

DEBT RECOVERY IN BELGIUM
Law Firm Van Dievoet, Jegers, Van der Mosen & Partners

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The implementation of Directive 2000/35/EC of the European Parliament and of the Council of June 29, 2000 into Belgian law

The European directive had to be implemented into internal Belgian law by August 8, 2002. The Law on “combating late payment in commercial transaction” was adopted on August 2, 2002 and came into force on August 7, 2002.

According to European statistics, Belgium is one of the member states with excessive payment periods and late payment. These payment periods differ significantly from the average in the Community.

The scope of this law and the Directive are similar. The law applies to payments made as remuneration for commercial transactions for the supply of goods or the rendering of services between undertakings, or undertakings and public authorities, or equivalent entities. The law covers contracts that have been concluded, renewed or extended after August 7, 2002, and will apply to all commercial transactions from August 8, 2004 unless an exclusion has been agreed upon. The law regulates the same transactions as those outlined by the Directive.

Creditors have sufficient, adequate, and effective judicial means in Belgium to lodge an action or application with the court or other competent authority, in order to recover any accounts receivable by legal means. In this respect, the Directive has not required Belgium to change its legislation. When the amount of the debt or aspects of the court proceedings are not disputed – which would be quite rare – an enforceable title can be obtained normally within 90 days of the lodging of one’s action or application. However, the fact remains that whenever the amount of the debt or aspects of the court proceedings are disputed, this dispute will cause delay.

The Directive has not obliged Belgium to amend legal or administrative procedures in order to comply with the provision regarding retention of title clauses. Subject to some conditions, such clauses are already effective and enforceable.

Under Belgian law interest for late payment is not due automatically. A creditor needs to send a prior reminder. The applicable interest rate and penalties can be agreed upon, but courts are empowered to reduce excessive penalties and interest rates to a level which is considered to be fair (e.g., the rate of legal interest, which is actually 7%). Moreover, courts can grant the debtor, at any moment, an extension of payment, should the circumstances justify such.

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The new law provides that if no payment term has been agreed upon, interest is due automatically, without the necessity of a prior reminder, 30 days following the date of receipt by the debtor of an invoice, or an equivalent request for payment, or, if this date is uncertain, 30 days after the receipt of the goods or services, or 30 days after the date on which acceptance or verification takes place.

The applicable interest rate is fixed at the European Central Bank base reference rate, plus 7%, which shall be published in the Belgian Official Gazette.

The creditor is entitled to claim reasonable compensation from the debtor for all recovery costs incurred as a result of the latter's late payment if no other arrangement has been made, but irrespective of the right of the creditor to recover legal costs in accordance with the provisions of the Belgian Judicial Code. An unpaid creditor may incur additional administrative and legal costs as a consequence of the transfer of the debt to a third party such as a solicitor.

The court will check whether such recovery costs are transparent, proportional and have been incurred as a result of the debtor's late payment. The court can take into account whether these costs have already been compensated for by the interest for late payment. Maximum amounts to cover the recovery costs, corresponding with different levels of debt, will be fixed by a Royal Decree.

Parties can agree upon these three main principles: (1) a payment period of 30 days; (2) a right to claim interest at a higher rate without a prior reminder; and (3) a right to recover all relevant recovery costs, but the law aims to prohibit any abuse of the freedom of contract to the disadvantage of the creditor in such a way that the creditor would be bound by grossly unfair payment terms and conditions. Among other issues, the court will take into account whether the debtor has any objective reason to deviate from the provisions outlined in the Directive or whether he's simply abusing his economic power. Each agreement that is not in compliance will not be enforceable.

Prior to initiating legal action

Amicable recovery

If debts are not paid, the creditor should first try to reach an out-of-court settlement. He can get in touch with the debtor by phone or send him a summary of the outstanding bills. If the debtor doesn't respond in a proper or sufficient way, the creditor must send him a formal service notice via registered mail, after which the legal procedure can be initiated, if necessary.

Information about the solvency of the debtor

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As judicial debt recovery leads to certain costs, it is useful to collect background information about the solvency of the debtor. For this purpose, the creditor can consult the notices of attachment at the registry of the Judge of Attachment. A system has been put in place which allows the on-line review of these notices. However, for reasons of privacy, only lawyers, notaries, bailiffs, collectors of taxes, and, of course, the judges of attachment have access to these notices.

Information about the solvency of the debtor can also be received by consulting the annual accounts (balance sheet and statement of profits and losses) of the debtor at the National Bank of Belgium. Every company established in Belgium is obliged to file with the National Bank a certified copy of its annual accounts and balance sheet. This information is public and copies can be obtained on demand.

Finally, there are also companies such as Gratin Dun & Bradstreet who collect various kinds of data about the solvency of companies, (e.g., debts with tax authorities, social security, with other private creditors, checks and letters of credit remaining unpaid, any verdicts which have been rendered, etc.)

Protective measures

When it turns out that the debtor possesses some personal property or real estate, it may be useful to take protective measures, by seizing these goods (or some of them) for security. Basically, a prior authorization by court order is required. However, a seizure for security can only be used when the recovery of the debt is in immediate jeopardy.

The debt must fulfill the following conditions. The debt must be:

- certain. An attachment will not be allowed for potential, conditional, or disputed debts;
- payable. The debt is due and was not paid on maturity;
- fixed. The amount of the debt must be specified or can easily be specified.

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The consequence of the attachment is that the debtor can no longer sell the attached goods; he keeps title of ownership, but he cannot further organize his own insolvency.

Legal proceedings

If, notwithstanding all attempts to receive amicable payment, the creditor does not receive settlement, there remains only one alternative; that is to have the debtor ordered to pay the outstanding amount by the court.

Normally legal action commences by serving a writ on the debtor, which is a formal instrument that will be served by a bailiff at the creditor's request. Under penalty of nullity, the writ must include:

- the identity of the parties;
- the claim, its subject, and a short summary of the grounds on which the claim is based;
- the judge by whom the case will be heard;
- the time and place of the first court hearing.

In some cases the legal action may be started by (1) an application which is filed with the registry of the competent court or (2) the voluntary appearance of both parties before the competent court.

The judicial system in Belgium is organized in a pyramid, with a distinction between the criminal courts on the one hand and the courts for civil, commercial and social matters on the other. Furthermore, there are also some administrative courts for matters of public law.

With regard to civil, commercial and social matters, small claims (about €2,000) are dealt with at a cantonal level by the justices of the peace. Above that, at the level of the districts, there are the courts of first instance, the commercial courts and the courts for social matters.

Claims in excess of €2,000 are exclusively dealt with by the courts of first instance (civil cases) or the commercial courts (commercial cases).

One is allowed to appeal against almost every verdict. These cases will be heard before the Courts of Appeal. The jurisdiction of the Supreme Court, which is at the top of the legal system, is restricted to matters related to the lawful application of the legal rules.

In very obvious cases which don't need long explanations or pleadings, neither orally nor in writing, the claimant may request that the court hear the case immediately at the initial hearing. If the court agrees to proceed this way, the judge will hear both parties, who will each produce a file containing all written

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evidence about the case, and the judge will close the proceedings. Usually, he will render his verdict within one month. As a consequence, the proceedings will not take longer than one to three months.

If the debtor has not appeared before the court during the initial hearing, or if the debtor was not represented by an attorney, the case may be immediately heard and judged. If the debtor doesn't agree with the decision of the court, he can oppose the verdict. The case will be brought and heard once more before the same court.

If the case cannot be heard during the initial hearing, both parties will be given the opportunity to put their arguments in writing. All written evidence which will be used during the proceedings should be disclosed to the other party at the same time as the written memoranda are filed with court.

It is possible to make a binding agreement about the time frame within which memoranda and evidence must be submitted to the court. If such an agreement cannot be reached, parties may request the court establish a binding time frame. In most cases, provided they are well managed, the proceedings before a court of commerce will take no longer than one year.

Afterwards, the case will be plead before court. Except for criminal cases, a jury will never be involved.

It is possible, but rather exceptional, that the court order specific measures to clarify some issues or facts, which may remain obscure or uncertain. The court can hear witness testimony or appoint an expert in order to examine goods which were said to be defective etc. In most cases, the court will consider the written evidence submitted by the parties during the hearing sufficient to reach a verdict.

The party that has appeared in the first instance, but does not agree with the decision, can appeal to the court that is one level higher. After the period of appeal, only an appeal to the Court of Cassation is permitted, and only on the alleged grounds that the legal rules have been wrongly implemented. When no further legal remedy is possible, the decision of the court is definitive and must be executed.

The debtor may carry out the judgment voluntarily, but it is also possible that he will still refuse to pay. In that case, the judgment may be enforced upon the debtor. The bailiff has the authority to sell personal property. Real estate may be sold by a notary public in a public auction. The claim of the creditor will be settled with the proceeds from such sales.

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Decisions of Belgian courts may also be executed abroad when the debtor is located in a foreign country. In that event, the rules of the Brussels Treaty of 1968 will apply throughout the European Union.

The same rule applies to decisions rendered by foreign courts. Before they can be enforced in Belgium, an “exequatur” must be obtained, which is delivered by the court of first instance, after which the foreign decision may be carried out in Belgium.

Alternative settlement

Arbitration is a private means of settling disputes, which requires that both parties have agreed to submit the dispute that has arisen, or may arise, to one or more arbitrators.

The Belgian Code of Civil Procedure provides that a verdict rendered by an arbitrator, according to the provisions of the Belgian Code, is as binding as a verdict rendered by a court. We encourage agreeing on arbitration in technical matters, (e.g., in the ITC business).

Nevertheless, it is of vital importance that the intention of the parties to submit a dispute to arbitration has been previously agreed upon in writing.

Another kind of settlement is the out-of-court settlement, by which parties terminate a dispute that has arisen, or may arise, between them. The advantage is that the parties may reach a settlement rather quickly, without additional expenses and without having to go through the legal process. However, it is an essential condition that both parties are ready to make mutual concessions. Mediation, either court-ordered or upon an agreement entered into between the parties, may result in a settlement out of court.

Legal composition and bankruptcy

If the debtor (tradesman) is temporarily unable to pay his debts, the commercial court may grant a legal composition. As a result, the provisional suspension of payments is granted, during which the creditors are no longer allowed to enforce verdicts on the debtor. This measure applies to all kinds of creditors, even privileged creditors.

Meanwhile, a restructuring plan must be filed with court. It may provide terms of payment, reduction of debts, the sale of a part of the business etc. When the creditors and the court agree with this business plan, the court grants the definitive suspension of settlement. If, on the contrary, the plan is not adopted, the court will declare the company or the business bankrupt. The order of bankruptcy may also be issued without a previous legal composition if the debtor has stopped paying his debts permanently and is no longer creditworthy.

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As a result of the declaration of bankruptcy, the bankrupt is dispossessed of his belongings and a trustee in bankruptcy is appointed, who is entrusted with the liquidation of the bankrupt's property. With the proceeds, the creditors will be paid according to order of priority.

Collective settlement of debts

Debtors who are not registered as a commercial business do not qualify for legal composition or bankruptcy. Nevertheless, they may be confronted with a burden of debt. For that purpose, a procedure of collective settlement of debts was introduced in 1998.

As for debtors who are not able to settle their debts and find themselves confronted with an excessive burden of debt, a collective settlement of debts may be imposed. As a result, the judge of attachment appoints a mediator, who has to submit a rescheduling of outstanding debts. This plan aims to restore the financial ability of the debtor and, at the same time, it aims to guarantee that the debtor and his family live in reasonable conditions.

As a result of the collective settlement of debts, all creditors must suspend the enforcement of their debts.

Duration, costs and fees

Of course, the legal recovery of debts leads to some costs.

Generally, the costs of serving a writ and court fees range between €500 and €1,000. The claimant has to advance these costs, but ultimately, the court will decide and order one of the parties to pay them.

Each party has to pay its own lawyer's costs and fees, but the court will order that the winning party be paid compensation for the costs of the court proceedings. The amount of the compensation is regulated by law.

The fees involved will be calculated on the basis of a flat fee per hour, ranging from €100 (for small, undisputed claims) to €250 per hour (for more complicated matters). All costs are included, except for disbursements and out-of-pocket expenses. If special circumstances are involved, or if the case requires specific expertise, the hourly fee will be at least €200.

Fees can also be calculated on the basis of a percentage of the claimed amount (ranging between 5% and 25%). It is also possible to agree on a success fee. Agreements on a "no cure, no pay" basis are not allowed by Belgian law.

Generally speaking, the time involved ranges from two months to one year if debts are not heavily and seriously disputed. If they are heavily disputed, the

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time frame will be at least two years and eventually, if one of the parties appeals against the verdict, the time frame will be five years.

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execution abroad of Belgian decisions: European Regulation Brussels I for European Union

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