BELGIUM

Global litigation guide

About

Welcome to The Global Litigation Guide (the **"Guide"**) which has been prepared by DLA Piper's civil litigation experts around the world for the purpose of presenting key aspects of civil litigation in jurisdictions in which DLA Piper operates.

For each country, the Guide focuses on the following aspects:

- Overview of court system
- Limitation
- Procedural steps and timing
- Disclosure and discovery
- Default judgment
- Appeals
- Interim relief proceedings
- Prejudgment attachments and freezing
- Costs
- Class actions

This global Guide provides practitioners, in-house counsel and clients with a comparative source of reference that covers some of the intricacies of civil litigation in 30 jurisdictions worldwide. DLA Piper has prepared separate guides that deal with matters that are closely related to civil litigation, such as DLA Piper's guide to Legal Professional Privilege and (coming soon) DLA Piper's guide to Third Party Funding. Criminal or administrative litigation (as well as litigation relating to other specialist areas of law that require different procedures such as tax and employment) are outside the scope of the Guide.

The Guide is not a substitute for legal advice. Should you have a civil claim, or if you would like further information, please contact any of the individuals listed in the Guide.

About DLA Piper

DLA Piper is a global law firm with lawyers located in more than 40 countries throughout the Americas, Europe, the Middle East, Africa and Asia Pacific, positioning us to help clients with their legal needs around the world.

For further information visit www.dlapiper.com.

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Belgium

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Overview of court system

Belgium is a civil law jurisdiction and civil proceedings are regulated by the Belgian Code on Judicial Proceedings (the Code). The Code was enacted on 10 October 1967 and entered into force on 1 November 1970. It has since then been subject to various amendments.

Precedents do not bind other courts but they are nonetheless used as a source of authority. This is especially the case for judgments of the Belgian Supreme Court (*Hof van Cassatie/Cour de cassation*).

The language of court proceedings is subject to strict regulation. In civil, commercial and employment law matters, proceedings are conducted in French or Dutch depending on where the court is located. In criminal cases, the language of the defendant is the relevant element to determine the language of the proceedings. Whilst most cases are heard in French or Dutch, proceedings in courts located in the German-speaking areas of Belgium will be heard in German. Proceedings in English or any other language are not possible.

The Belgian civil court system is organized as a pyramid and consists of several levels:

- At the lowest level are the 162 Justices of the Peace (*vredegerecht/justice de paix*), which are competent for small claims (not exceeding EUR5,000) and for a number of specific matters (such as disputes relating to rent or consumer credit), and, secondly, the 15 Police Tribunals (*politierechtbank/tribunal de police*), which deal with minor criminal offences and road traffic related matters (both criminal and civil).
- At the next level, we have the courts of first instance. The Court of First Instance (*rechtbank van eerste aanleg/tribunal de première instance*) has general competence to handle all cases that do not fall under the jurisdiction of any other court or that concern certain specific issues. The Court of First Instance also acts as an appellate court for judgments from the Justices of the Peace and most judgments of the Police Tribunal. Each Court of First Instance is subdivided into three sections: the civil section, the criminal section and the family and youth section.

  At the same level, the Business Court (*ondernemingsrechtbank/tribunal de l'entreprise*) has jurisdiction in proceedings between or against businesses. The term 'business' essentially comprises sole traders, companies, associations and foundations (though some exceptions apply). Additionally, the Business Court deals with a number of specific commercial disputes, such as insolvency matters, shareholders' disputes or directors' liability cases.

  Also at the same level, the Employment Tribunal (*arbeidsrechtbank/tribunal de travail*) has jurisdiction in matters relating to employment or social security law.

  There are 13 Courts of First Instance, Business Courts and Employment Tribunals, with additional locations spread across the country.
- The Court of Appeal hears appeals against judgments of the Court of First Instance (except where it sat as an appellate court), the Business Court and some judgments of the Police Tribunal. An appeal against a judgment of one of the Employment Tribunals is brought before the Employment Court (*arbeidshof/cour de travail*).

At the same level, we have the Court of Assizes (*Hof van Assisen/Cour d'assises*), which deals with the most severe crimes, such as murder. A jury of twelve will decide on whether the defendant is guilty and, if so, the sentence. Unlike the Court of Appeal, the Court of Assizes is not an appellate court. One cannot appeal a judgment from the Court of Assizes - except directly before the Supreme Court.

- At the highest level is the Supreme Court. Unlike the other appellate courts, which review the case anew on both points of law and fact, the Supreme Court will only examine whether the court has correctly applied the law.

In addition to these, Belgium also has specialized administrative courts, for instance for matters relating to immigration or urban planning, with the Council of State (*Raad van State/Conseil d'état*) as the highest administrative court. It is competent for appeals against judgments of the other administrative courts, with a role similar as that of the Supreme Court, and serves as the first and last instance administrative court in matters where no specialized administrative court exists.

Lastly, the Constitutional Court (*Grondwettelijk Hof/Cour constitutionnelle*) has exclusive jurisdiction to determine whether legislation enacted by one of the Belgian parliaments is in accordance with the Belgian Constitution or with the rules on the distribution of powers between the federal level, the communities or the regions. Other courts can refer preliminary questions to the Constitutional Court if they have doubts as to constitutionality of certain legislation.

Limitation

If a claim is time barred, the court will reject it and will not assess the merits of the case. In principle, all contractual claims or claims for which there exist no specific limitation periods are subject to a ten-year limitation period beginning on the date on which the rights under the contract could have been exercised. Unlike for non-contractual claims (see below), for contractual claims the moment the plaintiff learnt of the existence of the claim is irrelevant for limitation purposes.

For tort or so-called non-contractual claims, this period is five years from the moment the plaintiff learnt of either the damage or its aggravation as well as the identity of the person liable. In any event, there is a back-stop on tort claims of twenty years following the date on which the harmful event occurred.

However, Belgian law has a great variety of other limitation periods which can have different starting points, for example in employment or rent matters. One should therefore be cautious to verify the applicable limitation period before commencing legal proceedings.

Procedural steps and timing

Representation by an attorney (*advocaat/avocat*) in civil proceedings is not mandatory, so a party can decide to handle a case itself. It cannot, however, instruct any person to represent him. Except in some cases, for instance in employment-related matters (where an employee can be represented by a trade union representative), attorneys have a monopoly representing parties before the courts.

Civil proceedings are typically commenced by a writ of summons being served on the adverse party by a bailiff. The writ of summons is, at the same time, registered with the court.

In some cases, however, the proceedings can be initiated by a so-called application (*verzoekschrift/requête*) that is filed with the court and will be communicated by mail to the defendant (and thus not served on the defendant by a bailiff). The plaintiff and defendant could also decide to file a joint application and in that way initiate proceedings together.

Within one or two weeks, although this may vary in practice, an introductory hearing is scheduled. At that hearing several routes are possible:

- The court could render a default judgment if the defendant or, though exceptional in practice, the plaintiff does not appear.
- The case is postponed to a later hearing or postponed indefinitely, after which any party can have the proceedings reactivated.
- If the case is not complex and can be dealt with summarily, the case may be heard at the introductory hearing or a hearing shortly thereafter, with or without the parties having first exchanged written pleadings (*korte debatten/débats succincts*).
- The majority of cases are handled through the normal track, under which the parties are given the opportunity to set out their position in written pleadings followed by a hearing where the case will be pleaded orally. The parties usually agree on the procedural calendar with their respective deadlines to file the written pleadings and, should they fail to reach an agreement, the calendar is set by the court. On average, parties file one to three sets of written pleadings each. The length of time required to exchange pleadings is determined by the parties and varies from case to case, depending on the complexity of the case and the court's availability.

The hearing concludes the proceedings and usually takes between thirty minutes and three hours. Hearings that take several days are rather exceptional. Oral pleadings are important for explaining the position of the parties to the court and to focus on specific issues. In practice, a hearing allows the parties to emphasize what they deem to be important and offers the court the opportunity to ask questions of the parties. While the oral hearing is important, the court is only obliged to take into consideration the arguments raised in the written pleadings.

In principle, the court will render the judgment one month following the date of the oral hearing. However, this may take longer if the case is complex.

The timeframe for proceedings depends on the type of court and, since some courts are dealing with backlog, its workload. For proceedings before courts of first instance, the average duration for a fairly straightforward case that is handled through the normal track is approximately one year, although it is common to have longer timeframes for complex cases.

Disclosure and discovery

For civil proceedings in Belgium, there is no formal discovery or disclosure process. Each party bears, in principle, the burden of proving its allegations and will attach to its written pleadings the list of documents (or other information) on which it relies. Copies of such information shall be provided to the other party and, shortly before the hearing, each party provides the court with a bundle with all the evidence upon which it relies.

The parties are free to decide which information they wish to rely on and submit to the court. However, each party also has a duty of good faith, which implies a certain degree of cooperation in the production of evidence.

A party that has reasons to believe its adversary is in possession of a document that is relevant to the court's decision may solicit the production of said document, if needed, with the intervention of the court. Where there are strong indications that a third party has a document that is of relevance to the proceedings, the court may order that this document, or a copy thereof, be sent to the other party and filed with the court. One will have to clearly specify the document it wishes to be produced. Document production requests cannot, in other words, be used as fishing expeditions. Documents, or information more generally, that is covered by legal professional privilege as well as (but for some exceptions) correspondence between attorneys cannot be produced. A person requested or ordered to submit such documents can raise privilege as a defence.

If a party fails to comply with the order without a legitimate reason, the court may order the party (or, on occasion, third party) to pay damages. The court can also, either in the initial order or at a later stage at the request of one of the parties, link a penalty (*dwangsom /astreinte*) to the production of the documents in question (for instance, per day the defendant has not complied with the order). Altering or destroying evidence that is ordered by a court to be produced is a criminal offence under Belgian law.

The court further has the power to take measures aimed at ensuring that evidence is properly gathered and preserved. For this purpose, the court may order the appointment of a third party (such as a notary or bailiff) to hold and preserve certain information, which could be useful if the originals are of importance or if there are reasons to fear that one of the parties may otherwise try to alter or destroy the information in question.

Default judgment

If the defendant does not appear at the introductory hearing or, should the case be postponed, a later hearing, the court is obliged to thoroughly analyse the merits of the claim before delivering a default judgment at the request of the plaintiff. The court will, for instance verify whether the defendant was properly informed of the hearing and analyze issues of liability and quantum. It could, for example, reduce the quantum where the amount specified in the claim is unreasonable. If the court is not satisfied that the summons was properly served on the defendant, it can also order the plaintiff to have it served again.

If the claimant does not appear, the judge can simply reject its claim. The claimant's failure to appear at the hearing is quite exceptional in practice.

Furthermore, a default judgment cannot be rendered against a party that has filed a written pleading, even if it does not appear in person before the court. Once a party files its written pleading, the proceedings become adversarial and the court is obliged to address the issues raised in the pleading in its judgment.

The party who failed to appear at the hearing and has had a default judgment rendered against it, can challenge it by appealing the judgment. The aggrieved party has one month as from service of the judgment to make its challenge. A so-called opposition (*verzet*

/opposition), which is a remedy available to the person against whom a default judgment is handed down, is only possible if the judgment cannot be appealed, for instance when the default judgment is a judgment on appeal or if the value of the case does not exceed the threshold to appeal. In that case, the proceedings will be assessed anew before the same court as that which issued the default judgment and the court will review the case in its entirety, both as to the law as to the facts.

Appeals

A judgment can be appealed from the moment it is delivered and, in any event, no later than one month as of the date on which it is served by a bailiff (although longer time limits apply if one of the parties resides abroad). This implies that the one-month time-limit does not start when the court informs the parties of the judgment, but only from when one of the parties have taken the initiative to have the judgment served on the other. If none of the parties does so, the time limit will not commence.

If a party decides to appeal a judgment, it must identify the particular objections it has against the court's decision. Only the parts of the first decision that are appealed will be subject to a new decision. A party could, for example, decide to only challenge the court's decision as to the quantum of the damage and not the question whether or not there was a breach of contract.

The appellate court will review the facts of the case and questions of law. It will, in other words, review the case anew and the parties are free to bring forth new arguments or modify the relief sought (provided, in case of the party who was the plaintiff at first instance, it is based on facts or circumstances mentioned in the initial summons).

A judgment of an appellate court can be appealed to the Supreme Court, but the Supreme Court will only review questions of law. Unlike the appellate courts, which have the full power to review the merits of the case, the Supreme Court can only assess whether the court has applied the law correctly. The time limit for lodging an appeal to the Supreme Court is three months after the service of the judgment on the party that appeals.

Appeal proceedings can last a number of years depending on the court's workload. By way of illustration, some appeal proceedings before the Brussels Court of Appeal have lasted more than five years. The Supreme Court usually takes around a year and a half to decide on a case.

Interim relief proceedings

The courts have the power to grant interim measures (*voorlopige maatregelen/mesures provisoires)* to protect the interests of the parties before the commencement and during the course of proceedings. A person seeking such interim measures has three options:

- Request the interim measures before the same court that has jurisdiction to rule on the merits.
- In summary proceedings (*procedure in kort geding/action en référé*), before the President of the Court of First Instance, Business Court or Employment Tribunal (depending on which court has jurisdiction), provided the plaintiff establishes that there is urgency – that is, the applicant would suffer harm were the case not dealt with through summary or expedited proceedings.
- By filing an *ex parte* application with the President of the Court of First Instance, Business Court of Employment Tribunal (depending on which court has jurisdiction). Since the party against whom relief is sought will not be informed of the proceedings until after the order is delivered, there is a high threshold for obtaining interim relief on an *ex parte* The plaintiff will have to show that there is an absolute necessity that justifies *ex parte* proceedings and thus a derogation from the adversarial nature of civil proceedings. This is the case where the addressee cannot be identified or where the element of surprise is essential for the relief to be effective.

Typical interim relief measures in Belgium include:

- the appointment of an expert, since the courts are in general reluctant (although it occasionally does happen in practice) to rely on evidence on technical issues submitted by the parties in, for instance, the form of a party-appointed expert report.
- the payment of a provisional sum of money, for example in a dispute relating to breach of contract.
- the production of documents.
- an injunction ordering a party to do or refrain from doing a particular action pending a decision on the merits - for instance, an order requiring a party continue performing a contract in a dispute about the termination of a contract, the suspension of construction works, the removal of an article from a magazine, newspaper or website, or the transfer of an asset to the other party.

To compel the addressee of the order to comply with it, the court can impose a penalty. For instance, in a case where the lessee of a car refuses to return the car to the lessor, the court could impose a penalty of EUR500 (or any other amount it deems appropriate) for every day the lessee fails to do so. If the addressee fails to comply with the order, it will have to pay the penalty to the other party. Though not required to do so, the court usually sets a maximum penalty that a party will be liable to pay.

If interim measures are granted in proceedings separate from the proceedings on the merits, a subsequent proceeding on the merits usually follows. However, this is not a requirement. It is, for example, possible that the parties may settle the dispute outside of court or that a merits proceeding is no longer required because a debtor has paid its debt. In addition, the judge granting interim relief sometimes sets a deadline by which a party must commence a proceeding on the merits. Failure to do so may lead to the expiry of the interim measure.

An order granting or rejecting interim measures can be appealed in the same way that any other judgment. Where the interim measure was granted on an *ex parte* basis, a special type of opposition (*derdenverzet/tierce opposition*) is available to the party against whom the order was directed. A party has one month from the service of the order to file the appeal or the opposition; the court will then decide the case anew on both points of law and fact. If, however, the interim measure is ordered by the same court that will subsequently rule on the merits, an appeal against the interim order must be brought together with the judgment on the merits.

Such an appeal or opposition does not suspend the enforceability of the interim relief. The party to whom to order has been granted may continue the enforcement even if the other party decides to appeal or file an opposition.

Prejudgment attachments and freezing orders

A creditor may apply to have a debtor's assets frozen, preventing the debtor from disposing of the encumbered assets (for example, by selling them). Two conditions must be met:

- The creditor must have a good arguable case that it has a due and payable debt owed by the debtor. That is, the creditor need not have already obtained a judgment ordering the creditor to pay the debt and the mere fact that the claim is contested does not prevent a creditor from freezing its debtor's assets. The court will determine, on a *prima facie* basis, whether the creditor's arguments are sufficient to justify the freeze.
- The creditor must have reason to believe that it will be unable to recover the debt unless the debtor's assets are frozen (the so-called urgency requirement). This essentially means that the debtor is in or is facing financial difficulties.

Since secrecy is of the utmost importance, a freezing order is requested by filing an *ex parte* application with a specialized judge sitting in the Court of First Instance. Usually within a few days, the order is rendered. If the asset freeze is granted, the creditor will have the order served on the debtor by a bailiff, following which the freezing order takes effect.

For assets owned by a debtor but held by a third party (for example, funds in the debtor's bank accounts), the creditor is not actually required to seek authorisation from the court before instructing a bailiff to have the assets frozen. It is to be noted, however, that a creditor proceeding om this basis would do so at its own risk: should the debtor decide to bring a challenge, the court may overrule the freeze and (albeit rather exceptional in practice) order the creditor to pay damages. Additionally, the third party holding the debtor's assets has fifteen days following service of the freezing order to deliver a declaration to the court. The declaration states what assets it holds for or on behalf of the debtor. If the third party fails to deliver the declaration, the court may (although it does enjoy a margin of discretion) decide that the third party is jointly and severally liable together with the debtor for the creditor's debt.

The debtor may challenge the freezing order within one month of being served with it. The debtor can argue that the two conditions mentioned above were not met and could even claim damages from the creditor if the court finds that the initial order was abusive – that is, obtained in bad faith. For example, it may be deemed abusive if a creditor proceeds to freeze a debtor's assets without the court's prior authorization (where such authorization was not required) and the court subsequently decides that the relevant conditions were clearly not met, or if the court believes that the information presented to it by the creditor in order to obtain the freezing order was not accurate or complete.

In principle, all assets (real estate, movable property, and claims on third parties such as bank accounts) can be attached. However, there are a number of exceptions - for instance, government assets.

Costs

The court will order the unsuccessful party to bear the legal costs of the successful party, subject to a general discretion to make some other costs order. Where, for instance, the plaintiff claimed EUR100,000 in damages but was ultimately only awarded EUR30,000, the court could decide that costs should be split between both parties.

The costs relating to civil proceedings in Belgium are, at least in comparison to some other jurisdictions, fairly modest. The most noteworthy costs are the following:

- The bailiff costs for serving the writ of summons on the defendant or to have the court's judgment served, which is generally around EUR300 (but could be higher if, for example, the summons is to be served abroad).
- The court fee (*rolrecht/droit de rôle*), which is essentially a tax or duty, of EUR165 for most proceedings at the first instance level and EUR400 for cases before the Court of Appeal. The court fee will be collected by the Federal Tax Authorities (*Federale Overheidsdienst Financiën/Service Public Fédéral Finances*).
- The fees and costs of a court-appointed expert or mediator.
- The fixed statutory compensation for legal representation (*rechtsplegingsvergoeding/indemnité de procedure*), which is based on the value of the case and can exceptionally be decreased or increased by the court depending on the particulars of the case, such as complexity or the limited financial means of the party ordered to pay costs. Legal representation costs are capped by statute in accordance with a scale set by a Royal Decree. For cases with a value of over EUR1,000,000, the standard amount is EUR22,500 and can in any event not be higher than EUR45,000. In the majority of cases, this compensation only covers part of a party's lawyers' fees.

Furthermore, barring a few exceptions, judgments must be registered with the Tax Authorities and, at that stage, registration duties become payable. The registration fee is 3% of the principal amount that the unsuccessful party is ordered to pay and is levied when the successful party requests an authenticated copy of the judgment (which it will need in order to serve the judgment on the unsuccessful party).

Finally, the costs relating to the enforcement of a judgment are borne by party against whom enforcement is sought. Enforcement costs do not include lawyers' fees.

Class actions

Class actions do exist under Belgian procedural law and are brought before the Business Court. The aim of such claims is to provide compensaton damage suffered by a group of plaintiffs. A class action can be brought on a large variety of topics, however a few requirements need to be met:

- The invoked cause constitutes a potential breach of the defendant’s obligations under contract, European regulations or the laws mentioned in Article XVII. 37 of the Economic Law Code. Whilst this means that class actions are not available for every type of case, the list of applicable cases is fairly extensive and includes actions under competition, market practices and consumer protection laws.
- The action is initiated by a group representative. For example, an association defending consumer interests with legal personality and that sits on the Special Advisory Commission for Consumer Affairs (such as FGTB or Test-achat, an association that has received ministerial approval) or a representative entity approved by a Member State of the European Union or the European Economic Area that meets specific criteria. The litigation group itself will consist of all consumers who, individually, are harmed by the common cause.
- A class action would be a more relevant and efficient procedure compared to normal court proceedings.

If these admissibility conditions are met, the class action procedure has two possible outcomes: an amicable settlement or a judicial decision.

The keys phases in the class action procedure can be summarised as follows:

- Admissibility phase: within two months of the request being filed, the court rules on the admissibility of the collective redress action.
- Negotiation phase: during the timeframe set by the court, the group representative and the defendant negotiate an agreement on compensation for collective harm.
- Approval phase: in case of an agreement between the group representative and the company regarding consumer compensation, the court reviews and, if it is satisfied with the agreement reached, grants approval.

- Substantive decision: if no agreement is reached, the court will issue a determinative ruling. The judge can either grant the collective redress request or reject it.

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