PRELIMINARY PROCEEDINGS IN BELGIUM ("RÉFÉRÉ PROCEEDING" AND "PROCEDURE OP EENZIJDIG VERZOEKSCHRIFT")

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SUMMARY: I. Référé *Proceeding*. II. Ex Parte *Proceeding*. III. *Ordinary Proceeding*. IV. Référé *Proceeding*. V. Ex Parte *Proceeding*. *VI. Bibliography*.

1. *Which are in your country the summary (or preliminary) proceedings that satisfy the material rights (e. g. advance remedy* —tutela anticipata— *provvedimenti d'urgenza, monitory proceedings, référé, pre-trial etcetera)?*

In this questionnaire we will present a brief analysis of the remedies granted by the Belgian legislature to immediately guarantee the right of the party in a judicial action pending final decision. Only proceedings which aim to settle temporarily an urgent situation or which are commenced to avoid an imminent danger, will be discussed. The verdicts resulting from this sort of proceedings do not affect the final decision and may not lead, in principle, to the full satisfaction of the substantial right. The two main forms in Belgium are *référé* proceedings ("kort geding") and *ex parte* proceedings ("procedure op eenzijdig verzoekschrift").

One can define in the *référé* proceedings pronounced verdict as a temporary decision granted at the request of one of the parties, the other one present or duly notified, in situations where the law gives the power to order immediate necessary measures to a judge (president of a court or tribunal) who does not have jurisdiction over the substance of the case. The *référé* procedure is covered by only a few Articles of the Belgian Judicial Code (*Gerechtelijk Wetboek-Code judiciaire*), namely 584 and 1035 through 1041. Belgian civil procedure rules allow plaintiffs in the event of "absolute necessity" to litigate without the defendant being present

(article 584, section 3). Thus, the *ex parte* proceeding can be described as unilateral. As the maxim *audiatur et altera pars* stands in general for a trial according to the rule of law, *ex parte* proceedings must remain the domain of exceptional circumstances. The *ex parte* procedure must be based on a request that is *absolute necessary*. Accordingly the rule that an originating motion can only be initiated when the other party is given notice of the proceedings, does not apply when successful enforcement of the order depends on the element of surprise, when quick action is necessary to preserve the subject matter of the action, or when the defendant's identity is unknown. These three possibilities of application are dealt with in question 3.

In contrast with this first category of summary proceedings, the Belgian Judicial Code also contains specific proceedings which do judge the merits of the case, but in a more fast, efficient and from a procedural viewpoint simplier way. A fast track for instance is provided for claims for debts worth less than € 1 860 (articles 1338 through 1344). Another example is the possibility for plaintiffs, pursuant to the provisions of the statute of 14 July 1991, to ask the cessation of blacklisted acts considered as infringements of commercial practice. Although the proceeding itself is mainly identical to the *référé* proceeding, here the president of the commercial court when evaluating the cessation action does examine the substance of the case, contrary to the *référé* proceedings. We will not deal with this second category of summary proceedings.[1]

2. *In all those proceedings is the judge's cognition superficial as far as depth is concerned?*

The injunction procedure requires less certainty on the matter. It is sufficient to demonstrate the plausibility of the right invoked and the *référé* judge must (only) examine the *appearance* of the rights and responsibilities.[2] The decisive factor here is that the substantive rights relied upon must be likely to support the pronounced order. This is called the *principle of reasonableness*, which has its repercussions on the substantiation of the verdict, as we will see below.

[1] *See* also *e. g*. Articles 587, 587*bis*, 587*ter* and 589.

[2] *See* Cass. March 9, 1995, *Arr. Cass*. 1995, 291; *Pas*. 1995, I, 301; Cass. January 31, 1997, *Arr. Cass*. 1997, 56; *Pas*. 1997, I, 56; Cass. May 5, 2000, *Arr. Cass*. 2000, 275; *Pas*. 2000, I, 275. Also for reference http://www.cass.be.

3. *Which are the requirements for the granting of the summary protection (e. g.* periculum in mora*, probability and veritableness, reversional protection, etcetera)?*

I. *Référé* Proceeding

Two conditions must be fulfilled for implementation of the *référé* proceedings, namely urgency of the demand and temporality of the verdict.

1. *Urgency*

The law does not define the term "urgency". According to the Belgian Supreme Court,[3] urgency must be assessed when an immediate decision is desirable to avoid a certain extent of damage or to prevent serious inconveniences. The president will consequently accept urgency when the plaintiff proves that the claimed measures are only than efficient and appropriate if ordered in a *référé* proceeding. The interest thus has to be so urgent that the decision of the ordinary judge cannot be awaited. It is not required that the damage the plaintiff would suffer be irreparable.

Whether urgency will be assumed or not can depend on the plaintiff's behaviour, *e. g.* when the urgency originates from his own attitude or when he waited too long to litigate.[4]

If the plaintiff does not mention the urgency in the initiatory writ of summons, the president will declare himself incompetent.[5] The Supreme Court clearly decided that urgency is an essential component of the president's competence. If the plaintiff did advance forward the urgency in the writ of summons, but the judge comes to a different decision, the claim will be held groundless.[6]

The possibility to litigate in *référé* is extended by the Supreme Court to compensate for the delays affecting judgments on the merits.[7] According to this, the *référé* procedure may become a sort of safety valve for a judi-

[3] Cass. May 21, 1987, *Arr. Cass*. 1986-87, 1287; *Pas*. 1987, I, 1160.
[4] Cass. March 17, 1995, *Arr. Cass*. 1995, 320; *Pas*. 1995, I, 330.
[5] Cass. May 11, 1990, *Arr. Cass*. 1989-90, 1169; *Pas*. 1990, I, 1045.
[6] Cass. May 11, 1990, *Arr. Cass*. 1989-90, 1175; *Pas.* 1990, I, 1050.
[7] Cass. May 21, 1987, *Arr. Cass*. 1986-87, 1287; *Pas*. 1987, I, 1160.

cial system close to suffocation. Thus, one can discern a clear tendency towards a procedure much closer to the basic procedure, insomuch the injunction judge is no longer deprived of judging the substance of the case (see also below). Undoubtedly, the exasperatingly slow course of the full proceedings explains partly the increasing interest for the *référé* proceeding.

2. *Provisional decision*

What regards the second condition, the president in *référé* proceedings must never rule on questions affecting the merits of the dispute. According to article 584 —in combination with article 1039— the judge deciding on the substance of the case is not bound by the *référé* decision. In this respect the jurisdiction of the president is restricted: his decision may not modify the legal position of the parties in a way that the decision on the substance would become senseless. Following measures can for instance be imposed by the president:

- The appointment of an expert to determine the damages caused by an accident.
- The appointment of a managing director *ad hoc*.
- Compulsory publication of a warning.
- To oblige a person to let somebody in.
- The suspension of the voting rights attached to shares.
- The execution of a contract.
- To oblige workers to stop occupying a factory.

Notable is that since the early eighties the allegation was abandoned that the *référé* president may only impose strict provisional measures.[8] Two main categories can be distinguished within the scope of remedies. Firstly, *conservatory* measures, which tend to secure the future satisfaction of a substantive right (*e. g*. the appointment of an expert, the appointment of a managing director *ad hoc*, the suspension of the voting rights attached to shares). Secondly, *regulatory or constitutive* remedies granted in order to provisionally arrange disputed situations through orders for specific acts, omissions or indulgences (*e. g*. the execution of a contract, handing

[8] *See* for instance Cass. November 25, 1996, *Arr. Cass*. 1996, 1088.

in documents within the scope of Social Security Law, to oblige workers to stop occupying a factory). A particular kind of this category is the provisional adjudication of claims.

Some difficulties, however, relate to labour law. Decisions made by the *référé* judge on collective social conflicts, strikes and factory occupations are often criticized severely. It happens more often that a *référé* president forbids on forfeiture of a periodic penalty payment a factory occupation set up to exert pressure on the employer or prohibits the obstruction by picketers of vehicles attempting to enter or exit the employer's plant. Most disapproved item is the tribunal of first instance's competence in labour matters. The distinctiveness of collective labour conflicts, asking for an individual approach, is the main reason for lodging objections to the jurisdiction of the president of the tribunal of first instance in these cases.

II. *Ex Parte* Proceeding

As mentioned earlier, basic assumption is that the unilateral procedure is an exception, not only to the ordinary basic proceeding, but also to the injunction proceeding. The defendant is not present nor informed. Of course, the plaintiff must advance good arguments to prejudice the defence so severely. Therefore, the Judicial Code speaks of "absolute necessity", without defining the term. What is meant by that?

Firstly, the *ex parte* procedure is applicable in cases of extreme urgency. Even the *référé* procedure must be unsatisfying to ensure one's essential rights.[9] It is clear that this will arise seldom, considering the present sophisticated ways of communication.

Note for example that —because the intellectual freedom collapsed with the privacy law— the book *Uitgeverij Guggenheimer* from the Belgian author Herman Brusselmans was banned from publication by unilateral verdict. Although restrictions of intellectual freedom are rare in Belgium, delicate considerations of complex and controversial interests are brought to an increasing extent before a by unilateral request seized judge.

Secondly, application is possible when the nature of the required measure would suffer well effectiveness if the case was judged in a defended

[9] *See* Cass. June 13, 1975, *Arr. Cass*. 1975, 1088; *Pas*. 1975, I, 984.

action. Elements of surprise, such as catching a person in the act, may be of importance in evaluating the admissibility of the unilateral request.

The Judicial Code provides for instance a specific proceeding which aims at protecting the creditor's rights and the substance of the debtor's patrimony. If the creditor fears his debtor's imminent insolvency and if besides this, the debt is certain, liquid and due for payment, seizure for security can be asked to the judge of seizures by lodging a unilateral request. Authorisation is not necessary if the creditor has a title (a decision of justice or a private title).

Finally, unilateral proceeding is granted when the plaintiff does not know the defendant's identity.[10] Examples here are the institution of legal action against squatters or strikers.

4. *In your country how are those satisfying decisions performed or actuated?*

As a rule once a creditor has obtained an enforceable judgement, he can proceed with the enforcement whether or not he executed a preliminary seizure. Enforcement measures in execution of an enforceable judgement, regardless of whether the enforceability is final or provisional do not require the prior authorisation from the judge of seizure. In accordance with article 1495 no judgement can be executed unless it has been served by a bailiff on the debtor. This obligation has been imposed in order to ensure that the debtor is fully informed of the judgement. The service of the judgement initiates the time for the lodging of an appeal or an opposition.

Decisions made by the *référé* president and *ex parte* orders are *de iure* immediately enforceable after they have been served (articles 1039 and 1029). This is a deviation from the general rule that an appeal or opposition suspends the enforcement of a judgement. Ordinarily the provisional enforcement needs to be requested by the plaintiff and allowed by the judge (article 1397).

5. *How steady is the summary proceeding in your country (e. g. constitution of executive title,* res judicata, *etcetera)?*

Contrary to what has been defended in the past, the *référé* verdict is characterized by *res judicata*. As long as the circumstances of the case remain unchanged, parties are bound by the decision (article 23). Only if

[10] *See* Cass. February 25, 1999, *Arr. Cass*. 1999, 279; *Pas*. 1999, I, 286.

shown that there are new elements, parties may ask the *référé* judge to cancel or modify a previous decision. So there is *res judicata* insofar as new facts are not revealed (*rebus sic stantibus*) or insofar as there are no changes in the relations between the parties. A *référé* verdict conflicting with the irrevocable judgment obtained afterwards in the full procedure is excluded, because the verdict does not pass an opinion on the merits of the case *as such*.

Nonetheless, it has to be emphasized that a *référé* verdict regulates apart from the full proceeding and totally autonomous the parties' situation. In principle, the imposed measures aim to avoid further harm while waiting for a decision on the substance of the case. Thus the question of law could be decided differently in the principal proceeding even if the underlying facts remain the same. In practice decisions rendered in the course of summary proceedings provide an important guideline for the principal proceedings. But essential is that the court will not be obliged to follow what has been decided by the president. The effects of the *référé* verdict cease to exist as soon as a judgement on the merits of the case is pronounced.

6. *In your country does the summary proceeding replace or just shorten the common (or ordinary) proceeding (e. g. does the advance remedy* —tutela anticipata— *require a later judgement on merits or is it despensable)?*

Typical of the *référé* procedure is that the measures ordered by the judge are *temporary*. Even though the *référé* decision may be invoked before the full court which will hear the substance of the case, the court will not be obliged, as mentioned before, to follow what has been decided by the president and may simply decide to ignore it or decide something completely different. The institution of a full action is not essential nor even required and the *référé* procedure is neither a branch nor a dependency of the ordinary procedure, rather, it is an independent one parallel to the latter. It is nonetheless perfectly possible that a *référé* order means *de facto* the final settlement of the dispute. In practice, the oral hearing often ends in a settlement achieved between the parties and *référé* orders have, in fact if not in law, more and more the effect of a final definitive decision on the merits of the case.

In the case De Benedetti for example the injunction procedure —which was partly carried on unilateral— resolved *de facto* the controversy on the contested takeover of the Société Générale de Belgique. In January 1988, the financier De Benedetti spent over 1.5 billion dollars trying to gain

control of the Brussels-based group which accounted for some one-third of the Belgian economy. At the time, it was the biggest hostile takeover bid in European history. Though he failed and the company fell into orbit around the French Compagnie de Suez instead, this takeover battle highlighted the problems due to informational uncertainty regarding shareholdings and voting rights. It is striking that the procedure on the substance of the case never has been instituted. In spite of the fact that the *référé* procedure is intended for cases where the interests of one party might be damaged during the long period of time for which a full proceeding must remain pending, it has come to be commonly used as a proceeding deciding on vital matters of substantive law.

7. *How comprehensive are the summary proceeding guarantees in your country (e. g. full or limited contradictory, motivation, publicity, appellate ways, etcetera)?*

III. Ordinary Proceeding[11]

To enter upon an ordinary judicial process in Belgium, the normal introductory act is a writ of summons. The first court session can not take place before eight days from the date of the notification. In practice, pleadings rarely take place at this first session.

It is nevertheless possible that the defendant agrees that the case is quite simple and will not lead to long debates. Article 735 gives the parties in that case the opportunity to abbreviate the procedure, which is completely different from the *référé* proceeding. The latter is, as seen earlier, not the appropriate course for resolving uncomplicated civil claims. *Brief pleadings* can be asked either by the plaintiff in his introductory act or by the defendant. The reason to comply with such a demand must be the simplicity of the facts. If allowed to do so —the judge has full discretion to decide on the brief pleadings— the parties will argue their claims orally and will only make a statement of defence if necessary.

[11] P. Ramquet and V. Jones, "Summary Proceedings. Belgium", in Aija, M. Jobert (ed.), *Summary Proceedings*, The Hague-London-Boston, Kluwer Law International, 2000, 41, pp. 46 and 47.

From the production of the plaintiff's documents, the defendant has one month to write his statement of defence. The plaintiff has one month to answer, then the defendant has two weeks to reply. It is noticeable that parties can agree on the modification of these time limits in order to adapt them to the exigencies of the case. When they are ready, they ask the clerk of the tribunal to set a date for the pleadings.

The possibility provided for under article 747, § 2 is that one party asks the president of the court to set a calendar for the preparation of the hearing and to set a date for the pleadings. These deadlines are compulsory for all parties.

Article 751 also allows the plaintiff to ask the president of the court to set some deadlines for the defendant to prepare the suit for hearing and a date for the pleadings. No time limit is imposed upon the plaintiff, which of course is advantageous for him because he retains a certain control over the procedure. Each of these possibilities can be used to speed up the course of the proceedings.

The delivery of the judgment must take place ultimately one month after the closure of the hearings.

IV. *RÉFÉRÉ* PROCEEDING

The procedure occurs before a specific judge, the president of the competent tribunal (civil, commercial or labour tribunal). It is noticeable that in all urgent issues, the president of the tribunal of first instance has a general competence.

The rules for the basic procedure are applicable in *référé* procedures. The competence *ratione materiae* is established by the Belgian Judicial Code. In principle, it cannot be modified by the parties. The competence *ratione loci* can be defined by the parties, except in specific matters such as bankruptcy. The Supreme Court ruled that, contrary to the ordinary proceeding, there is jurisdiction *ratione loci* before the president of the court where the required investigative activities will take evidence.[12]

If one of the parties or both parties live abroad or are seated there, the rule of Belgian international private law says that the judge in a *référé*

[12] Cass. December 22, 1989, *Arr. Cass*. 1989-90, 564; *Pas.* 1990, I, 504.

procedure will be competent to take provisional including protective measures on the claim on the request of an interested party, even if the courts of another state have jurisdiction as to the substance of the matter (Article 31 of the EEC Council Regulation 44/2001).[13]

The plaintiff must serve a writ on the defendant which summons the defendant to appear in court on a specific date. The time between the notification and the first hearing is reduced to *two days* instead of eight (article 1035). This minimum time period can be shortened in cases of real emergency (article 1037). In some extreme cases only a few hours will be allowed.

If necessary, parties can file statements. All of the earlier mentioned ways of preparing the suit for hearing are also applicable in the *référé* proceeding, but the president has considerable authority to restrict the parties'choice if the proceedings are getting delayed. After having heard the parties, the judge will render his decision (if necessary within a few hours or days after the hearing) which automatically has the benefit of the provisional execution.

As with all judgments, the *référé* decision must give the reasons for the judge's decision, even though he only judges upon the *likelihood* of substantive rights. A verdict here requires an equal level of reasoning as a verdict in an ordinary procedure and it has also to be taken on the presented defence, in a sense that the considered legal standard must be reasonable enough to support the verdict.[14] It should be noticed however that the Supreme Court's jurisprudence is not fully coherent on this point.[15]

If the defendant did not appear in court he or she will have the possibility of opposing the verdict. Next to this, appeal against the verdict can be brought. Cumulation of both remedies is not allowed by the Belgian Judicial Code (article 1039).

V. *Ex Parte* Proceeding

Competence is attributed in accordance with article 584, section 3 exclusively to the president of the competent tribunal (civil, commercial or labour tribunal).

[13] Council Reg. 44/2001 came into force on March 1, 2002. *See* http://europa.eu.int/eur-lex.

[14] Cass. June 4, 1993, *Arr. Cass*. 1993, 556; *Pas*. 1993, 542; Cass. January 31, 1997, *Arr. Cass*. 1997, 140, Concl. X. De Riemaecker.

[15] *See* Cass. February 4, 2000, *Arr. Cass*. 2000, 300.

There is only one party, the plaintiff. The unilateral request for an *ex parte* order must be filed by an attorney (article 1026).

The judge is not obliged to hold a hearing and can base his decision only on written pleadings and evidence. It is however always possible for the president, but happens rarely, to summon the parties in chambers.

The order upon *ex parte* application can be affixed beneath the request presented to the president and is given in the judge's chambers (article 1029). The clerk notifies the decision to the plaintiff and to the intervening parties, if any.

The plaintiff or the intervening party can appeal against the decision rejecting the request. The course of the appellate proceeding preserves a unilateral character. Lodging an appeal in cassation against the verdict at second instance is also possible.

The aggrieved party, who was not present nor duly notified and who suffered damage from the unilateral measures, can oppose the verdict (article 1033). Institution third-party proceedings, starts a adversary procedure.

Because far-reaching measures can be imposed by unilateral verdicts which are barely verifiable, the remedies at law have become of extreme importance. Assuming that the unilateral character does not withhold plaintiffs to bring controversial and complex issues before court, and assuming, moreover, that these short-cut proceedings end up more and more into a final judgment, third-party proceedings are essential to guarantee fair trial.

8. *To what extent are the summary (or preliminary) proceedings used in your country? Are there any statistics?*

There are no official statistics on preliminary proceedings in Belgium which allow comparison in the long term[16] and there is no exact information as to the member of applications for summary proceedings during a pending law suit. Nevertheless, we can say that we are dealing here with a more efficient procedure which has become more and more widespread, and sometimes even overused. No longer branded as a derogation, *référé* proceedings have become pre-eminently the usual solution for urgent cases. Even misuse of the president's jurisdiction has been denounced, especially concerning social law issues.

[16] *See* for recent information http://www.just.fgov.be/.

9. *In your opinion, which are the aims of the summary proceeding (e. g. fast jurisdictional response, proceeding agility, suitability to the kind of controverse, etcetera)?*

The amount of the time between the commencement of an action and the consequent judgment on the merits of the case, whereby the dispute is finally settled, can be an essential element in causing irreparable damage not only to those that are party to the litigation but to the legal action itself by changing its range or even by making the tribunal's final decision *de facto* senseless. The summary proceeding is a response in cases where ordinary judgment could not be obtained in time. It is the legal institution that regulates the system of the injunction process, suitable for preventing imminent damage of all kind, relevant —but independent— to the judgment in another process where the merits of the case are discussed. Its purpose is to ensure a personal right throughout the normal course of the principal process.

10. *In your opinion, will the summary proceeding totally replace the common (or ordinary) proceeding or will the latter still be suitable to more complex controversies, despite its inevitable duration?*

No, summary proceedings will not replace ordinary proceedings. The stringent conditions required for appealing to the short track proceedings obstruct that parties can "escape" from the ordinary proceedings. Judges must make sure that misuse of the summary proceedings does not come about.

11. A contrario sensu, *do you think that by simplifying the common (or ordinary) proceeding the summary (or preliminary) proceeding will have less importance?*

No, the only way is to speed up the common proceedings or by making the organization of the tribunals more efficient.

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