New B2B law: insurance sector in the clear?

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Context

The Law of 4 April 2019 (the “B2B Law”)(1) introduced new mandatory rules that intend to procure that the key terms of contracts between businesses are fair and not abusive (the “B2B Fair Contract Rules”). Under the rules, unfair terms will be deemed to be null and void and thus unenforceable.

The B2B Fair Contract Rules apply to all businesses and to all types of contracts between them, irrespective of the law that governs the contract. However, for the time being, they do not apply to financial services contracts, including notably (re)insurance contracts. However, where (re)insurance contracts as such enjoy an exemption, it is a key question whether or not other types of contracts in the insurance sector can benefit from that exemption as well.

The B2B Fair Contract Rules, inspired by existing consumer protection (B2C) provisions, are included in the Belgian Code of Economic Law (the “CEL”) (2).

General features of the B2B Fair Contract Rules

Who do these rules apply to?

The B2B Fair Contract Rules apply to contracts to which each contract party is an ‘undertaking’ as defined in Book VI of the CEL, i.e. “any natural or legal person who pursues an economic goal on a long-term basis, as well as its associations“. No distinction is made based on size, nature or turnover. Thus, these rules are not restricted to SMEs.

Which contracts do the rules apply to?

All contracts between undertakings (as defined above), irrespective of the object, nature or form

of the agreement.

Excluded from the scope are financial services and public procurement agreements and the agreements further resulting therefrom.

Important to note, however, that the B2B Law provides the possibility for the Federal Government to explicitly extend in the future the scope of the B2B Fair Contract Rules (or some thereof only) also to all (or some) financial services contracts.

The effective date of the new rules is 1 December 2020 with immediate impact for the agreements that are entered into, renewed or amended after that date. For avoidance of doubt, the rules also apply when previously existing contracts are modified or (even tacitly) renewed after 1 December 2020.

Do the rules apply to contracts governed by foreign law?

The parliamentary documents that were introduced in Parliament make clear that the B2B Fair Contract Rules should be considered as being mandatory rules, i.e. rules that should apply even if parties have chosen another governing law than Belgian law. In a cross-border context, many different fact patterns can occur and this principle should be analysed on a case by case basis. However, it is unlikely that in most cases the impact of these rules can be avoided by choosing a more flexible national law other than Belgian law.

How should clauses be assessed?

First, a general transparency rule applies: all written contract provisions need to be drafted in a clear and comprehensible way. No specific sanction is envisaged in case of non-compliance with this rule. However, a lack of transparency can have an adverse impact on the assessment of the (un)fair nature of a clause.

Second, to assess B2B clauses on their fairness, the B2B Law introduces (a) a general open rule, (b) a ‘black list’ and (c) a ‘grey list’.

The general open rule states that each contract clause that, individually or taken together with other clauses, creates a significant imbalance between the rights and obligations of the contracting parties, is prohibited. It should be pointed out that so-called ‘core clauses’, i.e. clauses determining the actual object of an agreement and the balance between a price and the corresponding goods/services; are exempted from the general ‘fairness’ assessment, provided they are sufficiently transparent. The scope of the general rule is further limited to those clauses that are not included in the black list or grey list.

The black list of contract clauses are deemed to be unfair in any event (this presumption may not be rebutted), while the grey list of clauses are only presumed to be unfair unless proven otherwise. The presumption will be accepted to be rebutted if, taking into account the

circumstances and characteristics of the contract, the clause does not create a significant imbalance between the rights and obligations of the parties and if it is demonstrated that both parties truly wanted this specific arrangement. The latter of course will be subject to a judge's factual appreciation, leaving a material level of legal uncertainty for the parties.

What is the sanction for unfair clauses?

Unfair contract terms are prohibited and will be null and void. The contract itself will however remain binding for the parties, provided in the case at hand it can continue to exist and operate without the unfair terms or provisions.

B2B Fair Contract Rules applied to the insurance sector

Are insurance related businesses also undertakings as defined in the CEL?

Since the rules apply to all 'undertakings' as defined in the CEL, most or all insurance-related businesses should be caught by them, such as (re)insurance companies, insurance brokers, insurance agents, experts, claims representatives… As mentioned above, size does not matter; rules will be applicable without distinction e.g. between a large international brokerage firm and a small local insurance agent.

Do insurance contracts fall under the exclusion of 'financial services'?

The extent of the exclusion of 'financial services' is primarily determined by the definition thereof in the CEL: "any service of a banking or credit granting nature, insurance, individual pensions, investments and payments".

This means that insurance contracts concluded between undertakings are not subject to the new rules. Although reinsurance is not explicitly mentioned in the definition of financial services, it can be assumed that reinsurance contracts should also fall under the exemption. The exclusion of (re)insurance contracts is easily justifiable as Belgian sector specific legislation already provides for many mandatory provisions protecting the 'weaker' party in (re)insurance contracts. The added value of the application of the B2B Fair Contract Rules would therefore be limited. Such application could even be counterproductive by introducing questions of compatibility between different levels of regulation.

However, contracts between insurance undertakings, or between insurance undertakings and other undertakings, which do not relate to financial services (see above), will fall under the B2B Fair Contract Rules. For some types of agreements that are not really sector-specific it is fairly clear that they do not escape the rules: IT agreements, shareholder agreements, rental contracts … For a lot of more sector-specific contracts the answer may be less obvious: outsourcing arrangements, cooperation between (re)insurance undertakings among themselves or with banks, (re)insurance distribution, insurance intermediaries, customer agents, claims representatives… To what extent are these contracts the legal format for financial services and if

not entirely, which elements should prevail for the purpose of assessing the applicability of the exemption?

As mentioned above, the B2B Fair Contract Rules are mandatory law. Any contractual provision whereby parties exclude their application (or waive any rights resulting therefrom) will in principle be unenforceable (see however below in relation to the ‘grey list’).

Transparency rule

The transparency rule is applicable to written (sic) contractual clauses. In this context, it is relevant to note that the Belgian Insurance Law(3) requires a written contract for a cooperation between the insurance undertaking, the reinsurance undertaking and the ancillary insurance intermediary, the insurance intermediary or the reinsurance intermediary. A similar obligation can be found in the NBB rules on ‘outsourcing’ which require a written agreement between the (re)insurance undertaking and the service provider (e.g. accountancy, claims management, IT, internal audit, …).

General open rule of the prohibition of unfair terms

When assessing whether or not particular clauses are ‘fair’ when tested under the general rule, a court may take into account relevant ‘prevailing commercial practices’. Examples thereof in the insurance sector can include e.g. Incoterms (as developed by the ICC), model agreements on insurance brokerage and distribution between brokers and insurers (as drawn up by professional sectoral associations), and the principles of brokerage or certain rules of conduct (as issued by sector federations). However, it should be stressed that even if a particular term, condition or clause is widely used in a particular sector, this does not automatically mean that the term, condition or clause is not unlawful.

Impact of the black list

No proof can be given to rebut the presumption of unfairness of a provision included in the black list. Therefore, special attention needs to be paid to these blacklisted clauses when drafting or reviewing contracts. Examples include certain boilerplate clauses which may provide for a general waiver of recourse or contain an acknowledgement clause that is too strict. Note that also a combination of clauses which has the same objective and/or result as a blacklisted clause can fall under the prohibition.

Impact of the grey list

The grey list includes many provisions which are very common in insurance related B2B contracts, in particular, exoneration of liability clauses, unilateral amendment clauses, damage or indemnity clauses and clauses concerning the duration and tacit renewal of the contract.

Because the B2B Fair Contract Rules do not want to entirely exclude the basic freedom of

contract, parties can explicitly and deliberately opt for including into their contract a type of provision that is listed in the grey list. However, the question arises what elements exactly will need to be demonstrated to a judge to convince him that both parties truly wanted to include and accept such terms. Can a standard clause be sufficient stating that each term is a ‘specifically negotiated’ term, i.e. “is intended willfully and does not create a significant imbalance between the rights and obligations of the parties”?

Any questions on this topic? Feel free to contact us!

(1) Law of 4 April 2019 amending the Code of Economic Law with regard to abuses of economic dependency, unfair terms and unfair market practices between undertakings (Belgian Official Gazette 24 May 2019).

(2) Title 3/1 (Agreements concluded between undertakings) of the Code of Economic Law.

(3) Insurance Law of 4 April 2014 (Belgian Official Gazette 30 April 2014).