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Reform of the law of obligations - bill for new title VI

At the initiative of Minister Koen Geens, the basic legislation of Belgian law is being revised in its entirety. In our newsflash of 8 December 2017 we already noted that anyone interested in doing so can examine the bills to adapt the Civil Code with regard to property law, the law of obligations and the law of evidence on the website of the FPS Justice.

One of the parts concerns obligations and contract law, for which a new book VI is being created in the new Belgian Civil Code. This will have a major impact, given that this directly intervenes in contractual relations, e.g. between enterprises and with the government.

With this reform, the Minister and a working group of external experts wish to offer a response to the obsolescence of the present Civil Code and fill in a number of gaps in the law. The Civil Code Reform Commission has therefore drawn up a draft reform of the law of obligations.

The explanatory memorandum states that the commission has attempted to strike a balance between the right of self-determination of the parties and the role of the judge as protector of the interests of the weaker party and of the general interest. The new book VI will consist of three titles: a first title with introductory provisions, a second on the sources of the law of obligations, inter alia the contract and the extra-contractual liability law, and a third on the general regime of the obligation itself.

These three titles bring with them the following innovations (amongst others):

Negotiations (art. 18 et seq.), including duties to provide information (art. 20) and precontractual liability (art. 21)
The preference and option contract (art. 28 and 29)
The abuse of circumstances as general vitiated consent (art. 37 and 41)
Extrajudicial invocation of the invalidity of the contract (art. 62, third paragraph)
Express prohibition on abuse of right and the sanction (art. 7 and 76)
Unforeseeability (change of circumstances) (art. 77)
The extension of the contract (art. 80) and the (tacit or not) renewal thereof (art. 81)
The general release clause (art. 92)
Unilateral, extrajudicial dissolution at the risk of the one who dissolves (“anticipatory breach”) (art. 93 and 96)
The consequences of dissolution (art. 98) and partial dissolution (art. 99)
Price reduction as sanction (art. 101)
General regulation of the direct claim (art. 113)
Post-contractual obligations and clauses (art. 117)
General regulation of restitution (art. 118-127)
Joint and several obligations (art. 242-243)
The transfer of a debt (art. 261-266) and of a contract (art. 267)
Early formal notice of default (art. 306)
Unilateral waiver of claims (art. 327)

1. The introductory provisions

The first title of book VI contains several introductory provisions.

For example, there at last comes a legal definition of the obligation, namely a legal relation [*rechtsband*] on the basis of which a creditor can demand from a debtor the execution of a work and can thereby, if necessary, make use of enforcement methods.

Then this title also deals with the natural obligation and it lists the sources of obligations. These sources are: a juristic act, a quasi-contract [*oneigenlijk contract*], extra-contractual liability and the law. The notification and the unilateral juristic act that must be communicated are also dealt with. After an article on representation, for the first time the prohibition on abuse of right is expressly treated.

2. The sources of obligations and the contract in particular

The second title concerns the sources of obligations, namely juristic acts (the contract and the unilateral juristic act) and juristic facts (quasi-contracts and extra-contractual liability).

The first chapter of the subtitle juristic acts thus concerns the contract in general. After a definition of the contract, the types of

contracts are discussed. Attention is also devoted here to the framework contract, the contract of adhesion [*toetredingscontract*], the contract with a consumer and a multi-party contract.

Then the formation of the contract is dealt with in section 2. In the part on negotiations, along with freedom of contract and the freedom to negotiate, the duties to provide information and precontractual liability are also covered. Then the new code focuses in on the doctrine of offer and acceptance. There is also an article devoted to general terms and conditions, inter alia the requirement of actual knowledge by the other party, or at least the possibility of the other party to have actually taken cognisance of the other party's general terms and conditions and accepted them. The new article 27 provides amongst other things that if offer and acceptance both refer to different general terms and conditions, the contract is nevertheless concluded, and that both sets of general terms and conditions form part of the contract, with the exception of the incompatible clauses. However, the contract will not come into existence if a party indicates in advance expressly (and not by means of general terms and conditions) that it does not want to be bound by such a contract, or within a reasonable period of time after the meeting of minds the other party communicates that it does not want to be bound by such a contract. The preference and option contracts are also discussed.

A second subsection concerns the validity requirements of the contract. Along with the familiar cases of vitiated consent such as error, fraud, violence and prejudice [benadeling], the abuse of circumstances is also discussed. With this the legislature is trying to offer protection to the party that finds itself in a weaker position. Subsection three concerns the invalidity of agreements, inter alia the grounds, the classification, the entry into effect, the prescription, the confirmation, the consequences and the partial character of the invalidity.

Section three concerns the interpretation and the characterisation of the contract. There is also a doctrine on the characterisation of mixed agreements and on the re characterisation of the contract if the characterisation given by the parties for the contract is incompatible with its own clauses or with the compulsory legal rules or rules of public order.

Section four concerns the consequences of the contract between the parties, namely the binding force of the contract, with definitions for the best-efforts obligation and the result obligation, the prohibition of abuse of right, and the execution in good faith. There is also an article on the change of circumstances (unforeseeability). Then the term of the contract is addressed, including the renewal. The ownership-transferring consequence of specific contracts is also regulated, inter alia the risk transfer and the delivery obligation.

Section five concerns non-fulfilment of the contractual obligations and its sanctions. This section deals with the following: specific performance, the right to remedy of the damage, including the damages clause and the release clause, dissolution due to non-fulfilment, inter alia dissolution by notification of the creditor at his own risk (extrajudicial dissolution) and irregular or abusive extrajudicial dissolution, and the consequences of the dissolution, the defence of non-performance, and the price reduction. The consequences of non-fulfilment that is not imputable to the debtor are also treated.

Section six concerns the consequences of the contract for third parties. Amongst other things, the surety and the third-party beneficiary clause are treated, as well as the direct claim and third-party complicity in the disregard of a contractual obligation.

Section seven concerns the extinction of the contract. For example, the contract will end through the extinction of the obligations, through judicial or extrajudicial nullification, through the cancellation of the contract by mutual agreement, through unilateral cancellation, through judicial or extrajudicial dissolution due to non-performance and through the impossibility of performance or other cases defined by law. For the first time the post-contractual obligations and post-contractual clauses are also dealt with, i.e. survival after termination of the contract. The duty of restitution is also treated.

A second (and much shorter) chapter of the juristic acts subtitle concerns the unilateral juristic act as a source of obligations.

The first chapter of the next subtitle on the sources of obligations (juristic facts) deals with quasi-contracts, in particular the management of another person´s affairs, undue payment and unjustified enrichment.

A second chapter concerns extra-contractual liability. Given that this forms part of yet another renewal of the civil law scheduled for 2018, the articles here are provisionally reserved without concretisation.

3. The general regime of the obligation

The third title concerns the general regime of the obligation.

After a first introductory subtitle, the second subtitle concerns the modalities of the obligation, namely the conditional obligation and the time-bound obligation.

Then in a third subtitle the obligations with plurality of objects or subjects are treated, including the cumulative obligation, the alternative obligation, the obligations with plurality of subjects, such as the divisible obligation, joint and several liability amongst debtors, the indivisibility amongst debtors and the joint and several obligations, and joint and several liability and indivisibility amongst creditors.

Then the transfer of obligations is dealt with. A first chapter goes into detail on the transfer of the debt claim, before dealing with the transfer of debt and the transfer of the contract.

A following subtitle concerns the fulfilment of the obligation, in particular the payment. The grace period is also treated here. With regard to the special provisions for monetary obligations, the various types of interest are explained (remuneration interest, late-payment interest and compensatory interest) and the principle of capitalisation. Payment with substitution / subrogation is also treated here.

Subtitle six deals with the non-fulfilment of the obligation, including a list of the sanctions (the right to specific performance, the right to remedy of the damage and the right to suspend the performance of one´s own obligation). A second chapter concerns the imputability of the non-fulfilment, including definitions of non-imputability, force majeure, negligence and the liabilities for the fault of auxiliary persons and for defective auxiliary materials. The formal notice of default is also dealt with. Then chapters are devoted to the various sanctions.

In subtitle seven the measures to protect the rights of the creditor are addressed, namely the indirect claim and fraudulent conveyance [*pauliaanse vordering*].

Finally, in subtitle eight the grounds for extinction of the obligation are treated, namely the payment, the resolutory condition or the extinguishing time limit, discharging prescription, novation, remission or unilateral waiver, setoff, lapse as a result of the disappearance of the object, merger of debts and the other cases that the law or the contract provides for. These grounds of termination are then dealt with in the new chapters of this subtitle.

Minister Koen Geens is organising a public survey on these new provisions. Everyone can give feedback until 1 February 2018 via bwcc@just.fgov.be. The legislature will then be able to take the input into account when drafting the final bill which will be submitted to the Parliament.

Other bills concern the law of property (Book II) and the law of evidence (Book VIII). The Schoups firm is following them closely and will keep you informed about further developments.

For more information on this topic, you can consult Siegfried Busscher (author and Private Construction Law unit head).

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