



Wouter Lauwers

Wouter has more than 25 years of experience in corporate and commercial law and M&A. For well over a decade, Wouter has been a member of the Global Japanese Practice, which he co-heads for KPMG Belgium and he is a permanent member of the KPMG EMA GJP Steering Committee.

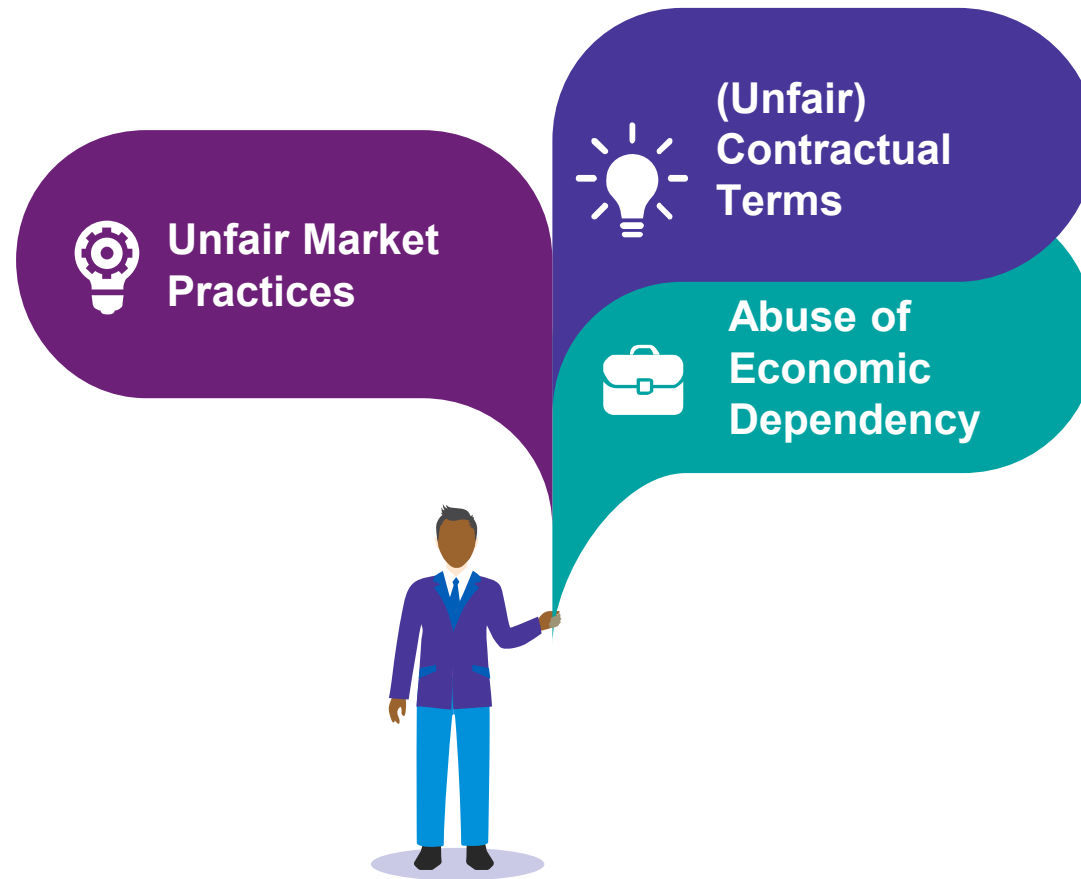
Wouter serves a large number of Japanese clients active in a wide variety of industries and sectors such as chemicals, biomedics, automotive, airconditioning industry, pharmacy, internet and telecommunication, steel and aluminum industry, semi-conductor industry, transport.



The B2B Legislation:

The Law of 4 April 2019

Introduction: The Law of 4 April 2019 (B2B Law)



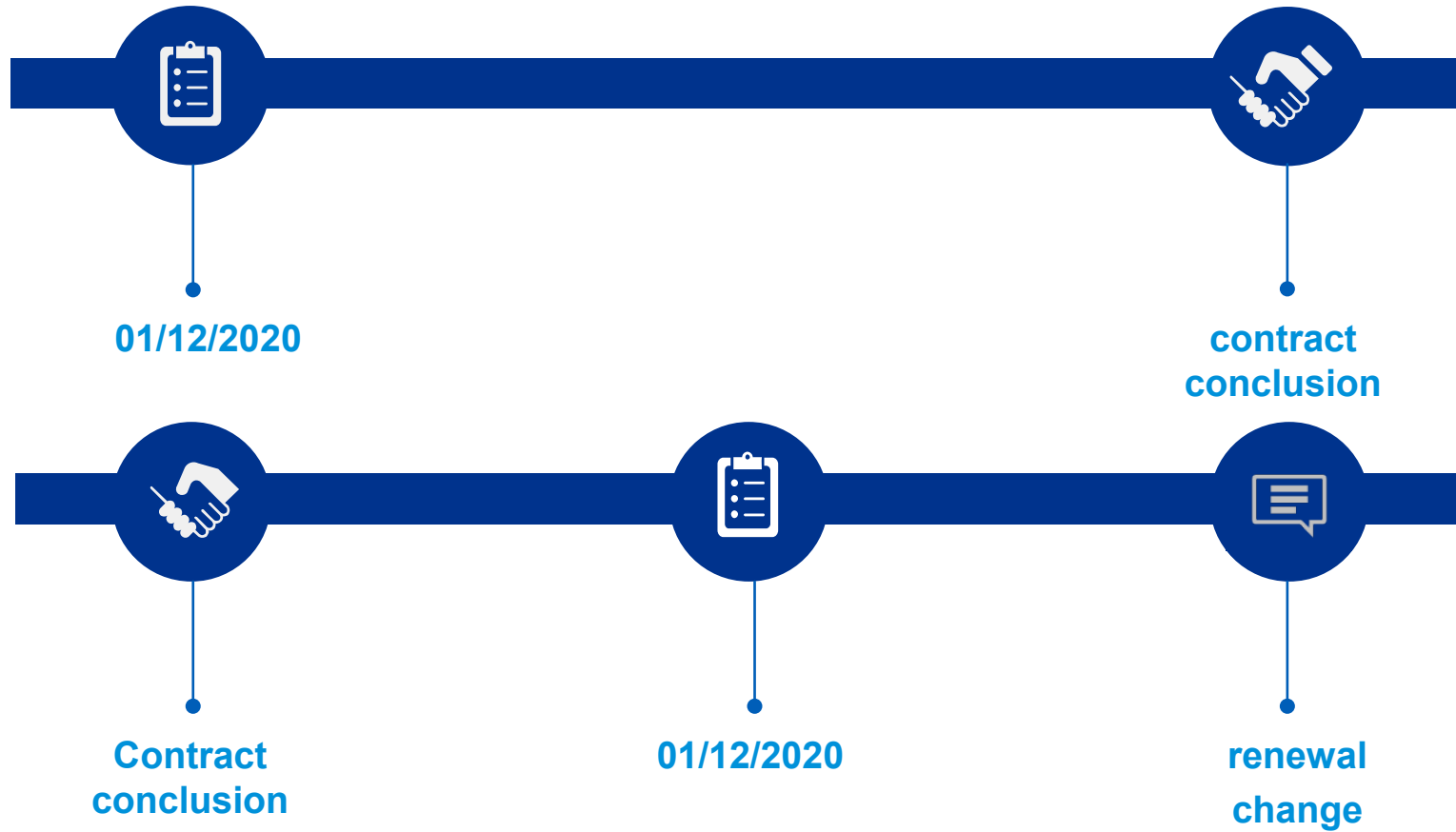


(Unfair) Contractual Terms : scope

(Unfair) Contractual Terms: scope

- Contracts between “businesses” (B2B, “business contracts”)
- **All** businesses
 - a business:
 - Every physical or legal person who, in a sustained manner, endeavours an economic goal, as well as its “associations”
 - regardless of their nature or size (so *not* limited to SME’s)
- **All** (types of) contracts, **with the exception of:**
 - Financial services
 - Public procurement contracts and contracts that result from them

(Unfair) Contractual Terms: entry into force and consequences

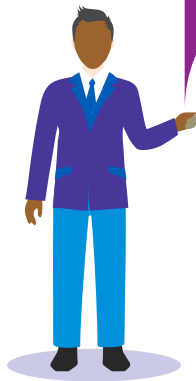




Contractual Terms : the general principle

Contractual terms: general principle

**The Transparency
Rule : business
contracts have to be
clear and
understandable**



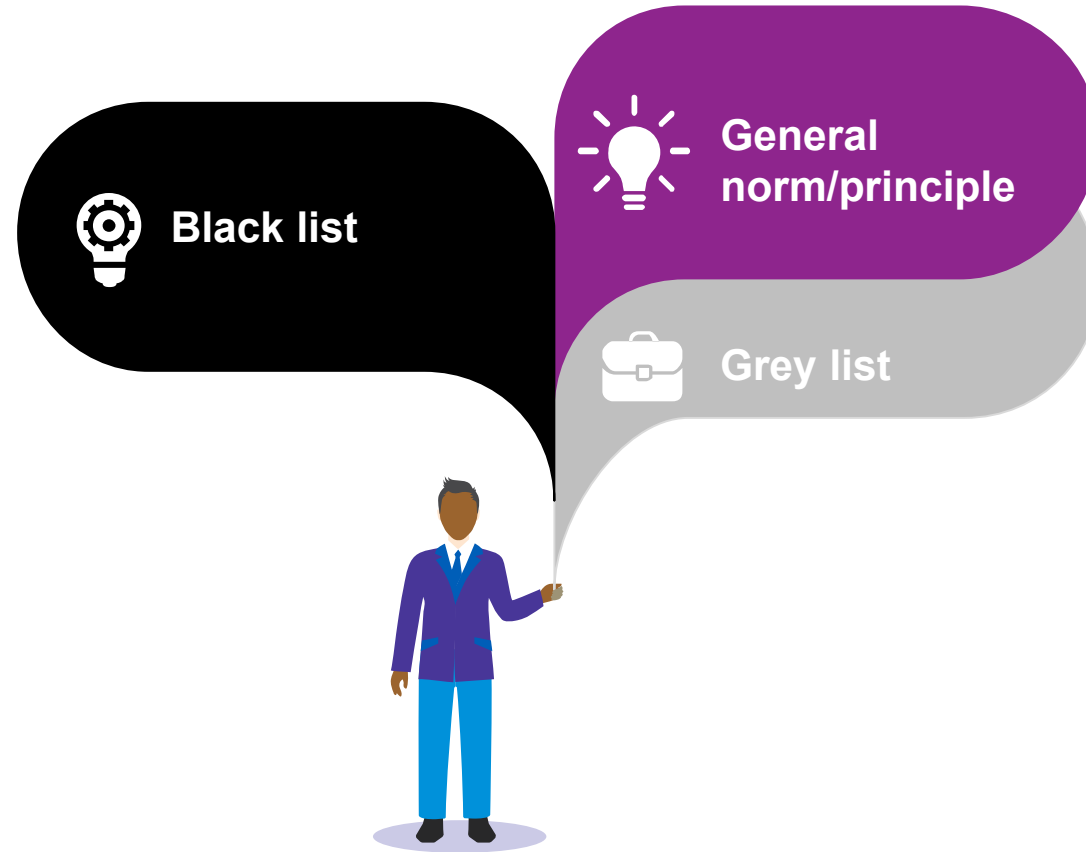
Contractual Terms : transparency principle

- Contracts between “businesses” have to be drafted in a clear and undubious way
- This applies also to the so called ‘core-terms’ of the contract (i.e terms that pertain to the object of the contract)
- Two aspects :
 - Information duty on contractual terms
 - Contents : clear & undubious
- Sanctions :
 - Nullity
 - Tortuous liability (precontractual liability)
 - Interpretation rules

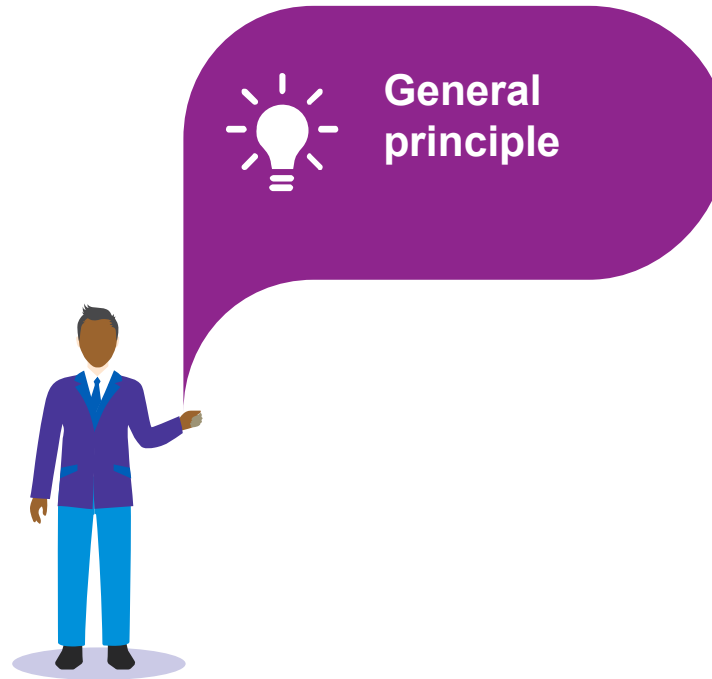


Unfair (contractual) Terms

Unfair Terms: Overview



Unfair Terms: the general norm/principle



Unfair Terms: "catch all"

- **Unfair and thus prohibited** are:
 - Each term (/clause) that, in itself or taken together with one or more other terms, creates a **manifest imbalance** between the rights and the obligations of the contracting parties
- **Legal imbalance**
 - not: economic imbalance (cf. core-terms, pricing and counter-performance)

Unfair Terms



Unfair Terms : the black list (art. VI. 91/4 CEL)

Are **unfair** and (thus) **forbidden**:

- 1) the term that creates an irrevocable obligation of the other party while performance of the obligations of the business is subject to a condition of fulfillment which depends solely on the will of that business
- 2) the term that gives one of the parties the unilateral right to interpret any term of the contract
- 3) the term that obliges the other party to, in the event of a dispute, waive any means or redress against the business
- 4) the term that establishes irrefutably the knowledge or acceptance of terms which that party had not been able to become acquainted with prior to the conclusion of the contract

Terms on the black list are **null and void at all times**

Unfair Terms: examples



“Party [X] has to pay a warranty amounting to 2.500 Euro when at the sole discretion of Party [Y] the usage of Party [X] is deemed abnormally high”



“Party [X] has to pay a warranty of 2.500 Euro when based on regular checks, the usage of Party [X] is twice as high as compared to the same timeframe in the previous year”

Unfair Terms: examples



“The buyer irrevocably desists of all and any claims against the seller in case of late delivery of the goods”.



“The parties agree that the delivery terms of the goods are indicative only and not binding. The seller is not liable in case of late delivery except if the late delivery is caused exclusively by the seller’s deliberate or gross error”

Unfair Terms



Unfair Terms : the gray list (art. VI. 91/5 CEL)

Unless evidence of the contrary is provided, the following clauses are **presumed** being unfair and forbidden : terms that:

- 1) give a party the right to unilaterally modify, without a valid reason, the price, characteristics or terms of the contract
- 2) limit the means of evidence a party can rely on
- 3) which affect the duration of the contract :
 - terms that tacitly extend or renew a fixed-term contract, without providing a reasonable notice period
 - terms that bind the parties without providing a reasonable notice period
- 4) place, without counter-performance, the economic risk on a party if that risk would normally be borne by the other party or by another party to the contract
- 5) inappropriately exclude or limit the legal rights of one party in the event of total or shared non-performance or defective performance by the other business of any of its contractual obligations
- 6) discharge a party from its liability for willful misconduct, its gross negligence or that of its employees, except in case of force majeure, for the non-performance of essential obligations that are the subject matter of the contract
- 7) In the event of non-performance or delay in the performance of the other party's obligations, fix damage amounts that are manifestly disproportionate to the harm that may be suffered by the other party

Unfair Terms : the grey list

Proof of the contrary:

- no manifest imbalance between the rights and obligations of the parties
- the legal assessment has to be done *in concreto* at the time of the closing of the contract
- taking into account the specific consequences of the contract
- Also taking into account:
 - the specific nature of the good or service,
 - the sector
 - the commercial practices
 - the entire context and commercial relations

Unfair Terms: examples



“Only and to the extent the complaint has been found justified in writing by the seller will the payment obligation for the disputed part be suspended.”



“A complaint by the buyer can only suspend its payment obligation to the extent of the disputed part.”

Unfair Terms : examples

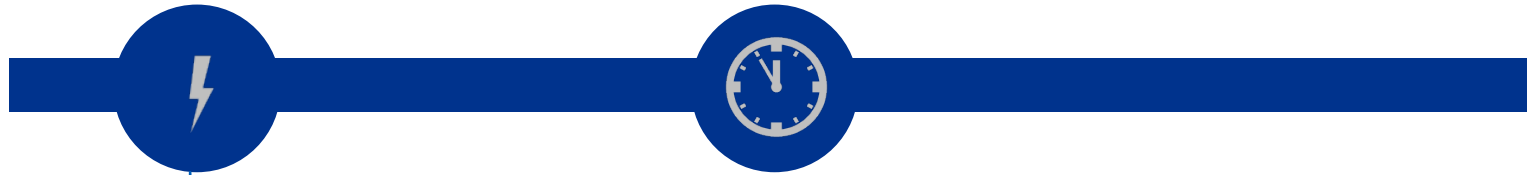


“The contract between the parties has a duration of 5 years. Unless the contract is duly and timely terminated by Party [X], the duration of the contract will be automatically extended by 1 year.”



“The contract between the parties has a duration of 5 years. Unless the contract is terminated by Party [X] one month prior to the expiry date, the duration of the contract will be automatically extended by 1 year.”

Unfair Terms: tips & tricks

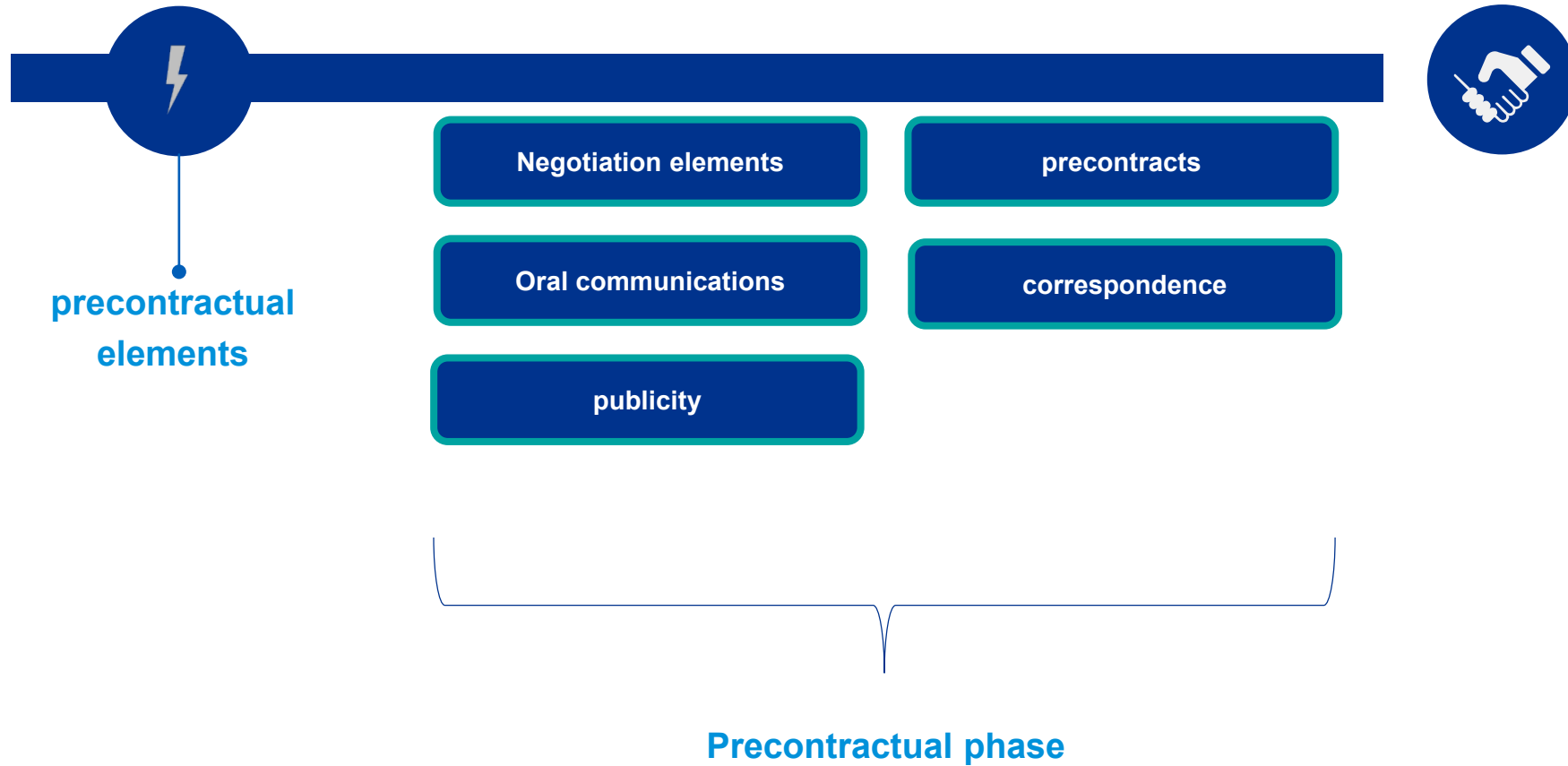


tips & tricks



- be attentive to the precontractual setting
- the preamble : more important than ever
- extra *boilerplate*-clause(s)
- divisibility clause
- applicable law (?)

Unfair Terms : precontractual elements



Entire Agreement Clause

Unfair Terms : boiler-plate clause(s)



boilerplate-clause

“Each clause truly reflects the will of both parties and does not give rise to a manifest imbalance between the rights and obligations of the parties”

Unfair Terms : divisibility clause



Divisibility clause

*“In case one or more clauses of these terms & conditions are, partially or entirely, null and void or unenforceable, then this does not impact the validity or enforceability of the other clauses or of that part of the clause that is not null and void or unenforceable. In such case, the parties shall negotiate **in good faith** to **replace** the null and void or unenforceable (part of) the clause by a lawful and enforceable clause that comes as close as possible to the goal and scope of the initial clause”*

Unfair Terms : applicable law clause



“The present contract and contracts that are concluded as a result of it are in all aspects, such as but not limited to its coming to existence, existence, validity, interpretation, execution and non-execution or late or defective execution, enforceability or termination, subject to [x] law”



- **identical rules (Dutch, Fr. and Ger.)**
- **specific mandatory laws (contract terms legislation?)**



Distressed M&A

Agenda



Distressed M&A

De Standaard Meest recent Binnenland Coronacrisis Meer

HOME > BIZ > ECONOMIE

 economisch nieuws

VanHaren neemt 40 Brantano-winkels over, geen overname van personeel

11/09/2020 om 11:21 door evg, pdd, ast



3°C 34km 1.02%

OVERZICHT ECONOMIE EN GELD

ECONOMIE

MIJN GELD

FINANCIËLE MARKTEN

De Standaard Meest recent Binnenland Coronacrisis Meer

ONDEKZUUK

Een op de drie bedrijven komt in ademnood

Zowat 103.000 bedrijven die vóór de coronacrisis nog gezond waren, staat het water aan de lippen. Dat zijn er volgens het VBO 20.000 meer dan in september. Daardoor dreigen de komende jaren tot 50.000 faillissementen.

Stijn Decock
Dinsdag 26 januari 2021 om 3:25 uur



Het weggeven van toerisme doet niet alleen de grote touroperators pijn, maar ook de kleinere toeleveranciers, zoals de chocolatiërs en de koetsiers in Brugge. © Fred Debrock

DINSDAG 26 JANUARI 21:02:25

 **Business AM**

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NL Typ om te zoeken

E5 Mode voor tweede keer dit jaar op rand van faillissement

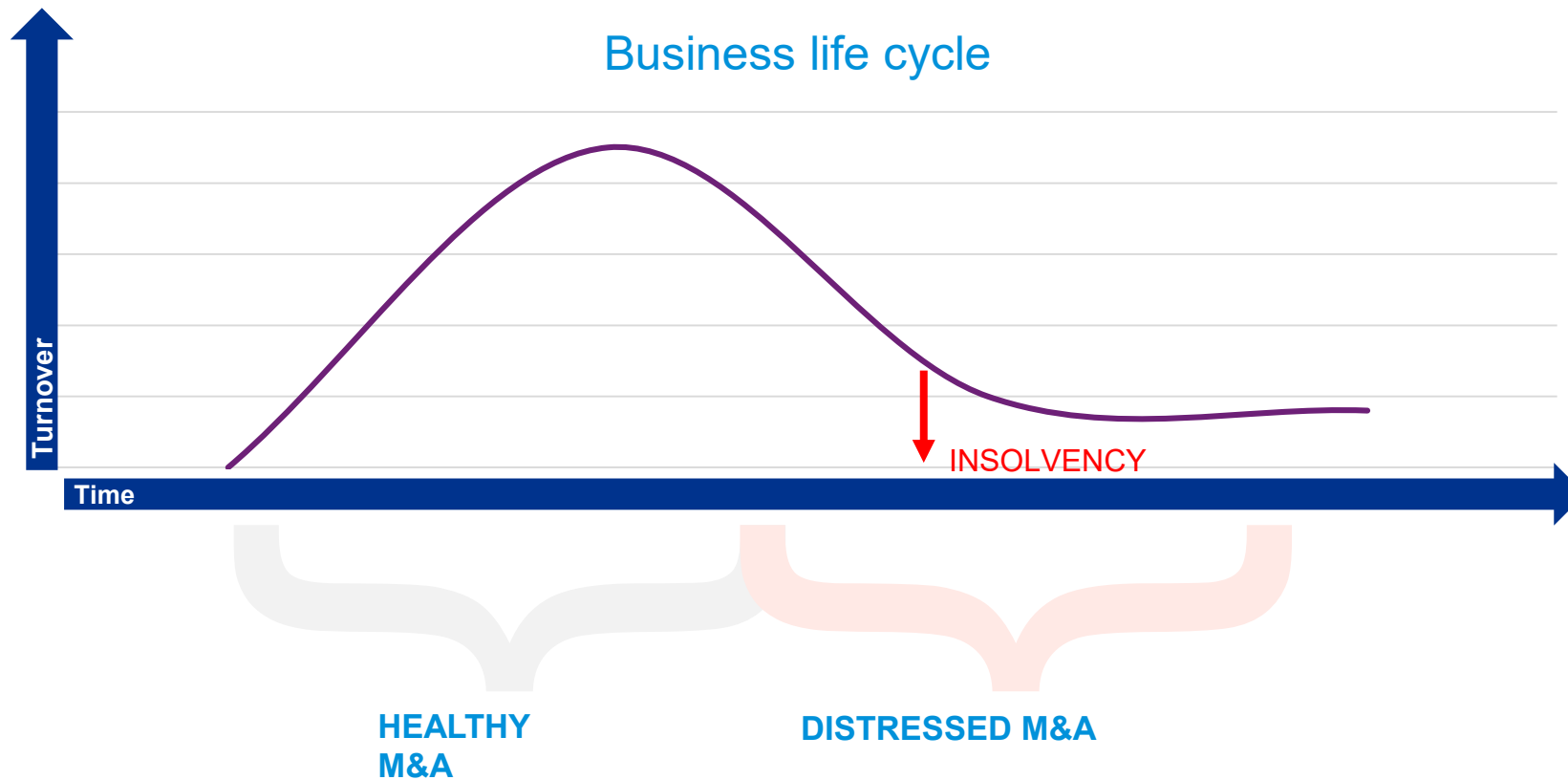
BUSINESS 21/11/2020 2 min lezen door Ruben Van Lent



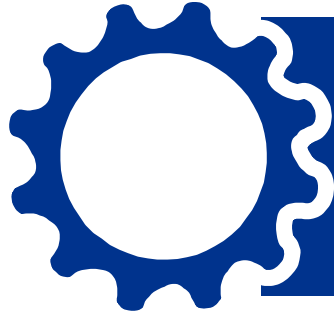
Stefan Grommen
Update ma 08 jun 2020 11:17
ma 08 jun 2020 09:59

Swissport vraagt faillissement aan voor bagage- en schoonmaakpoot op Brussels Airport: 1.500 banen op de tocht

Distressed M&A

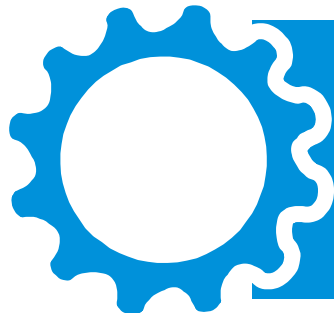
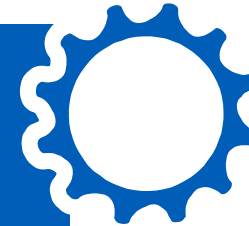


Distressed M&A



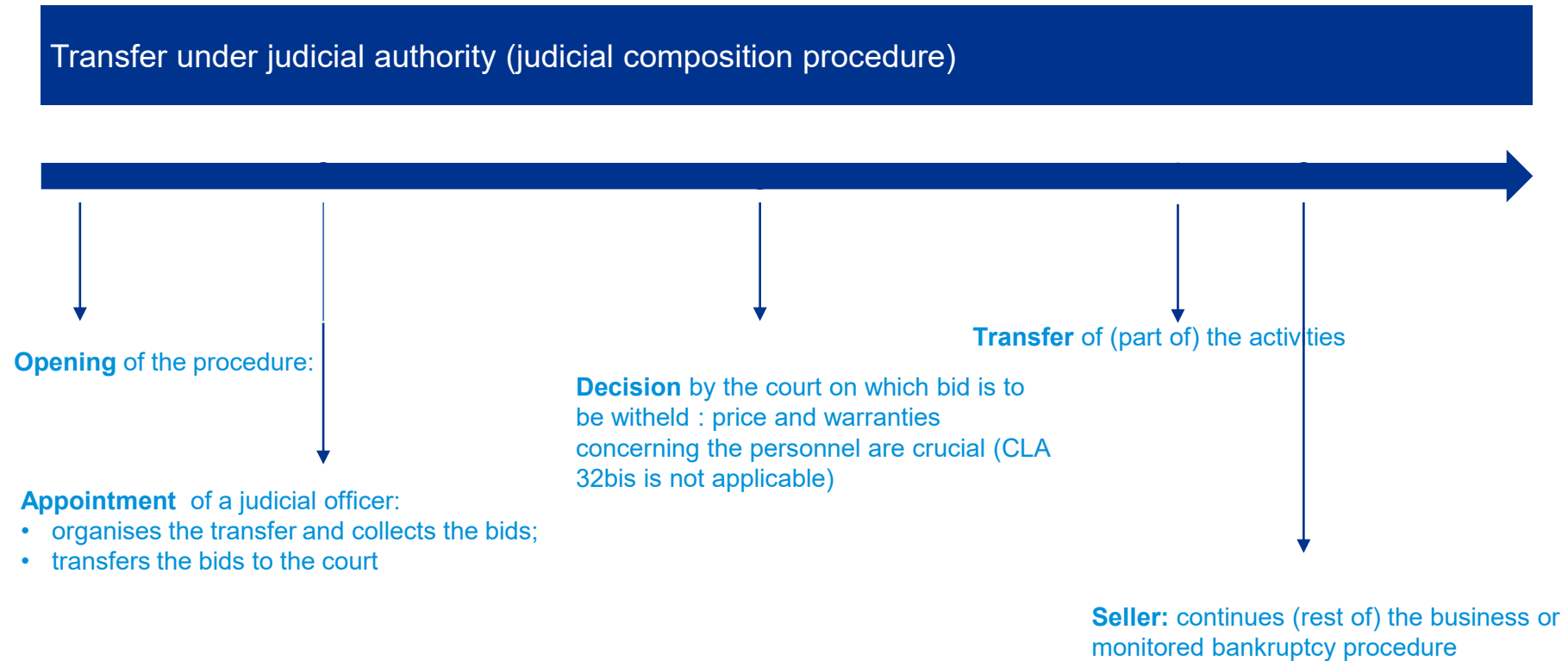
[Regular M&A process]

Transfer under judicial authority
(judicial composition)



Acquisition out of a bankruptcy

Distressed M&A



Distressed M&A

Acquisition out of a bankruptcy (procedure)

Bankruptcy and appointment receiver. Bankruptcy proceedings are proceedings aimed at the liquidation of the assets and disperse the proceedings amongst the creditors.

The receiver will sell the assets (under the supervision of the court).

If the Court agrees, the receiver can sell the business in going concern via an “asset” deal.

Attention points:

- Few (or no) Reps&Warranties
- Business is sold “as is”;
- Special formalities have to be met to transfer a business lease, intellectual property, etc.

The assets are sold without the debts

Closure bankruptcy proceedings



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