractual obligation" as the situation where a third party participated in the non-performance by a party of its contractual obligations when the third party **knew or should have known** of the existence of those obligations.

> "Since 1 July 2022, deeds granting a preference right, pre-emption right or option right on a right in rem are subject to transcription. A purchaser should therefore know the existence of such preferential right."

For a diligent purchaser in the real estate sector, it is therefore of utmost importance to verify whether, by entering into a transaction, he does not violate the contractual obligations of the seller vis-à-vis the beneficiary of a preferential right. Since 1 July 2022, deeds granting a preference right, pre-emption right or option right on a right in rem are subject to transcription at the competent Office for Legal Certainty, such verification can easily be done but also considerably reinforces the duty of care from the candidate purchaser. Indeed, the candidate purchaser should be considered mala fide if he disregards the preferential rights while the latter was transcribed at the competent Office for Legal Certainty.

Substitution as sanction and transfer taxes

Preparatory works clarify that the beneficiary of a preferential right can take the place of the third-party accomplice (at the price and under the conditions agreed with such third-party). By requesting the substitution, the beneficiary expresses his willingness to enter into the contract on the same terms. Both Book 5 and the preparatory works however remain silent on the modalities underlying this substitution. As a consequence, the possible substitution as sanction also raises questions, e.g., with regard to the application of transfer taxes when the contract concerns real estate assets.

Substitution, being considered as a personal subrogation by the legal doctrine, has a declarative effect. Although they may involve a transfer of real estate, subrogation proceedings in case of disregard of a preferential right are considered to remain outside the scope of application of the proportional transfer taxes due to their declarative effect. This means that the substitution of the purchaser accomplice by the beneficiary of the preference or option right is not considered as a second sale, by reference to the original sale between the seller and the purchaser accomplice, for transfer tax purposes (i.e., no double proportional transfer taxes are due). Thus, only a general fixed duty will be due upon substitution (besides the initial proportional registration duties). Note that the legal doctrine considers that the subrogation does not give rise to a refund of the proportional registration duties levied on the initial sale concluded in disregard of the preference or option right, this payment being definitive.

Conclusion

As generally observed with the implementation of Book 5, the definition of the concept of preference contract and option contract, or unilateral promise of contract, does not constitute a revolution but rather codifies the main principles and clarifies the possible sanctions in case of breach, both vis-à-vis the grantor of the preferential right and the third-party accomplice. For a diligent purchaser in the real estate sector, it is of utmost importance to verify whether, by entering into a transaction, he does not violate the contractual obligations of the seller vis-à-vis the beneficiary of a preferential right, certainly that the mandatory transcription of such rights as from 1 July 2022 will constitute a presumption that this purchaser "should have known" the existence of such right.

General conditions
the “battle of forms” issue

The problem of conflicting general terms and conditions is an important issue. Indeed, practitioners are often confronted with the problem of conflicting general conditions (“battle of forms”), i.e., when the general conditions of each of the parties have entered the contractual field and are contradictory.
If an offer (in which the general sales conditions are communicated) is accepted, but at the time of acceptance, reference is made to the party’s own general purchase conditions, which undoubtedly contain incompatible provisions, which conditions should be applied?

Regime in force under the old Civil Code

Under the old Civil Code, different theories were applied in the event of conflicting general conditions, resulting in legal uncertainty. However, the dominant solution in Belgian law was (i) to look at the actual will of the parties, which in most cases led to the exclusion of the conflicting clauses thereby stating that the parties could not agree on them, (ii) to apply only those clauses that were agreed and, for the rest, (iii) to apply general (contract) law (“knock-out rule”).

When drafting the text of Book 5, the authors were divided on the subject, with some advocating giving priority to the general terms and conditions mentioned in the first document/agreement (“first shot rule”); others argued for giving priority to the general terms and conditions in the last document (“last shot rule”).

Novelty brought by Book 5

Book 5 clarifies the situation and puts an end to the inconsistencies in case law and different theories on this issue established in the legal doctrine.

Indeed, article 5.23, section 3 of the new Civil Code provides that “Where the offer and acceptance refer to different general conditions, the contract is nevertheless formed. Each of the general conditions forms part of the contract, with the exception of incompatible clauses”.

The idea is that the conflicting conditions are not essential (it would otherwise be deviated from in the offer/acceptance), and therefore the absence of agreement does not prevent the conclusion of the contract. What is incompatible remains ineffective and will be replaced by the general principles of contract law. Book 5 thus opts for the “knock-out rule”.

Exception

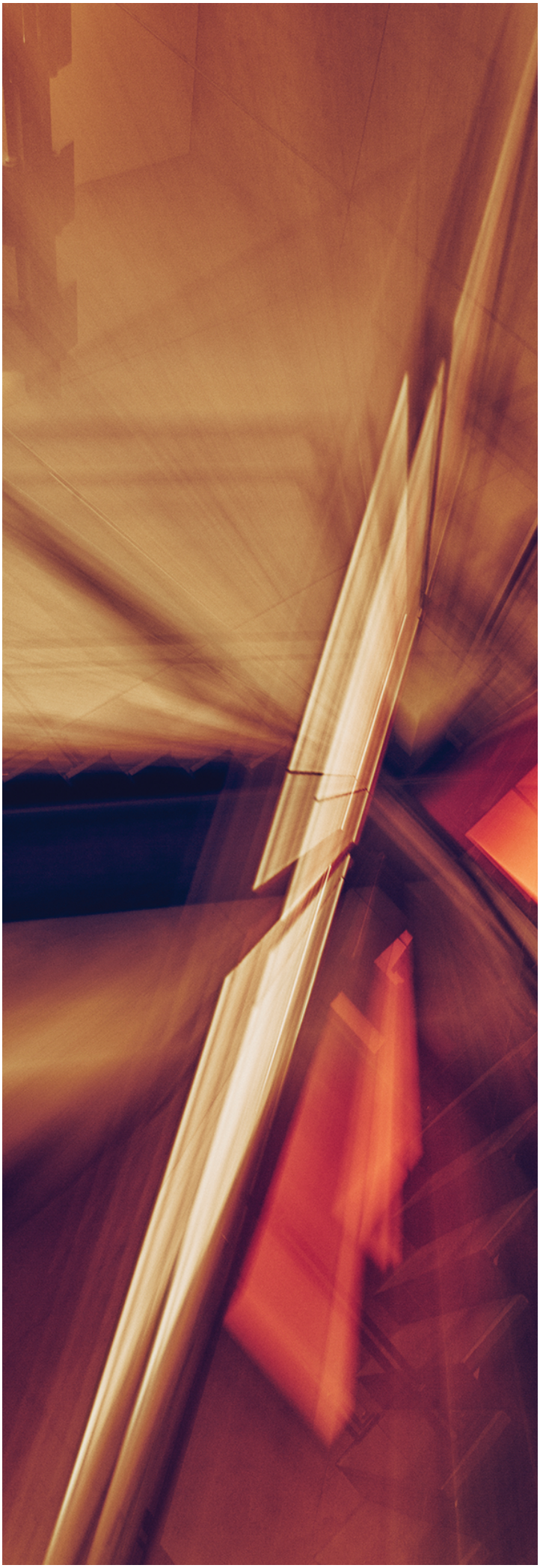
However, an exception to this principle is provided for in article 5.23, section 4, stating that “the contract shall not be formed if a party expressly indicates in advance or without undue delay after receipt of the acceptance, and not by means of general conditions, that it does not wish to be bound by such a contract”. Consequently, if a party does not agree with (certain) (a) general condition(s), he must expressly indicate this in advance:

- **explicit**, not by general conditions
- **in advance** or **without undue delay** after receipt of the acceptance

The clarification that the expression of the will not to be bound by the contract in case of (an) incompatible general condition(s) must take place without undue delay after the receipt of the acceptance is remarkable. It is intended to prevent the offeror from being “trapped” to the contract when his offer refers to general terms and conditions that determine his consent and the acceptance refers to incompatible general terms and conditions.

Furthermore, the expression of this will must take place other than by general conditions, which is important in practice. Therefore, this condition is not met when only the general terms and conditions stipulate that all contracts concluded by the party concerned are subject to his own general terms and conditions and that these exclude the general terms and conditions of the other party, which often occurs in practice.

Article 5.23 of the new Book 5 is therefore a welcome clarification that increases legal certainty.



“Unfair clauses” prohibition for financial services

Article 5.52 of the new Book 5 of the Civil Code introduces a general statutory prohibition on “unfair clauses”, which are clauses that cannot be negotiated and that create a manifest imbalance between the rights and liabilities of the parties to the contract. This prohibition may potentially restrict parties’ contractual freedom in relation to B2B financial services and contracts.

Context

The new prohibition on “unfair clauses” (*clauses abusives / onrechtmatige bedingen*) is not new and complements existing legislation which already prohibits unfair clauses in B2B and B2C contracts. Financial services were however exempted from the scope of such prohibitive B2B legislation due to their special and international nature. As this still holds true, and the legislator has unfortunately not provided for any specific confirmation, it is not clear whether the B2B financial services, regardless of their special nature, will also, as from 1 January 2023, fall under the scope of the new residual prohibition on unfair clauses or whether they remain exempt considering their explicit exclusion under a *lex specialis*, namely the B2B Act.

Assuming the new ‘catch all’ prohibition in Book 5 will apply in a B2B financial context, “unfair clauses” will be prohibited in all finance and credit contracts entered into as from 1 January 2023. Article 5.52 targets clauses that ‘cannot be negotiated’ and that create a ‘manifest imbalance’ between the rights and obligations of parties. Such clauses will be deemed unwritten. Importantly, the new provision will however not apply to the determination of the main performances of the contract, nor to the determination of equivalence between the main provisions (in other words, the ‘core clauses’ of a contract, which in a financing context should at least include any agreed interest, principal and repayment provisions). Manifest imbalance

Manifest imbalance

The question whether a clause creates a manifest imbalance between the rights and obligations of the parties remains a factual question to be ultimately decided by the court. The condition that the imbalance must be ‘manifest’ (*manifeste / kennelijk*) limits the court intervention to a marginal assessment. The court should indeed take a restrictive approach so that only those imbalances which are evident are sanctioned. In making such assessment, it will also need to consider all circumstances surrounding the entry into the contract, such as the nature of services, the general economy of the contract or customary practices.

> “Clauses which may seem at first disproportionate or unbalanced may be perfectly legitimate and even prerequisite mitigants within a more global financial context or within a group of contracts.”

But even if the general view would be that Article 5.52 applies to financial services and contracts, this should not lead to a broader or even equivalent application of the prohibition on unfair clauses in such contracts. The fact that the legislator itself has emphasized their special and international nature should prevent that a court makes abstraction of the particular requirements of financial services and contracts. Indeed, certain clauses which may seem at first disproportionate or unbalanced, at least within an individual and bilateral context, may be perfectly legitimate and even prerequisite mitigants within a more global financial context or within a group of contracts.

Non-negotiable clauses

The new prohibition further only applies to clauses which 'cannot be negotiated', which is broader than accession agreements. It will indeed need to be assessed whether the other party had an opportunity to influence the content of the contract, taking into account the economic balance of powers between the parties, regardless however of whether the opportunity to exert such influence was effectively used by that party. On the other hand, the fact that there were negotiations on certain aspects of the contract, will not necessarily prevent other clauses from being qualified as clauses which could not be negotiated.

> "You should keep track of the negotiation process to be able to demonstrate if a clause was negotiable or not."

This analysis will in particular be relevant if credit providers and other market participants use general terms and conditions which cannot be derogated from and where imposing such general terms and conditions on counterparties may become increasingly a balancing act.

LMA?

Loan Market Association (LMA) and other market standard agreements include several provisions which are not systematically subject to negotiations, if already negotiable. While the question is a legitimate one, the risk that certain of the standard terms of said documents would not be upheld for such mere reason, seems rather remote. Considering that such market standard documents are the end-product of consultations between various user groups and stakeholders of the particular industry and that the templates aim at establishing widely supported best market practices, it is difficult to see how they would constitute a manifest imbalance of rights and obligations. Furthermore, the legislator itself has indicated that for the assessment of the manifest imbalance, applicable common practices (*usages applicables / toepasselijke gebruiken*) should be taken into account.

Conclusion

Although it remains debated if the new prohibition on unfair clauses is applicable in a B2B financing context, it clearly fits in the legislator's broader intention to recognize certain legal principles aimed at protecting weaker parties. Standard provisions and documents may become increasingly important indicators for benchmarking what is to be seen as unfair, and this may necessitate parties to be increasingly mindful if imposing departures from the standard provisions and deliverables which at first sight may seem disproportional.

To mitigate the risk of a court ruling that a clause was non-negotiable, parties should be allowed the opportunity to review and negotiate all contractual terms and counterparties with no adequate inhouse expertise should seek legal assistance when negotiating their contracts. Recitals and preambles to a contract may further be useful to demonstrate the negotiation and review process. In anticipation of jurisprudence on the matter, you should in any case be mindful on how you negotiate your finance contract and in general be warry for clauses being presented as policy, 'non-negotiable' or simply 'must-haves', rather than having the rationale behind a clause explained.

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