

# Relief in Small and Simple Matters in Belgium

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## Abstract

This article is based on a national report that was written for the XVth World Congress of the International Association of Procedural Law that was held in Istanbul in May 2015 and that focused on Effective Judicial Relief and Remedies in an Age of Austerity. It first of all sketches the general judicial context in Belgium and some of its relevant features: the judicial organisation, the goals of the civil justice system, the course of an ordinary civil lawsuit, the role of the court, and the litigation costs. Next, a detailed and critical overview of the current and future procedures that offer relief in small and simple matters is given. The current summary order for payment procedure, which was introduced in 1967, did not meet its goals. The article concludes that a new trend is emerging in Belgium, namely keeping small and unchallenged claims outside the judiciary and providing for cheap and more efficient alternatives.

**Keywords:** Belgium, small matters, simple matters, recovery of unchallenged claims, summary order for payment

## 1 Judicial Context

This article is based on a national report that was written for the XVth World Congress of the International Association of Procedural Law that was held in Istanbul in May 2015 and that focused on Effective Judicial Relief and Remedies in an Age of Austerity. It gives a detailed and critical overview of the current and future procedures in Belgium that offer relief in small and simple matters. Before analysing these procedures, it is important to sketch the general judicial context and some of its relevant features: the judicial organisation, the goals of the civil justice system, the course of an ordinary civil lawsuit, the role of the court, and the litigation costs.

### 1.1 Judicial Organisation

In 2014, the Belgian judiciary was reformed.<sup>1</sup> The most important parts are the reorganisation of the judicial districts, the introduction of judicial mobility, and more

independent judicial management.<sup>2</sup> The reform aims to achieve three goals: (i) better judicial management and more efficiency regarding the use of public means, (ii) reducing the judicial backlog, and (iii) more judicial quality and better judicial service through specialisation. A second part concerns a major judicial competence reform. On the one hand, a (specialised) Family and Juvenile Court is created.<sup>3</sup> On the other hand, some civil and commercial competences are re-allocated so that a dispute is adjudicated by its natural judge.<sup>4</sup> The goal of this reform is a more efficient administration of justice in family disputes and a speedier and more qualitative adjudication of disputes by the judge who is best suited. Belgium's current judicial structure (after the 2014 reforms) can be summarised as follows.<sup>5</sup> There are five first instance courts: Justices of the Peace, Police Courts, Courts of First Instance, Commercial Courts, and Labour Courts. In the context of this article, the Justice of the Peace is the most important one. It has general jurisdiction over all claims that do not exceed € 2.500<sup>6</sup> and specific jurisdiction over, among others, landlord-tenant cases irrespective of the value of the

2. Loi du 1 décembre 2013 portant réforme des arrondissements judiciaires et modifiant le Code judiciaire en vue de renforcer la mobilité des membres de l'ordre judiciaire, *Moniteur Belge* (Official Gazette of Belgium) 10 December 2013, at 97957; loi du 18 février 2014 relative à l'introduction d'une gestion autonome pour l'organisation judiciaire, *Moniteur Belge* (Official Gazette of Belgium) 4 March 2014, at 18200 and loi du 21 mars 2014 portant modification de la loi du 1 décembre 2013 portant réforme des arrondissements judiciaires et modifiant le Code judiciaire en vue de renforcer la mobilité des membres de l'ordre judiciaire, *Moniteur Belge* (Official Gazette of Belgium) 24 March 2014, at 23194. See also loi du 8 mai 2014 portant modification et coordination de diverses lois en matière de Justice (I), *Moniteur Belge* 14 May 2014, at 39086 and loi du 12 mai 2014 portant modification et coordination de diverses lois en matière de Justice (II), *Moniteur Belge* (Official Gazette of Belgium) 19 May 2014, at 39863.
3. Loi du 30 juillet 2013 portant création d'un tribunal de la famille et de la jeunesse, *Moniteur Belge* (Official Gazette of Belgium) 27 September 2014, at 68429. See for an analysis K. Devolder, *De bevoegdheidsverdeling in familiezaken: voor en na de familierechtbank* (2014).
4. Loi du 26 mars 2014 modifiant le Code judiciaire et la loi du 2 août 2002 concernant la lutte contre le retard de paiement dans les transactions commerciales en vue d'attribuer dans diverses matières la compétence au juge naturel, *Moniteur Belge* (Official Gazette of Belgium) 22 May 2014, at 40635.
5. All courts discussed in this article are federal courts. Although Belgium is a (complicated) federal state composed of three (language) communities and three (economic) regions, the judicial organisation remains a federal competence. The three (language) communities are the Flemish (Dutch-speaking) Community, the French (French-speaking) Community, and the German-speaking Community. The three (economic) regions are the Flemish Region, the Walloon Region, and the Brussels-Capital Region. For a good understanding of the differences between the Flemish and the Walloons, see R. Mnookin and A. Verbeke, 'Persistent Nonviolent Conflict with No Reconciliation: The Flemish and Walloons in Belgium', 72 *Law & Contemporary Problems* 151 (2009).
6. Art. 590 Belgian Judicial Code.

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1. See for an analysis B. Allemeersch, P. Taelman, P. Van Orshoven & B. Vanlerberghe (eds.), *Nieuwe Justitie* (2014) and D. Fries (ed.), *Le nouveau paysage judiciaire* (2014). See for an analysis in English S. Voet, 'Belgium's New Specialized Judiciary', 4 *Russian Law Journal* 129 (2014).

claim.<sup>7</sup> It is regarded as a small claims court and an easily accessible court, in the sense that a petition can be used to bring a claim (instead of a more formal and expensive writ of summons) and pro se litigants are common and allowed. In each of the 187 judicial cantons, there is a Justice of the Peace.

Since 2014, there are twelve judicial districts.<sup>8</sup> Every district encompasses a Court of First Instance and a Police Court. The Police Court has civil and criminal jurisdiction in relation to traffic accidents, irrespective of the value of the claim.<sup>9</sup> The Court of First Instance consists of four sections:<sup>10</sup> the Civil Court deals with civil cases, the Criminal Court handles criminal cases, and the Family and Juvenile Court has jurisdiction over family and juvenile cases. In some Courts of First Instance, there is a fourth division having jurisdiction over the enforcement of criminal penalties (*e.g.* regarding parole issues). The President of the Court of First Instance can give preliminary rulings. Every Court of First Instance has one or more Judges of Seizure who deal with the enforcement of orders and pre-trial attachments. In each of the five judicial areas,<sup>11</sup> there is a Commercial Court and a Labour Court. The Commercial Court has jurisdiction to adjudicate all disputes between businesses, more particularly between all persons durably pursuing an economic goal, regarding an action that was performed in the context of the realisation of that goal.<sup>12</sup> This means that the Commercial Court has general jurisdiction over all (internal and external) business and corporation disputes, irrespective of the value of the claim. Finally, the Labour Court has jurisdiction with regard to matters of labour law as well as social security law.<sup>13</sup>

Appeals against decisions of the Justice of the Peace and civil decisions of the Police Court are brought before the Civil Court in the Court of First Instance.<sup>14</sup> An appeal is only possible when the claim exceeds € 1.860.<sup>15</sup> Appeals against criminal decisions of the Police Court are brought before the Criminal Court. The Court of Appeal has jurisdiction to hear appeals against judgements of the Court of First Instance or the Commercial Court.<sup>16</sup> An appeal is only possible when the (civil) claim exceeds € 2.500.<sup>17</sup> There is one Court of Appeal in each of the five judicial areas. The Court of Appeal is subdivided into civil, criminal, and family and juvenile courtrooms.<sup>18</sup> The Labour Court of Appeal hears appeals against judgements of the Labour Courts.<sup>19</sup> All

7. Art. 591 Belgian Judicial Code.

8. These are East Flanders, West Flanders, Antwerp, Limburg, Leuven, Brabant wallon, Brussels, Namur, Liège, Hainaut, Luxembourg, and Eupen.

9. Art. 601bis Belgian Judicial Code.

10. Art. 76 Belgian Judicial Code.

11. These are Antwerp, Brussels, Ghent, Liège, and Mons.

12. Art. 573 Belgian Judicial Code.

13. Art. 578 Belgian Judicial Code.

14. Art. 577 Belgian Judicial Code.

15. Art. 617 Belgian Judicial Code.

16. Art. 602 Belgian Judicial Code.

17. Art. 617 Belgian Judicial Code.

18. Art. 101, §1 Belgian Judicial Code.

19. Art. 607 Belgian Judicial Code.

decisions of the Labour Court can be appealed, irrespective of the value of the claim.<sup>20</sup>

Finally, on top of the ladder, there is the Court of Cassation, Belgium's Supreme Court. There is only one Court of Cassation. It is located in Brussels. There are three courtrooms: one handling civil cases, one dealing with criminal cases, and one handling social cases. Each courtroom consists of a Dutch-speaking and a French-speaking department. The Court of Cassation deals with appeals against judgements rendered in last instance.<sup>21</sup> The review of the Court of Cassation is of a limited nature. It does not decide the merits of the case but merely examines whether procedural rules and rules of substantive law were complied with. The Court can reject the appeal against the challenged decision, or it can quash that decision. In the latter case, the Court will refer the case to a court of the same level as that which rendered the quashed decision in order to obtain a new decision on the merits.

## 1.2 Goals of the Civil Justice System<sup>22</sup>

There is no general consensus on the goals of civil justice in Belgium. Its main goal is the authoritative determination and enforcement of rights recognised by substantive law. Civil litigation is commenced when someone violates or refuses to respect the substantive rights of someone else. The outcome of the litigation leads to an enforceable title. Belgian civil procedure offers the framework within which this process unfolds. It regulates which court has jurisdiction, how a civil lawsuit is conducted, and how a judicial decision can be enforced. Belgian civil justice serves two additional public goals that are not in the direct interest of the litigating parties. Firstly, the demonstration of the effectiveness of private law and the court system. Civil litigation demonstrates the consequences when one does not act in accordance with one's civil obligations. It therefore has a deterrent effect and a preventive effect, in the sense that further litigation can be prevented since many of the legal issues may be resolved on the basis of previous case law without the need of bringing a new case. According to Allemeersch, not only the effectiveness of private law is at stake in Belgium but also the effectiveness of the court system as a whole. In each individual case, Belgian judges are at least implicitly trying to demonstrate that in the long run the system is an effective system. This also means that the length of the proceedings is not an issue to be determined by the parties. The judge may even disallow delays that are mutually requested by both of the parties.<sup>23</sup>

20. Art. 617 Belgian Judicial Code.

21. Art. 608 Belgian Judicial Code. *E.g.* an appellate decision of the Court of Appeal or a decision of the Justice of the Peace or the Police Court involving a claim less than € 1.860.

22. See C.H. van Rhee, 'Dutch National Report with Some Additional Information on Belgium and France', in D. Maleshin (ed.), *Civil Procedure in Cross-cultural Dialogue: Eurasia Context: IAPL Word Conference on Civil Procedure*, September 18-21, 2012, Moscow, Russia (2012) 196.

23. *Ibid.*, at 196 and the quote of B. Allemeersch in note 4.

Secondly, there is the development of law and guaranteeing its uniform application. Although Belgian law has no binding precedents,<sup>24</sup> it is clear that judicial decisions are an important source of law, albeit always submitted to legislation as the primary source of law. Especially decisions of higher courts, in particular the Court of Cassation, are considered authoritative. Lower courts can rely on these decisions to give reasons for their own decisions. All of this enhances the development of the law and its uniform application.

### 1.3 Course of an Ordinary Civil Lawsuit<sup>25</sup>

Belgian civil procedure rules are laid down in the 1967 Belgian Judicial Code, which replaced the French *Code de procédure civile* of 1806.<sup>26</sup> Belgian civil procedure therefore belongs to the French legal tradition. The goal of the 1967 Code was to introduce a less laborious, a faster, and a less expensive kind of litigation.

The basic rules can be summarised as follows. As a rule, proceedings are initiated by serving a writ of summons,<sup>27</sup> which is an official document that is served on the defendant by a bailiff. They can also be initiated by filing a petition,<sup>28</sup> but only when the law allows it, or by voluntary appearance of the parties before the court.<sup>29</sup> As soon as a docket fee has been paid, the clerk of the court registers the case on the civil docket of the court. In order to prepare his defence, the defendant should have a minimum period of 8 days between the day the writ of summons or the petition is served and the day the preliminary hearing takes place.<sup>30</sup>

At the preliminary hearing, the parties or their counsel must appear in person.<sup>31</sup> Legal entities are represented by their legally empowered representatives. Before the Justice of the Peace, the Commercial Court, and the Labour Court, the parties can be represented by a spouse or by a family member as long as the representative holds a proxy and the court allows the representation.<sup>32</sup> In tax cases, the court can allow the parties to be assisted (not represented) by an accountant, a bookkeeper, or an auditor.<sup>33</sup> Before the Labour Court, the parties have the right to be represented by a union representa-

tive.<sup>34</sup> In some labour disputes between an individual and a Public Centre for Social Welfare (PCSW), some particular rules apply.<sup>35</sup> The individual can be represented or assisted by a representative from a non-profit organisation or association (*e.g.* a poverty association). The PCSW can be represented by a lawyer or a staff member.

The preliminary hearing deals with two categories of cases: cases that only require short hearings<sup>36</sup> or the more complex cases that are referred to the docket in order to be allocated in a later stage to a pleading room of the court. When one of the parties does not appear, the other party can claim a default judgement.<sup>37</sup> When none of the parties appear, the judge cannot deal with the case and refers it to the docket.

In the complex cases that are referred to the docket, the parties exchange briefs (or written pleadings). These are written documents containing the claims and the defences of the parties. The original pleadings are filed with the court's clerk by mail or through personal delivery (to date, this cannot be done electronically ...).<sup>38</sup> Simultaneously, a copy of the pleadings is sent to the adversary party.<sup>39</sup> Normally, the parties themselves have to agree on a procedural calendar in which case the judge of the introductory courtroom ratifies this at the preliminary hearing.<sup>40</sup> If the parties do not agree on a procedural calendar, the judge imposes one, including a trial date.<sup>41</sup> Once a calendar is determined, the parties have to respect the deadlines. The court disregards pleadings that are filed after the expiration of the deadlines.<sup>42</sup>

At the trial, the parties plead their case orally. Lawyers do most of the talking. However, the parties can plead in person unless the court forbids it for reasons of improper or unclear use of language.<sup>43</sup> Although the oral pleadings are important because they give the court a first impression of the case, their importance should not be exaggerated since the court does not have to answer to arguments that are raised during the oral pleadings. As a rule, the parties are not supposed to raise arguments not included in their briefs.<sup>44</sup>

The court takes the case in deliberation after the closing of the hearings. Within 1 month, it has to render a judgement.<sup>45</sup> When this term is exceeded, the judge informs his hierarchical superior. If he does not render judgement within 6 months, the case can be withdrawn from him. If the court is composed of three judges, it

24. Art. 6 Belgian Judicial Code.

25. For a summary in English, see P. Lefebvre, 'Belgium', in S.R. Grubbs (ed.), *International Civil Procedure* (2003) 75.

26. See P. Van Orshoven, 'The Belgian Judicial Code (1967)', in C.H. van Rhee (ed.), *European Traditions in Civil Procedure* (2005) 97 and C.H. van Rhee, D. Heirbaut & M. Storme (eds.), *The French Code of Civil Procedure (1806) after 200 Years. The Civil Procedure Tradition in France and Abroad* (2008).

27. Art. 700 Belgian Judicial Code.

28. Arts. 1034bis-1034sexies Belgian Judicial Code. This is a written request directly addressed to the court by the plaintiff. The clerk of the court notifies it to the defendant. Apart from its form, the petition has the same legal effects as the writ of summons: it commences adversary proceedings between the parties.

29. Art. 706 Belgian Judicial Code.

30. Art. 707 Belgian Judicial Code.

31. Art. 728, §1 Belgian Judicial Code. Only counsels have the opportunity to agree upon a written appearance replacing the personal appearance (Art. 719 Belgian Judicial Code).

32. Art. 728, §2 Belgian Judicial Code.

33. Art. 728, §2bis Belgian Judicial Code.

34. Art. 728, §3 Belgian Judicial Code.

35. *Ibid.* These disputes have to do with subsistence minimum and social welfare/services provided by PCSWs.

36. Art. 735 Belgian Judicial Code. These cases are pleaded at the preliminary hearing.

37. Arts. 802-806 Belgian Judicial Code.

38. Art. 742 Belgian Judicial Code.

39. Art. 740 Belgian Judicial Code.

40. Art. 747, §1 Belgian Judicial Code.

41. Art. 747, §2 Belgian Judicial Code.

42. Art. 748, §1 Belgian Judicial Code.

43. Art. 758 Belgian Judicial Code.

44. Art. 756bis Belgian Judicial Code.

45. Art. 770 Belgian Judicial Code.

reaches a decision by majority vote. There are no dissenting opinions.

#### 1.4 Role of the Court

One of the basic principles of Belgian civil procedure is that the parties autonomously set the limits of the dispute.<sup>46</sup> They decide (i) if proceedings are initiated, (ii) who will be the parties and (iii) the cause and the object of the claims.<sup>47</sup> Within this framework, the court decides the case. For example, it is not allowed for the court to involve *ex officio* other parties in the proceedings than the ones designated by the plaintiff and the defendant.<sup>48</sup> Another example is that the court cannot grant a claim that was not expressed, nor can it grant more than what was claimed.<sup>49</sup>

The question arises what the role of the court is. First, the court plays an active role with respect to the procedure. It sees to the orderly evolution of the proceedings, meaning that the procedural rules should be respected and that a judgement should be rendered within a reasonable time. Second, in case the parties do not succeed in producing sufficient evidence, the court is obliged to order a complementary inquiry consisting of, for example, the submission of certain documents, witness depositions, an official visit to the scene of the facts, the personal appearance of the parties in court, etc.<sup>50</sup> Third and finally, the court can *ex officio* complete and/or substitute the legal grounds that the parties have invoked. In other words, the court is obliged to examine the judicial character of the facts irrespective of their qualification by the parties.<sup>51</sup> However, the following conditions apply: (i) the court cannot raise a dispute that not has been raised by the parties, (ii) the court can only rely on facts or documents properly submitted to the court, (iii) the court cannot change/modify the cause and the object of the claims, and finally (iv) the court has to respect the rights of defence. The latter means that the court has to give both parties the opportunity to give their point of view.<sup>52</sup>

#### 1.5 Litigation Costs<sup>53</sup>

The provisions on litigation costs are laid down in the Belgian Judicial Code.<sup>54</sup> The basic principle is that these

costs are born by the party who loses the case.<sup>55</sup> These litigation costs are:<sup>56</sup>

- the court and registration fees;
- the price, emoluments, and wages for judicial deeds;
- the price for the authenticated copy of the judgement;
- the expenses concerning investigative measures (including the expenses of witnesses and experts);
- the expenses for travelling and accommodation of judges, clerks, and the parties when their trip has been imposed by the court and the expenses of deeds drafted with regard to the legal proceedings;
- the expenses of the judicial proceedings as stated in Article 1022 Belgian Judicial Code; and
- (in case of judicial mediation) the fees, emoluments, and costs of a mediator.

The most important court fees are the docket fees: the sum of money charged by a court for placing a case on its docket. These costs differ depending on the court before which the case is brought and on the value of the claim. These fees were raised in 2015 (Table 1).

Particular attention should be paid to the expenses of the judicial proceedings as stated in Article 1022 Belgian Judicial Code. This article, which was amended in 2007, introduced the partial recoverability of lawyers' fees. The expenses of the judicial proceedings are defined as a fixed compensation (or lump sum)<sup>57</sup> for the expenses and the fees of the lawyer<sup>58</sup> of the winning party. The amount depends on the value of the claim. There is a basic amount, a minimum amount, and a maximum amount (Table 2).

At the request of the parties, the court can decrease or increase the basic amount, without exceeding the minimum or maximum amount. The following criteria can be used to do so: the financial capacity of the parties (only to decrease the amount), the complexity of the case, the contractually agreed compensation for the winning party, and (and this is a catch-all provision) whether the litigation is manifestly unreasonable.

Finally, it should be underlined that in *ex parte* (or unilateral) proceedings (*e.g.* the summary order for payment procedure, which is discussed hereafter), the plaintiff always has to pay his own expenses. In these cases, no compensation *ex Article 1022 Belgian Judicial Code* can be claimed.

Civil proceedings can be funded through legal aid.<sup>59</sup> The Belgian Constitution guarantees everyone the right to legal aid.<sup>60</sup> This can take the form of an exemption

46. For a thorough analysis, see B. Allemeersch, *Taakverdeling in het burgerlijk proces* (2007).

47. The causes of the claim are the underlying (legal) facts. The plaintiff has to determine these facts (Art. 702, 3° Belgian Judicial Code). The object of the claim is what is claimed by the parties, the advantage they want to obtain.

48. Art. 811 Belgian Judicial Code.

49. Art. 1138, 2° Belgian Judicial Code.

50. For an overview of Belgian evidence law, see B. Cattoir, *Burgerlijk bewijsrecht* (2013).

51. See the Roman adage *da mihi factum, dabo tibi ius*.

52. The court can even reopen the debates (Art. 774 Belgian Judicial Code).

53. See V. Sagaert and I. Samoy, 'Belgium', in Ch. Hodges, S. Vogenauer & M. Tulibacka (eds.), *The Costs and Funding of Civil Litigation* (2010) 217 and V. Sagaert and I. Samoy, 'Cost and Fee Allocation in Civil Procedure', in E. Dirix and Y.-H. Leleu (eds.), *The Belgian Reports at the Congress of Washington of the International Academy of Comparative Law* (2011) 279.

54. Arts. 1017-1024 Belgian Judicial Code.

55. Art. 1017 Belgian Judicial Code.

56. Art. 1018 Belgian Judicial Code.

57. This means that the actual expenses and fees are not recoverable, but only a part of it.

58. This means that the winning party has to be represented by a lawyer. Pro se litigants or litigants being represented by a non-lawyer have no right to compensation.

59. See B. Hubeau and A. Terlouw, *Legal Aid in the Low Countries* (2014).

60. Art. 23 Belgian Constitution.



Table 1 Overview of the Belgian docket fees.\*

Court	Value of the claim – docket fee
Justice of the Peace and Police Court	claim < € 2.500: € 40 claim > € 2.500: € 80
Court of First Instance and Commercial Court	claim < € 25.000: € 100 claim between € 25.000,01 and € 250.000: € 200 claim between € 250.000,01 and € 500.000: € 300 claim > € 500.000: € 500
Labour Court and fiscal procedures < € 250.000	claim between € 250.000,01 and € 500.000: € 300 claim > € 500.000: € 500
Court of Appeal	claim < € 25.000: € 210 claim between € 25.000,01 and € 250.000: € 400 claim between € 250.000,01 and € 500.000: € 600 claim > € 500.000: € 800
Labour Court of Appeal and fiscal procedures in appeal > € 250.000	claim between € 250.000,01 and € 500.000: € 600 claim > € 500.000: € 800
Court of Cassation (with the exception of appeals against decisions of Labour Courts of Appeal or decisions in fiscal procedures)	claim < € 25.000: € 375 claim between € 25.000,01 and € 250.000: € 500 claim between € 250.000,01 and € 500.000: € 800 claim > € 500.000: € 1.200

\* Art. 269 Belgian Code of Registration Duties.

from paying litigation costs,<sup>61</sup> or judicial assistance.<sup>62</sup> Regarding the latter, a distinction is made. First-line judicial assistance means the offering of a free and first legal advice, including the referral to a specialised body or organisation (*e.g.* a lawyer or a tenants' organisation). Second-line judicial assistance means the free assistance of a lawyer in the form of an elaborate legal advice, legal assistance, or legal representation. The lawyer, who is appointed by the local bar, is paid by the State. It is also possible to fund civil litigation through legal expenses insurance. Under certain conditions, one can get a tax advantage if such an insurance is taken. The aim is to encourage people to take an insurance and to enhance access to justice.<sup>63</sup>

## 2 Available Simplified Procedures

### 2.1 Overview

The Belgian Judicial Code currently contains one explicit procedure to obtain relief in small and simple matters: the summary order for payment procedure, which is discussed hereafter. There are no other partic-

ular procedures. As mentioned earlier,<sup>64</sup> the Justice of the Peace has general jurisdiction over all claims that do not exceed € 2.500. It is regarded as a small claims court. However, there are no specific procedural rules. The general rules as discussed earlier apply.<sup>65</sup> The presidents of the Court of First Instance, the Commercial Court, and the Labour Court have jurisdiction in summary proceedings.<sup>66</sup> There are two basic conditions. On the one hand, the case has to be urgent. According to the Belgian Court of Cassation, this will be the case if an immediate decision is desirable to prevent (further) harm or serious discomfort. On the other hand, the President can only order provisional or protective measures,<sup>67</sup> which means that he cannot rule on the merits of the case.<sup>68</sup> The court that has to decide on the merits of the case is not bound by a summary order. Again, the general procedural rules apply, although there are some exceptions.<sup>69</sup>

61. Arts. 664-699ter Belgian Judicial Code. One has to show that the claim seems legitimate and that his or her income is insufficient. A request must be submitted to the office of the court before which a judicial procedure would be initiated.

62. Arts. 508/1-508/25 Belgian Judicial Code.

63. Sagaert and Samoy (2010), above n. 53, at 224.

64. See *supra* Section 1.1.

65. See *supra* Section 1.3.

66. Art. 584 Belgian Judicial Code.

67. *E.g.*, the appointment of a court expert, ordering the testimony of a witness, ordering a publication ban, ordering a party to do something or to stop something to do, ordering an injunction, etc.

68. Art. 1039 Belgian Judicial Code.

69. *E.g.* in normal proceedings, there have to be at least 8 days between the serving of the writ of summons or the petition and the preliminary hearing (see *supra* Section 1.3). In summary proceedings, this term is 2 days.

Furthermore, a court-annexed conciliation procedure exists.<sup>70</sup> Before bringing a claim, each party, or both parties, can submit the dispute to the court exclusively with the view of obtaining a settlement.<sup>71</sup> This is called a voluntary preliminary court-annexed conciliation procedure, in which the court tries to achieve a settlement by assisting the parties towards an agreement. The court does not have the power to adjudicate the dispute if conciliation fails. Sometimes, this process is mandatory,<sup>72</sup> for example, in labour cases. The (voluntary) procedure is of an informal nature. The parties can simply write a letter to the clerk of the court asking to summon the opposite party. The court will draft a *procès-verbal* of the conciliation session. If a settlement is reached, this *procès-verbal* is enforceable as a judgement.<sup>73</sup> Under no circumstances, the settlement can be appealed. In case no settlement is reached, the court will draft a *procès-verbal* of non-settlement, in which case judicial proceedings have to be initiated. Conciliation is to be distinguished from mediation. While a conciliator (in most cases a judge) indirectly recommends a solution, a mediator (who is not a judge) does not give any advice about the resolution of the dispute. The mediator only assists the parties in working towards a self-negotiated settlement.

Finally, there are the European small claims procedure<sup>74</sup> and the European order for payment procedure.<sup>75</sup> Although both instruments are directly applicable in Belgium, they are far from successful. Their complementarity with the Belgian summary order for payment procedure is discussed hereafter.

## 2.2 Summary Order for Payment Procedure<sup>76</sup>

The summary order for payment procedure was introduced in 1967, at the same time of the enactment of the Belgian Judicial Code.<sup>77</sup> It served two goals: introducing a quick and simple *ex parte* procedure for the collection of small claims and eliminating the possibility for a debtor to delay payment by way of abusive and frivolous arguments.<sup>78</sup> The procedure consists of two parts: a prior demand for payment and the actual summary order for payment procedure.

### 2.2.1 Scope

The procedure, which is entirely voluntary, only applies to claims falling under the jurisdiction of the Justice of the Peace, the Police Court, or the Commercial Court. The claim must relate to an established debt of an amount not exceeding € 1.860.<sup>79</sup> The amount must be certain, be fixed, and have fallen due.<sup>80</sup> According to the Justice of the Peace of Roeselare, an established debt is a debt that is *prima facie* not disputable. Any appearance (or doubt) about the disputable character should lead to a rejection of the claim.<sup>81</sup> If only a part of the claim relates to an established debt, the procedure cannot be used.<sup>82</sup>

For claims falling under the jurisdiction of the Commercial Court, the condition that the claim must relate to an established debt of an amount not exceeding € 1.860 has been abolished in 2014.<sup>83</sup> The goal is to make the procedure more attractive for business dis-

70. See P. Taelman and S. Voet, 'Mediation in Belgium: A Long and Winding Road', in C. Esplugues and L. Marquis (eds.), *New Developments in Civil and Commercial Mediation – Global Comparative Perspectives* (2015) forthcoming.

71. Art. 731 Belgian Judicial Code. See also Art. 3(a) of the Directive of the European Parliament and of the Council 2008/52 on certain aspects of mediation in civil and commercial matters, OJ 2008 L 136/3.

72. Art. 734 Belgian Judicial Code. The article stipulates that the conciliation attempt has to be mentioned in the judicial decision.

73. Art. 733 Belgian Judicial Code.

74. Regulation of the European Parliament and of the Council 861/2007 establishing a European Small Claims Procedure, OJ 2007 L 199/1.

75. Regulation of the European Parliament and of the Council 1896/2006 creating a European order for payment procedure, OJ 2006 L 399/1.

76. Arts. 1338-1344 Belgian Judicial Code. For an analysis, see J. Bette, 'Un mode de récupération de créance simple, rapide et peu onéreux: la procédure sommaire d'injonction de payer', *Cahier du Juriste* 8 (1996); A. Doudelet, 'Summiere rechtspleging om betaling te bevelen', *Rechtskundig Weekblad* 505 (1971); G. Closset-Marchal, 'La procédure sommaire d'injonction de payer: un nouvel essor?', *Tijdschrift voor Vrederechters* 35 (1988); L. Samyn, 'De uitdagingen van het Europees (internationaal) procesrecht voor het Belgisch procesrecht' (doctoral thesis on file at the UA, Antwerp); A. Vareman, 'Summiere rechtspleging en territoriale bevoegdheid', *Rechtskundig Weekblad* 201 (1995-1996); A. Vareman, 'Art. 1338 Ger.W. – Art. 1344 Ger.W.', in *Gerechtelijk recht. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer* (1996) (looseleaf); X., 'Les procédures européenne et belge de règlement simplifié des litiges pécuniaires', 1 *Ius & Actores* 5 (2009). For a summary in English, see G. Van Mellaert, 'Order for Payment Under Belgian Law', in W. Rechberger and G. Kodek (eds.), *Orders for Payment in the European Union* (2001) 91. See also <[https://e-justice.europa.eu/content\\_order\\_for\\_payment\\_procedures-41-be-maximizeMS\\_EJN-en.do?member=1](https://e-justice.europa.eu/content_order_for_payment_procedures-41-be-maximizeMS_EJN-en.do?member=1)> (last visited 29 June 2015).

77. The procedure was amended in 1987.

78. Van Mellaert, above n. 76, at 91.

79. Only pecuniary claims are eligible.

80. Van Mellaert, above n. 76, at 92 (underlying that a creditor may not artificially split up his claim in several parts in order to benefit from the procedure).

81. Justice of the Peace of Roeselare, 7 November 1996, *Rechtskundig Weekblad* 192 (1997-1998).

82. Justice of the Peace of Borgerhout, 28 December 1970, *Rechtskundig Weekblad* 1895 (1971-1972).

83. Art. 9 Loi du 26 mars 2014 modifiant le Code judiciaire et la loi du 2 août 2002 concernant la lutte contre le retard de paiement dans les transactions commerciales en vue d'attribuer dans diverses matières la compétence au juge naturel, *Moniteur Belge* (Official Gazette of Belgium) 22 May 2014, at 40635 and Art. 32 Loi du 19 décembre 2014 portant des dispositions diverses en matière de Justice (1), *Moniteur Belge* (Official Gazette of Belgium) 29 December 2014, at 106446.

Table 2 Overview of the expenses of the judicial proceedings as stated in Article 1022 Belgian Judicial Code.\*

Value of the claim	Basic amount	Minimum amount	Maximum amount
< € 250,00	€ 165,00	€ 82,50	€ 330,00
€ 250,00 - € 750,00	€ 220,00	€ 137,50	€ 550,00
€ 750,01 - € 2.500,00	€ 440,00	€ 220,00	€ 1.100,00
€ 2.500,01 - € 5.000,00	€ 715,00	€ 412,50	€ 1.650,00
€ 5.000,01 - € 10.000,00	€ 990,00	€ 550,00	€ 2.200,00
€ 10.000,01 - € 20.000,00	€ 1.210,00	€ 687,50	€ 2.750,00
€ 20.000,01 - € 40.000,00	€ 2.200,00	€ 1.100,00	€ 4.400,00
€ 40.000,01 - € 60.000,00	€ 2.750,00	€ 1.100,00	€ 5.500,00
€ 60.000,01 - € 100.000,00	€ 3.300,00	€ 1.100,00	€ 6.600,00
€ 100.000,01 - € 250.000,00	€ 5.500,00	€ 1.100,00	€ 11.000,00
€ 250.000,01 - € 500.000,00	€ 7.700,00	€ 1.100,00	€ 15.400,00
€ 500.000,01-€1.000.000,00	€ 11.000,00	€ 1.100,00	€ 22.000,00
> € 1.000.000,01	€ 16.500,00	€ 1.100,00	€ 33.000,00
non-pecuniary claim	€ 1.320,00	€ 82,50	€ 11.000,00

\* Royal Decree of 26 October 2007. A different table, with substantially lower amounts, exists for proceedings before the Labour Courts and the Labour Courts of Appeal.

putes irrespective of the value of the claim, since the financial threshold is regarded as an impediment.

On the other hand, the claim must be substantiated by a written document drawn up by the debtor. This does not have to be an admission or acknowledgement of debt.<sup>84</sup> This condition is usually broadly interpreted: an ordering slip,<sup>85</sup> a receipt of delivery signed by the debtor or an accepted invoice<sup>86</sup> all have been accepted as a written document from the debtor. Most case law requires a document that is (explicitly) signed or accepted by the debtor and that directly relates to the product or service that has been bought. Have not been accepted as a written document from the debtor: a simple (not explicitly accepted) invoice<sup>87</sup> or a financing/rental/insurance contract.<sup>88</sup>

Finally, the procedure only applies when the debtor has his domicile or habitual residence in Belgium.<sup>89</sup>

84. Art. 1338 Belgian Judicial Code. Originally, the claim had to be proven by a deed from the debtor. This condition was dropped by the 1987 legislative amendments.

85. *Contra*: Justice of the Peace of Fexhe-Slins, 26 March 1981, *Jurisprudence de Liège* 175 (1981).

86. Van Mellaert, above n. 76, at 92.

87. Justice of the Peace of Ostend, 28 November 1997, *TWVR* 1998, 44 and Justice of the Peace of Fexhe-Slins, 26 March 1981, *Jurisprudence de Liège* 175 (1981).

88. Justice of the Peace of Wezet, 29 June 1987, *Jurisprudence de Liège* 1011 (1987).

89. Art. 1344 Belgian Judicial Code.

### 2.2.2 Prior Demand for Payment

There is no standard form that has to be used to initiate the procedure. The Belgian Judicial Code only lays down a number of conditions regarding the information that has to be stated in the prior demand for payment and in the petition initiating the procedure.

Before initiating the procedure, the creditor/plaintiff must send the debtor a final demand for payment.<sup>90</sup> This formal notice may take the form either of a bailiff's writ that is served upon the debtor or of a registered letter (with proof of reception). A writ is more expensive than a registered letter. However, a writ offers more certainty regarding the reception by the debtor.

The writ or the letter have to contain the following information:

- a reproduction of the relevant articles of the Belgian Judicial Code regarding the summary order for payment procedure;<sup>91</sup>
- a demand requiring payment within 15 days;
- the exact amount being claimed;
- the court that will handle the claim in case the debtor refuses to pay.

A failure to include this information renders the demand null and void.

90. Art. 1339 Belgian Judicial Code.

91. If this is forgotten, the claim introducing a summary order for payment procedure will be declared inadmissible (Justice of the Peace of Roeselare, 12 April 1994, *Tijdschrift voor Vrederechters* 392 (1994)).

### 2.2.3 Procedure

With 15 days of the date on which the 15-day period stated in the demand for payment expires, the summary order for payment procedure has to be initiated.<sup>92</sup> This is done by way of *ex parte* petition.<sup>93</sup> The petition has to contain the following information:

- day, month, and year;
- first and last name, profession and place of residence of the plaintiff, and, if applicable, the first and last name, place of residence and capacity of his/her legal representatives;
- the object of the claim<sup>94</sup> and a detailed statement of the amount being claimed, including a detailed overview of the different parts of the claim and the legal grounds on which the claim is based;<sup>95</sup>
- the court that has jurisdiction;
- the signature of the plaintiff's lawyer.

The last condition means that the plaintiff *must* use a lawyer to initiate the procedure. He or she cannot act *pro se*.

At the discretion of the plaintiff, he or she may also indicate the reasons why he or she opposes the granting of a deferment of payment.

Finally, the petition must be accompanied by a photocopy of the written document drawn up by the debtor or a copy of the bailiff's writ or a copy of the registered letter or the original letter, accompanied by evidence that the recipient refused the letter or failed to collect it from the post office, together with a declaration stating that the debtor is registered at the address listed in the civil register. It is sufficient that the plaintiff shows that all has been done to notify the debtor. He or she does not have to prove that the debtor effectively received the demand for payment.<sup>96</sup>

The petition is submitted to the clerk of the court who registers the claim.<sup>97</sup> The procedure is of a unilateral or *ex parte* nature. The debtor does not receive a copy of the petition. It is not possible for the debtor to voluntarily intervene in the procedure.<sup>98</sup>

Within 15 days of the date on which the application is submitted, the court grants or rejects the claim.<sup>99</sup> The court may grant a deferment of payment or partially uphold the claim. A copy of the decision is sent to the plaintiff's lawyer.

When the court upholds the claim either wholly or in part, the decision has the same effect as a default judgement.<sup>100</sup> Therefore, one of the basic rules regarding default judgements applies: the decision granting the

summary order for payment must be served on the debtor within 1 year, otherwise it will be deemed to be non-existent.<sup>101</sup>

The memorandum of service has to contain the following information:<sup>102</sup>

- a copy of the petition;
- a statement of the period within which the debtor can lodge an opposition against the decision;
- details of the court to which that opposition must be submitted, together with the formalities to be fulfilled in that regard;
- a warning that if the debtor does not act by the stated deadline, all available legal remedies may be used by the creditor/plaintiff in order to require the debtor to pay; a failure to include such a warning renders the memorandum of service null and void.

The decision is not provisionally enforceable.<sup>103</sup> Therefore, the enforcement of the decision is suspended during the period in which an opposition may be submitted or an appeal lodged. However, the decision may be used as grounds for precautionary attachment of property.<sup>104</sup>

### 2.2.4 Legal Remedies

In case the plaintiff's claim is (partially) rejected, he or she cannot appeal the decision. He or she has to initiate an ordinary contradictory civil lawsuit according to the general rules of civil procedure.<sup>105</sup>

The debtor can oppose the decision in two ways: by lodging an appeal<sup>106</sup> or by submitting an opposition.<sup>107</sup>

In both cases, the deadline is 1 month, commencing from the date on which the judgement is served.<sup>108</sup> The normal rules on appeal and opposition apply, subject to one exception: the opposition may be lodged in the form of a petition.<sup>109</sup> The petition has to contain the following information:<sup>110</sup>

- day, month, and year;
- first and last name, profession, and place of residence of the person submitting the opposition;
- first and last name, profession, and place of residence of the original creditor/plaintiff and the name of his or her lawyer;
- the disputed decision;
- the grounds relied upon by the opposing party.

### 2.2.5 Evaluation

The Belgian summary order for payment procedure is not a successful procedure, as is illustrated in Tables 3

92. There is no sanction if the term of 15 days is not respected.

93. Art. 1340 Belgian Judicial Code.

94. See *supra* Section 1.4.

95. The claim should correspond with the claim as formulated in the prior demand for payment (Justice of the Peace of Bastenaken, 5 February 1971, *Jurisprudence de Liège* 207 (1970-1971)).

96. Van Mellaert, above n. 76, at 94.

97. Art. 1341 Belgian Judicial Code.

98. Justice of the Peace of Herne, 16 February 1983, *Tijdschrift voor Vrederichters* 211 (1983).

99. Art. 1342 Belgian Judicial Code. Rejection is possible either on the merits or because the forms were not respected.

100. Art. 1343, §1 Belgian Judicial Code.

101. Art. 806 Belgian Judicial Code.

102. Art. 1343, §2 Belgian Judicial Code.

103. Art. 1399 Belgian Judicial Code.

104. Art. 1414 Belgian Judicial Code.

105. Art. 1343, §4 Belgian Judicial Code.

106. In practice, this will be impossible. According to Art. 617 Belgian Judicial Code, an appeal against a decision of the Justice of the Peace or the Police Court is only possible when the claim exceeds € 1.860. An appeal against a decision of the Commercial Court is only possible when the claim exceeds € 2.500. The summary order of payment procedure only applies to claims lower than € 1.860 ...

107. Art. 1343, §3 Belgian Judicial Code.

108. Arts. 1048 and 1051 Belgian Judicial Code.

109. Art. 1047 Belgian Judicial Code requires a bailiff's writ to be served.

110. Failure to do so renders the petition null and void.



Table 3 Overview of the total number of summary order for payment procedures vs. the total number of new (petition) cases before the Justices of the Peace in the five judicial areas between 2009 and 2013.\*

Total number of ...	2009		2010		2011		2012		2013	
	Summary order for payment procedures	New cases	Summary order for payment procedures	New cases	Summary order for payment procedures	New cases	Summary order for payment procedures	New cases	Summary order for payment procedures	New cases
Antwerp	1.050	95.840	657	99.729	121	102.831	67	93.717	141	94.103
Brussels	1.442	124.306	493	128.011	217	127.869	333	127.037	175	126.289
Ghent	408	78.349	353	79.253	139	77.529	129	81.264	111	82.769
Liège	56	90.032	181	93.083	184	98.658	173	94.199	173	89.469
Mons	299	66.723	160	61.079	162	64.955	63	58.899	58	62.293
<b>Total</b>	<b>3.255</b>	<b>455.250</b>	<b>1.844</b>	<b>461.155</b>	<b>823</b>	<b>471.842</b>	<b>765</b>	<b>455.116</b>	<b>658</b>	<b>454.923</b>
	0.7149%		0.3998%		0.1744%		0.1680%		0.1446%	

\* <[http://justitie.belgium.be/nl/informatie/statistieken/hoven\\_en\\_rechtbanken](http://justitie.belgium.be/nl/informatie/statistieken/hoven_en_rechtbanken)> (last visited 29 June 2015). There are no available data about the number of summary order for payment procedures before the Police Courts. Only since 2014, it is possible to bring this procedure before the Commercial Court.

Table 4 Overview of the total number of default cases vs. the total number of summary order for payment procedures before the Justices of the Peace in the five judicial areas between 2009 and 2013.\*

Total number of ...	2009		2010		2011		2012		2013	
	Default cases	Summary order for payment procedures	Default cases	Summary order for payment procedures	Default cases	Summary order for payment procedures	Default cases	Summary order for payment procedures	Default cases	Summary order for payment procedures
Antwerp	55.318	1.050	58.400	657	60.861	121	52.570	67	49.784	141
Brussels	68.767	1.442	70.954	493	70.894	217	69.528	333	68.517	175
Ghent	39.115	408	38.818	353	37.031	139	37.845	129	37.512	111
Liège	44.385	56	47.448	181	49.190	184	46.184	173	40.744	173
Mons	35.120	299	31.348	160	32.345	162	27.986	63	29.699	58
<b>Total</b>	<b>242.705</b>	<b>3.255</b>	<b>246.968</b>	<b>1.844</b>	<b>250.321</b>	<b>823</b>	<b>234.113</b>	<b>765</b>	<b>226.256</b>	<b>658</b>

\* *Ibid.*

and 4. Table 3 shows that, in average, no more than 0.3% of all new (petition) cases that were brought before the Justices of the Peace between 2009 and 2013 are summary order for payment procedures. Table 4 illustrates that the ordinary default procedure is much more successful than the summary order for payment procedure.

The entire procedure is criticised:<sup>111</sup> its limitation to claims not exceeding € 1.860 (with the exception of claims falling under the jurisdiction of the Commercial Court), the condition of a written document drawn up by the debtor, the fact that a prior demand for payment must be sent to the debtor, the impossibility to obtain a

111. A. Berthe, 'L'injonction de payer en droit belge – Aspects de *lege lata* et de *lege ferenda*', 1 *Ius & Actores* 67 (2009); Closset-Marchal, above n. 76 and G. De Leval, 'La procédure sommaire d'injonction de payer et l'espace européen', in *La procédure sommaire d'injonction de payer et l'espace européen*, 3 *Actualités du droit: revue de la Faculté de droit de Liège* 399 (2003).

decision that is provisionally enforceable, and particularly the mandatory assistance of a lawyer. All these elements lead to the conclusion that the Belgian summary order for payment procedure is a burdensome, inefficient, costly, and not frequently used procedure for creditors to obtain relief in small and simple matters. According to Closset-Marchal, the psychological perception about this ex parte procedure is also a fundamental reason for its failure. From the beginning and because of its unilateral and concise character, the Justices of the Peace paid extra attention to the rights of the unfortunate and weak debtor, thereby undermining the goals of the procedure.<sup>112</sup> It is therefore no surprise that the 2002 Green Paper concludes that 'due to some structural defects (e.g. the payment order has to be preceded by a formal notice), the *procédure sommaire d'injonction de payer* procedure has turned out to be more cumbersome than ordinary civil proceedings and has, therefore, not met broad acceptance among legal practitioners'.<sup>113</sup>

In the course of the years, many proposals were launched to amend the summary order for payment procedure.<sup>114</sup> Particular attention should be paid to the proposals made after the introduction of the European order for payment procedure. In August 2007, a legislative proposal was submitted to the Belgian Senate.<sup>115</sup> In March 2008, some amendments were proposed in order to harmonise this proposal with the new European procedure.<sup>116</sup> For example, it was suggested to adjust the scope of application of the Belgian summary order for payment procedure to its European counterpart. The same was suggested regarding the role of the court and the term within which the court has to render a decision. In June 2008, the amended proposal was accepted by the Justice Commission of the Senate<sup>117</sup> and later by the Senate itself.<sup>118</sup> In the Belgian House of Representatives, a series of new amendments was suggested,<sup>119</sup> which was followed by an elaborate report by the Justice Commission.<sup>120</sup> The discussion in the House revolved around suggestions to depart from the European procedure,

for example, by excluding the consumer/debtor from the Belgian summary order for payment procedure. In May 2009, the Belgian Council of State gave an advice about the proposal.<sup>121</sup> Its main concern was the lack of coherence between the Belgian and the European procedures. It concluded that a constitutional problem could emerge when the national procedure is more complicated, less efficient, and more expensive than the European transnational procedure. In May 2010, and because of the end of the legislature, the legislative proposal was dropped.<sup>122</sup>

In March 2014, the Belgian government submitted a proposal to the House.<sup>123</sup> The proposal first of all wanted to transpose Article 10 of the 2011 Directive on Late Payments into national law.<sup>124</sup> According to this provision, the Member States must ensure that an enforceable title can be obtained, including through an expedited procedure and irrespective of the amount of the debt, normally within 90 calendar days of the lodging of the creditor's action or application at the court or other competent authority, provided that the debt or aspects of the procedure are not disputed. The proposal also aimed at harmonising the Belgian procedure with its European counterpart. Finally, the proposal wanted to introduce a preliminary, mandatory, and contradictory conciliation phase before the actual summary order for payment procedure. It wanted to maintain the prior demand for payment. Because of the end of the legislature, this proposal was also dropped in April 2014.

According to Samyn, Belgian policy makers merely strive for an amelioration of the Belgian summary order for payment procedure. This is done very inconsistently: an advantage for one is a disadvantage for the other. Moreover, these proposals ignore the European context, in the sense that the European order for payment procedure, that is directly applicable in Belgium, requires a 'mirror procedure' in national law. Only this avoids an inequality between foreign and national creditors. The latter are disadvantaged vis-à-vis the former, because they do not have an efficient procedure at their disposal.<sup>125</sup>

112. Closset-Marchal, above n. 76, at 38-40.

113. Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation, COM (2002) 746 final, at 9.

114. These are analysed in detail by Samyn, above n. 76, at 217-27.

115. Projet de loi introduisant l'injonction de payer dans le Code judiciaire, 10 August 2007, No. 4-139/1, <www.senate.be> (last visited 29 June 2015).

116. Projet de loi introduisant l'injonction de payer dans le Code judiciaire. Amendements, 18 March 2008, No. 4-139/2, <www.senate.be> (last visited 29 June 2015).

117. Projet de loi introduisant l'injonction de payer dans le Code judiciaire. Texte adopté par la commission, 24 June 2008, No. 4-139/8, <www.senate.be> (last visited 29 June 2015).

118. Projet de loi introduisant l'injonction de payer dans le Code judiciaire. Texte adopté en séance plénière et transmis à la Chambre, 26 June 2008, No. 4-139/9, <www.senate.be> (last visited 29 June 2015).

119. Projet de loi introduisant l'injonction de payer dans le Code judiciaire. Amendements, 21 January 2009, No. 52K1287/003, <www.lachambre.be> (last visited 29 June 2015).

120. Projet de loi introduisant l'injonction de payer dans le Code judiciaire. Rapport fait au nom de la commission, 9 March 2009, No. 52K1287/006, <www.lachambre.be> (last visited 29 June 2015).

121. Projet de loi introduisant l'injonction de payer dans le Code judiciaire. Avis du Conseil d'Etat, 8 May 2009, No. 52K1287/009, <www.lachambre.be> (last visited 29 June 2015).

122. However, in September 2010, the proposal was re-submitted to the Senate: Proposition de loi modifiant les articles 587, 589 et 628 du Code judiciaire en vue de l'introduction de l'injonction de payer dans le Code judiciaire, 2 September 2010, No. 5-59/1, <www.senate.be> (last visited 29 June 2015). This proposal was dropped in September 2014 because of the end of the legislature.

123. Projet de loi modifiant la procédure sommaire d'injonction de payer, 31 March 2014, No. 53K3512/001, <www.lachambre.be> (last visited 29 June 2015). The proposal was largely based on an advice of the Belgian High Council of Justice of 26 January 2011 (see <www.csj.be/fr/content/avis-doffice-sur-lapplication-de-linjonction-de-payer-europeenne> (last visited 29 June 2015)).

124. Directive of the European Parliament and of the Council 2011/7 on combating late payment in commercial transactions (recast), OJ 2011 L 48/1.

125. Samyn, above n. 76, at 226-27.

### 2.3 Possible Recovery Procedure for Unchallenged Claims

In his 2015 Justice Plan, the new minister of Justice Koen Geens announced a reform of the summary order for payment procedure. The goal is to make it more efficient.<sup>126</sup> At the end of June 2015, the government submitted a legislative proposal to the House of Representatives to amend a series of civil procedural rules.<sup>127</sup> Part of this proposal deals with the recovery of unchallenged claims and the introduction of a new simplified recovery procedure. However, the existing summary order for payment procedure (as discussed above) remains in force and will not be amended. The same is true for the European order for payment procedure, although the government predicts that the new (and more efficient) national procedure will also be used for cross-border cases. It has to be underlined that to date (July 2015) this is just a proposal. The legislative process still has to play out.

On the one hand, reference is made, once again, to Article 10 of the 2011 Directive on Late Payments. On the other hand, and as already mentioned above,<sup>128</sup> it is noted that the current summary order for payment procedure does not meet its goals. There are very few cases, and compared to an ordinary civil procedure, it is not really a summary procedure, as the description above illustrates. The government also refers to the overload these cases cause for judges who are simply used to issue an enforceable title. This is not part of their core task, namely adjudicating disputes. Therefore, the government wants to introduce an administrative recovery procedure, instead of a jurisdictional procedure (which the summary order for payment procedure is). The recovery of unchallenged claims should, in a first phase, be kept outside the courts. In order to surround this procedure with guarantees regarding expertise and independence, a key role will be played by bailiffs (*huissiers de justice*) and the Belgian National Chamber of Bailiffs.

The proposed recovery procedure for unchallenged claims is composed of four steps.

1. In the first step, the bailiff sends an order to pay to the debtor with a copy of the relevant pieces of evidence (showing the unchallenged nature of the claim) and an answer form.<sup>129</sup> The order has to contain, among others, a clear description of the claim and the amounts that are being claimed from the debtor, a summons to pay within 1 month and the modalities to pay.
2. In the second step, the debtor has 1 month to pay or to ask for payment facilities or to challenge the claim (wholly or in part) by using the answer form. In the latter case, the debtor has to state the reasons why he

or she challenges the claim. A non-motivated challenge is seen as an absence of challenge.

3. As a third step, the procedure is cut short for the debts that are paid or that are challenged. In the latter case, the creditor is free to initiate an ordinary civil procedure. If, in a procedure on the merits of the case, the challenge as formulated by the debtor is clearly unfounded or unreasonable, the debtor can be condemned to a fine for abuse of process.
4. As a fourth step, an enforceable title is issued in case the debtor does not react in time or if there is no agreement on payment facilities. At the request of the creditor, the bailiffs draws up a *procès-verbal* of non-challenge that is declared enforceable by a judge who is part of the management committee that deals with the publication of attachment orders. The enforcement is suspended if the debtor initiates a judicial procedure, which he or she can by using a petition (not a writ of summons).

The procedure and its scope are surrounded by a number of safeguards. First, the procedure can only be used for unchallenged claims. Once a claim is challenged, the ordinary procedure applies and a judge will have to adjudicate the dispute. Second, the scope is limited to commercial claims and debts, in the sense that the creditor and the debtor have to be registered at the Central Enterprise Databank. Are excluded from the scope of application: public debtors, private (or non-commercial) creditors and debtors, insolvency procedures, and most tort claims between private (or non-commercial) parties.<sup>130</sup> Third, the interests and penalties are legally capped at 10% of the claim.<sup>131</sup> Fourth and finally, the procedure can only be initiated by a lawyer.<sup>132</sup>

The Belgian National Chamber of Bailiffs will create an electronic database that will be called Central Register for the Recovery of Unchallenged Claims. All decisions relating to the aforementioned procedure will be registered in this database. Bailiffs will be able to consult it for every creditor and debtor.

## 3 The 'Age of Austerity' and Relief in Small and Simple Matters

In Belgium, relief in small and simple matters can be obtained before the Justice of the Peace. This small claims court, that has general jurisdiction over all claims that do not exceed € 2.500, is an easily accessible court, in the sense that a petition can be used to bring a claim and *pro se* litigants are common and allowed. However, the judiciary is under constant pressure. For many deca-

126. <<http://www.koengeens.be/justitieplan>> (last visited 29 June 2015).

127. *Projet de loi modifiant le droit de la procédure civile et portant des dispositions diverses en matière de justice*, 30 June 2015, No. 54K1219/001, <[www.lachambre.be](http://www.lachambre.be)> (last visited 1 July 2015).

128. See *supra* Section 2.2.5.

129. This is comparable to the prior demand for payment in the summary order for payment procedure (see *supra* Section 2.2.2).

130. Exceptions are tort claims that are laid down in an agreement or I.O.U. and tort claims dealing with joint ownership.

131. As a general rule, the judge has the discretionary power to reduce the contractual interests and penalties.

132. Under the motto that the lawyer is the first judge.

des, austerity has been important issue in the Belgian justice system. There has always been a general perception and even conviction that the system is always underfunded. Recent examples are the non- or late payment of court-appointed experts, refusing to declare vacant judicial mandates, cutting back on the number of clerks, not investing in IT and digitisation, etc. One notable example are the budgetary constraints on legal aid,<sup>133</sup> which is vital in small and simple matters. According to the Belgian NICC,<sup>134</sup> the number of legal aid cases (*i.e.* second-line judicial assistance<sup>135</sup>) has doubled over the years. In average, the costs have risen with 8% to 9% per year. In 2012, the legal aid system costed € 78 million. This is three times more than in the beginning of the nineties, when the budget was € 20 million. In 2013, the government came up with some proposals to tackle this budgetary explosion. For example, it was suggested that young lawyers should be obliged to do at least five legal aid cases for free. Big law firms could do the same and would get in return a pro bono label from the government. Another proposal was to charge legal aid litigants a minimum fee of € 30. To date, none of these proposals have been turned into legislative proposals.

The current summary order for payment procedure, which was introduced in 1967, clearly did not meet its goals.<sup>136</sup> Statistics are low, and there is constant scholarly criticism, not only about some of the technical rules (*e.g.* the financial threshold, the prior demand for payment, the impossibility to obtain a decision that is provisionally enforceable, and the mandatory assistance of a lawyer) but also about its acceptance by the public. Many proposals were made to amend the procedure. To date, all of them failed, also because the European context is completely ignored. Recently, the government proposed a new recovery procedure for unchallenged claims that would exist beside the existing summary order for payment procedure. Most interestingly, the government wants to keep the recovery of unchallenged claims outside the courts. It should be an administrative procedure with a key role for the bailiff.

The latter could be seen as part of a new and general trend: keeping small and unchallenged claims outside the judiciary and providing for cheaper and more efficient alternatives. The judiciary should fall back on its core task: adjudicating complex disputes. In 2011 and regarding small consumer claims, the Federal Public Service of Economy launched Belmed (*Belgian*

*Mediation*) which is a digital ADR and ODR portal.<sup>137</sup> Belmed offers information about all existing ADR agencies, in the sense that it gives a clear and easily accessible overview of all Belgian arbitration, conciliation, mediation, and ombudsman agencies. On the other hand, and this is the crucial part, Belmed offers the possibility of making an online application for arbitration, conciliation, or mediation. The aim is to create a single digital and easily accessible access point for the consumer and the tradesman. They simply have to fill out a form, and the Belmed system automatically sends the application to a competent ADR entity. Its aim overlaps with the 2013 Consumer ODR Regulation that wants to create a pan-European ODR platform.<sup>138</sup> In 2014, Belgium was one of the first Member States to implement the 2013 Consumer ADR Directive.<sup>139</sup> The Act of 4 April 2014 not only transposes the minimum quality standards for ADR entities, as enumerated in the Directive, into national law but also creates a Consumer Ombudsman Service that will act as a residual ADR entity that will be competent to deal with disputes for the resolution of which no existing Belgian ADR entity is competent.<sup>140</sup> All these initiatives aim to enhance the out-of-court resolution of small consumer claims.

133. Service public fédéral Justice, *La réforme de l'aide juridique*, 3 May 2013, <[http://justice.belgium.be/fr/nouvelles/communiqués\\_de\\_presse/news\\_pers\\_2013-05-03.jsp](http://justice.belgium.be/fr/nouvelles/communiqués_de_presse/news_pers_2013-05-03.jsp)> (last visited 29 June 2015). For more detailed data, see Hiil, *Legal Aid in Europe: Nine Different Ways to Guarantee Access to Justice?*, 21 February 2014, <[www.hiil.org/data/sitemanagement/media/Report\\_legal\\_aid\\_in\\_Europe.pdf](http://www.hiil.org/data/sitemanagement/media/Report_legal_aid_in_Europe.pdf)> (last visited 29 June 2015) and The European Commission for the Efficiency of Justice, *Evaluation of European Judicial Systems. 5th Report – Edition 2014 (2012 data)*, <[www.coe.int/t/dghl/cooperation/cepej/evaluation/default\\_en.asp](http://www.coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp)> (last visited 29 June 2015).

134. National Institute for Criminology and Criminality.

135. See *supra* Section 1.5.

136. See *supra* Section 2.2.5.

137. <[www.belmed.fgov.be](http://www.belmed.fgov.be)> (last visited 29 June 2015). See on Belmed S. Voet, 'Belgium', in Ch. Hodges, I. Benöhr & N. Creutzfeldt-Banda (eds.), *Consumer ADR in Europe* (2012) 25 and S. Voet, 'Public Enforcement and A(O)DR as Mechanisms for Resolving Mass Problems: A Belgian Perspective', in Ch. Hodges and A. Stadler (eds.), *Resolving Mass Disputes. ADR and Settlement of Mass Claims* (2013) 285.

138. Regulation of the European Parliament and of the Council 524/2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, OJ 2013 L 165/1.

139. Directive of the European Parliament and of the Council 11/2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, OJ 2013 L 165/63.

140. Loi du 4 avril 2014 portant insertion du Livre XVI, 'Règlement extrajudiciaire des litiges de consommation' dans le Code de droit économique, *Moniteur Belge* (Official Gazette of Belgium) 12 May 2014, at 38262. See S. Voet, 'Buitengerechtelijke regeling consumentengeschillen', 308 *Nieuw Juridisch Weekblad* 674 (2014).