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Payment periods disallowed under the Late Commercial Payments Act: inappropriate voidness

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We are accustomed to hearing the assertion that a bilaterally agreed clause contravening the statutory rule setting a time limit for commercial payments is void ab initio. But is this case when it is the supplier who has the bargaining power? And, in general, does such an assertion make sense?

The circumstances that follow, and that we use as a basis for the treatment of the problem that we formulate, are those of a real case and, in my opinion, by no means rare. A large service supplier (in fact, an IBEX 35 company) wants to enter into a contract with another company for the supply of services and is willing to accept payment periods in excess of the 60 days under the Late Commercial Payments Act 3/2004 of 29 December[1] (version 11/2013) provided that some type of guarantee is provided, the specifics of such being immaterial. Would this clause be void under art. 4(3) of said Act 3/2004 ("the Act"), which allows payment periods of 30 days to be extended by agreement of the parties, with the limit that "in any case, a period of more than 60 calendar days cannot be agreed to"? Our case appears to fall within the scope of the Act (arts. 1 and 3). Let us suppose that in cases of the type described above, it is the supplier who has the strongest bargaining position, or at least is a contracting party who is in a position of bargaining equilibrium with its counterpart.

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[1] *Ley 3/2004, de 29 de diciembre, por la que se establecen medidas de lucha contra la morosidad en las operaciones comerciales.*

The Judgment of the Supreme Court ("STS") of 23 November 2016 is the only one of its kind to have dealt with the type of prohibition and the nature of the appropriate penalty in respect of payment periods agreed in contravention of (today) art. 4(3). The judgment, although pronounced directly on the matter, is not very decisive because in fact it neither clarified the relationship between art. 4 and 9 of the Act, nor delimited the reason (*ratio*) for the former rule in relation to the penalty of voidness. Because what would in fact apply according to the judgement is the (partial) voidness under art. 6(3) of the Civil Code, since the agreement would have been concluded in contravention of a mandatory rule. No balancing should be made on the grounds of art. 9, nor should the scope of voidness be restricted on the basis of the doctrine of estoppel. Although the case dealt
(2) with by the judgment was subject to an earlier version of the Act, and the court appears to mix up the 30- and 60-day payment periods, it seems certain that the judgment held that partial voidness would be appropriate with a reduction in the scope of the payment period up to the limit of what would have been correct to agree to as an extension of the payment agreement. The result of the court decision is very formalistic and rather superficial. Not only because it fails to observe the necessary nuances, but also because it actually has perverse effects, since the parties (or the party that imposes the deadline) can agree on payments in excess of 30 days without having to seek disincentives, since the agreement will in any case last until the sixty days that an extension agreement could have lasted; what incentive can the party concerned have to agree only to statutory time limits, if it can also achieve its effect by agreeing to longer unlawful time limits?

The doctrine of voidness must be handled with care at the risk of producing blind and counterproductive results. To begin with, this obvious consideration: if it were voidness under art. 6(3) of the Civil Code, the two parties (at least) would have standing to claim voidness. And it
(3) is already odd that the debtor who makes (as the case may be) his superiority prevail, by imposing disproportionate payment deadlines on the creditor, should be able to invoke voidness; nor can we see how a debtor, such as the one in our case, who does not make his bargaining power prevail to extend the period of compliance, but in fact enjoys this extraordinary period, could have an interest in seeking voidness.

If we consider the wording of art. 4(3) of the Act, nothing impels us to yield to the penalty of voidness. The rule confines itself to stating that a period of more than 60 calendar days "cannot be agreed to". But there is no need to consider that this piece of legislation contains a prohibitive rule within the meaning of art. 6(3) of the Civil Code. It is much more coherent, and the final impact more limited, to propose that the penalty for an infringement thereof is not voidness but that found under art. 5 for late payments (*mora debitoris*). Indeed, the rule can be rephrased in
(4) these terms: *in any case, the debtor will be in default when, after 30 days, the agreed payment deadline has elapsed, which may not exceed 60 days*. Since the default penalty "exhausts" all rights in need of protection, the creditor cannot bring an action to void the time limit, but only demand payment of default interest, notwithstanding any agreement to extend the time limit beyond 60 days. Glossing over art. 6(3) of the Civil Code, we can then say that *the Act has provided for a penalty other than voidance in the event of infringement*. And in this regard, art. 4(3) differs from art. 9 of the Act, which explicitly refers to the voidance of contractual clauses.

(5) It seems to us certain that the agreement referred to as the starting point of this paper cannot be void. It is certain that the debtor - favoured by the extension of the deadline - will not claim partial voidness and it is certain that the supplier cannot claim a reduction of the payment period to the statutory maximum.

(6) There is a first restriction to this effect, derived from the delimitation of the purpose of the rule. One need only read the Explanatory Memorandum to Directive 35/2000 to realise that the purpose of this rule is to reduce the defaulting options of the debtor who is in the position of imposing long payment periods, and that the creditor is the addressee of the protection provided by the rule. Even if art. 4(3) should not provide a penalty other than voidance in the case of an infringement, a penalty of voidance of a contract cannot be predicated when the effect of such voidance would not produce any legitimate advantage to the party favoured by the *ratio* of the rule. The effect of voidance cannot be proclaimed when the person who in the abstract is the addressee of protection was in a position to have protected himself and the "unlawful" agreement is the result of a business choice which he was not compelled to consent to if he had not been interested. As the rule of art. 4(3) does not protect public policy expectations of public order, but of the contractual party concerned, it would be voidness with relative standing to sue (not any interested party could bring an action to void); but in this case, relative in favour of a person against whom, if voidness were sought, the doctrine of estoppel could be raised without further consideration. An action to void would have no other purpose than to obtain strategic advantages: the service supplier, who has perhaps bested a competitor's payment period, then claims voidance and has his waiting periods are reduced to a measure lower than the period bided with; or claims voidance of the payment period in excess only after seeing that the debtor's liquidity is worsening and insolvency looms.

(7) The justifications given by successive Spanish legislators are also eloquent. The rule's "purpose is to prevent possible abusive practices by large companies on small suppliers" (Late Commercial Payments Act Amendment Act 15/2010). It is intended to prevent the debtor from benefiting from "exceptional liquidity at the expense of the creditor" (the Act).

(8) Consequently, the situation calls for a teleological restriction of the rule and the need to postulate a loophole which, though not expressed by law, should be expressed in the form of an exception. The elimination of the principle of contractual freedom is only justified when the legal right in need of protection cannot otherwise be protected or is not protected. But if one has any legalistic scruple concerning this surgical procedure of repealing provisions implicitly by means of the postulation that its *ratio* has ceased, one can always reach the same result by means of the recourse to the technique of the abuse of rights, because such abuse is committed by anyone who exercises a power based on a provision whose reason to oblige has disappeared, considering the interests that the provision tried to protect (cf. Angel CARRASCO, *Tratado del abuso de derecho y del fraude de ley*, 2016, pages 172-173).

The proposed interpretation is also one that complies with the interpretative principle of enforceability. If Art. 4(3) were to impose a partial radical voidness, art. 9 of the Act would have no room of its own. Indeed, para. 1 of this provision provides that *A contractual clause or a practice relating to the payment date or period, the rate of interest for late payment or compensation for collection costs shall be void where it is grossly unconscionable to the detriment of the creditor, taking into account all the circumstances of the case, including: a) Any serious deviation from good commercial practice, contrary to good faith and fair dealing. (b) The nature of the good or service. (c) And where the debtor has any objective reason to depart from the statutory rate of interest for late payment under article 7(2), or from the fixed amount referred to in article 8(1). Likewise, in determining whether a clause or practice is unconscionable in respect of the creditor, account shall be taken, in all the circumstances of the case, of whether it serves primarily to provide the debtor with additional liquidity at the creditor's expense*. This "balanced" voidness according to the criteria of abuse or unconscionableness is the appropriate one if blind procedures for the application of the doctrine of radical voidness are to be avoided. It is clear that in the case we have chosen in this paper as problematic, the levels of unconscionableness of the rule do not apply and therefore the clause in question is valid. This solution is preferable to the application of art. 4(3) under the assumption that the penalty is not so much the voidance as the outcome of culpable delay on the part of the debtor (*mora debitoris*), as I have proposed above. Because, even if we argue that the unpermitted extension of the 60-day period (only) provokes arrears as from 60 days, we would still need to resort to the rule of estoppel to reject that a commercial debtor may have defaulted if such has been granted additional time by a supplier who does not need the protection that the law generally provides for suppliers of goods and services.

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Nonetheless, it can be argued that the formal "infringement" of the maximum time limit of art. 4(3) would not be irrelevant to private law even in cases, such as the present one, where the grounds for protection provided by the rule have ceased to apply. Although the purpose of the Late Commercial Payments Act is not to regulate competition between the various suppliers (price creditors) of goods or services, we would fall under art. 15(1) of the Unfair Competition Act[2] ("It is considered unfair to rely in the market on a competitive advantage acquired through the infringement of the law. The advantage must be significant"). It could be the case here that other competing suppliers of the creditor complain that such is seeking significant advantages by way of an abstract violation of a rule that is not, of itself, a rule that has the purpose of disciplining competition. However, I do not believe that the conduct should be classified as unfair either, unless it is an exclusionary abuse carried out by an undertaking with a dominant position on the market within the meaning of Art. 102 TFEU. Once again, we see ourselves in the need to recover the meaning of art. 4(3) of the Act as a simple qualifying rule for commencement of the *mora debitoris* rules when the payment period has been agreed. My interpretation is based on the assumption that those who agree "counter to" the provisions of art. 4(3) do not infringe the rule. It would only be possible to speak of an infringement if the time limit clause were to satisfy the requirements for the unconscionableness of art. 9(1). And not even in this case, because the use of unconscionable

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[2] *Ley 3/1991, de 10 de enero, de Competencia Desleal*.

(10) clauses is not an infringement of rules within the meaning of Art. 15 of the Unfair Competition Act (or in any other sense).