CROSS BORDER ENFORCEMENT OF MONETARY CLAIMS - INTERPLAY OF BRUSSELS I A REGULATION AND NATIONAL RULES

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Cross border Enforcement of Monetary Claims - Interplay of Brussels I A Regulation and National Rules

National report: Belgium

STEFAAN VOET & PIETER GILLAERTS

Abstract The "National Report: Belgium" systematically and comprehensively addresses the main features of the enforcement of monetary claims in the German legal system, focusing in particular on the analysis of legal remedies in the enforcement procedure. Said issues are approached from both national and cross-border perspectives. The issues discussed are profoundlytopical in light of the recent coming into effect of the Brussels IA Regulation (Recast) and its more or less successful implementation in the national systems of the Member States, which has raised a number of issues. The report critically reflects some of the controversial solutions covered by the Recast Regulation regarding the effectiveness and appropriateness of the Regulation's application in the legal system in question and related problems. It also deals with national specificities in the enforcement procedure, which still constitute an obstacle to cross-border procedures. The report was created as part of a study conducted under the auspices of the EU project BIARE ("Remedies on the Enforcement of Foreign Judgments according to Brussels I Recast") under the coordination of the Faculty of Law University of Maribor.

Keywords: • Brussels IA Regulation • cross-border enforcement procedure • enforcement of monetary receivables • legal remedies • Belgium •

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Part I: Main features of the national enforcement procedures for recovery of monetary claims (general overview)

1 BRIEF PRESENTATION BELGIAN LEGAL SOURCES ON ENFORCEMENT

The main domestic legal source on enforcement is located in the fifth section of the Judicial Code ("conservatory attachments, means of enforcement and collective debt settlement"), especially Title III (Art. 1494-1675).

According to Belgian civil procedural law, a distinction has to be made between conservatory attachments (*bewarend beslag, saisie conservatoire*/seizure for security) and attachments in execution (*uitvoerend beslag, saisie exécutoire*/enforcement of judgments). Both are regulated by the Belgian Judicial Code (*Gerechtelijk Wetboek, Code Judiciaire,* Art. 1413-1493 (conservatory attachments) and 1494-1675 (attachments in execution).

By means of *a conservatory attachment*, the plaintiff can limit the authority of the debtor to dispose of his assets. The attached assets are put "in the hands of justice" (*onder de hand van het gerecht, sous les mains de la justice*), thus guaranteeing further execution. However, the debtor is not deprived of his property rights. Furthermore, he remains

in possession of the attached assets: these are not frozen in place, nor – as a principle – placed in the custody of a third party. The rights of enjoyment of the debtor also remain unlimited. The attachment only deprives him of his *authority of disposal* with regard to the attached property. This deprival however, has a *relative* character: the debtor still has the – factual – possibility of alienating or encumbering the attached assets, but these legal acts cannot be opposed to the plaintiff(s). A conservatory attachment can either be made on moveable assets (Art. 1422-1428 Judicial Code), immoveable property (art. 1429-1444 Judicial Code) or in the hands of a third party (*bewarend beslag onder derden*, *saisie-arrêt conservatoire*, see Art. 1445-1460 Judicial Code). Specific types of conservatory attachment are the pledge attachment (Art. 1461 Judicial Code), the attachment in reclamation (Art. 1462-1466 Judicial Code), the attachment of sea-going vessels and river crafts (Art. 1467-1480 Judicial Code) and the attachment with regard to counterfeit (Art. 1481-1488 Judicial Code).

An *attachment in execution* on the other hand, is aimed at the *sale* of the attached assets. The proceeds of this sale – that can either be held public or privately – are used as a means of paying off the plaintiff(s). An attachment in execution is not a protective measure. In addition, it presupposes the existence of a judgment or another entitlement to enforcement (such as a notarial deed).

In addition to normal precautionary attachment and attachment in execution of movable and immovable property, there are also special rules for attachment of ships (Articles 1467 to 1480 and Articles 1545 to 1559 Judicial Code.), attachment in the event of forgery (Articles 1481 to 1488), distraint (Article 1461 Judicial Code.), replevin (Articles 1462 to 1466 Jud. Code.) and attachment of unharvested fruit and crops (Articles 1529 to 1538 Judicial Code.). In the rest of this report we shall consider only normal attachment.

A conservatory attachment can be transformed quite easily into an attachment in execution. Art. 1491, paragraph 1 Judicial Code provides that the judgment in the procedure on the merits is the entitlement to enforcement, the mere service of which transforms the conservatory attachment into an attachment in execution. This principle is confirmed by Art. 1497 Judicial Code, according to which there is no need, in case of a conservatory attachment, for a new attachment prior to the execution. After the service of the judgment in the procedure on the merits, the plaintiff can simply serve the order to pay, which has to precede every attachment

in execution, announcing that the conservatory attachment is transformed into an attachment in execution. If the judgment in the procedure on the merits has immediate effect, the service of this judgment and of the order to pay can be done in one and the same writ.

However, if the attachment is disputed before the judge of seizure at the time of the service of the afore-mentioned judgment, the attachment can only be transformed by the service of the decision of the judge of seizure acknowledging the regularity of the attachment (Art. 1491, final paragraph, Judicial Code).

There is also a new procedure for the recovery of undisputed monetary debts (Art. 1394/20-27 Judicial Code), which is an administrative recovery procedure. The bailiff can note down the absence of a dispute in a procès-verbal of non-dispute, which can be declared enforceable at the bailiff's request by a judge. The new procedure was introduced by the so-called *Law Potpourri I*.[1]

Another important aspect is the penalty payment (Article 1385a Judicial Code.). This is a means of exerting pressure on the person convicted in order to encourage compliance with a legal judgment. A penalty payment cannot, however, be imposed in certain cases: when the person has been sentenced to pay a sum of money or to comply with an employment contract and when it would be incompatible with human dignity. A penalty payment is enforced on the basis of the title providing for it, in which case no further title is required.

Enforcement principally requires an enforceable title, albeit with some exceptions for conservatory attachments. The best known enforceable titles are executory copies of judicial decisions and notarial deeds (incl. an exequatur).

[1] Wet 19 oktober 2015 houdende wijziging van het burgerlijk procesrecht en houdende diverse bepalingen inzake justitie, *BS* 22 oktober 2015 en KB 16 juni 2016 tot vaststelling van de inwerkingtreding van de artikelen 9 en 32 tot 40 van de wet van 19 oktober 2015 houdende wijziging van het burgerlijk procesrecht en houdende diverse bepalingen inzake justitie, en tot uitvoering van de artikelen 1394/25 en 1394/27 van het Gerechtelijk Wetboek, *BS* 22 juni 2016.

2 JURISDICTION AND ACTORS INVOLVED

2.1 Jurisdiction

The Courts of First Instance are competent for disputes concerning the enforcement of judgments (Art. 569, 5° Judicial Code). In case of urgency, the president is competent (Art. 584 Judicial Code). For all claims regarding conservatory attachments and means of enforcement, there is a specialised judge: the judge of seizure (Art. 1396, 1489 and 1498 Judicial Code). The importance of the judge of seizure is illustrated by his control over procedures of conservatory attachment or means of enforcement (Art. 1396 Judicial Code).

If the dispute relates to the interpretation of the judgment, parties have to bring the case before the judge who gave that judgment (Art. 793 Judicial Code).

If the enforcement measures prove insufficient or ineffective, parties have to go back to the judge who gave the judgment and request further measures.

Only the judge of seizure of the place where the attachment is to be made has local jurisdiction (art. 633, section 1, Judicial Code). However, in case of an attachment in the hands of a third party, the judge of seizure of the domicile of the debtor has exclusive local jurisdiction for disputes concerning that measure. When the domicile of the debtor is abroad or unknown, only the judge of seizure of the place of attachment has local jurisdiction (art. 633, section 2, Judicial Code).

2.2 Actors involved in the enforcement system

To begin with, one should note that the Belgian system of enforcement is centralized. This means that it is regulated at the federal level. Several actors are important within the enforcement system, particularly the bailiff. Although the creditor controls the enforcement procedure, in practice he will consult the bailiff. The enforcement itself will proceed via the bailiff, given the prohibition of taking justice into one's own hands.

Enforcement requires an enforceable title, thus in general necessitating the intervention of a judge (to obtain a judicial decision) or a notary (to obtain an

authentic instrument) (Art. 1386 Judicial Code). What matters is whether or not the creditor has an enforceable title. The actor giving the title will examine whether all prerequisites are met. Claims regarding conservatory attachments and means of enforcement will be brought before the judge of seizure (*beslagrechter*, *juge des saisies*) (Art. 1396, 1489 and 1498 Judicial Code).

For conservatory attachments, there are exceptions to the requirement of leave by the judge of seizure. For example, a private document or an authentic instrument suffices for attachments in the hands of a third party (Art. 1445 Judicial Code). A conservatory attachment is made by means of a bailiff's writ (*gerechtsdeurwaardersexploot*, *exploit de huissier de justice*), in which the bailiff gives service to the debtor (or a third party) that an attachment is made on his assets (or on those of the debtor). An informal attachment, on the mere basis of a letter, is not allowed by law.

In most cases, if a party wants a judgment to be enforceable against the other party, it needs to be served on that other party (Article 1495(1) Judicial Code). This means that the party wanting the judgment to be enforced must request the court registry to deliver a copy thereof with the formula of enforcement and request the bailiff to serve the judgment.

As already referred to, the bailiff's plays a key role in the new procedure for the recovery of undisputed monetary debts.

3 UNDERLYING PRINCIPLES GOVERNING THE ENFORCEMENT PROCEDURE

3.1 Territoriality

Both the leave of the judge of seizure and the conservatory attachment itself, as a rule, only have territorial effect in Belgium. Only Belgian courts are competent for disputes about enforcement in Belgium.

3.2 Protection of the debtor

In order to protect the debtor's personal freedom and privacy against inappropriate public interference, no enforcement actions are allowed between 21h and 6h, nor on Saturdays, Sundays and official holidays, except in case of urgent necessity and on condition that there is a leave from the judge of seizure (judge of attachments) ("de beslagrechter"/*juge des saisies*) (Art. 1387 Judicial Code).

The debtor is also protected by the requirement of serving the judgments (Art. 1495 Judicial Code). It should allow him to defend himself and offer a final chance to perform voluntarily. No service, however, is needed for judgments that order investigative measures (Art. 1496 Judicial Code) or for notarial deeds. The debtor is supposed to know the content of the notarial deed. For evictions, there are particular conditions (Art. 1344 *et seq.* Judicial Code). When exercising his right of seizure, the creditor must avoid abuse of the law in doing so.

Furthermore, some goods cannot be seized due to their nature or legal provisions (*e.g.* Art. 1408 *et seq.* Judicial Code). The following paragraphs will elaborate on this.

First of all, certain assets are very closely related to the debtor and therefore cannot be attached (e.g. correspondence). The same goes for assets that do not have any market value.

The rules provided for by the Articles 1408-1412*quater* Judicial Code are of more importance. In these articles, a number of assets protected from attachment are described. The legislator has tried to find a balance between the rights of recovery of the creditors and the right of the debtor to a dignified existence. Thus, Art. 1408, paragraph 1 Judicial Code provides that the following categories of assets are protected from attachment (among others):

- goods that are absolutely necessary to the debtor and his family, e.g. beds and bed linen, clothing and linen, a washing machine and a flat-iron, heating appliances, a dinner table and chairs, kitchen ware, one device to cook food, one appliance to conserve food, pets, garden tools, etc., with the exception of luxury goods and luxury furniture;

- books and other goods that are necessary for the education (professional or otherwise) of the debtor and his children;
- goods that are absolutely necessary for the exercise of the profession of the debtor, with a maximum value of € 2 500, except for the payment of the price of these goods;
- food and fuel needed by the debtor and his family for one month's living.

However, these goods cease to be protected from attachment if they are found in another place than the usual residence or workplace of the debtor (Art. 1408, paragraph 2, Judicial Code).

The difficulties with regard to the application of this article are settled by the judge of seizure, on the basis of the attachment writ, in which the remarks of the debtor are taken note of by the bailiff. These remarks have to be made – under pain of forfeiture – at the time of the attachment, or within five days of the service of the first writ of attachment. A copy of the writ has to be deposited at the court registry by the bailiff or the party that has the most interest in doing so, within fifteen days of the delivery or service of the attachment writ to the debtor. The procedure is suspended as long as this copy has not been deposited. The settlement of these difficulties has priority over all others cases (Art. 1408, paragraph 3, Judicial Code).

The protection from attachment can also be provided by special legislation. E.g., the revenue of minors is protected from attachment or delegation based on loan agreements (Art. 37, paragraph 2, Belgian Law on Consumer Loans).

3.2.1 Wages, similar revenue and (social security) benefits

One type of claim is protected in a special way by the legislator: the claim of an employee on his wages (and similar claims). The wages – as well as similar revenues – are only partially subject to attachment. The amounts are determined in Art. 1409 Judicial Code and are, once a year, reviewed on basis of the increase or decrease of the index for the consumption of goods.

The current[2] amounts of the monthly net-wages – i.e. after tax – that can be attached are (the percentage relates to the maximum amount that can be attached):

- the part of the wage that exceeds € 1 271: 100 %;
- the part of the wage between € 1 162 and € 1 271: 40 % (i.e. maximum € 43,60);
- the part of the wage between € 1 054 and € 1 162: 30 % (i.e. maximum € 32,40);
- the part of the wage between € 981 en € 1 054: 20 % (i.e. maximum € 14,60);
- the part of the wage that does not amount to € 981: 0 %

In the near future these amounts will be increased by € 61[3] per child the debtor has to support.

For instance, if a debtor earns € 1 797 net per month and has no children to support, a total amount of € 616,60 is at this moment subject to attachment:

€ 1 797 – € 1 271	=	€ 526,00
(€ 1 271 – € 1 162) x 40 %	=	€ 43,60
(€ 1 162 – € 1 054) x 30 %	=	€ 32,40
(€ 1 054 – € 981) x 20 %	=	€ 14,60
Total subject to attachment:		€ 616,60

Different attachment limits apply to similar revenues (i.e. not originating from the execution of a contract of employment or a similar contract). These limits are indicated immediately below (the percentage relates to the maximum amount that can be attached):

- the part of the revenue that exceeds € 1 271: 100 %
- the part of the revenue between € 1 054 and € 1 271: 40 % (i.e. maximum € 86,80);

[2] See Royal Decree 8 December 2008, *Moniteur Belge* 12 December 2008, entered into force 1 January 2009.
[3] This amount is also subject to an index correction, once in a year.

- the part of the revenue between € 981 and € 1 054: 20 % (i.e. maximum € 14,60);
- the part of the revenue that does not amount to € 981: 0 %

These amounts will also be increased in the near future by € 61 per child the debtor has to support. All the above mentioned amounts are index-linked.

The attachment limits for similar revenues also apply to certain benefits (social security or otherwise), maintenance payments, retirement pensions and unemployment benefits (Art. 1410, paragraph 1, Judicial Code). However, certain social security benefits are protected from attachment, for example family income supplements and subsistence level benefits (Art. 1410, paragraph 2, Judicial Code).

The attachment limits, as described in the Articles 1409, 1409*bis* and 1410 Judicial Code, also apply to amounts credited on a demand account, opened at a credit institution, as meant in the Belgian Law on the statute of and the supervision of credit institutions (Art. 1411*bis*, paragraph 1, Judicial Code). The debtor can prove by all means of law that the amounts that cannot be attached in accordance with the above mentioned articles, were credited on his demand account, which the plaintiff has attached. Amounts that are paid by the employer of the debtor are, until proven otherwise, presumed to be partially protected from attachment in accordance with Art. 1409, paragraph 1 Judicial Code. This presumption only applies on the relations between the debtor and his creditors. Art. 1411*bis* – 1411*quater* Judicial Code foresee in further details (e.g. specifications concerning the encoding of amounts that are paid on a demand account and that cannot be attached).

3.2.2 Maintenance payment creditors

Maintenance payment creditors are favored twice by law (Art. 1412 Judicial Code). First of all, the protection from attachment, provided by Art. 1409-1410 Judicial Code, is not applicable to attachments based on maintenance payment claims (however, the attachment limits are applicable to the income from the maintenance payments itself, see above). Secondly, maintenance payment creditors that are in concurrence with other creditors have absolute priority (i.e. always rank first).

3.2.3 Government property

The basic assumption is that government property – in its broadest sense – is immune from attachment (Art. 1412*bis*, paragraph 1, Judicial Code). However, this is not an absolute rule. Assets which the government has declared that they are not protected from attachment are fully attachable. If the government does not provide such a list of attachable assets, or if the value of these assets is not sufficient to pay the creditor, the assets that are "seemingly not useful for the exercise of the mission of the government or the continuity of the public service", are attachable (Art. 1412*bis*, paragraph 2, 1° and 2°, Judicial Code). However, the government can oppose the sale of the latter assets and can offer other assets to the creditor. This offer is binding for the creditor if (a) these assets are located on Belgian territory and (b) the proceeds of the sale are sufficient to pay the creditor. In case of dispute, this dispute can be applied to the judge of seizure (Art. 1412*bis*, paragraph 3, Judicial Code).

Art. 1412*ter* Judicial Code provides that, notwithstanding binding supranational provisions, culture goods – i.e. goods that are of artistic, scientific, cultural or historic importance (*not* goods of economic of commercial importance) – of foreign states cannot be attached when these goods are located on Belgian territory with a view to a public and temporary exposition on the territory.

Art. 1412*quater* Judicial Code provides that assets in any form that are being managed in Belgium by foreign central banks or international monetary authorities cannot be attached. The second paragraph of this provision stipulates that the creditor, who has an enforceable title, can nevertheless ask the judge of seizure for permission to attach the aforementioned assets if he can prove that these assets are exclusively intended for an economic or private commercial activity.

3.3 Publicity

There is a strong system of publicity in order to enhance efficiency of the law of seizure. Prior to any seizure, it is mandatory to consult the notices of attachment (Art. 1391 Judicial Code).

4 ENFORCEABLE TITLES

The enforceable title is one that embodies the creditor's entitlement and has the formula of enforcement (cf. Art. 1386 Judicial Code). Only certain public officials (*e.g.* notary, registrar) have the authority to appose the formula of enforcement. In case of legal succession after the enforcement title was obtained, the only requirement is the acceptance by the successor of the estate. No changes in the enforcement title are needed.

There are three categories of enforceable titles. The first and best known category contains the executory copies of judicial decisions and notarial deeds, as well as of consular officials legally competent for those executory copies. It inclused proceeding via *ex parte* (unilateral) petition *("eenzijdig verzoekschrift"/"la requite unilaterale"*) or an exequatur. In general a judgment is enforceable *ipso jure*. At the request of the winning party, the court's clerk will appose the formula of enforcement on the judgment, transforming it by doing so into an enforceable title (Article 1386 Judicial Code). Moreover, a judgment cannot be enforced before it has been properly served to the party against whom enforcement is sought (Article 1495(1) Judicial Code). The enforceability of a judgment depends on its qualification: either the judgment is provisionally enforceable, or it is not.

If a judgment is provisionally enforceable, the party can always execute the judgment. However, if the judgment gets overturned as a result of appellate proceedings, the party who has enforced the overruled judgment must return everything he gained by the execution and compensate for the damages resulting from the execution even if he was in good faith and did not make a fault (Article 1398(1) *in fine* Judicial Code).

No service, however, is needed for judgments that order investigative measures (Art. 1496 Judicial Code) or for notarial deeds.

The second category consists of authentic documents by other public officials who can deliver acts that are enforceable in a simplified way (*i.e.* without intervention of the judiciary). The third category comprises the judicial decisions and acts from foreign jurisdictions.

5 SERVICE AND NOTIFICATION

In Belgium, a distinction is made between the service ("*betekening*"/"*signification*") and the notification ("*kennisgeving*"/"*notification*") of the judgment. In essence, service refers to the delivery of a document by writ via a government judicial official. In Belgium, this judicial official is the bailiff ("*gerechtsdeurwaarder*"/"*huissier de justice*"). Notification is effected by the court registry ("*griffie*"/"*greffe*") (on rare occasions by the Public Prosecutor's office) by so-called judicial mail (*i.e.* a special type of registered letter with acknowledgement of receipt), registered mail or ordinary mail.

In all cases, the court registry sends an unsigned (free) copy of the judgment by ordinary mail to each of the parties or their counsel (Article 792(1) Judicial Code). This communication of the decision is given for information purposes only and neither make the judgment enforceable against either party, nor does it trigger the running of the term of appeal (or any other appellate remedy). In some exceptional cases, the law requires the court registry to notify the decision to the parties by judicial mail, in which case this notification is the starting point of the term of appeal (for both parties) (Article 792(2) Judicial Code). This notification needs to contain information on the appellate remedies, their time-limit, and the competent court. The absence of this information results in the nullity of the notification, meaning that the notification is void and cannot produce any legal effects (Article 792(3) Judicial Code).

The notification to addressees with a known (elected) place of residence or domicile abroad is subject to the applicable regulations and treaties (see below).

In most cases, if a party wants a judgment to be enforceable against the other party, it needs to be served on that other party (Article 1495(1) Judicial Code). This means that the party wanting the judgment to be enforced must request the court registry to deliver a copy thereof with the formula of enforcement and request the bailiff to serve the judgment. The service of the judgment constitutes the starting point of the term of appeal (Article 1051(1) Judicial Code).

With regard to service (or notification) to addressees with a known (elected) place of residence or domicile abroad, three situations must be distinguished. The service (or notification) is governed by (1) the Council Regulation (EC) No 1397/2007 of

13 November 2007 on the service in the member states of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000[4]; (2) the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters (ratified in Belgium by Act of 24 January 1970)[5]; (3) Article 40 Judicial Code, where neither the Council Regulation nor the Hague Convention apply.

The Regulation provides for several means of service and notification of judicial documents. The most frequently used method is regulated in Articles 4-11 of the Regulation. In this case, the transmitting agency competent under the law of the Member State in which the documents originate[6] shall transmit the documents to be served (or notified) in another Member State to the competent receiving agency of that Member State. This transmission of documents includes a certified copy of the judgment drafted in or accompanied by a translation in one of the languages provided for in Article 8 of the Regulation (*i.e.* a language which the addressee understands or the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected), as well as a request drawn up using the standard form (set out in Annex I of the Regulation) and completed in the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected, or in another language which that Member State has indicated it can accept.

Depending on the agency effecting the transmission of documents, the translation is the responsibility of the court registry, the Public Prosecutor's office, or the bailiff.

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[4] *OJ L* 324, 10 December 2007, 79-120.

[5] Belgian Official Gazette, 9 February 1971.

[6] In Belgium, the following judicial officers are designated as competent transmitting agencies: (1) the court registry (of the Justice of the Peace Courts (County Courts), Police Courts, Courts of First Instance, Commercial Courts, Labour Courts, Courts of Appeal, Labour Courts of Appeal, Court of Cassation); (2) the Public Prosecutor's Office (including the office representing the public interest in labour matters) and (3) the bailiffs (European Judicial Atlas in Civil Matters (http://ec.europa.eu/justice_home/judicialatlascivil/html/ds_transmitting_be_en.htm) last accessed on 11 August 2016).

The costs of translation shall be borne by the applicant, without prejudice to any possible subsequent decision by the court or competent authority on liability for such costs (Article 5(2) Regulation).

The receiving agency shall itself serve (or notify) the document or have it served (or notified), either in accordance with the law of the Member State addressed or by a particular method requested by the transmitting agency, unless that method is incompatible with the law of that Member State. The receiving agency shall take all necessary steps to effect the service (or notification) of the document as soon as possible, and in any event within one month of receipt (Article 7 Regulation).

When the formalities concerning the service (or notification) of the document have been completed, a certificate of completion of those formalities shall be drawn up in the standard form (set out in Annex I of the Regulation) and addressed to the transmitting agency, together with a copy of the document served if requested by the transmitting agency (Article 10(1) Regulation).

With respect to the addressee, the date of service (or notification) of the judgment is determined by the law of the Member State addressed.[7]

The Council Regulation also provides for other means of transmission and service (and notification) of judicial documents, namely service through diplomatic channels (Article 12 Regulation); by diplomatic or consular agents (Article 13 Regulation); by postal services (Article 14 Regulation) and direct service, where such direct service is permitted under the law of the Member State addressed (Article 15 Regulation).

[7] Belgium applies a dual-date system for determining the moment of service; the date to be taken into account as the moment of service differs according to whether this relates to the addressee or to the person transmitting the document. With regard to the addressee, the periods which start to run as of the service of a paper-based document are calculated with effect from (and unless the law stipulates otherwise): (1) the first day following that on which the judicial registered letter or the registered letter with acknowledgment of receipt is presented at the residence of the addressee or, where applicable, at his domicile or address for service where service is effected by such letter; (2) the third working day following that on which the registered letter or ordinary letter is presented to the postal service, except where the addressee provides evidence to the contrary, where service is effected by such letter (Article 53*bis* Judicial Code). With regard to the person transmitting the document, it is the date of transmission (or the date of presentation to the postal service or to the court registry) that is regarded as the date of service.

The language and translation requirements set out above also apply to these other means of transmission and service (Article 8(4) Regulation).

Under the Hague Convention, the authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority[8] of the State addressed a request conforming to the Convention model (Article 3(1) Convention). The document to be served (*i.e.* the first instance judgment) or a copy thereof shall be annexed to the request (Article 3(2) Convention). The standard terms in the model shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the State in which the documents originate (Article 7(1) Convention). The corresponding blanks shall be completed either in the language of the State addressed or in French or in English (Article 7(2) Convention). The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory or by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed (Article 5(1) Convention). The Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed (Article 5(3) Convention). This is the responsibility of the competent transmitting agency.

With respect to the addressee, the date of service (or notification) of the judgment is the date of the actual receipt thereof by the addressee.[9]

Where no regulation or treaty applies, the service of judicial documents to an addressee with known (elected) place of residence or domicile abroad is regulated by Article 40 Judicial Code, which states that the bailiff sends a transcript of the original judgment to the (elected) place of residence or domicile of the addressee abroad, by registered mail or by airmail if the place of destination is not located in a

[8] Each Contracting State must designate a Central Authority which will undertake to receive requests for service coming from other Contracting States. In Belgium, this is the National Bailiffs' Association of Belgium ("*Nationale Kamer van Gerechtsdeurwaarders*"/"*Chambre Nationale des Huissiers de Justice*").
[9] Cass. 21 December 2007, C.06.0155.F.

neighboring country. The judgment is deemed to have been served as soon as the bailiff delivers it to the post office in return for a receipt. Article 40 Judicial Code does not provide for any language or translation requirements.

Unless the exceptional case in which the judgment has to be notified by the court's registry in accordance with Article 792(2-3) of the Belgian Judicial Code, Belgian law does not require that the service or notification of a judgment upon a person, whether this person is domiciled in Belgium or abroad, contains any information regarding the appellate remedies, their time-limit or the competent court. Such duty to inform was, however, provided for in a new Article 46*bis* of the Belgian Judicial Code[10], but until today this article did not enter into force.

This is no different whether the first instance judgment was rendered in a contentious procedure or *in absentia*.

One must, however, take into account the judgment of the European Court of Human Rights in the case of Faniel vs. Belgium (ECtHR 1 March 2011, nr. 11892/08): Belgium was held in violation of Article 6.1 ECHR because Mr. Faniel, a Belgian national who was sentenced in his absence to six months of imprisonment, had not been informed of the relevant formalities and time-limits in order to lodge an appellate remedy against the judgment rendered in his absence, whereby the Court took into account that Mr. Faniel did not have any legal assistance at the time of the lodging of the appellate remedy (which was declared inadmissible by the Belgian courts because of an alleged violation of the time-limit). (Belgian) legal doctrine is divided as to whether the Faniel case entails a general duty to include information on the available appellate remedies in the act of service or notification of a judgment (rendered in criminal and/or civil cases).

In its judgment of 15 May 2015 (in a civil case), the (Dutch-speaking section of the) Court of Cassation ruled that Article 6.1 ECHR does not entail an obligation to provide information on the available legal remedies in case of the service of a

[10] Art. 46*bis* Judicial Code would have stipulated that the act of service or notification of the judgment must contain information regarding the time-limit to appeal the judgment by means of opposition, ordinary appeal or appeal to the Court of Cassation, as well as the way in which these appellate remedies are to be lodged.

judgment at the request of one of the parties to the other party.[11] On the other hand, the (French-speaking section of the) Court of Cassation ruled, in its judgment of 29 January 2016, that the notification of the judgment by the court's registry will only trigger the running of the statutory time-limit for lodging an appellate remedy if such effect is expressly provided for by law and the notification contains information regarding the available appellate remedies and their statutory time-limit. The Court referred to Article 6.1 ECHR.[12]

6 DIVISION BETWEEN ENFORCEMENT AND PROTECTIVE MEASURES.

6.1 Interlocutory judgment

The court does not have to exhaust its judicial power in one final judgment. The court can decide a case by several interlocutory judgments and eventually a final judgment in which the remaining points of the claim are judged.

For example, if a plaintiff files a claim of € 20,000 and the defendant disputes € 5,000 of it, the judge can decide that the plaintiff is entitled to € 15,000 in an interlocutory judgment.

6.2 Provisional measures ("voorafgaande maatregel"/"la mesure préalable")

Before ruling, every judge can order a provisional measure in every step of the court proceedings (Article 19(3) Judicial Code). This provisional measure either relates to an investigative measure or a provisional arrangement of the situation of the parties. Every interested party to the proceedings can request such a measure by filing a simple written request with the clerk of the court who will notify the parties (and their lawyers) by (judicial) letter. Since 1 November 2015 these "decisions before adjudicating" can only be appealed together with the appeal against a decision on the admissibility or the merits of the case (Article 1050(2) Judicial Code).

[11] Cass. 15 May 2015, C.12.0568.N.
[12] Cass. 29 January 2016, C.14.00006.F.

6.3 Interim injunction proceedings ("kort geding"/"la procedure en référé")

6.3.1 Basic requirements

The president of the Court of First Instance, Labour Court and Commercial Court have the jurisdiction to decide by provisional judgment upon urgent matters which fall within the normal scope of the jurisdiction of the court over which they are presiding, except for those matters explicitly excluded from their jurisdiction by the law (Article 584(1 and 3) Judicial Code).

Obtaining a ruling via interim injunction proceedings is thus only possible when three requirements are met:

a) urgency;
b) provisional; and
c) not explicitly excluded by law.

a. Urgency is present when it is desirable that an immediate decision should be made to prevent further or future damage or serious discomfort. If interim injunction proceedings are initiated by a party who does not speak of urgency, the judge will not be competent. If the plaintiff speaks of urgency the judge has jurisdiction. However, if the judge finds that the claim lacks urgency he must dismiss the claim on the merits. The claim must remain urgent up to the date of judgment.[13]

b. The requirement of the judgment to be provisional implies that this judgment may not cause any prejudice to the decision on the merits of the case (Article 1039(1) Judicial Code). This means that the judgment of the president has the authority of *res iudicata* but the court, which will have to pass judgment on the merits of the case later on, will not be bound by the findings of the president. Therefore the president must refrain from issuing judgments that cause a definitive/irreparable change in the legal positions of the parties.[14] This does not mean that the president cannot examine

[13] The Court of Appeal however, can decide on the claim even though the matter has lost its urgency in appeal. (Cass. 4 February 2011, *RW* 2011-12, 866-867).
[14] Jurisprudence shows that it is not always easy to make a distinction (e.g. the president of the Court of First Instance in Liège rendered a provisional judgment in which he ordered the destruction of a

the merits of the case; what he will do, however, is determine whether there is a likelihood of success on the merits of the case and then render a judgment in accordance with the probable rights of the parties.

The provisional judgments in interim injunction proceedings are always provisionally enforceable (Article 1039(2) Judicial Code). The judgment on the merits of the case entails *ipso jure* that the provisional decision stops having effect. The judgment on the merits however has no retroactive effect.[15]

The provisional character of the judgments rendered in interim injunction proceedings also allow the judge, when asked by an interested party, to revoke or alter his judgment in case of new or changed circumstances.

c. The condition "… except for matters explicitly excluded from their jurisdiction by the law", refers mostly to disputes on an administrative decision of the government or another authority where in some cases it is possible to conduct parallel interim injunction proceedings before an administrative court and a civil court.

6.3.2 Specific procedural rules

Interim injunction proceedings can be commenced either before any procedure on the merits of the case, together with commencement of the procedure on the merits or while a procedure on the merits is pending before the court. It is *inter partes* (see *infra* for proceedings *ex parte* in case of absolute necessity).

In principle, interim injunction proceedings have to be commenced by writ of summons, served upon the defendant, to appear before the president of the designated court. The term for the writ of summons is a minimum two days (Article 1035 Judicial Code). This term is extended when the defendant has no (chosen) domicile or residence in Belgium. In case the domicile or residence of the defendant is located in a neighbouring country or in the United Kingdom, the term is extended

bridge stating that it can be replaced by something similar afterwards (KG Rb. Luik 2 December 2002, *JLMB* 2003, 1017)).

[15] Cass. 24 January 2014, AR C.12.0359.F, www.cass.be.

by fifteen days. When the domicile or residence is located in another European country, the term is extended by thirty days (Article 1035 *j*° Article 55,1° and 2° Judicial Code).

The president can even allow the defendant to be summoned to appear at the president's private home (e.g. when the hearing has to be held at a time when the courthouse is normally closed) or on a legal holiday (Article 1036 Judicial Code).

In interim injunction proceedings the terms of the procedural calendar (*supra* answer 2.1.) are the following: parties can pass their comments about the procedural calendar within five days after the preliminary hearing to the judge, who has to decide on the procedural calendar within eight days after the preliminary hearing (Article 747, §3(1) Judicial Code).

If the president orders an investigative measure, the measure then follows the normal procedural terms except if the president finds it necessary to shorten these terms (Article 1038 Judicial Code).

In very urgent cases, the president will render a decision the same day of the hearing. If necessary, he can declare his judgment enforceable even before its registration (Article 1041(2) Judicial Code). In less urgent cases, a judgment will usually be rendered one of the days following the hearing, most commonly one week thereafter. Ultimately the first working day following the day of the provisional judgment the clerk communicates the decision to the parties via normal letter and – in case of default – to the default party by judicial letter. A default party can only oppose and not appeal the provisional judgment (Article 1039 Judicial Code).

Ever since the *Babcock*-decision[16] of the Court of Cassation, a judge is obliged to investigate the precise scope of an applicable foreign rule to a case (see Article 15 Belgian Code of Private International Law). This rule must be complied with except when contrary to public policy. In interim injunction proceedings however, if the president of the court does not have the necessary information at his disposal

[16] Cass. 9 October 1980, *Arr.Cass.* 1980-81, 142.

concerning the foreign law, he can provisionally apply the Belgian law (*lex fori*) to adjudicate the case (Article 15 section 2 Belgian Code of Private International Law).[17]

6.4 Proceedings via ex parte (unilateral) petition in case of absolute necessity

In case of absolute necessity a party can file an *ex parte* (or unilateral) petition with the president of the Court of First Instance (Article 584(4) Judicial Code; or the President of the Labour court or the Commercial Court). Absolute necessity is present when the requested measure is of such an urgency and/or of such a nature (e.g. the necessity for a 'surprise' effect) that it would be ineffective to follow the interim injunction proceedings. Absolute necessity can also arise when the identity of the opposite party is unknown to the plaintiff (e.g. the unlawful occupation of a building). Proceeding via *ex parte* (unilateral) petition *("eenzijdig verzoekschrift"/"la requite unilaterale"*) must remain exceptional as it undermines the possibility of a debate *inter partes*.

The procedure via *ex parte* petition is set out in Articles 1025-1034 Judicial Code. Under penalty of nullity certain elements must be included in the unilateral petition. The recently altered nullity provisions in Belgian civil procedural law (Articles 860-865 Judicial Code) require the defendant to enter the plea for nullity before other pleas of defence (*in limine litis*) (Article 864 Judicial Code) and to prove his interests were prejudiced by the alleged violation of these stipulations (Article 861 Judicial Code). However, the defendant is not present in these proceedings. According to Article 1028 Judicial Code the judge has to investigate the claim and could as such raise the nullity *ex officio*.

Two copies of the petition need to be filed with the clerk of the court. The pieces of evidence and the inventory thereof are attached to the petition (Article 1027 Judicial Code).

The judge can call for the presence of the plaintiff though this does not happen often in practice (Article 1028 Judicial Code). He rules behind closed doors (Article

[17] Cass. 12 December 1985, *Pas.* 1986, I, 479.

1029(1) Judicial Code). The decision is sent to the plaintiff via judicial letter (Article 1030(1) Judicial Code).

Remedies for the plaintiff:

a) claim for annulment or alteration

Under changed circumstances and subject to gained rights by third parties, the plaintiff can file a claim for annulment or alteration of the decision (Article 1032 Judicial Code).

b) appeal (and third instance)

Within one month after notification by judicial letter the plaintiff can appeal the decision (Article 1031 Judicial Code). If the claim of the plaintiff is dismissed in appeal, he can file a petition for cassation. The proceedings retain their unilateral character.

The remedy for a third party is (third party) opposition, the procedure of which is regulated in Articles 1125-1131 Judicial Code with the exception that the time limit for filing third party opposition against a decision rendered in a procedure via *ex parte* petition is one month after being served this decision (Article 1033-1034 Judicial Code). This opposition results in a contradictory procedure.

1.1. Comments and critical approach to your legislation. Please identify deficiencies of your national system, e.g. length of enforcement proceedings; success rate of enforcement; interconnectivity and over-lapping to other areas of law (insolvency proceedings).

7 TIME'S UP: REMAINING PROBLEM

The length of the proceedings remains a problem in Belgium, especially in light of Art. 6 ECHR (fair and public hearing within a reasonable time). The time of the enforcement proceedings is included in the total amount of time taken into account for the assessment under Art. 6 ECHR.

There is insufficient data collection to discuss further deficiencies.

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Part II: National procedure for recognition and enforcement of foreign judgements

1 CONCEPTS OF RECOGNITION AND ENFORCEMENT

Recognition gives legal power to the foreign judgment (Art. 22(3) 2° Belgian Code of Private International Law). A foreign judgment, which is enforceable in the State in which it was rendered, will be declared enforceable in whole or in part in Belgium, in accordance with the procedure set out in article 23. A foreign judgment will be recognized in Belgium, in whole or in part, without there being a need for the application of the procedure set out in article 23. If the recognition issue is brought incidentally before a Belgian court, the latter has jurisdiction to hear it. The judgment may only be recognized or declared enforceable if it does not violate the conditions of article 25 (Article 22 Belgian Code of Private International Law).

2 LIMITED CONTROL

Disregarding European or other international acts, Belgium adheres to a system of *contrôle limité* as to the recognition and enforcement of foreign judgments. Article 25(2) of the Belgian Code of Private International Law explicitly states that under no circumstances the foreign judgment will be reviewed on the merits. Nevertheless, there is still a limited control by means of the grounds for refusal of recognition and enforcement in Article 25(1). These grounds are crucial, since the judgment may

only be recognized or declared enforceable if it does not violate the conditions of article 25 (Article 22(1), fourth paragraph Belgian Code of Private International Law).

3 JURISDICTION

Article 23 of the Belgian Code of Private International Law states that, except in the cases provided for in article 121 (foreign insolvency judgments), the court of first instance has jurisdiction to hear actions for recognition and enforcement of a foreign judgment (§1). Except in the case provided for in article 31, the court with territorial jurisdiction, is the court of the domicile or habitual residence of the defendant; in the absence of such domicile or habitual residence, it is the court of the place of execution. When an action for recognition cannot be introduced before the court referred to in the first part, the plaintiff may seize the judge of its domicile or residence in Belgium. In the absence of such domicile or residence in Belgium, the plaintiff can seize the court of the district of Brussels (§2). The action is introduced and treated in accordance with the procedure referred to in articles 1025 to 1034 of the Code of Civil Procedure. The petitioner has to elect domicile within the district of the court. The judge decides within a short delay (§3).

4 PROCEDURE

According to Article 23(3) of the Belgian Code of Private International Law, the action for recognition/enforcement of a foreign judgment is introduced and treated in accordance with the procedure referred to in articles 1025 to 1034 of the Code of Civil Procedure. The petitioner has to elect domicile within the district of the court. The judge decides within a short delay.

With regard to the use of foreign judgments as evidence, a foreign judgment is evidence in Belgium of the findings of fact made by the judge if it meets the conditions required for the authenticity of judgments according to the law of the State where it was rendered. The findings of fact made by the foreign judge are not taken into account to the extent that they would produce an effect manifestly incompatible with the public policy. Evidence to the contrary relating to facts established by the foreign judge can be brought by any legal means (Art. 26 Belgian Code of Private International Law).

In Belgium, consideration is given to the existence of a foreign judgment or authentic instrument without verification of the conditions required for recognition, enforcement or its value as evidence (Art. 29 Belgian Code of Private International Law).

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Part III: Recognition and Enforcement in Brussels Ibis Regulation: capita selecta

1 CERTIFICATION OR DECLARATION OF ENFORCEABILITY AND RECOGNITION

1.1 In general

Article 53 of the Brussels Ibis Regulation states that the court of origin shall, at the request of any interested party, issue the certificate using the form set out in the Annex of the Regulation. No major critical comments have been made in Belgian doctrine regarding that certificate. If one was to challenge the certificate, the availability of legal remedies depends on the law of the Member State of origin.

As a prior remark, reference should be made to Article 38(10) Language Act 1935. It stipulates that every party has the right to ask for a translation of any judicial document at his own expense.

1.2 Control and correction

Correction and (clarification of) the interpretation of judgments is regulated in Book II, Title II, Chapter II, Section IX (Art. 793 *et seq.*) of the Judicial Code. Unclear or ambiguous decisions can be interpreted by the judge who gave them, as long as the rights involved are neither expanded, nor limited or altered (Art. 793 Judicial Code). The same is true for material errors or omissions (Art. 794 Judicial Code). Both correction and interpretation are possible *ex officio* (Art. 797 Judicial Code).

1.3 Service of the certificate of enforceability

With regard to service (or notification) to addressees with a known (elected) place of residence or domicile abroad, three situations must be distinguished. The service (or notification) is governed by (1) the Council Regulation (EC) No 1397/2007 of 13 November 2007 on the service in the member states of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000[1]; (2) the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters (ratified in Belgium by Act of 24 January 1970)[2]; (3) Article 40 Judicial Code, where nor the Council Regulation nor the Hague Convention apply.

The Regulation provides for several means of service and notification of judicial documents. The most frequently used method is regulated in Articles 4-11 of the Regulation. In this case, the transmitting agency competent under the law of the Member State in which the documents originate[3] shall transmit the documents to be served (or notified) in another Member State to the competent receiving agency of

[1] *OJ L* 324, 10 December 2007, 79-120.

[2] Belgian Official Gazette, 9 February 1971.

[3] In Belgium, the following judicial officers are designated as competent transmitting agencies: (1) the court registry (of the Justice of the Peace Courts (County Courts), Police Courts, Courts of First Instance, Commercial Courts, Labour Courts, Courts of Appeal, Labour Courts of Appeal, Court of Cassation); (2) the Public Prosecutor's Office (including the office representing the public interest in labour matters) and (3) the bailiffs (European Judicial Atlas in Civil Matters (http://ec.europa.eu/justice_home/judicialatlascivil/html/ds_transmitting_be_en.htm) last accessed on 11 August 2016).

that Member State. This transmission of documents includes a certified copy of the judgment drafted in or accompanied by a translation thereof in one of the languages provided for in Article 8 of the Regulation (*i.e.* a language which the addressee understands or the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected), as well as a request drawn up using the standard form (set out in Annex I of the Regulation) and completed in the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected, or in another language which that Member State has indicated it can accept.

Depending on the agency effecting the transmission of documents, the translation is the responsibility of the court registry, the Public Prosecutor's office or the bailiff. The costs of translation shall be borne by the applicant, without prejudice to any possible subsequent decision by the court or competent authority on liability for such costs (Article 5(2) Regulation).

The receiving agency shall itself serve (or notify) the document or have it served (or notified), either in accordance with the law of the Member State addressed or by a particular method requested by the transmitting agency, unless that method is incompatible with the law of that Member State. The receiving agency shall take all necessary steps to effect the service (or notification) of the document as soon as possible, and in any event within one month of receipt (Article 7 Regulation).

When the formalities concerning the service (or notification) of the document have been completed, a certificate of completion of those formalities shall be drawn up in the standard form (set out in Annex I of the Regulation) and addressed to the transmitting agency, together with a copy of the document served if requested by the transmitting agency (Article 10(1) Regulation).

With respect to the addressee, the date of service (or notification) of the judgment is determined by the law of the Member State addressed.[4]

The Council Regulation also provides for other means of transmission and service (and notification) of judicial documents, namely service through diplomatic channels (Article 12 Regulation); by diplomatic or consular agents (Article 13 Regulation); by postal services (Article 14 Regulation) and direct service, where such direct service is permitted under the law of the Member State addressed (Article 15 Regulation). The language and translation requirements set out above also apply to these other means of transmission and service (Article 8(4) Regulation).

Under the Hague Convention, the authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority[5] of the State addressing a request conforming to the Convention model (Article 3(1) Convention). The document to be served (*i.e.* the first instance judgment) or a copy thereof shall be annexed to the request (Article 3(2) Convention). The standard terms in the model shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the State in which the documents originate (Article 7(1) Convention). The corresponding blanks shall be completed either in the language of the State addressed or in French or in English (Article 7(2) Convention). The Central Authority of the State addressed shall itself serve the document or shall arrange to

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[5] Each Contracting State must designate a Central Authority which will undertake to receive requests for service coming from other Contracting States. In Belgium, this is the National Bailiffs' Association of Belgium ("*Nationale Kamer van Gerechtsdeurwaarders*"/"*Chambre Nationale des Huissiers de Justice*").

have it served by an appropriate agency, either by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory or by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed (Article 5(1) Convention). The Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed (Article 5(3) Convention). This is the responsibility of the competent transmitting agency.

With respect to the addressee, the date of service (or notification) of the judgment is the date of the actual receipt thereof by the addressee.[6]

Where no regulation or treaty applies, the service of judicial documents to an addressee with known (elected) place of residence or domicile abroad is regulated by Article 40 Judicial Code, which states that the bailiff sends a transcript of the original judgment to the (elected) place of residence or domicile of the addressee abroad, by registered mail or by airmail if the place of destination is not located in a neighboring country. The judgment is deemed to have been served as soon as the bailiff delivers it to the post office in return for a receipt. Article 40 Judicial Code does not provide for any language or translation requirements.

Unless the exceptional case in which the judgment has to be notified by the court's registry in accordance with Article 792(2-3) of the Belgian Judicial Code, Belgian law does not require that the service or notification of a judgment upon a person, whether this person is domiciled in Belgium or abroad, contains any information regarding the appellate remedies, their time-limit or the competent court. Such duty to inform was, however, provided for in a new Article 46*bis* of the Belgian Judicial Code[7], but until today this article did not enter into force.

This is no different whether the first instance judgment was rendered in a contentious procedure or *in absentia*.

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[6] Cass. 21 December 2007, C.06.0155.F.

[7] Art. 46*bis* Judicial Code would have stipulated that the act of service or notification of the judgment must contain information regarding the time-limit to appeal the judgment by means of opposition, ordinary appeal or appeal to the Court of Cassation, as well as the way in which these appellate remedies are to be lodged.

One must, however, take into account the judgment of the European Court of Human Rights in the case of Faniel vs. Belgium (ECtHR 1 March 2011, nr. 11892/08): Belgium was held in violation of Article 6.1 ECHR because Mr. Faniel, a Belgian national who was sentenced in his absence to six months of imprisonment, had not been informed of the relevant formalities and time-limits in order to lodge an appellate remedy against the judgment rendered in his absence, whereby the Court took into account that Mr. Faniel did not have any legal assistance at the time of the lodging of the appellate remedy (which was declared inadmissible by the Belgian courts because of an alleged violation of the time-limit). (Belgian) legal doctrine is divided as to whether the Faniel case entails a general duty to include information on the available appellate remedies in the act of service or notification of a judgment (rendered in criminal and/or civil cases).

In its judgment of 15 May 2015 (in a civil case), the (Dutch-speaking section of the) Court of Cassation ruled that Article 6.1 ECHR does not entail an obligation to provide information on the available legal remedies in case of the service of a judgment at the request of one of the parties to the other party.[8] On the other hand, the (French-speaking section of the) Court of Cassation ruled, in its judgment of 29 January 2016, that the notification of the judgment by the court's registry will only trigger the running of the statutory time-limit for lodging an appellate remedy if such effect is expressly provided for by law and the notification contains information regarding the available appellate remedies and their statutory time-limit. The Court referred to Article 6.1 ECHR.[9]

1.4 Service of declaration of enforceability

1.4.1 Notification from a foreign state to Belgium

Notification from a foreign state to Belgium works as follows. Only the judicial officers (*bailiffs*) are Belgian receiving agencies. The judicial officer will do the service. He will serve an identical copy of the document on the addressee.

[8] Cass. 15 May 2015, C.12.0568.N.

[9] Cass. 29 January 2016, C.14.00006.F.

With regard to the costs, Article 11 Regulation 1393/2007 will be applied. The costs of service by a bailiff correspond to a flat-rate fee of € 135 per service, payable by the natural or legal person before any intervention.

1.4.2 Notification from Belgium to a foreign state

Notification from Belgium to a foreign state operates as follows. The Belgian transmitting agencies are the judicial officers, the court clerks, or the members of the public prosecutor's office. To institute legal proceedings, a distinction is made in Belgium between a service and a notification (Article 32 Judicial Code). A service is done by a judicial officer (bailiff). A notification is effected when a court document, in original or copy, is sent by post or email (with the involvement of a court clerk or a member of the public prosecutor's office). The law specifies which documents must be served or notified.

The costs are very difficult to estimate without concrete data (amount of the claim, translation or not of the writ and/or court documents) available for that estimate. For services, the Belgian Royal Decree of 30 November 1976 establishing the rates for bailiff services in civil and commercial cases and the rates for certain allowances (which are annually indexed) must be applied (see: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1976113030&table_name=loi (last accessed 2 October 2017) For notifications, no extra costs have to be paid. The costs are included in the court fees.

1.5 Concept of recognition

The concept of recognition is understood in accordance with the interpretation given to Article 36 Brussels Ibis Regulation. One should also keep in mind what the Court of Justice stated in the Gothaer case (C-456/11) of 15 November 2012: "*the concept of res judicata under European Union law does not attach only to the operative part of the judgment in question, but also attaches to the ratio decidendi of that judgment, which provides the necessary underpinning for the operative part and is inseparable from it.*"

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Part IV: Remedies

1 INTRODUCTION

The Belgian Judicial Code distinguished between ordinary and extraordinary remedies (Article 21 Judicial Code). The ordinary remedies are opposition and appeal. The extraordinary measures of appeal are cassation, third party opposition, repeal of *res judicata* and direct action against the judge.

2 OPPOSITION

2.1 Admissibility (condition, including time-limits)

As a general rule, each default judgment can be either opposed (Article 1047 Judicial Code) or appealed (Article 616 Judicial Code) by the party who defaulted. The (ordinary) appeal submits the case to the scrutiny of a higher court, whereas the opposition is lodged before the same court that delivered the default judgment (Article 1047(2) Judicial Code).

The possibility to lodge opposition against a default judgement is a right of the defaulting party, irrespective of the reason of the default (and without prior leave by a court or other authority). The notice of the opposition must however, on pain of nullity, indicate the reasons for the lodging of the opposition, meaning that the

opposing party must explain why and to what extent he feels aggrieved by the default judgment (Article 1047(4) Judicial Code). This statement of the grounds of the opposition may be brief.[1]

There exists, however, many exceptions to the rule that each judgment *de facto* rendered by default is susceptible to opposition. The law can provide that opposition is not possible against some decisions, for example when the decision is deemed to have been rendered after adversarial trial (e.g. Article 747, § 2(6), Article 748, § 2(6), Article 804(2) and Article 1113(1) Judicial Code). Some decisions are not susceptible to the application of any ordinary appellate remedies (*i.e.* opposition and appeal), such as decisions regarding the administration of the trial (e.g. decisions fixing the procedural calendar or the trial date (Article 747, § 2(4) and 748, § 2(5) *j°* Article 1046 Judicial Code) or decisions ordering certain investigation measures (e.g. decisions ordering a judicial site inspection (Article 1007-1008 Judicial Code) or appearance of the parties in person before the judge (Article 992 and 996 Judicial Code)).

Unlike the (ordinary) appeal, no statutory threshold must be met in order to lodge opposition. Opposition is available to the defaulting party who is aggrieved by the default judgment, regardless of the monetary value of the claim.

The opposition may be lodged as soon as the default judgment has been given even if it has not yet been served. The term for lodging the opposition is generally one month from the date the judgment is served by a bailiff or notified by the court registry by means of judicial letter (Article 1048(1) Judicial Code).[2] This is a peremptory time-limit that is provided for by law under penalty of inadmissibility, which must be pronounced by the court *sua sponte* (Article 860(2) *j°* 865 Judicial

[1] Cass. 13 January 2011, C.10.0053.F.

[2] Before 1 November 2015, Art. 806 Judicial Code stipulated that the default judgment had to be served on the defaulting party within a time-limit of one year, in absence of which the default judgement would be considered "non-existent". This implied that the defaulting party could enter a plea in the event that the other party wanted to enforce the judgment after the one year time-limit. The defaulting party could also oppose the judgment in court. However, the procedure prior to the default judgment was preserved, meaning that the party who obtained the "defunct" judgment, could simply request a new hearing and judgment. These rules still apply to default judgments which have become non-existent before 1 November 2015.

Code). If the party who did not enter an appearance failed to introduce the opposition within the statutory time-limit, a petition for cassation may be filed (provided that the conditions of this extraordinary legal remedy are met – see below) (Article 1076 Judicial Code). For the calculation, extension and suspension of the time-limit, please refer to what is set out below in relation to the (ordinary) appeal.

Opposition is only available to persons who were summoned to appear as a party in the proceedings, but defaulted and are aggrieved by the default judgment. Opposition is not possible by third parties, but an extraordinary appellate remedy, *i.e.* the third party opposition, is available to them (see Article 1122 *et seq*. Judicial Code).
If the party who has lodged the opposition defaults again, no opposition is allowed against the second default judgment (Article 1049 Judicial Code).

2.2 Form and language of the notice of opposition

Opposition must be lodged by service of a writ of summons upon the other party (Article 1047(2) Judicial Code). This formality may be abolished if all of the parties agree to appear voluntarily before the court (Article 1047(3) *j°* 706 Judicial Code). In some cases, it is allowed to lodge the opposition by means of a petition ("*verzoekschrift*" / "*requête*"), *i.e.* a written request directly addressed to the court registry by the opposing party or his counsel (e.g. Article 1253*quater*(c) Judicial Code).

The notice of opposition must be drawn up in the same language as the default judgment (comp. Article 24 Language Act 1935).

2.3 The scope of review/re-litigation

The opposition allows the defaulting party to re-submit the case in its entirety to the scrutiny of the same judge who delivered the default judgment. The judge who has to decide upon the opposition can review and re-litigate upon both facts and legal assessments. The scope of the judge's review is determined by the litigating parties, meaning that the judge cannot re-litigate on points at issue that are not challenged in the notice of opposition.

The opposition has a relative effect, meaning that it cannot have adverse effects for the party who lodges the opposition. This relative effect does not prevent, however, the extension or amendment of the original claim (Articles 807-808 Judicial Code).

2.4 Consequences of the opposition on (provisional) enforcement

As a general rule, the lodging of opposition entails a stay of the enforcement of the default judgment (Article 1397(1) Judicial Code), unless the judge has authorized the (provisional) enforcement of the default judgment or the law expressly provides for an exception to this rule (e.g. in family matters (Article 1398/1 Judicial Code)).
With regard to default judgments concerning the conviction of the defaulting party to pay a sum of money, both the effective lodging of opposition as well as the fact that the time-limit to lodge opposition has not yet expired to suspend the ability to enforce the judgment, unless the judge has authorized the provisional enforcement thereof (Article 1495(2) Judicial Code).

2.5 Coordination of the opposition with the appeal

Generally, each default judgement can be opposed (Article 1047 Judicial Code) and each judgment rendered in first instance, can be appealed (Article 616 Judicial Code). Unless expressly excluded by law (e.g. 1039(2) Judicial Code), appeal and opposition may be lodged simultaneously by the same party provided that the appeal is merely of a conservative nature and is filed in secondary order, namely in the event that the opposition is inadmissible. The appellate court shall, if necessary, stay its decision until after the decision regarding the opposition has been pronounced.

3 APPEAL

3.1 Admissibility of the appeal (including time-limits)

As a general rule, each judgment rendered in first instance may be subject to appeal, without prior leave by a court (Article 616 Judicial Code).

Although the Belgian Judicial Code does not expressly provide for (special) admissibility requirements, it is generally accepted that an appeal may only be lodged:

a. against a judgment that is susceptible to appeal;
b. in an appealable dispute;
c. within the statutory time-limit;
d. by and against a legal subject who was a party in the first instance proceedings;
e. if one is aggrieved by the first instance judgment.

a. As a rule, an appeal is available against all judgments rendered at the first instance level, even if its concerns an interlocutory judgment (“*tussenvonnis*”/“*décision incidente*”), a judgment before adjudicating (“*vonnis alvorens recht te doen*”/“*jugement avant dire droit*”) or a default judgment (“*verstekvonnis*”/“*jugement par défaut*”) (Article 616 Judicial Code).

There exist however a few exceptions to this rule. The law can provide that a certain decision is not appealable, such as decisions concerning the administration of the trial (*i.e.* administrative measures ordered by the court with respect to the proceedings, for example the decision fixing the terms to file pleadings or the trial date (Article 747, § 2(4) and 748, § 2(5) *j°* Article 1046 Judicial Code) or judgments rendered by the District Court (“*arrondissementsrechtbank*”/“*tribunal d'arrondissement*”) (Article 642 Judicial Code).

b. The law can determine that a dispute is not appealable, when a judgment is delivered “at first and final instance” (“*in eerste en laatste aanleg*”/“*en premier et dernier resort*”). In this case only extraordinary appellate remedies, such as a procedure before the Court of Cassation (“*Hof van Cassatie*”/“*Cour de cassation*”), are available.

This is the case if the amount in dispute does not exceed the threshold laid down in Article 617 Judicial Code [3]: € 2,500.00 for judgments of the Court of First Instance (“*rechtbank van eerste aanleg*”/“*tribunal de première instance*”) and the Commercial Court (“*rechtbank van koophandel*”/“*tribunal de commerce*”); € 1,860.00 for judgments of the

[3] The monetary value of the claim is determined in accordance with Art. 557-562 Judicial Code. The Court of Cassation ruled that the judge may decide that the appeal is not admissible, even though the statutory threshold is met, if the appellant maliciously raised or exaggerated the monetary value of the (counter)claim with a view to circumvent the statutory threshold (Cass. 8 January 2004, C.01.0453.N).

Justice of the Peace Court ("*vredegerecht*"/"*justice de paix*") and the Police Court (in disputes as referred to in Article 601*bis* Judicial Code) ("*politierechtbank*"/"*tribunal de police*"). The judgments of the Labour Court ("*arbeidsrechtbank*"/"*tribunal de travail*") however are always susceptible to appeal, regardless of the monetary value of the claim (Article 617(2) Judicial Code). If the value of the claim is modified in the course of the proceedings, the amount of money claimed in the final pleadings will be considered (Article 618(2) Judicial Code). If the claim cannot be expressed in terms of money, the judgment is presumed to be rendered in first instance (Article 619 Judicial Code). Interlocutory judgments and judgments ordering an investigation measure are appealable if the value of the main claim exceeds the abovementioned amounts (Article 612 Judicial Code). However, in case of a counterclaim for vexatious litigation, a counterclaim or action to intervene (seeking the conviction of a third party)[4] resulting from the same disputed contract or fact founding the main claim, the possibility to appeal the judgment is determined on the basis of the added value of the main claim and the counterclaim, *c.q.* action to intervene (Article 620 Judicial Code).

c. In principle, an appeal can be filed as soon as the judgment has been given even if it has not yet been served (Article 1050(1) Judicial Code). In some cases, a certain waiting period has to be observed before a judgment may be appealed. An interlocutory judgment deciding upon the competence of the court is not immediately possible, but can only be lodged together with the appeal against a decision on the admissibility or the merits of the case (Articles 1050(2) *j°* 19(1) Judicial Code). As a result of recent changes to the Belgian Judicial Code, decisions before adjudicating (e.g. decisions ordering an expert investigation or provisionally arranging the (legal) situation between parties) rendered after 1 November 2015 are subject to the same rule, unless the judge decides otherwise (Article 1050(2) Judicial Code).

[4] The Constitutional Court ruled that the limitation of the scope of Art. 620 Judicial Code to "actions to intervene" – which do not cover all kinds of incidental claims – is unconstitutional (Const.Court 7 June 2001, 79/2001), precluding the application of this provision by the courts (Cass. 5 February 2016, C.15.0011.F).

The term for lodging an appeal is generally one month from the date of service[5] of the judgment (Article 1051(1) Judicial Code). The time is calculated starting from the day after the *dies a quo* (being the day of the act or event that triggers the time-limit) (Article 52(1) Judicial Code) until/and inclusive the *dies ad quem* (being the last day, *i.e.* the day on which the prescribed period of time elapses) (Article 53(1) Judicial Code). For the calculation of the term of one month, one must count from the day after the *dies a quo* until the day before such day in the next month (Article 54 Judicial Code), meaning that when the event starting the term of appeal took place on 15 February, the term itself will start on 16 February (the day after the *dies a quo*) and end on 15 March (the day before such day in the next month). When the term expires on a Saturday, Sunday or a public holiday[6], it will be prolonged until the next working day (Article 53(2) Judicial Code).

The term of appeal is a peremptory time-limit and is provided for by law under penalty of inadmissibility, which must be pronounced by the court *sua sponte* (Article 860(2) *j°* 865 Judicial Code). The term cannot be extended (or shortened) by the court, even with the agreement of the parties (Article 50(1) Judicial Code). However, when a party has no (elected) place of residence or domicile in Belgium, the time is extended by 15 days if this party resides in France, Luxembourg, the Netherlands, Germany or the United Kingdom; by 30 days if he resides in another state of Europe and by 80 days if he resides in another part of the world (Article 1051(3) *j°*55 Judicial Code). The same applies if the judgment is notified by judicial letter[7] to a party who has no (elected) place of residence or domicile in Belgium (Article 1051(4) *j°* 55 Judicial Code). Also, when the term of appeal begins and ends during the judicial holidays (from 1 July to, and including, 31 August (Article 340 Judicial Code)), it is

[5] In some exceptional cases, the law requires the court clerk to notify the decision to the parties by judicial mail, in which case this "notification" triggers the running of the term of appeal (see Art. 792(2-3) *j°* 46, § 2 Judicial Code). The notification that is effected pursuant to Art. 792 JC needs to contain information on the appellate remedies, their time-limit and the competent court. The absence of this information results in the nullity of the notification, meaning that the notification is void and cannot produce any legal effects (Art. 792(3) JC).

[6] The public holidays are: 1 January (New Year's Day); Easter Sunday and Easter Monday (variable dates); 1 May (Labour Day); Ascension Day (sixth Thursday after Easter Sunday); Whitsun and Whit Monday (seventh Sunday and Monday after Easter Sunday); 21 July (national holiday); 15 August (Assumption); 1 November (All Saints Day); 11 November (Armistice WW I); 25 December (Christmas).

[7] Comparable with a registered letter with acknowledgement of receipt.

(automatically) extended until the fifteenth day of the new judicial year (*i.e.* 15 September) (Article 50(2) Judicial Code).

The term of appeal can be suspended due to *force majeure* (for as long as the *force majeure* lasts) being an insurmountable impediment to lodge an appeal, which has to be proved by the party lodging the appeal after the expiration of the time-limit. Only circumstances which happen in spite of human will and which cannot be foreseen or prevented are accepted as *force majeure*. The non- or malfunctioning of the mail delivery service is not considered *force majeure* since the documents could have been delivered in another way. Mistakes or negligence of an authorised representative (lawyer, bailiff, etc.), which took place within the limits of the representation, are generally considered to be the mistakes or negligence of the person represented, and cannot give rise to *force majeure*.[8]

The death of a party suspends the time-limit imposed on that party to file an appeal. The term of appeal commences again only after the judgment has been served again at the place of residence of the deceased party. If the judgment is served before the expiry of the time-limits to draw up an estate inventory and reflect hereupon, the term of appeal commences again after the expiry of those time-limits. The judgment can be served jointly on the heirs, without stating their name and title. Any interested party can nevertheless be exempted from the expiry of the time-limit if he was not informed of the service of the judgment (Article 56 Judicial Code).

Cross appeals ("*incidenteel beroep*"/"*appel incident*") can be lodged "at all times" (Article 1054(1) Judicial Code), *i.e.* until the hearings are closed, provided that the principal appeal was filed in time (Article 1054(2) Judicial Code).

d. Appeal is only available to persons who were a party (or represented by a party) in the first instance proceedings. Appeal is not possible by third parties, not even if they are aggrieved by the judgment; only the third party opposition is available to them (see Articles 1122 *et seq.* Judicial Code).

[8] Cass. 3 May 2011, P.10.1865.N; Cass. 27 April 2010, P.10.0512.N; compare with Cass. 9 November 2011, P.11.1027.F.

The respondent must also have been a party in the first instance proceedings and must have been the opponent of the appellant. The latter condition is fulfilled when the first instance judgment creates an obligation for the appellant towards that party. In principle, the appellant can freely choose against whom, among the parties to the case, he will lodge an appeal. This is only different in the case of an "indivisible dispute" (Article 1053 *j°* 31 Judicial Code).

A cross appeal can only be filed by a party against whom a (principal or other cross) appeal is already pending. A cross appeal can be filed against all parties involved in the case before the appellate judge (Article 1054(1) Judicial Code).

e. Appeal is only available to parties in the first instance proceedings who are aggrieved by the first instance judgment. This means that the appellant must have a legitimate interest in bringing the case before the appellate court (Article 17 Judicial Code). For example, since the appeal aims at reversing the first instance judgment, no appeal can be filed on behalf of the party whose claim has been fully granted.

3.2 Form and language of the notice of appeal

Appeal may be lodged in different forms (Article 1056 Judicial Code): (1) by service of a writ of summons upon the party against whom appeal is sought (i.e. the respondent); (2) by petition to be filed with the clerk's office of the competent Court of Appeal ("*hof van beroep*"/"*cour d'appel*") or Labour Court of Appeal ("*arbeidshof*"/"*cour de travail*"), the date of arrival of the petition being the date of the appeal (the clerk notifies a copy thereof to the party against whom appeal is sought and its counsel, if any); (3) by registered letter where specifically provided by law and (4) by pleadings for lodging a cross appeal against other parties in the appellate proceedings.

Except when lodged by pleadings, the notice of appeal must mention the date, the complete identity and address of the appellant and respondent, the profession of the appellant, where appropriate the identity of the counsel of the appellant, the judgment which is appealed, the appellate court, the place where the respondent must file his declaration of appearance, the grounds for the appeal and the date, place and time of the hearing except if the appeal has been lodged by registered mail

in which case the court clerk will summon the parties to the hearing determined by the judge (Article 1057 Judicial Code).

The grounds of the appeal are the grievances, complaints and reproaches of the appellant regarding the contested judgment. The statement of the grounds of appeal may be brief, but a simple referral to the pleadings of the appellant filed during the proceedings in first instance is insufficient.

The notice of appeal must be drawn up in the same language as the contested judgment (Article 24 Language Act 1935)[9].

3.3 The scope of review/re-litigation

The appeal allows the parties to obtain a new decision in a dispute which has already been adjudicated. The appellate court can review and re-litigate upon both facts and legal assessments.

The appeal has a relative effect, meaning that it cannot have adverse effects for the party who lodges the appeal. The position of such party may only become worse at the appellate level if the other party lodges a (cross) appeal against the aforementioned party.

In principle, the appeal submits the dispute in its entirety to the scrutiny of the appellate court. Even the appeal against a mere interlocutory judgment brings the entire dispute before the appellate court (Article 1068(1) Judicial Code).[10] This implies that the appellate judge will have to judge all the issues of the matter,

[9] This Act governs the use of languages before the Belgian courts. In principle, the language is determined by the geographical location of the competent (first instance) court. Pursuant to Article 42 Language Act 1935, there are three linguistic regions: the French, the Dutch and the German linguistic region. There is also the bilingual conurbation of Brussels (French/Dutch). Under certain circumstances, a case can however be referred to a court that uses a different procedural language. Under certain conditions, a change of procedural language may be requested, in principle at the start of the proceedings.

[10] There is only one exception to this rule (Art. 1068(2) Judicial Code): when the first judge has ordered an investigation measure, e.g. a witness examination or expert investigation, and this decision is – even partially – affirmed, the appellate judge must refer the case back to the first instance judge. If the appellate judge reverses the decision ordering the investigation measure, he will deliver judgment with regard to the entire case.

including the issues not adjudicated yet by the first judge. Therefore, the appellate judge can examine all the facts laid down before the first judge and the parties can advance all arguments and pleas already set forth in the proceedings in first instance. Moreover, the appellate judge needs to examine the new facts advanced by the parties, even if those facts only occurred after the decision of the first judge.

Even when the appellate judge annuls the first judgment for reason of procedural irregularity, he still has to render judgment on the entire matter and cannot refer the case back to the first instance judge. This is, for example, the case when the appealed judgement is annulled for reason of violation of the rights of defence, an irregular composition of the first instance court or a procedural error of the first instance court that cannot be rectified by the appellate judge.

The abovementioned irregularities should not be confused with an irregularity in the preliminary notice (e.g. the writ of summons, the petition, etc.) that brought the case before the first instance court. The irregularity of the preliminary act cannot be rectified by the fact that the appeal has been lodged in a regular way. As a consequence, the appellate judge has to dismiss the case without judging it merits.

In accordance with the principle of party autonomy, the parties set the limits of the case. With regard to the appeal proceedings, this implies that the scope of the appellate judge's jurisdiction is determined by the scope of the appeal determined by the appellant, *c.q.* the cross appeal(s) determined by the respondent(s) ("*tantum devolutum, quantum appellatum*").

3.4 Consequences of the appeal on (provisional) enforcement

As a result of recent changes to the Belgian Judicial Code, a distinction must be made between judgments rendered in cases which were initiated before 1 November 2015 and judgments rendered in cases which were initiated after 1 November 2015.

4 PETITION FOR CASSATION

The Belgian legal system provides for a further (extraordinary) legal remedy against judgments rendered in last instance, *i.e.* the petition for cassation ("*de voorziening in cassatie*"/"*le pourvoi en cassation*"), which is to be filed before the Court of Cassation.

4.1 Admissibility of the petition for cassation (including time-limits)

The petition for cassation can be filed only against judgments delivered in last instance, *i.e.* judgments against which it is no longer (or has never been) possible to lodge an (ordinary) appeal on points of fact and law (Article 608 Judicial Code). The petitioner is not required to obtain prior leave by a court or other authority.

The petition for cassation may be filed against both final decisions (*i.e.* decisions on the admissibility or merits of the case) and decisions before adjudicating (e.g. decisions ordering an investigation measure). The petition against a decision before adjudicating, however, can only be lodged after the final judgment (*i.e.* the judgment in which the judge has exhausted his power with regard to the entire dispute) has been rendered (Article 1077 Judicial Code).

The petition may be filed only on the grounds of violation of the law or violation of substantial procedural formalities (Article 608 Judicial Code). The petition must explain in which way and to what extent the judgment against which it is filed is not in accordance with the law. It must also precisely indicate the allegedly violated legal provisions (Article 1080 Judicial Code).[11]

In civil cases, the petition must be signed by an attorney admitted to practice before the Court of Cassation. A petition that is not signed by such specialized attorney will be declared inadmissible (Article 1080 Judicial Code). It is usual, before initiating cassation proceedings, to consult an attorney admitted to practice before the Court of Cassation about the chances for success. In case of a negative advice, the intention to lodge an appeal before the Court of Cassation is mostly abandoned. However, in case a party persists in its intention, he can order a lawyer (in civil cases one who is

[11] Although the ECtHR has ruled that this requirement is aimed at securing a legitimate goal, its application i*n concreto* must pass the proportionality test (see ECtHR 30 July 2009, nr. 18522/06, Dattel/Luxemburg: "*Aussi, la Cour a-t-elle estimé que la limitation imposée par cette règle jurisprudentielle poursuit un but légitime. En effet, la précision exigée dans la formulation des moyens de cassation a clairement pour objectif de permettre à la Cour de cassation d'exercer son contrôle en droit (…). Reste à savoir si cette exigence de précision dans la formulation du moyen de cassation répond à la condition de la proportionnalité entre les moyens employés et le but visé. A ce sujet, la Cour estime que le mémoire en cassation doit être considéré dans son ensemble, en ce sens que les requérants doivent avoir formulé leurs doléances à l'égard de l'arrêt d'appel soit dans l'énoncé du moyen de cassation même, soit au besoin dans la discussion qui développe le moyen*"; see also ECtHR 29 March 2011, nr. 50084/06, RTBF/Belgium).

admitted to practice before the Court of Cassation) to initiate proceedings. There is no leave for cassation appeal.

The petition has to be served to the defendant by a bailiff and subsequently to be filed with the court registry of the Court of Cassation (Article 1079 Judicial Code).

The petition for cassation, in principle, has to be filed within three months from the date of service or notification of the contested judgement (Article 1073 Judicial Code). This term is a peremptory time-limit and is provided for by law under penalty of inadmissibility. In the event of death of the party against whom the petition for cassation must be filed during the running of the term of cassation appeal, the term is extended by two months (Article 1074 Judicial Code).

As with the ordinary appeal, the petition for cassation can only be filed by a legal subject who was a (represented) party in the previous (appellate) proceedings, provided that he has an interest in bringing the case before the Court of Cassation. The latter means for example that a party cannot file a petition for cassation against a decision concerning the course and administration of the proceedings which was rendered in conformity with this party's pleas, even though this decision constitutes a violation of the law.[12]

4.2 Form and language of the petition for cassation

The form and formal requirements of the petition for cassation are explained above.

The petition must be drawn up in the same language as the contested judgment (Article 27 Language Act 1935). If the language of the contested judgment is German, the petition may be drawn up in Dutch, French or German, to which the petitioner has the choice (Article 27*bis* Language Act 1935).

4.3 The scope of review/re-litigation

The petition for cassation is not a second appeal or third instance procedure, but a review procedure that aims at reviewing only whether the judgment against which

[12] Cass. 7 February 2014, C.12.0571.F; Cass. 3 May 2013, C.12.0350.N; Cass. 16 March 2012, C.08.0323.F-C.09.0590.F; Cass. 1 March 2012.

the petition for cassation is made is rendered in accordance with the law and the applicable formal requirements (Article 147 Belgian Constitution; Article 608 Judicial Code). In other words, the Court of Cassation does not rule on the facts but only on questions of law. Hence, a petition for cassation may be lodged on points of law only, *i.e.* on the grounds that there has been a breach of the law or a general principle of law or due process.

The scope of review by the Court of Cassation (in civil cases)[13] is set by the petitioner only. The Court has no jurisdiction regarding points of law which are not included in the petition for cassation (Article 1080 *j°* 1095 Judicial Code), not even if it is apparent that the judgment against which the petition is filed contains (other) violations of the law or general principles of law.

When the petition for cassation is dismissed, the judgment against which the petition was made (including its *res judicata*) is preserved. If the petition is granted, the Court of Cassation quashes the judgment, either in whole or in part. If the substance of the case has to be reconsidered, the case is referred to a court at the same level as the one that delivered the initial judgment (Article 1110 Judicial Code). The procedure before this court will be commenced by the service of a writ of summons accompanied by a copy of the judgment of the Court of Cassation (Articles 1110 and 1115 Judicial Code). The court is not bound by the decision of the Court of Cassation, except when there are two subsequent cassation decisions in the same case on the same point of law (Article 1120 Judicial Code). In practice, however, the decisions of the Court of Cassation have a decisive influence on the creation of the case-law. The lower courts usually follow precedents set by the Court of Cassation and the Court of Cassation only exceptionally overrules its own precedents.

[13] In criminal cases, the Court of Cassation examines on its own initiative any (other) violations of the law or fundamental procedural requirements.

4.4 Consequences of the petition for cassation on enforcement

In civil cases, the filing of a petition for cassation does not entail a stay of the enforcement of the contested judgment, unless the law expressly provides otherwise (Article 1118 Judicial Code). In other words, the contested judgment is fully enforceable (has the force of *res judicata*), notwithstanding the cassation appeal.

5 REMEDIES IN ENFORCEMENT PROCEDURE

Whereas recourse regarding the merits of the case boils down to the remedies of opposition, appeal and petition for cassation, claims regarding the enforcement have to be brought before the judge of seizure.

If the enforcement itself is concerned, objections have to be brought before the judge of seizure. If the title is disputed, legal proceedings regarding the merits of the case need to be started.

The grounds for opposition against an enforcement decision are in accordance with either the Brussels Ibis Regulation or general domestic rules, depending on whether the enforcement decision is foreign or domestic.

6 REMEDIES IN INTERNATIONAL PRIVATE PROCEDURE

6.1 Types and main features

The Belgian Code of Private International Law provides for an automatic (*de plano*) recognition of foreign judgments, (meaning that a foreign judgment gains legal force (or has "legal effects") in Belgium) without there being a need for a particular (preliminary) procedure before the Belgian courts. The enforcement of a foreign judgment requires that such a judgment must be declared enforceable in special enforcement proceedings before a competent court of first instance.

While the recognition or enforcement of a foreign judgment implies that under no circumstances is there a review of its merits (meaning that a re-trial of the substance of the matter before a Belgian court is precluded), recognition or enforcement is, however, subject to the foreign court's decision not infringing upon any of the

grounds for refusal that are exhaustively listed in Article 25, first paragraph of the Belgian Code of Private International Law.

The debtor is entitled to oppose the actual enforcement of the foreign judgment that has been declared enforceable in Belgium. Such opposition proceedings are not different from those filed in the framework of actual enforcement proceedings of domestic judgments or authentic instruments.

6.2 Grounds for challenging foreign judgement

A foreign judgment shall not be recognized or declared enforceable if:

1° the result of the recognition or enforceability would be manifestly incompatible with public policy; upon determining the incompatibility with the public policy special consideration is given to the extent in which the situation is connected to the Belgian legal order and the seriousness of the consequences, which will be caused thereby.
2° the rights of the defence were violated;
3° in a matter in which parties cannot freely dispose of their rights, the judgment is only obtained to evade the application of the law designated by the present statute;
4° according to the law of the State where the judgment was rendered and without prejudice to article 23, §4, the judgment would still be subject to an ordinary recourse in the said State;
5° the judgment is irreconcilable with a Belgian judgment or an earlier foreign judgment that is amenable to recognition in Belgium;
6° the claim was brought abroad after a claim which is still pending between the same parties and with the same cause of action was brought in Belgium;
7° the Belgian courts had exclusive jurisdiction to hear the claim;
8° the jurisdiction of the foreign court was based exclusively on the presence of the defendant or the assets located in the state of such court, but without any direct relation with the dispute; or;
9° the recognition or enforceability would be contrary to the grounds for refusal provided for in articles 39, 57, 72, 95, 115 and 121.

Under no circumstances will the foreign judgment be reviewed on the merits (Article 25 Belgian Code of Private International Law). Note that the list in Article 25 of the Belgian Code of Private International Law resembles the grounds listed in Article 45 of the Brussels Ibis Regulation.

The Belgian Code of Private International Law provides for diverging rules on the recognition and enforceability of foreign judgments relating to specific subject matters:

- name (Chapter II, Section 2, Article 39);
- repudiation (Chapter III, Section 5, Article 57);
- adoption (Chapter V, Section 2, Article 72);
- intellectual property (Chapter VIII, Section 3, Article 95);
- legal entities (Chapter X, Article 115); and
- insolvency (Chapter XI, Article 121).

7 REMEDIES FOLLOWING THE ABOLISHMENT OF EXEQUATUR

7.1 Remedies in Member State of origin concerning enforcement title

With regard to remedies in the Member State of origin regarding the enforcement title itself, one could wonder whether these remedies influence the enforcement procedure in the Member State of enforcement. To the extent that the application of those remedies in the Member State of origin affects the enforcement title, it will have consequences for the enforcement procedure in the Member State of enforcement that is based on that enforcement title.

7.2 Application for refusal

Article 47 of the Brussels Ibis Regulation concerns the application for refusal of enforcement. The court to which an application for refusal of enforcement can be submitted is the Court of First Instance (Articles 46, 47(1) and 75(a))[14]. As the regulation contains no provisions concerning the local jurisdiction of this court, it has to be assumed that national law is applicable. The local jurisdiction of the court is determined by reference to the place of domicile of the party against whom enforcement is sought (Article 624 Judicial Code; compare Article 23 Code of Private International Law).

Belgium has appointed the Court of Appeal (*cour d'appel*) as the court to which the appeal against the decision on the application for refusal of enforcement can be lodged (Articles 49 and 75(b)). The decision given on this appeal may only be contested by a petition for cassation, which has to be submitted to the Court of cassation (*Cour de cassation*) (Articles 50 and 75(c)).

In addition, one should consider Articles 46-51 *juncto* Article 75[15] of the Brussels Ibis Regulation. According to Article 46 B IA, the enforcement of a judgment shall be refused where one of the grounds referred to in Article 45 of the Regulation is found to exist. Since those grounds do not only concern security measures, enforcement can be refused based on (the content of) the enforcement title.

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[14] In jurisprudence (I. Couwenberg, "Erkenning, exequatur en executie van vonnissen", in B. Allemeersch and T. Kruger (eds.), *Europees burgerlijk procesrecht*, Antwerp, Intersentia, 2015, 182) it is mentioned that at first sight it would be a logical option to designate the judge of attachments (a magistrate in the Court of First Instance who has the exclusive power to deal with seizures and attachments) as the competent judge on this matter. At second thought, this choice seems to be incongruent with the architecture of the Regulation. Indeed, the same procedure applies in case of an application for refusal of recognition and this matter clearly does not belong to the jurisdiction of the specialized judge of seizure.

[15] See: https://e-justice.europa.eu/content_brussels_i_regulation_recast-350-be-en.do?member=1 (last accessed 15 August 2016).

7.3 Specific requirements regarding the required documents

The party that invokes the recognition of or seeks to declare a foreign judgment enforceable must produce the following documents:

1° a certified copy of the decision, which according to the law of the State where it was rendered meets the conditions required for the authenticity thereof;
2° if it concerns a decision by default, the original or a certified copy of the document establishing that the act that introduced the proceeding or the equivalent document was served or brought to the notice of the defaulting party in accordance with the law of the State where the decision was rendered;
3° any document on the basis of which it can be established that, according to the law of the State where the decision was rendered, the decision is enforceable and has been served or brought to notice.

In the absence of the production of these documents, the judge may impose a delay in which they are to be produced or accept equivalent documents or, if he believes to be sufficiently informed, grant an exemption (Article 24 Belgian Code of Private International Law).

7.4 Suspension and limitation of enforcement proceedings

In principle, it is not up to the judge of seizure to suspend the enforcement of an enforceable judgment. A statutory exception is Article 1127 Judicial Code, which states that the judge of seizure can suspend the enforcement of the disputed judgment, at the request of the party who started third-party proceedings ("*derdenverzet*"/"*tierce opposition*"). The provision has a general scope. Another example is Article 1714 Judicial Code, which authorises suspension of the enforcement by a judge before whom an enforcement or annulment claim regarding an arbitral award. However, it is not a task of the judge of seizure (Brussels Civil Court 4 November 1991, *Pas.* 1992, III, 27).

Thus, the judge of seizure cannot suspend the immediate enforceability (*e.g.* Judge of seizure of Liège 19 February 1990, *JLMB* 1990, 851; Brussels Civil Court 19 February 1991, *Act.dr.* 1992, 1373), neither can the appeals judge (Court of appeals

of Ghent 9 March 1995, *RW* 1995-96, 437, note; Court of appeals of Brussels 23 June 1993, *JLMB* 1993, 1266), nor the president in interim proceedings (Court of appeals of Ghent 9 March 1995, *RW* 1995-96, 437, note; President employment court ("*arbeidsrechtbank*"/"*Tribunal du travail*") 6 October 1993, *TGR* 1993-94, 138).

In exceptional circumstances, the judge of seizure can suspend enforcement. Four cases have been accepted by case law. In case of urgency, the president of the court of first instance can be competent.

1° abuse of the right of seizure. The suspension of the enforcement is then to be seen as an adequate way of redress following the abuse (*e.g.* Court of appeals of Mons 16 May 1995, *JLMB* 1996, 486; Judge of seizure of Liège 20 March 1991, *JLMB* 1991, 694; Judge of seizure of Namur 30 December 2005, *JLMB* 2006, 1060).
2° in case of a serious dispute about the scope of the enforceable title
3° the judgment the enforcement of which is being pursued came about through a violation of fundamental rules of procedure. *E.g.* judgment *ultra petita* or violation of the right defence (Court of Cassation 1 April 2004, *RW* 2004-05, 1222, note K. Broeckx).
4° the judge of seizure can examine whether the enforceable title still is real and effective. In case of serious discussion, the judge of seizure can suspend the enforcement, for example, until judgment has been given on the merits of the case.

8 GROUNDS FOR REFUSAL

The grounds of refusal are very strictly applied in Belgium. Parties can only invoke the grounds provided for by the Brussels I(bis) Regulation. The Court of Cassation confirmed that the Belgian judge cannot review the substance of the foreign decision, even in case the foreign decision would violate EU law (Court of Cassation 29 April 2010, AR n° C.09.0176.N-C.09.0479.N, Pasicrisie 2010, Vol. 4, 1327).

Since evasion of law that assimilates fraud is a specific and important ground for refusal of recognition under Belgian private international law, it can cause a refusal on ground of violation of international public policy. There are nevertheless situations in which the Belgian judge will have jurisdiction for the (refusal of)

recognition, but domestic law impedes the start of the procedure, e.g. when the action is barred by limitation. These grounds only apply when they are compatible with EU law (I. Couwenberg, "Brussel I-Vo: Quo vadis exequatur?" in CBR Jaarboek 2012-2013, Antwerp, Intersentia, 2013, 206).

The Belgian courts apply a strict assessment of the grounds of refusal of recognition of foreign judgments, in line with the objective of free movement of judgments. There is discussion on the matter if judges can *ex officio* refuse the recognition of a foreign decision. The jurisprudence defends the idea that this is only possible in case of a manifest breach of international public policy (K. Piteus, "Commentaar bij art. 42 t.e.m. 48 EEX-Verordening", in X., *Gerechtelijk Recht. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, Antwerp, Kluwer, 2004).

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