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# EFFORTS Practice Guide for cross-border enforcement of judgments, court settlements and authentic instruments under the Reg. (EU) No 1215/2012 – Belgium

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## I. Outgoing

When Belgium is the Member State of origin

### *A. Outgoing judgments*

When a party wishes to invoke a judgment or seeks its enforcement in another Member State, s/he shall produce certain documents, depending on each specific case, that shall be obtained in the Member State of origin, according to the applicable procedures and rules: (1) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; (2) the certificate issued pursuant to Art. 53, either in the standard version or with mandatory information (see Art. 42(1)(b) and Art. 42(2)(b)-(c) BI bis Reg.); (3) a translation or a transliteration of the contents of the certificate or a translation of the judgment.

1. **How and when to obtain a copy of the judgment which satisfies the conditions necessary to establish its authenticity.** ***See Art. 37(1)(a) and Art. 42(1)(a)-(1)(b) BI bis Reg***.

The Belgian BJC specifies what is meant by "a copy of the judgement which satisfies the conditions necessary to establish its authenticity". This is a copy of the ruling which presents certain formalism. This copy is issued by the Clerk of the court that issued the decision to the parties at their request.
A copy of a court decision is usually obtained by the lawyer. But it can be obtained directly by the parties as well[1].
The precise rates, which must be adhered to, are set out in the Royal Decree of 30 November 1976[2].

2. **How and when to ask for the certificate issued pursuant to Article 53.** ***See Art. 37(1)(b) and Art. 42(1)(b)-(2)(b) BI bis Reg***. The certificate attached in the Annex I, concerning a judgment in civil and commercial matters, contains the indication of the court of origin (name, address, and other relevant information), of the parties (identification of the claimant and of the defendant) and information regarding the

[1] See for more details: https://justice.belgium.be/fr/nouvelles/communiques_de_presse/pour_la_premiere_fois_les_citoyens_peuvent_consulter_leur_jugement.

[2] Arrêté royal du 30 novembre 1976 fixant le tarif des actes accomplis par les huissiers de justice en matière civile et commerciale ainsi que celui de certaines allocations, http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1976113030&table_name=loi.

judgment (date and reference number, if a default judgment, service of the judgment on the defendant, terms of the judgment and interests, information on the kinds of obligations contained in the judgment (monetary or otherwise), judgment ordering a provisional/protective measure, information on the costs and applicable interests).

In Belgium, the clerk of the Court that has rendered the decision is the competent authority. A written request to the clerk is sufficient.
Such a request can also be made directly during the procedure, the judge may therefore accept to issue the certificate when making its decision.
In any case, there is no time limit for such a request. Therefore, this request for issuance of certificate may be made after the decision has been issued.
There are no specific provisions regarding the issue of the certificate.
No security, bond or deposit (however described) is required from parties who apply in one EU member state for the enforcement of a judgment given in another member state on the ground that they are foreign nationals or not domiciled or resident in the addressed member state.
In general, court fees in Belgium are governed by art. 1018 BJC.
Article 1018 BJC details the costs:
*1. The various registry and registration fees.* Court registry fees include fees for entry in the cause list fees for drafting court documents and fees for providing copies of court documents (see Article 268 et seq. of the Code on registration, mortgage and registry fees). Registration fees are payable for decisions relating to a principal amount of more than €12 500 (not including legal costs) and are set at 3 % of that amount. They are therefore not payable for small claims.
*2. The cost of and emoluments and salaries for judicial documents.*
*3. The cost of providing a copy of a judgment.*
*4. The costs of any measures of inquiry, particularly the witness and expert fees.* The Royal Order of 27 July 1972 sets this fee at 200 francs per witness, which today corresponds to around EUR 5. Reimbursement of travelling expenses is added to this amount.
Experts are free to set their expenses and fees for expert reports, although the method of calculation must be clearly indicated and in the final assessment of the total legal costs the court may reduce the amount, where appropriate, for example where unnecessary expenses have been incurred.
*5. Travel and subsistence expenses for judges, registrars and parties, when required to travel by order of the court, and costs of documents drawn up solely for the proceedings.*
*6. Procedural cost indemnity* (Article 1022 of the BJC): this indemnity is paid by the unsuccessful party and is a flat-rate contribution towards the successful party's expenses and lawyers' fees. The amounts are linked to the consumer price index. Any

change of plus or minus 10 points gives rise to an increase or decrease, respectively, of 10 % of the amount.

2 *bis*. **Specific information for the enforcement**. For the purposes of enforcement in a Member State of a judgment given in another Member State, the certificate shall certify that the judgment is enforceable and contain an extract of the judgment as well as, where appropriate, relevant information on the recoverable costs of the proceedings and the calculation of interest. Furthermore, when the judgment orders a provisional, including protective, measure the certificate shall contain a description of the measure and certify that the court has jurisdiction as to the substance of the matter and that the judgment is enforceable in the Member State of origin.

**Arts. 2(a) and 42(2)(c): provisional measure ordered without the defendant being summoned to appear**. When a provisional, including protective measure was ordered without the defendant being summoned to appear, the creditor shall provide the competent authority of the Member State addressed also with proof of service of the judgment.

It should be supposed that a request for rectification can be made in front of the same authority who granted the certificate. There are no specific provisions regarding this issue.
The provisional measures are ordered without the defendant being summoned to appear and even informed, whenever the procedure can be introduced unilaterally, to create the surprise effect (Art. 1395 BJC), e.g., in intellectual property infringement cases. The proceeding starts with a unilateral request to the president of the court. Following the receipt of the president's order, the defendant can oppose the proceedings and request an "inter partes" debate. Interim orders can be appealed within one month from service of the original copy of the court's decision.
A party can file an *ex parte* (or unilateral) petition with the president of the Court of First Instance (Article 584(4) BJC; 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 BJC. 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 BJC) require the defendant to enter the plea for nullity before other pleas of defence (*in limine litis*) (Article 864 BJC) and to prove his interests were prejudiced by the alleged violation of these stipulations (Article 861 BJC). However, the defendant is not present in these proceedings. According to Article 1028 BJC the judge must 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 BJC).

2 *ter*. **Enforceability of the judgment**. A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required.

**Art. 44(2): suspension of the enforceability**. The competent authority in the Member State addressed shall, on the application of the person against whom enforcement is sought, suspend the enforcement proceedings where the enforceability of the judgment is suspended in the Member State of origin.

**Art. 51(1): ordinary appeal against an enforceable judgment**. The court of the Member State addressed to which an application for refusal of enforcement is submitted may stay the proceedings if an ordinary appeal has been lodged against the judgment in the Member State of origin or if the time for such an appeal has not yet expired.

The law of 19 October 2015, on changes to the civil procedure and diverse clauses in justice, changed the suspending effect of an appeal. All judgments[3] are in principle enforceable unless stated otherwise in the judgment. These include:

- Money judgments.
- Judgments ordering or prohibiting acts, or injunctions.
- Declaratory judgments.

Default judgments are only enforceable after the expiry of the period available for opposing/appealing the judgment of one month from the date of service of the judgment on the appellant, if not opposed/appealed during that period (Article 1397 BJC).
A final judgment (that rules definitively on an issue of the dispute)[4] will not enforceable if the judge explicitly declares it to be unenforceable pending further appeal

[3]Taking into account the conditions due by Belgian public policy laws (see: https://www.hg.org/legal-articles/enforcement-of-foreign-judgments-in-belgium-29229):
(a) Money judgments are enforceable in Belgium, either in euros, or in another currency, foreign to the euro-zone.
(b) Specific performance judgments are enforceable. To be enforceable, these performances must have been ordered by the foreign judgment; if this were not the case, the Belgian court could not order them.
(c) Injunctions are enforceable.
(d) Arbitration awards are enforceable in Belgium.
(e) (i) Judgments upon personal status and capacity (divorce, adoption, wedding) do not need to be enforced by the procedure of exequatur, since the Belgian system automatically recognizes their res judicata effect when they do not have any patrimonial or compulsory aspects. (When they do, the decision will have to be enforced to compel the defendant to satisfy the judgment rendered abroad). A judgment of insolvency is enforceable.
(f) Judgments allowing multiple or punitive damages are enforceable, at least theoretically. The Belgian court will refuse the enforcement if it is of the opinion that the damages are too high, and thus contrary to the Belgian public order policy.
(g) The exequatur of an exequatur is impossible.
(h) Foreign interim orders are not enforceable in principle, since only definitive judgments are enforceable. However, these orders may be enforced in Belgium if they can be enforced (and to the same extent) as in the country of origin. This means that, for instance, interim maintenance or custody orders would be enforceable in Belgium.
(i) A judgment against the Belgian Federal State, the Flemish Region, the Walloon Region, the Brussels Region, the German Region or against one of their bodies may be enforced, provided that it is not contrary to the Belgian public order policy, and that the foreign court had jurisdiction. Practically speaking, the possibilities of executing a foreign judgment against these bodies will however be limited, unless some creative thinking is involved. For instance, paintings in a State-owned Museum may not be seized as they serve the public interest, but a painting in the office of the curator of the same museum might be seized because this painting is not on display for the public and is not serving the public interest.
(j) Foreign decisions in criminal matters or concerning taxation are not enforceable.

[4] Article 19 BJC defines a final judgment as a decision rendered by a court that exhausts its jurisdiction over a disputed issue. The judgment must be in a form that shows procedural guarantees and that contains the enforcement formula set out in the Royal Decree of 21 July 2013.

proceedings at the request of one of the parties. Such a judgment becomes enforceable once the delay for filing for appeal has inspired.
Injunctions are enforceable.
Arbitration awards are enforceable in Belgium.
No enforcement proceedings are necessary for judgments from EU member states and no further *exequatur* or declaration of enforceability is required. Such an enforceable judgment carries with it the power to use any protective measures that exist under the law of the addressed member state.

**Art. 44(2): suspension of the enforceability**
In general, provisional enforceability cannot be suspended.
By way of derogation, the enforceability of certain decisions can be suspended.
Either by virtue of the law: the appeal suspends the enforceability of definitive judgments concerning the status of persons, as well as judgments rendered by the family court sitting in the context of a deemed or invoked emergency within the meaning of article 1253ter/4 of the BJC, and which concern disputes relating to the formalities for the celebration of marriage, the lifting of the prohibition of marriage of minors and its authorisation (art. 1399 BJC, repeating the text of articles 1398/2, and 1399, anterior, BJC).
Or by the decision of the judge: the judge can, by means of a specially reasoned decision, suspend the enforceability of the decision in the event of an appeal (art. 1397, para. 2, BJC).
In these cases, the judgment whose enforceability is suspended can only serve as a basis for conservatory measures, which render the property which is the subject of the judgment unavailable, but which cannot lead to its compulsory realization (art. 1397, 1414 and 1413 BJC).
Provisional enforceability can be stopped by the cantonment (art. 1404, para. 1, BJC), except when the enforceability is pursued to obtain payment of a claim of a maintenance nature (art. 1404, para. 1 initio) or if the judge has excluded the possibility of doing so (art. 1406 BJC).
As a general rule, each default judgment can be either opposed (Article 1047 BJC) or appealed (Article 616 BJC) 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) BJC).

**Opposition**
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) BJC). This statement of the grounds of the opposition may be brief.
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) BJC). 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 BJC) or decisions ordering certain investigation measures (e.g. decisions ordering a judicial site inspection (Article 1007-1008 BJC) or appearance of the parties in person before the judge (Article 992 and 996 BJC)).

**Appeal**
Appeals must relate to court decisions of the relevant provinces.
Belgium has five courts of appeal, which include:

- A Dutch-speaking division and a French-speaking division of the court in Brussels.
- Dutch-speaking courts in Ghent and Antwerp.
- French-speaking courts in Liège and Mons.

Each court of appeal covers two provinces.
Unless otherwise provided by law, all judgments issued by a court of first instance can be appealed *de novo*5 before the competent court of appeals. The appellant does not need obtaining permission to file an appeal. The court of appeal will decide on the admissibility of the appeal. *De novo* appeals are not available against decisions that exclusively relate to the internal rules of a court and decisions issued by the attachment judge on a court's competence.
Other examples of decisions that cannot be appealed before a court of appeal are:

- Judgments ruling on the grounds for annulment or exequatur of an arbitral award.
- Orders to produce documents or information.

Decisions ordering specific investigation measures.
The judge of appeal may grant provisional enforceability if it was not granted by the first judge (art. 1401 BJC). His power also extend to the review of the decision of the first judge to make provisional enforceability conditional on the provision of a

[5] The court looks afresh at the merits of the case. Parties can question the findings of fact and law of the lower court.

guarantee (art. 1400 BJC) or to refuse to exclude the possibility of confinement (art. 1406 BJC).
On the other hand, the power of the judge of appeal is limited with respect to the decision for which the first judge has granted provisional enforceability: s/he may not suspend or put an end to the enforceability of the judgment (art. 1402, BJC) unless the first judge is guilty of a manifest illegality, by committing an excess of power, by disregarding the rights of the defence or by granting the privilege.
1. Article 1051 BJC: An appeal may be lodged against a judgment within one month of service of the judgment on the appellant, or in some cases within one month of notice of the judgment given under Article 792 (2) (3) BJC. This applies whether or not both parties appeared in the proceedings.
This term is extended when the defendant in the appeals procedure has no domicile or residence in Belgium, as follows:

- 15 days' extension if the defendant resides in France, Luxembourg, The Netherlands, Germany or the UK.
- 30 days' extension if the defendant resides in another EU member state.
- 80 days' extension if the defendant resides in any other jurisdiction.

2. Article 1048 BJC provides that where a judgment is given in default of appearance of one of the parties, an objection (opposition/oppositie) may be entered, likewise within one month of service of the judgment on the appellant or in some cases within one month of notice of the judgment given under Article 792 (2) (3) BJC.
3. Where neither of those remedies is any longer available against a judgment of a civil court (or of a criminal court ruling on the civil aspects of a case before it), a party may in certain circumstances be able to make an application seeking an extraordinary review under Article 1133 BJC (requête civile/herroeping van het gewijsde), within six months of learning of the judgment, with a view to having the judgment revoked
The time-limits set out above for appeal, objection and application for extraordinary review do not affect:
- time-limits laid down in imperative provisions of supranational and international law;
- the provision in Article 50 BJC that allows a time-limit after which an entitlement lapses to be extended under certain conditions laid down by law;
- the possibility of applying the general principle of law, repeatedly confirmed by the Court of Cassation, according to which the time allowed for the performance of an act is extended in favour of a party who has been prevented from performing the act by force majeure.
An appeal on a point of law (pourvoi en cassation/cassatieberoep) may be lodged against the judgment of the court of appeal, according to art. 608 BJC.

2 *quater*. **Art. 55: judgment ordering payment of a penalty**. A judgment given in a Member State which orders a payment by way of a penalty shall be enforceable in the Member State addressed only if the amount of the payment has been finally determined by the court of origin.

According to article 1385 bis and following BJC, the penalty payment can be defined as a pecuniary sanction intended to force the debtor of an obligation to perform and it is called "astreinte"[6].
The pronunciation of an "astreinte" must meet several conditions.
First of all, the penalty must necessarily be ancillary to a main judgement, which implies that it must be pronounced and applied at the same time as the latter.
The judge is not bound by the proposal of the party about the amount and may impose a lower or higher penalty (Cass., September 21, 1993, Pas., 1993, I, p. 717).
In addition, the penalty can never be enforced before the notification of the decision which includes it.
The amount of the penalty payment may be fixed or variable depending on the number of breaches by the debtor or the number of days late in performing the disputed obligation. Be that as it may, the judge can set a ceiling beyond which the amount can no longer change.
On the other hand, periodic penalty payments can be classified into two categories: those that are final and those that are provisional. In the first case, the judge sets a penalty on which he cannot go back. When the penalty is temporary, the judge may, at the request of the debtor or even of the creditor, modify the rate initially planned. Thus, the debtor of the unexecuted obligation could request that the judge cancel, suspend or reduce the penalty imposed in the event of impossibility of executing the main sentence.
To make his decision, the judge will notably take into account the situation of the debtor, his attitude and the circumstances of the case, particularly when they are new.

[6] In the BJC, Part IV. Book IV. a chapter XXIII is introduced, entitled "On astreinte" and comprising the following eight articles:
Art. 1385 bis: "The judge may, at the request of a party, condemn the other party to pay a sum of money, called an astreinte, in the event that the principal condemnation is not complied with, all without prejudice to damages, if any. However. the astreinte cannot be pronounced in the case of an order for the payment of a sum of money. nor with regard to actions for the execution of employment contracts. The request is admissible, even if it is made for the first time in opposition or on appeal. The astreinte cannot be incurred before the notification of the judgment that pronounced it. The court may grant the condemned party a period of time during which the astreinte may not be incurred".
Art. 1385 ter. The judge may fix the astreinte either at a single sum or at a sum determined by unit of time or by contravention. In the latter two cases, the court may also determine an amount beyond which the astreinte order shall cease to have effect.

3. **How and when to obtain a translation or a transliteration of the contents of the certificate or a translation of the judgment.** ***See Art. 37(2) and 42(3)-(4) BI bis Reg***.

**Translation or transliteration of the contents of the certificate.** The court or authority before which the judgment is invoked or the competent enforcement authority may, where necessary, require the applicant to provide, in accordance with Art. 57, a translation or a transliteration of the contents of the certificate ([7]).

**Translation of the judgment.** The court or authority before which the judgment is invoked may require the party to provide a translation of the judgment instead of a translation of the contents of the certificate if it is unable to proceed without such a translation. In addition, the competent enforcement authority may require the applicant to provide a translation of the judgment only if it is unable to proceed without such a translation.

In Belgium, a translator under oath must certify the translation[8].
Courts do not provide translations, and parties involved must provide them at their own expense.
A sworn translator is a translator who has taken an oath before the court of first instance of his judicial district.
This translator is competent to translate certain official documents and stamp them with a personal seal, signature and affidavit.
The price of a (sworn) translation depends on the following factors: the number of words, the level of difficulty, the desired delivery time and the language combination. You have the choice between a rate per word or a fixed rate per request. The average price is 30 to 50 euro/page.
Translation costs must be paid by the applicant which may eventually recover these expenses against the defendant, in case of obtaining a declaration of enforceability, during enforcement proceedings.

[7] Please note that the translation or the transliteration of the certificate issued pursuant to Art. 53 shall be into the official language of the Member State addressed under Art. 57(1) as well as any other official language or languages of the institutions of the Union that the Member State concerned has indicated it can accept under Art. 57(2) BI bis Reg.
[8] Consult the registry of translators in Belgium: https://belgian-sworn-translator.be/registration-belgian-sworn-translators.html.

## *B. Outgoing authentic instruments and court settlements*

### Authentic instruments

When a party seeks the enforcement of an authentic instrument in another Member State, s/he shall produce (1) an enforceable authentic instrument that satisfies the conditions necessary to establish its authenticity in the Member State of origin and (2) the certificate issued under Art. 60.

1. **How and when to obtain an authentic instrument which satisfies the conditions necessary to establish its authenticity.**

> 1 *bis*. **Enforceability of the authentic instrument**. An authentic instrument which is enforceable in the Member State of origin shall be enforceable in the other Member States without any declaration of enforceability being required (Art. 58).
>
> **Art. 44(2): suspension of the enforceability**. The competent authority in the Member State addressed shall, on the application of the person against whom enforcement is sought, suspend the enforcement proceedings where the enforceability of the authentic instrument is suspended in the Member State of origin.

**Enforceability of an authentic instrument**
An authentic act is an official document, drawn up by a public official. The public officer can be a notary, a civil registrar of a municipality, a judge or a clerk. The authentic instrument has a validity and an indisputable character. It is also enforceable, i.e. a bailiff can enforce it directly. Thus, for example, a notarial deed (deed of sale of a house, will, donation, etc.).
Such a title may take different forms, according to articles 1494 et seq. BJC:

- A court decision;
- A consent order[9];
- An arbitral award;
- A notarial instrument;
- An administrative document to which the law has conferred enforceability.

[9] A consent order is an order confirming an agreement between the parties which is filed at court so it can be entered and sealed. Some consent orders also require approval by the court. The agreement is legally binding and enforceable.

According to Belgian law, an authentic instrument is proof of its content, which are elements noted and verified by the competent authority. It is binding on the parties, on third parties and on judicial authorities. It is only possible to prove the contrary in a complex procedure similar to the procedure for challenging a judicial decision on the grounds of judicial bias: the procedure to challenge the authority of a document.
Authentic are: the date, the place where the instrument was drawn up, the fact that the parties have appeared before the notary, that they have made a number of declarations in his/her presence, that they have made certain payments, etc. However, any references the veracity of which the public officer was unable to ascertain in person and which have only been included in the instrument on the basis of the parties' declarations, are only evidenced by the authentic instrument until the contrary is proven according to the rules of ordinary law (Art. 1319-1320 C.C. and Art. 895 et seq. of the BJC).
In civil matters, the procedure to challenge the authenticity of a document may be principal or incidental. In the latter case, the judge hearing the main case has jurisdiction to rule on the authenticity of a document. In both cases, the judge orders the parties to appear before him/her and orders the defendant in a civil case to produce the alleged false document. If the defendant appears and declares that he/she doesn't wish to use this piece of evidence, the judge takes note of that and has an official report drawn up. However, if the defendant declares that he/she wants to use it, the judge initials the document and orders it to be handed over to the court registry. After having taken all necessary investigatory measures, the judge will rule on the authenticity of the document. If the judge declares it to be false, the ruling is mentioned in the margin of the document in question and an official report is drawn up. The document is seized and sent to the public prosecutor, together with a copy of the ruling declaring it to be false.

**Enforceable decisions:**
An enforceable decision is an instrument that may be deployed, where necessary, by recourse to compulsory execution measures against a party who fails to comply with its obligations.
Pursuant to Article 1397 of the BJC[10], final decisions are automatically enforceable, unless the judge decides otherwise by a specially reasoned decision. Such a judgment becomes enforceable once the delay for filing for appeal has passed.
The principle of automatic provisional enforceability has two exceptions[14]:

[10] Art.1397 BJC: Except as provided by law or unless the judge, ex officio or at the request of one of the parties, decides otherwise in a specially reasoned decision, without prejudice to article 1414 BJC, final judgments are provisionally enforceable notwithstanding an appeal and without security if the judge has not ordered that a security be provided.

• the exceptions listed by the legislator in article 1399 BJC[11]
• the faculty left to the judge of the first instance to modulate, by a motivated decision, the provisional enforceability *ex officio* or on demand of the interested party.
The provisional enforceability of the judgment cannot be cancelled by the appeal judge. Under Article 1402 of the BJC[12], the court of appeal cannot in any case prohibit the enforceability of final judgments.
The legislator intends to prevent the appeal judge from carrying out a review of the opportunity of the decision of the first judge.
Under article 1399 BJC nevertheless provides for an exception when the action is brought against:
• a provisionally enforceable decision when the judge has expressly excluded any possibility of bail and cantonment.
• a decision the provisional enforceability of which is expressly authorized by the judge;
• a decision the provisional enforceability of which is expressly refused by the judge.
These three hypotheses necessarily presuppose an explicit decision by the judge. The appeal judge cannot prohibit the suspensive effect of decisions which are automatically enforceable by application of article 1397 BJC.

2. **How and when to ask for the certificate issued pursuant to Article 60 for authentic instruments**.

Under Belgian law, the certificate must be issued to the court of first instance.
This application must be filed to the Clerk office in duplicate or be sent by the lawyer of the applicant. There are no specific procedural steps or conditions.
When referring to public deeds, the competent body is the notary, just as with bills of exchange.

### Court settlements

When a party seeks the enforcement of a court settlement in another Member State, s/he shall produce (1) an enforceable court settlement that satisfies the conditions necessary to establish its authenticity in the Member State of origin and (2) the certificate issued under Art. 60.

[11] The opposition and the appeal suspend the execution: of final judgments concerning the status of persons; of judgments rendered by the Family Court Judge, sitting in a deemed or invoked urgency in accordance with Article 1253ter/4, and which concern disputes relating to the formalities for the celebration of marriage, the lifting of the prohibition of marriage of minors and its authorization.
[12] Art. 1402. Without prejudice to the application of article 1066, paragraph 2, 6°, the judges of appeal may in no case, on pain of nullity, prohibit the execution of judgments or have them stayed.

1. **How and when to obtain a court settlement which satisfies the conditions necessary to establish its authenticity.**

1 *bis*. **Enforceability of the court settlement**. A court settlement which is enforceable in the Member State of origin shall be enforceable in the other Member States without any declaration of enforceability being required (Art. 59).

**Art. 44(2): suspension of the enforceability**. The competent authority in the Member State addressed shall, on the application of the person against whom enforcement is sought, suspend the enforcement proceedings where the enforceability of the court settlement is suspended in the Member State of origin.

**Arbitral award:**
The most common settlement in Belgium is the arbitral award.
The Belgian law on arbitration is contained in Part Six of the Belgian Judicial Code (articles 1676 to 1722 BJC). The form of arbitral awards is governed by article 1713 of the BJC, which deals with the validity requirements and different aspects relating to the content of arbitral awards.
To be valid under Belgian law, an arbitral award rendered in Belgium must:

- as to form, be in writing and signed by the arbitral tribunal (the signature of the majority of the members of an arbitral tribunal is sufficient, provided the reason for any omitted signature is stated) (article 1713, section 3, BJC);
- as to substance, state the reasons on which it is based (article 1713, section 4, BJC) and contain, as a minimum, the following information:
  - the names and domiciles of the arbitrators;
  - the names and domiciles of the parties;
  - the object of the dispute (and a citation of the arbitration agreement, although this is not explicitly required by law);
  - the date on which the award was rendered; and
  - the place of arbitration.

**Conclusion d'accord:**
In Belgian law, a settlement is a private agreement between the parties which is then produced, following the signature of the parties, in court for the judge to take note of.
The parties personally can file briefs ("*conclusion d'accord*") in which they put an end to the proceedings.
The judge therefore decides in this sense, accordingly to the will of the parties.

The transaction is a contract that binds the parties and is subject to the private law of the state.
It follows that when one party fails to fulfil its obligations deriving from the transaction contract, the other party could take legal action and force the enforceability.
Similarly, the party who wants to suspend the enforceability of a contract, in the absence of the agreement of the other party, can take legal action if it considers, for example, that the other party is abusing its right.

**Mediation settlement:**
According to Art. 1733 BJC: "In case of agreement, and if the mediator who conducted the mediation is approved by the commission referred to in Article 1727 BJC, the parties or one of them may submit the mediation agreement obtained in accordance with Articles 1731 and 1732 BJC to the competent judge for homologation. This is done in accordance with Articles 1025 to 1034 BJC.
However, the request may be signed by the parties themselves if it is signed by all parties to the mediation. The mediation protocol is attached to the request.
The judge may only refuse to homologate the agreement if it is contrary to public policy or if the agreement reached in family mediation is contrary to the interests of minor children. The homologation order shall have the effect of a judgment within the meaning of section 1043 BJC".
The mediation shall be conducted in accordance with the provisions of Articles 1731 and 1732 BJC. At the end of his mission, the mediator shall inform the judge in writing whether the parties have reached an agreement.
If the mediation has led to the conclusion of a mediation agreement, even if it is only partial, the parties or one of them may, in accordance with Article 1043 BJC, ask the judge to homologate it.
The judge may refuse to homologate the agreement only if it is contrary to public order or if the agreement reached in family mediation is contrary to the interests of the minor children.
If the mediation has not resulted in a complete mediation agreement, the proceedings shall be continued on the date set, without prejudice to the possibility for the judge, if he or she deems it appropriate and with the agreement of all the parties, to extend the mediator's mission for a period of time that he or she shall determine."

2. **How and when to ask for the certificate issued pursuant to Article 60 for court settlements**.

Under Belgian law, the certificate must be issued to the court of first instance.
This application must be filed to the Clerk office in duplicate or be sent by the lawyer of the applicant. There are no specific procedural steps or conditions.

## II. Incoming

When Belgium is the Member State addressed

When a party wishes to invoke a judgment in the Member State addressed or seeks its enforcement, s/he shall invoke it before the courts of the Member State addressed or follow the procedure for the enforcement of judgments of the Member State addressed. The procedure for the enforcement of claims in BE is dealt with in the Annex "Enforcement procedure". In addition to national rules, the Regulation provides that enforcement must be preceded by (1) service of the judgment and of the certificate. Furthermore, the creditor may avail her/himself of: (2) the right to apply for a decision that there are no grounds for refusal of recognition as referred to in Art. 45; (3) the power to proceed to any protective measures which exist under the law of BE; (4) the request for adaptation of a measure or an order which is not known in the law of BE. On the other hand, the person against whom enforcement is sought (or, in case of the refusal of recognition, any interested party) may fight the recognition or the enforcement of the judgment issued in another Member State, either filing a claim for opposition to enforcement under national rules (which also will be dealt with in the Annex "Enforcement procedure") or (5) filing a claim for refusal of recognition or enforcement, also with the power to apply for the measures under Art. 44(1). The person against whom enforcement is sought may also (6) apply for the suspension of the enforcement proceedings pursuant to the grounds of suspension provided for by national law (to the extent that they are not incompatible with the Regulation, see Art. 41(2)) or in cases where the enforceability of the judgment has been suspended in the Member State of origin in accordance with Art. 44(2) BI bis Reg.

1. **Service of the judgment and the certificate prior to the enforcement**. Alongside the conditions and the procedural steps applicable under the law of the Member State addressed, the Regulation requires the creditor to take a number of steps before proceeding with the enforcement. First, the certificate issued pursuant to Art. 53 BI bis Reg. shall be served on the person against whom the enforcement is sought prior to the first enforcement measure (Art. 43(1)). The certificate should be served on that person within a reasonable time before the first enforcement measure (Whereas (32)).

Generally, service of the certificate and of the judgment before the enforcement takes place could be classified as cross-border service, i.e., "service from one Member State to another Member State", according to the definition given by the Service Regulation ([13]),

[13] Whereas (6) of the Reg. (EU) 2020/1784 of the European parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast).

applicable from 1 July 2022. However, in case the person against whom recognition or enforcement is sought is domiciled in the Member State of enforcement, such service could be out of the scope of application of the Service Regulation and therefore national rules on service could be applicable.

The certificate issued according to Article 53 of the Recast Brussels Regulation must be served on the person against whom the enforcement is sought before the first enforcement measure. The certificate must be accompanied by the judgment, if not already served on that person.
On application of the person against whom enforcement is sought, the enforcement of a judgment will be refused if one of the grounds for refusal is found to exist
No security, bond or deposit (however described) is required from parties who apply in one EU member state for the enforcement of a judgment given in another member state on the ground that they are foreign nationals or not domiciled or resident in the addressed member state.
If one or more parties do not comply with a court decision, they may be forced to do so by the forced enforceability of the enforceable title.
The writ of enforceability must have been previously served by a bailiff, and most often, it must also have been preceded by a command to pay; through this act, the creditor gives the debtor a final deadline to perform.
In some cases, it is possible in an emergency to proceed without an enforceable title to a precautionary seizure. However, it is mandatory to obtain the authorization of the attachment judge, with the exception of the procedure of protective attachment.

1 *bis*. **Language**. Where the person against whom enforcement is sought is domiciled in a Member State other than the Member State of origin, s/he may request a translation *of the judgment* ([14]) if the judgment is not written in or accompanied by a translation into the official language of the Member State in which s/he is domiciled or a language that s/he understands (Art. 43(2)).

Where such translation is requested, no measures of enforcement may be taken other than protective measures until that translation has been provided to the person against whom enforcement is sought (Art. 43(2)).

[14] *Creditors should be aware that translation of the certificate, unlike the translation of the judgment, is not strictly required at this stage of the enforcement but may be requested just afterwards by the enforcement authorities, according to Art. 42(3).*

The Belgian state recognizes three official languages: Dutch, French and German. However, it only works in Dutch in Flanders, only in French in Wallonia and only in German in the German-speaking region; in Brussels, Dutch and French are on par. The public communications of the Federal State are carried out according to the official language of the territory where the message must be heard or read.

1 *ter*. **Art. 41(3): authorized representative in the Member State addressed**.

A party seeking enforcement of a judgment given in another EU member state is not required to have a postal address or an authorised representative in the addressed member state, unless such a representative is mandatory irrespective of the nationality or the domicile of the parties.

2. **Protective measures**. An enforceable judgment shall carry with it by operation of law the power to proceed to any protective measures which exist under the law of the Member State addressed.

Precautionary measures are intended to guarantee the preservation of rights until when a judgement is provided and the enforcement is started. In concrete terms, they enable the creditor to protect her/himself against the risk of non-payment by her/his debtor.
If purely precautionary measures are not sufficient, the judge may order interim measures whose effects are comparable to those of the decision awaited in the proceedings on the merits. The final decision may confirm or cancel these interim measures.
The judge may pronounce provisional and conservatory measures relating to the assets of the debtor. Reimbursement of debts is subject to the principle that the debtor is indebted for all his movable property (cash, furniture, jewellery, movable titles) and immovable property (land, buildings, dwelling house). The creditor can also assert the rights held by his debtor (credit, salary).
Any creditor may, in cases that require speed, ask the judge for authorization to temporarily seize the seizable assets that belong to his debtor (article 1413 of the BJC). The debtor then no longer has free disposal of the property subject to the protective attachment. He can therefore no longer sell them, donate them or encumber them with a mortgage. This incapacity to dispose has only a relative effect: it only applies to the benefit of the seizing creditor. The debtor remains the owner of the goods and retains the right of enjoyment over them.
In matters of protection, the creditor has a choice of 3 different types of attachment:

1) The seizure of movable property, ("Saisie Mobilièr")[15]
2) The seizure of immovable property, ("Saisie Immobilièr")[16],
3) Garnishment, (Saisie Arrêt Conservatoire)

Provisional enforceability, or enforceability by provision, is possible, under certain very specific conditions, after the pronouncement of a judgment which has not yet become final.
Save for the exceptions provided for by law or unless the judge decides otherwise by means of a specially reasoned decision and without prejudice to article 1414 BJC, opposition filed against final judgments suspends their enforceability.
Save for the exceptions provided for by law or unless the judge decides otherwise by means of a specially reasoned decision, without prejudice to article 1414 BJC, final judgments are provisionally enforceable notwithstanding appeal and without guarantee if the judge has not ordered that one is established (article 1397 of the BJC).

3. **Adaptation**. If a judgment contains a measure or an order which is not known in the law of the Member State addressed, that measure or order shall, to the extent possible, be adapted to a measure or an order known in the law of that Member State which has equivalent effects attached to it and which pursues similar aims and interests (Art. 54). How, and by whom, the adaptation is to be carried out should be determined by each Member State (Whereas (28)).

As for Art. 54, a decision to be enforced issued by one Member State's court is automatically enforceable in the requested Member State, without prior formalities, and must form the object of adaption if it does not exist in this late State.
This option that should facilitate the circulation in all EU territory, especially on provisional and protective measures, shows many difficulties depending on the diversity of national judicial systems and the consequent difficulties in the identification of the equivalent measure in the requested system.
This verification must be carried out by the Bailiff, identifying the measure he considers corresponds to the foreign measure. So, he engages his liability if the measure implemented is disproportionate in respect of the original one.

[15] Articles 1627 et seq. of the Belgian BJC provide the seizure of movable property ('saisie mobilière'). This is an attachment of the tangible assets owned by the debtor (furnishings, vehicles, etc.).
[16] The attachment of immovable property ('saisie immobilière') is an attachment of all the debtor's immovables in the form of real property or chattels real. The same applies to the right of beneficial ownership ('usufruit'), the leaseholder's rights ('emphytéose') and the right of superficies ('droit de superficie') belonging to the debtor. On the other hand, the rights of use and of habitation cannot be seized (see more: Art. 1560 to 1626 BJC).

The difficulties in applying the rule are also increased by the fact that Article 75 of Brussels Ibis Regulation does not provide for notification to the Commission of which court before which each party may challenge the adaptation of the measure.

4. **Claim for refusal of recognition or enforcement**. On the application of the party against whom enforcement is sought (or, in case of refusal of recognition, of any interested party), the recognition or the enforcement of a judgment shall be refused where one of the grounds referred to in Article 45 is found to exist. The party challenging the enforcement of a judgment given in another Member State should, to the extent possible and in accordance with the legal system of BE be able to invoke, in the same procedure, in addition to the grounds for refusal provided for in this Regulation, the grounds for refusal available under national law and within the time-limits laid down in that law. The recognition of a judgment should, however, be refused only if one or more of the grounds for refusal provided for in this Regulation are present (Whereas (30)).

**Procedure**. The application for refusal of enforcement shall be submitted to the court which the Member State concerned has communicated to the Commission pursuant to point (a) of Article 75 as the court to which the application is to be submitted (Art. 47(1)).

According to the information provided by the Belgian government, under Article 75 of the Brussels Ibis Regulation, applications for denial of recognition and enforcement are to be submitted to the Court of First Instance[17].
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 BJC).
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 of the Brussels Ibis Regulation. According to Article 46 B IA, the enforcement of a judgment shall be

[17] 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.

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, but enforcement can also be refused based on (the content of) the enforcement title.

4 *bis*. **Authorised representative in the Member State addressed**. The party seeking the refusal of a judgment given in another Member State shall not be required to have an authorised representative in the Member State addressed unless such a representative is mandatory irrespective of the nationality or the domicile of the parties.

If an appeal against first instance decision is to be lodged in the Court of Cassation the relevant petition must be signed by an attorney admitted to practice before the Supreme Court. A petition that is not signed by such specialized attorney is inadmissible (Art. 1080 BJC).

4 *ter*. **Grounds for refusal**. National grounds for refusal of enforcement shall also apply in so far as they are not incompatible with the grounds referred to in Art. 45 (Art. 41(2)) ([18]). Which are the national grounds for refusal in BE? Please mention possible issues of incompatibility under Art. 41(2)

The grounds of refusal are very strictly in Belgium. The Court of Cassation confirmed that the Belgian judge cannot review the substance of the foreign decision, even in the case the foreign decision would violate EU law[19].
The Belgian courts apply a strict assessment of the grounds of refusal of recognition of foreign judgements, in line with the objective of free movement of judgements.
There is discussion on the matter if the judge can *ex officio* refuse the recognition of a foreign decision. Pursuant Article 25 Private International Law (hereinafter: PIL Code),

[18] For guidance see, amongst others: "This means that domestic grounds relating to, for example, the disproportionality of enforcement means, prohibitions on seizing certain (primary) goods or abuse of rights, or indeed set-off, may generally be allowed. However, for example disputes on the service of documents or a violation of jurisdiction rules beyond those set out in the Regulation, or a re-examination of the facts or the applicable law are not allowed.", X. KRAMER, *Cross-border enforcement and the Brussels I-bis Regulation: towards a new balance between mutual trust and national control over fundamental rights*, in *Netherlands International Law Review*, 2013, p. 360.
[19] Court of Cassation 29 April 2010, AR n. C.09.0176.N-C.09.0479.N, Pasicrasie 2010, Vol. 4, 1327.

the jurisprudence defends the idea that this is only possible in case of a manifest breach of international public policy[20].
In determining this incompatibility with the public policy, the court must consider the:

- Extent to which the matter is connected to Belgian public policy.
- Seriousness of the consequences if the foreign judgment is recognised or enforced.

Invoking this ground for refusal is extremely rare.
Of course, BE' courts follow, in addition, all the grounds for refusal of recognition and enforcement are listed in Article 45 of the Recast Brussels Regulation.

4 *quater*. **Appeal**. The decision on the application for refusal may be appealed against by either party. The appeal is to be lodged with the court which the Member State concerned has communicated to the Commission pursuant to point (b) of Article 75 as the court with which such an appeal is to be lodged. The decision given on the appeal may only be contested by an appeal where the courts with which any further appeal is to be lodged have been communicated by the Member State concerned to the Commission pursuant to point (c) of Article 75.

In Belgium it is possible to lodge a further appeal at the Court of Cassation (*Cour de cassation* / *Hof van Cassatie*) by either party.
Procedures, court fees and taxes are governed in conformity with other proceedings behind the Supreme Court, according to articles 1073 et seq. BJC.
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 BJC). 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 BJC). The petition may be filed only on the grounds of violation of the law or violation of substantial procedural formalities (Article 608 BJC). The petition must explain in which way and to what extent the judgment against which it is filed is not in accordance with

[20] K. Piteus, "Commentaar bij art. 42 t.e.m. 48 EE-X Verordening", in X., Gerechtelijk Recht. Artikelsgewjze commentaar met overzicht van rechtsleer, Antwerp, Kluwer, 2004).

the law. It must also precisely indicate the allegedly violated legal provisions (Article 1080 BJC).

4 *quinquies*. **Measures under Art. 44(1) BI bis Reg**.

In the European e-justice Atlas, there is no information about the description of national enforcement proceedings in Belgium, being expressed "not applicable" in correspondence of Art. 44 (1) BI bis Reg.

1. limit the enforcement proceedings to protective measures, after lodging an opposition, according to art. 1397 BJC.
2. suspend, either wholly or in part, the enforcement proceedings in exceptional cases. A statutory exception is Article 1127 BJC, which states that the judge of seizure can suspend the enforcement of the disputed judgement, at the request of the party who started third-party proceedings. Another example is Art. 1714 BJC, which authorizes suspension of the enforcement by a judge before whom an enforcement or annulment claim regarding arbitral award.

5. **Claim for a decision that there are no grounds for refusal of recognition**. According to Art. 36(2), the application for a decision that there are no grounds for refusal of recognition as referred to in Art. 45 is presented in accordance with the procedure provided for in Subsection 2 of Section 3 of the Regulation.

The creditor could file an application to the court of instance to have it determined that there are no grounds for denying recognition.
This claim does not differ from the debtor's application to have the terms of execution changed (Art.45 Reg. 1215/2012).

6. **Suspension of the enforcement**. National grounds of suspension of enforcement shall also apply in so far as they are not incompatible with the grounds referred to in Art. 45 (Art. 41(2)).

6 *bis*. **Enforceability suspended in the Member State of origin**.

The judge of seizure can suspend the enforcement of an enforceable judgment only in few cases.
First of all, in accordance with Article 1127 BJC, 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.
In addition, Article 1714 BJC authorizes 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[21].
Anyway, 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. rd. 1992, 1373), neither can the appeals judge[22] nor the president in interim proceedings[23]. 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[24].
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[25].
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.

7. **Measures for the indirect enforcement (payment orders)**. Art. 55 establishes the rules for recognition of a judgment given in a Member State which orders a payment by way of a penalty. However, it does not cover the case in which the incoming judgment has not a payment order attached to it. It may be possible that the competent authorities

[21] Brussels Civil Court 4 November 1991, Pas. 1992, III, 27.
[22] Court of appeals of Ghent 9 March 1995, RW 1995-96, 437; Court of appeals of Brussels 23 June 1993, JLMB 1993, 1266.
[23] Court of appeals of Ghent 9 March 1995, RW 1995-96, 437; President employment court ("arbeidsrechtbank"/"Tribunal du travail") 6 October 1993, TGR 1993-94, 138.
[24] 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.
[25] E.g. judgment ultra petita or violation of the right defence (Court of Cassation 1 April 2004, RW 2004-05, 1222, note K. Broeckx.

of the Member State of the enforcement have the power to issue measures of indirect enforcement.

The law of January 31, 1980 introduced the “astreinte” in the Belgian Judicial Code (BJC), which the judge can pronounce "in the event that the principal sentence is not satisfied". The amount of the astreinte is paid to the party who obtained the judgment.
The “astreinte” is explicitly excluded in the case of an order to pay a sum of money. The Court of first instance is competent to issue them and the procedure to follow is the one mentioned by the law of January 31, 1980.
It is a judicial sentence, insofar as it is necessarily pronounced by a judge (art. 1385bis, C. jud.). It was specified during the preparatory work that "the term 'judge' does not include arbitrators". Any judge can therefore have recourse to an astreinte, "and thus in particular - by way of example - the president of the summary proceedings or the president of the court sitting as in summary proceedings (see, inter alia, art. 55 of the law on commercial practices), the judge of seizures or the penal judge with regard to the request of the civil party".
The new law does not authorize conventional penalty payments. It does not call into question the well-established opinion of doctrine and case law that penalty clauses must necessarily have an indemnity character. The penalty can only be imposed by a judge. It is therefore not a true private penalty. As it does not sanction a criminal offence, it can be defined as a civil penalty which will generally be of private interest, but which may be entirely of public interest when the astreinte sanctions a conviction pronounced at the request of the Public Prosecutor
According to the new article 1385bis, it is permissible to request the imposition of an astreinte even "for the first time on opposition or on appeal" (paragraph 2). On the other hand, there is nothing to prevent an astreinte being imposed by default.
Article 1385bis sets two important limits on the sentences which may be accompanied by an astreinte. The latter "may not be imposed in the case of an order for the payment of a sum of money, nor in respect of actions for the performance of a contract of employment" (paragraph 1). According to the travaux préparatoires: "There is no need to add that the Public Prosecutor cannot obviously claim a penalty in criminal matters". The astreinte is thus only "called upon to ensure an enforceability in kind, whereas a condemnation to a sum of money can be carried out by the means of oral enforceability".
It is therefore "appropriate" to include within its scope obligations to do or not to do and obligations to give a thing, without making any exception for things "in genere". Apart from these two exceptions in the first paragraph of article 1385bis BJC, 'no distinction can be made according to the nature of the obligations or of the condemnations'.