

Contract Price Revisions

Against the backdrop of the Covid-19 pandemic and now the Russian invasion of Ukraine, unprecedented global demand for raw materials and skyrocketing energy and transport prices are having a considerable impact on supply contracts and the prices agreed therein, putting suppliers under intense cost pressure. Suppliers are also increasingly facing demands for price increases from their own subsuppliers. As a consequence, many suppliers are seeking to renegotiate their supply contracts with their customers in order to avoid heavily reduced profit margins or even losses.

The present newsflash lists some points of attention for suppliers bound by supply contracts governed by Belgian law who are considering to seek a price revision.

1. PRICE REVISION CLAUSE IN SUPPLY CONTRACT AND/OR IN GENERAL TERMS & CONDITIONS OF SALE

First, the supplier should take a close look at the **supply contract** and at the supplier's **General Terms & Conditions of Sale (GTCS)** if the latter have been accepted by the customer and thus also apply to the contractual relationship. If the supply contract and/or the GTCS contain a **price revision clause**, the supplier can invoke that clause to push for a price increase, provided of course that the conditions for a price revision under the aforementioned clause are met.

If the supply contract and GTCS do not contain a price revision clause, they might at least contain a clause on **force majeure**. However, it is unlikely that a price increase of raw materials, energy, etc. in 2022, even in the context of the Covid-19 pandemic or now the Russian invasion of Ukraine, would be considered as force majeure events under Belgian law. Indeed, force majeure is interpreted as the occurrence of an event outside of the control of the parties that prevents a party from fulfilling a contract. Rising prices of raw materials, energy etc. do not prevent a supplier from fulfilling his contract, they just make his performance of the contract more burdensome from a financial point of view.

In the absence of a price revision clause in the supply contract and/or in the supplier's GTCS, the question has arisen whether the supplier could invoke so-called "**hardship**" to negotiate a price increase with his customers. Under Belgian law this is known as "*imprevisieeler*" / "*théorie de l'imprévision*". Hardship is intended to cover cases in which unforeseen events occur that fundamentally alter the equilibrium of a contract resulting in an excessive burden being placed on one of the parties involved. Unfortunately, the Belgian Civil Code does not contain any provision on hardship yet which is why the majority of case law and legal commentators agree that hardship is not at present a valid legal basis under Belgian law to argue for a revision of a contract clause.

2. VIENNA CONVENTION ON THE INTERNATIONAL SALES OF GOODS

The application of the **Vienna Convention on the International Sales of Goods (CISG)** could offer a solution if the supplier and the customer are located in different countries which have ratified the CISG (e.g., Belgium, Brazil, Canada, Japan, United States). Article 79 of the CISG provides for a broad definition of force majeure. It states that “*a party is not liable for a failure to perform if he provides that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.*” Force majeure under the CISG is thus interpreted more broadly than force majeure under Belgian law and is considered to also include hardship. Therefore, Article 79 of the CISG could be invoked as the legal basis for a request for a price revision by the supplier.

However, parties are free to exclude in their contract or in their GTCS the application of the CISG or to derogate from any provision of the CISG. In practice, supply contracts and GTCS quite often exclude the applicability of the CISG. This will have to be checked on a case-by-case basis.

3. PUBLIC WORKS, SUPPLY OR SERVICE CONTRACTS

In case of **public contracts** entered into following a **public procurement procedure**, parties in first instance can resort to (i) price revision clauses based on Article 38/7 of the Royal Decree of 14 January 2013 laying down the general rules on the enforcement of public contracts (**RD GRE**), but they can also resort to (ii) review clauses relating to unforeseeable circumstances in respect of a contractor or in respect of a contracting authority based on, respectively, Articles 38/2 and 38/9 of the RD GRE, (iii) a *de minimis* review of the public contract by virtue of Article 38/4 of the RD GRE or (iv) a non-substantial modification of the public contract by virtue of Articles 38/5-6 of the RD GRE. In particular for contracting authorities responsible for the execution of a public contract, (v) a review clause based on Article 38/10 of the RD GRE could also provide a solution to review the public contract if the contractual balance of this contract is disrupted in favour of the contractor for any reason beyond the control of the contracting authority.

When the situation so requires, both successful tenderers and contracting authorities could invoke these review clauses to renegotiate public contracts or even to enforce a review of these contracts before the competent courts. However, each review clause has its own conditions that must be fulfilled, and, in addition, there are general conditions that require strict compliance (e.g. informing the contracting authority in writing and submitting a substantiated justification within the prescribed time-limits) in order to successfully invoke these review clauses. Moreover, parties may deviate from some of these review clauses provided that a contractual equivalent is provided. Each public contractual relationship thus demands a case-by-case analysis.

We also flag that ongoing discussions regarding the application of certain review clauses cannot be invoked to slow down, interrupt or not resume the execution of the public contract.

VAN BAEL & BELLIS

How can VBB assist? VBB would be pleased to assist with:

- An analysis of your existing supply contracts and GTCS as to the presence of a price revision clause and/or a clause confirming or excluding the application of the CISG. If you are a **supplier**, we can assist you in enforcing these clauses. If you are a **customer**, we can assist you in verifying the enforceability of these clauses;
- If you are tendering (for) or are executing a **public works, supply or service contract**: drafting the tender documents and the public contract including the appropriate review clauses, an analysis of the tender documents / public contract in execution in the light of your specific situation, an assessment as to which review clauses could be applied as well as (contesting) the enforceability of review clauses;
- Drafting of price revision clauses for future supply contracts or as addenda to existing contracts; and
- Any other queries you may have regarding the above.