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The Challenge of the Information Society: Application of Advanced Technologies in Civil Litigation and Other Procedures

Report on Belgium

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I. INTRODUCTION

The first pavements to build a road towards automation of justice in Belgium have been laid in the years 1984 and 1985 in the framework of pilot projects regarding the administration of criminal justice. The automation of civil justice followed in the late eighties. Since then, part of the road has been covered.

Before tackling the automation of the administration of civil justice in Belgium, subject of this report, it seems opportune to set out briefly some initiatives of the federal government in Belgium at a general level[2]. At least four of these general initiatives are important for the future of ICT in the Belgian department of justice.

In the first place it is important to know that Belgium has a National Register of Natural Persons. Each person living in Belgium – Belgian or foreigner – has a record with a unique identification number in the National Register. The access to the Register and the use of the identification number is strictly regulated in a law of 1983. The National Register can be accessed and used online not only by all local municipalities but also by most of the federal and regional public administrations.

As far as legal persons are concerned – in the second place – there is at present not yet a unique national register. Identification data of commercial companies are collected in the Commercial Register. The data are collected through administrative units of the commercial tribunals but they are centralised in an automated register. The federal government has outsourced this task. Data about non-commercial associations are also collected through the administrations of the tribunals but they have not yet been centralised in one database. The present federal government prepares a bill to introduce a National Register of Legal Persons. This will be a central database with essential identification data and a unique identification number for all legal persons established in Belgium.

A third important initiative is the federal government « Intranet », called « FEDENET ». FEDENET is linking all federal – executive, judicial, legislative – administrations, using Internet-technology: TCP/IP as the communications protocol and graphic user interfaces of the www type. The function of FEDENET is double: (1) collecting, updating and exchanging information of the various databases of the legislative, executive and judicial authorities; (2) organising electronic communication between the different departments. The information available for the public is stored on a public server accessible via Internet.

Last but not least, and although it doesn't seem relevant for the administration of justice at first sight, we have to point at the recently introduced Social Identity Card. The Belgian « Cross-roads Bank for Social Security »[3] has implemented a secured memory chip card which contains at the one hand information tangible for everybody and at the other hand secured information in an encrypted form, only readable for the one who holds the necessary decryption key. This smartcard distributed to every citizen in Belgium, substitutes the social security administration documents in the health sector. The social ID card is the first operational example of an advanced electronic network in the public sector that uses digital signature techniques. The card will also serve as an identification tool for employers to submit social security data declarations about their employees. The initiative is important because it is considered as a trigger for the introduction of smartcards and digital signature technology in public administration.

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[2] http://belgium.fgov.be

[3] Created by the law of 15 January 1990, this Cross-roads Bank for Social Security can be described as a data base for social security, social security data being defined as « all data necessary for the application of relevant legislation pertaining to social security ».

II. USE OF ICT TO SUPPORT THE ADMINISTRATION OF JUSTICE, IN PARTICULAR CIVIL LITIGATION

A Objectives and general features.[4]

The introduction and development of IT technologies to support the administration of justice is an immense and complex task. Therefore priorities and strategies had to be put forward throughout the whole process.

Early projects, initiated in the eighties, on the introduction of IT technologies in support of the administration of justice pursued a double objective.

Firstly, the projects aimed at improving the effectiveness and efficiency of administrative tasks and organisation of the judicial system. Consequently, repetitive and executive tasks within the court registries have been automated as a matter of first priority. This has been achieved, taking into account a maximum interaction between specific application software and file management, especially word-processing. In this way, processing of data, standard documents and correspondence are, at each stage of the procedure, automatically generated through the system.

The second objective of IT projects in support of the court administration, tended to achieve a broader availability and flow of information for the benefit of courts and any interested and authorised third party.

There are *two sources of information*:

One source of information is stored *locally;* this is within the court.

The court registry consults internal data by using consultation programs, lists and statistics, which are “pre-programmed” or automatically generated. Furthermore a search language is made available to provide access to databases which offer a wider range of possibilities: lists can be drawn up with specific data fields, selected through personal search criterions. Thus, the court registry disposes of detailed overviews of pending cases and can obtain answers to ad hoc inquiries and questions. This system offers also a tool to acquire a general insight of the working of the own organisation.

The second source of information is stored *centrally:* local data are selected and sent to central databases that can be consulted from each desktop, upon authorisation. The content of the databases will be dealt with under section III of this report.

The above mentioned characteristics:

- interaction application software – document management,
- personalised consultation possibilities, and
- development and consultation of central databases

are features that apply to each IT project to support the administration of justice.

B The information structure and development of a WAN.

The global development of ICT technologies in support of the administration of justice needs self-evidently to be structured.

Technically, a number of standards are followed throughout all ICT projects. Since the first project, one has opted for « open systems » to make mutual communication possible through standard protocols.

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[4] Bollaerts, F., ‘De informatisering van de gerechtelijke orde’, *Computerrecht* 1993/5; Ministerie van Justitie, Centrum voor Informatieverwerking, ‘Op weg naar een geïnformatiseerde Justitie’, 1997.

As set out above, the information structure, which is opted for, is one of decentralisation of local data and centralisation of selected date in national databases. Furthermore, an intermediate level has been created, the so-called «memory» of judicial districts.

Thus, the information structure is composed of three levels:

- the local level : within each court, a local server is set up to process data and monitor case management of the respective court ;
- the judicial district level: selected information retrieved from decentralised (local) servers is stored within one judicial district, in the so called « memory » of the judicial district ;
- national or central level: central databases are kept and monitored at the central administration of the Ministry of Justice. The selected data are retrieved from the decentralised databases or from elsewhere, when the information seems to be useful for all sites in Belgium. Via this central place connections are made with central databases of other departments.

Consulting central databases, exchanging data and connecting local systems require not only the development of hardware and software at central level but also the establishment of a network structure so that the different servers or different users (more than 5000) of each « level » could communicate horizontally, vertically and with other departments.

This network, set up in 1995, is based on router technology and the TCP/IP protocol. It mainly consists of thirty intersections. A router and telephone lines are installed in each of those intersections. The network is « darned » which means that each intersection can be reached along two ways. In Brussels, the network is connected with the main administration office of each local network (LAN). Via this LAN, one has access to central databases and databases of other departments, upon authorisation which is organised through an extended security system comprising 4 Unix servers. The central management system in Brussels can administer the entire network from one single place.

This system gives also a permanent overview of the availability of the network and makes it possible to maintain the routers.

Thus, we can say that this standardised network provides communication from server to server, application to application, user to user. It is the physical basis structure for structured and unstructured data exchange, electronic mail and fax communication.

Besides the above mentioned technical harmonisation policy, it is necessary to work on a functional harmonisation policy. This is done by setting up uniform codification methods, registration procedures and selected criterions with a view to proceed to a qualitative selection of data to be put into the central databases.

C Overview of the development regarding the use of ICT in civil litigation.

1. Development in three stages – description of the projects.

This section seeks to provide an overview of the development of ICT technologies in court registries, especially in civil litigation.

This process took place in three stages:

- During the early eighties, PC's with word processing software were made available to members of the administrative court registry upon personal request to respond to urgent demands. Obviously, there was a need to adopt a more structured approach and to come up with a solution for the administrative court work globally. As the setting up of an integrated system would take some time, specific credits for the purchase of PC's, software and telefaxes were systematically put into the yearly budget as a matter of interim approach.

- At the end of the eighties, pilot projects were introduced to automate the administrative tasks of the court registry. Those pilot projects were set up in a limited number of sites of a specific court, with a view to test and improve the developed software for a determined period before circulation to the other sites of that court level.

  Relevant for the automation of administrative tasks in civil courts is the pilot project developed in the courts of first instance (tribunaux de première instance). The project started in 1992 in three sites (Brussels, Bruges and Liège) and is now implemented in all courts of first instance in Belgium.

  Following functions have been automated:

  - *administration of court registers («rolls»);*
  - *administration of the registers of deeds and certificates;*
  - *registry of non-profit associations;*
  - *accounting ;*
  - *initiating proceedings: registration; monitoring and research; archiving and resumption;*
  - *hearings: consultation of hearing rolls; planning and fixing dates of hearings;*
  - *preparation of the hearing; hearing and processing the hearing;*
  - *drafting repertories; -administration of preliminary divorce procedures;*
  - *follow up of surveys and inquiries;*
  - *follow up of seizures;*
  - *drafting statistics;*
  - *office automation.*

  After successful implementation in the three above-mentioned sites, this pilot project has been extended in 1993 to all (27) courts of first instance (civil section) in Belgium.

- In parallel with pilot projects, tested in a limited number of sites, **global** ICT projects have been set up. It is indeed essential to have a global view on ICT needs of the judicial organisation in its whole and to avoid the creation of «automated islands» which afterwards would be difficult to join together[5].

  Contrary to pilot projects, global ICT projects comprise a budget planning for implementation in all sites at once. Consequently, all court registries of the same type are provided with identical means within a fixed period.

  In the early nineties, the so-called global «mammoth project» created a real explosion of automation in the court registry and covered the entire court structure in Belgium (criminal, civil, first instance, appeal, supreme court).

  In this report, we will limit the description to what is relevant for the automation of civil procedures.

  All courts of first instances (civil section) had been automated through successive pilot projects (see above). Consequently, the global so-called «mammoth project» provided an automation plan for the remaining civil court registries, namely:

  - the justice of peace courts, called (justice de paix). These courts are to some extent comparable to the English county courts ;
  - the courts of appeal (civil section) and
  - the supreme court (cour de cassation).

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[5] Dumortier, J., 'Automatisering van de justitie in België', *Jura Falconis*, 1993.

2. *Justice of peace courts*

There are 221 justice of peace courts in Belgium. Besides their jurisdiction on small claims, they have a wide range of specific competencies.

Functions, which have been automated, are:

- *contentious jurisdiction: initiating proceedings; administration of registers and rolls; hearings; follow up of enquiry procedures; drafting of repertories; follow up of special procedures; conciliation;*
- *Non-contentious jurisdiction: guardianship; taking oaths; act of notoriety; accounting; drafting statistics; office automation.*

3. *Courts of appeal (civil section)*

There are five courts of appeal in Belgium. Their administrations have all been automated on the basis of the pilot project set up for the courts of first instance. The functions, which have been automated, are:

- *administration of registers («rolls»);*
- *administration of the registers of deeds and certificates;*
- *administration of non-profit associations;*
- *accounting ;*
- *initiating proceedings: registration; monitoring and research; archiving and resumption;*
- *hearings: consultation of hearing rolls; planning and fixing dates of hearings, preparation of the hearing; hearing and processing the hearing;*
- *drafting repertories;*
- *administration of preliminary divorce procedures;*
- *follow up of surveys and inquiries;*
- *follow up of seizures;*
- *production of statistics;*
- *office automation.*

4. *Supreme Court (Cour de Cassation)*

Contrary to the above-mentioned projects, this one involved the active participation of judges in the automation process. (see further).

The following subsystems have been automated:

- the common software applied on: file management; accounting; administration of hearings;
- administration of the agenda; drafting statistics; office automation;
- management of services with: the secretariat of the President of the Supreme Court, the secretariat of the registrar and registrar's office;
- document management regarding: compendium of laws, court decisions, index of case law.

From what precedes, it is clear that automation of justice got on the right track since the late eighties. However the process is still in its infancy.

5. Declaration of intent of 26 February 1996 between the actors of the administration of justice.

In February 1996, the professional associations of judges, attorneys, bailiffs and court registrars in Belgium negotiated a declaration of intent with the Ministry of Justice and agreed on a mission statement regarding an efficient and reliable administration of justice in Belgium[6]. The underwriters were indeed conscious of the fact that all citizens in a democratic society deserve to have confidence in the authorities and that a permanent commitment from the persons involved with and responsible for the administration of justice is essential to preserve the citizen's confidence.

Priorities put forward in the mission statement are efficient optimising of case settlement, eliminating the judicial backlog, strengthening the management of the courts and improving communication and image of the administration of justice.

In this respect, the further development of ICT in the administration of justice was regarded as an essential tool to accomplish the mission. The Ministry of Justice took up the commitment to pursue the running projects so that automation of the administration of justice should lead to:

- automation of a number of basic tasks.
- creation of information networks where necessary
- management information systems to improve and steer policy based on relevant information flows.

The latest ICT plans regarding the court administration for the next future concern:

- upgrading of hardware, compatibility between software systems in order to improve links between courts of first instance and appeal courts ;
- installation of Internet interfaces and communication with e-mail within court registries ;
- public consultation of rolls via website;
- training of the court staff ;
- creation of an electronic case file (in parallel with the paper based system as long as legal adaptations have not taken place yet) ;
- improvement of quality and readability of legal databases ;
- setting up of an Intranet between judges and court registries, to be extended to attorneys, bailiffs and notaries; electronic records of criminal offences.

D Additional comments on the automation of civil proceedings

1. General comments

A general question concerns the existence of completely digitised proceedings. In Belgium there are in the immediate future no concrete plans for completely digitised proceedings, fully involving all actors of a proceeding, although current automation projects tend to go in that direction (creation of Intranets, legislative developments towards the legal equivalence of the digital signature and hand-written signature, etc.)

Strictly speaking, automation of civil proceedings has - up to this day - been focused on internal administrative tasks and documents of the court registry. With 'internal' documents is meant all documents created, processed, retrieved and stored within the court registry.

The introduction of electronic internal documents has not suppressed the paper-based system yet: documents are currently processed electronically and on paper, even in cases where there would be no legal obstacles to suppress the paper based version. The existing

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[6] "Intentieverklaring tussen actoren van justitie ", 26 February 1996.

reluctance towards the replacement of paper based files by electronic files can be explained by a lack of knowledge regarding technical guarantees of authenticity which can be obtained from electronic documents.

Initiatives taken by the Belgian legislator to eliminate this reluctance will be set out in section IV on the legal issues and legislative developments.

In answer to questions regarding technical aspects of the common course of a civil litigation, we can comment as following:

2. Initiating the proceedings

Civil proceedings in Belgium are initiated by writ of summons or by request. The original document - duly dated and signed by the served party and bailiff (writ) or by the attorney or parties themselves (request) - is to be filed at the court registry for registration. The initiation document is null and void if those formalities have not been fulfilled.

Currently, documents initiating proceedings are not served and filed electronically. This would no doubt increase efficiency in the work organisation of bailiffs and attorneys.

In the short term, it seems rather doubtful that serving of documents to natural persons could effectively be done by electronic communication for the simple reason that less than 15% of Belgian households own a PC. The situation is of course different for legal persons.

However, there is no reason why -technically - bailiffs could not file a served writ of summons to the court registry by electronic means: the served writ of summons filed electronically to the court registry would comprise all essential information to initiate the proceedings. The original writ, signed by the bailiff and the «physically» served party would be kept in the bailiff's office, so that in case of disputes in the course of the proceedings regarding the authenticity of facts mentioned in the electronic writ, the latter could be verified with the original document.[7]

Once a served writ has been filed and fees for registration have been paid, the registers (rolls) are kept electronically in parallel with paper based registers (rolls).

Attorneys have presently no access to the electronic roll, although this would much facilitate the management of their agenda. In the framework of a pilot project, the Brussels Bar has been authorised to put some registers on its website.

For each case, an electronic and paper-based file is opened in which all data and documents are processed and stored in the course of the litigation.

3. File and case management[8]

As set out above, the automation of internal court documents has made the administrative tasks of the court registries much more efficient and easier.

To achieve this, it was necessary that registries would dispose of an automated system with the following main functions:

- storage, for each case, of a number of « case-linked » data, such as identification number, parties, lawyers, subject, etc.
- storage for use in all cases of a number of non case-linked data, such as full lists of attorneys, bailiffs, town administrations, list of subjects etc.
- follow up of the evolution of a case: the system shows at each stage of the procedure automatically the next step of the procedure, by means of pre-programmed «curricula».

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[7] Anné ,I., 'Juridische vragen bij de automatisering van griffies en parketten'; Interdisciplinary Centre for Law and Information Technology (ICRI), Katholieke Universiteit Leuven, Law Faculty, January 1997.

[8] ICRI, Proposals for automation of courts of first instance, II B 4, 1994.

- use of databases for the automatic filling in of account registers, repertory, statistics, correspondence, acts, decisions, fixation of hearings etc.
- use of databases for the drafting of the hearing roll
- automated accounting.

Once the data are put in, they should be used unlimited in all subsystems.

The computer software automatically generates all standard documents, adapted to the nature of the litigation. The task of the registries is limited to possible control, confirmation and signature. [9]

4. Preparation of the hearing

As set out above, the use of ICT in the court registries is limited to internal documents, created and generated within the court administration. There is, at this stage, no electronic file, which can be consulted by the parties and their attorneys. The communication with the court is still «paper based» (letter, faxes). Again, to clear all possible legal obstacles, legislative modifications should take place (see further under section IV – legal issues).

5. Hearing and evidence

In some courts, e.g. the court of appeals in Brussels, the court registrar sits in front of a desktop computer during the hearing so that immediate consultation and processing of data is possible.

6. Videoconferencing techniques

Videoconferencing is currently not used in civil proceedings, although it could be useful (e.g. in procedures in which statements are taken from children who may be impressed of direct contact with the court environment). [10] However, distances are short in Belgium so that the effectivity of videotechnique is limited.

7. Final decision

Standard decisions are pre-programmed in the computerised system. Data used in the course of litigation (such as the name of parties, of attorneys, facts, procedure) are automatically retrieved. Calculations are computerised. Judges usually use word-processing to draft the content of the decision. The decision is not serviced by electronic means.

8. Appeal

In appeal procedures, the court registries encounter presently difficulties to have access to electronic files of the registries in first instance. The software systems are being adapted so as to be compatible and allow retrieval of data.

E Involvement of judges and attorneys

As set out earlier, there is at present no Intranet system between court registries, judges and attorneys. It is, without any doubt, essential that court registries start using the same working tools as the ones diffused in the private sector and that consequently litigation will be handled more efficiently.

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[9] See J. Dumortier, 'Automatisering van de justitie in België', Jura Falconis 1984.

[10] Y. Poullet, 'L'Informatisation du service public de la Justice', Cahier de la Cellule Interfacultaire Technology Assessment IJ 3, 1996.

The staff of the court registries will be connected to the Internet and E-mail soon, so that one can reasonably expect that judges will be linked too within a short period of time.

The Belgian Ministry of Justice is planning to organise an electronic communication system between the diverse actors in the administration of justice, i.e. between attorneys, public notaries, judges and judicial administration staff. The aim is to provide for a secure and fast transmission of relevant information. Authentication methods such as digital signatures will be implemented in order to assure safe identity verification.[11]

Between themselves, attorneys have access to their own Intranet. These are presently two competing networks: Leganet and Lexnet. They offer a wide range of services, such as E-mail between subscribers, online directory of attorneys, bailiffs and notaries, decisions of the professional associations, legal databases and other legal and administrative documentation and online access to the commercial register (handelsregister).

[11] Anne, I., "Beleidsnota automatisering Justitie", ICRI, 1997.

III. LEGAL INFORMATION SYSTEMS

A Historical background of electronic legal information

The automation of legal documentation in Belgium was initiated in 1967 by the professional associations of notaries and attorneys under the name CREDOC. The aim of CREDOC consisted in making a global electronic legal documentation system available for all lawyers in Belgium. This online database covers title, origin, date, reference, and subject of the law and is still existing although its present success is limited.

In reaction to the CREDOC initiative, the Ministry of Justice launched in 1978 an ambitious project called "JUSTEL". Within a period of ten years, an automated documentation system had to be set up comprising the co-ordinated Belgian legislation in its whole, bibliographic description of all legal and regulatory acts published in the Belgian Official Journal as well as selected case law. However, the system has been criticised because of the unfriendly user interface and the fact that the progressive input of data passed off too slowly[12].

Besides JUSTEL, other small or larger commercial or private initiatives were taken up with a view to provide legislation and case law – selected or not - on electronic support.[13]

The role of the federal authorities at one hand and of private editors at the other hand to improve access to electronic legal databases was not clearly divided. In the early nineties, the Belgian Association of Law Librarians (JBDJ) expressed its concern regarding the lack of accessibility of the law. The association recalled the principle that "everyone is assumed to know the law" and urged the Ministry of Justice to take up its responsibilities in this respect .The Ministry of Justice was asked to come up with a coherent policy regarding publication of the exhaustive co-ordinated Belgian legislation.[14]

Since then, projects are running under the auspices of the Ministry of Justice to improve access to the law in a readable way.

B Overview of main legal databases.

The main legal databases of the Ministry of Justice regarding general legislation are:

- The Belgian Official Journal which is since March 1998 available on line and free of charge for everyone (content of O.J. since June 1997).
- JUSTEL Legislation on-line: comprises the entire legislation in certain fields of law, such as environment, commercial social, criminal law. In future, JUSTEL should become the reference on line for the complete updated and co-ordinated texts of all Belgian legislation. The online version is daily updated.

  An off-line version on CD-ROM is available, updated 4 times a year. Presently, JUSTEL is free of charges for judges.
- JUSTEL Headings: comprises all domains of law and is a catalogue of the headings of legislation and regulation published in the Belgian Official Journal since 1945.

The main legal database of the Ministry of Justice regarding *general case law* is:

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[12] Dumortier, J., "De automatisering van de juridische documentatie in België", Computerrecht 1993/5.

[13] E.g. databases such as JUDIT, RAJB.

[14] Dumortier, J., "Wie wordt nog geacht de wet te kennen? Een voorstel voor een betere toeogankelijkhied van de Belgische wetgeving"; R.W., 1992-1993, 938.

- JUSTEL Case Law: comprises case law regarding all domains of law, but limited to published decisions of the Supreme Court and decisions of annulment of the "Cour d'Arbitrage".

The relevant databases of the Council of State (kept by the Ministry of Internal Affairs):

- Decisions of the Council of State, which is the Supreme Administrative Court of Belgium. The decisions are published on the website of the Council of State.
- "Chrono"-database of the Council of State: co-ordination of legislation with references (chronological and thematic tables), partly on electronic support (since 1989) and without text. This reference database is only internally available to the staff of the Council of State. The references are linked to PDF-documents of the full-text as published in the Official Journal. In the future this database will be the core of the legislative information network, presently developed for the federal government.

Besides these legal databases of the Ministry of Justice and the Council of State, a large number of other databases are available from other entities[15]. More and more legislative information becomes available through the Internet. This is for instance the case for all the documents of the federal Parliament.

C Running projects regarding the improvement of quality of legal information systems.

There is a strong need to improve the quality of legal databases made available by the federal authorities. The most urgent need is to have an on-line access to co-ordinated legislation. This task has to be performed in co-operation with the different departments of the federal administration, which - up till now - have been working without sufficient co-ordination.

Presently a project is being set up between the Chancellor of the Prime Minister, the Council of State and the Ministry of Justice to create an information network for online access to Belgian legislation, based on Internet technology. This project has been initiated under the framework of the AGORA programme. The aim of the AGORA[16] programme is to improve access to governmental databases.

Another project is the SALOMON project regarding automatic summarising of Belgian criminal decisions in order to improve access to the large number of existing and future decisions.[17]

D Electronic diffusion of case law: legal issues.

The principle of electronic diffusion of case law, for scientific purpose or simple information, seems to be compatible with the Belgian Constitution and the civil procedure code,[18] which provide that decisions are rendered in open public. This is a logical outcome of the publicity of hearings required by the European Convention on human rights and by the Belgian Constitution[19] [20].

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[15] For an exhaustive list, see website KULeuven law library: http://www.law.kuleuven.ac.be/lib/.

[16] See Website ICRI, KULeuven: http://www.law.kuleuven.ac.be/icri/.

[17] On this subject, see: Moens, M.F., Uytenndaele, C., Dumortier, J., "Het automatisch samenvatten van vonnissen", Computerrecht 1982/2, p. 58-63; and from the same authors: "SALOMON: abstracting of legal cases for effective decisions", Artificial Intelligence and Law, 6, 1998, p.57-59.

[18] Art. 148 Belgian Constitution – art. 780 civil procedure code

[19] Art. 6 European convention on human rights – art. 149 Belgian Constitution.

[20] See Spiritus,A., "Actes du colloque sur l Impact d Internet sur les professions juridiques, Universités de Namur et de Liège, 28 February 1999.

Besides this constitutional principle, a Royal Decree has been adopted on 7 July 1997[21] regarding the publication of the decisions of the Council of State. This Royal Decree has been adopted to further implement the law of 4 August 1996 prescribing that the decisions of the Council of State are to be accessible to the public and that the Council is held responsible for the publication of its decisions.

Article 1 of the Royal Decree prescribes that the publication of the decisions has to take place both 'via an information network accessible to the public (or via the Internet) and via a magnetic support (or CD-ROM). An exception is made for decisions concerning the law of 15 December 1980 on access to the country, residence, establishment and removal of foreigners.

According to article 2 of the Royal Decree, each litigant is – in the course of the litigation till the moment of the decision - entitled to claim that the identity of the natural persons should not be published.

The principle in itself, laid down in the Royal Decree, is quite balanced, although its rather unclear provisions of Decree have lead to disparate interpretations. [22]

There is at present no specific legislation for the electronic publication of decisions of other courts.

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[21] Belgian Official Journal, 8 August 1997.

[22] Dumortier, J., "Privacybescherming bij electronische publicatin van rechspraak", Computerrecht 1997/5.

IV. LEGAL ISSUES AND LEGISLATIVE DEVELOPMENTS REGARDING ICT.

A Introduction

As set out earlier, civil litigation in Belgium is still based on paper documents, in spite of the generalised introduction of word-processing in the court registries and continued efforts to pursue the use of ICT within the courts.

Courts are generally rather reluctant towards the use of electronic documents, be it in the course of a civil litigation regarding the creation of a so-called electronic case file or regarding the submission of « electronic » evidence by parties in litigation.

The existing reluctance is probably due to a lack of knowledge, training and consequently confidence in the used technologies and to the uncertainty regarding the legal value of those technologies. In the following subsections we will set out the legal issues and latest legislative developments in Belgium. The latter can be seen as attempts of the Belgian authorities to overcome the current reluctance towards new technologies and to promote the exchange of electronic data.

B Legal value of electronic data in the Belgian civil procedure code.

1. Introduction

In spite of the « paper oriented » Belgian civil procedure code, there are at present already a few openings to use electronic data in civil litigation:

- not every violation of a formal requirement leads to the nullity of the act or document ;
- some provisions of the civil procedure code use generic concepts such as « the sending or deposit of documents », which could be subject to large interpretation ;
- article 867 of the civil procedure code prescribes that the omission or irregularity of a formality regarding a procedural act can not result in a nullity when it appears that the act has reached the aim, prescribed by the law.

The above-mentioned general provisions are however too dispersed to allow a systematic recourse to electronic data in civil litigation. An overall scanning of « paper-based » provisions of the civil procedure code and their adaptation to electronic neutral provisions seems necessary to eliminate any legal uncertainty. [23]

An exhaustive scrutiny of the entire civil procedure code would lead us too far in this present report. We will therefore confine to the «electronic» adaptability of a number of key documents and acts in the course of a common civil litigation and the possible legal consequences in the light of the civil procedure code.

Referring to the above-mentioned article 867 of the civil procedure code, it seems essential to analyse the aim or function of a specific formal requirement, in order to evaluate its admissibility in electronic form in civil litigation.

Following the path of a common civil litigation, we can generally distinguish two aspects, namely the required form of procedural acts or documents and their means of communication.[24]

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[23] Mougenot, D., "Le Code judiciaire à l'épreuve du cyberspace: la nécessaire réforme", Actes du colloque "l'Impact d'Internet sur les professions juridiques" organised by the Law Faculties of Namur and of Liège, 26 February 1999.

[24] Mougenot, D., op. cit.

2. Initiating the proceedings – delivering the initiating document.

As mentioned earlier in this report, a civil litigation is initiated by a writ of summons or by a request. Currently, documents initiating proceedings are not served and filed electronically.

The draft writ, prepared by the attorney, could be sent electronically to the bailiff, without any legal obstacle. The civil procedure code does not prescribe any formalities in the communication between attorneys and bailiffs.

The writ is to be signed and dated (form of the act). The original (signed by the bailiff and served party) is to be deposited at the court registry with a view to its registration in the general roll and payment of fee rolls (means of communication).

If those formalities have not been fulfilled, the initiation document is null and void. [25]

The aim of serving the writ is to notify the date of the introductory hearing to the served person. This date is being calculated by the bailiff taking into account the date of serving. The deposit of the original writ signed by the bailiff and served party, aims at giving evidence that the plaintiff has served the writ to the defendant, taking into account the rights of defence.

The introduction of electronic serving and filing of a writ would require modifications in the code of civil procedure.

Two situations should be distinguished:

a) the writ is still served « physically » (served person has no ICT facilities or refuses to be served electronically or did not react to electronic serving within a certain period so that « physical serving » has to take place)

and

then filed electronically to the court registry by the bailiff: the civil procedure code needs to be adapted so that the original writ (signed by served person and bailiff) can validly remain at the bailiffs office instead of the court registry which is presently required in the current provisions of the civil procedure code.

b) the writ is electronically served and filed: this requires the legal equivalence between hand-written and digital signature in the civil procedure code. A first step in this direction is the current draft law regarding a modification of the evidence rules of the civil code and will be set out in section IV.

Finally, regarding the serving of documents, it appears of necessary to adapt international rules in parallel with national procedural rules, e.g. the Convention of The Hague regarding the serving of judicial acts abroad.

As mentioned earlier, once a served writ has been filed and fees for registration have been paid, the registers (rolls) are kept electronically in parallel with paper-based registers.

Would the current provisions of the civil procedure code allow the suppression of paper-based registers? Article 713 of the civil procedure code prescribes a paper-based formalism, such as the initialling of each page of the register. The added value of hand-written initialling is rather doubtful. This requirement could 'de lege ferenda' be suppressed or at least be replaced by ICT methods[26]. The legal equivalence between digital signing (and perhaps initialling) and hand-written signing is here, once again, desirable.

The electronic rolls are presently not accessible to attorneys and to the public in general. There are plans to widen up the access to the rolls. Indeed, according to article 719 and 727 of the civil procedure code, the general roll is public.

However, one should be aware of the fact that public consultation of the roll via Internet could possibly have a direct impact on economic life. As a matter of example, a businessman would be in the position - through treatment of the rolls – to appreciate the present or future

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[25] Art. 43 and 702 Belgian Civil Procedure Code

[26] Anne, I., Juridische vragen bij de automatisering van griffies en parketten, ICRI, 1997.

solvability of a trade partner and act commercially according to the result obtained from the rolls. The public consultation of the rolls would serve thus as a tool for an effective commercial inquiry.[27]

3. Preparation of the hearings - communication between court, parties, attorneys:

(a) Communication amongst attorneys :

The civil code procedure is flexible in this regard. Documents can validly be communicated amicably as a complementary means. There is currently no legal obstacle for exchange of electronic data. Irregularities would rather have to be settled according to professional ethical rules of attorneys. [28]

(b) Communication between attorneys and court registries :

Regarding *ordinary correspondence* from registries to attorneys, for instance a notice of fixation of hearings, the civil procedure code is rather flexible and prescribes generally that notices to attorneys are sent by ordinary letter without further specification. A large interpretation of the current provisions of the civil procedure code would allow communication by electronic mail. However, to avoid any legal uncertainty, it would be preferable to introduce a slight modification of the civil procedure code and allow expressly electronic communication.[29]

Regarding *notifications and judiciary letters*, the situation is more complex for the reason that the provisions of the civil code procedure are more detailed. Judiciary letters or notifications are sent to parties by means of a registered letter with acknowledgement of receipt. Presently, the acknowledgement serves as evidence of sending, reception and date of reception (art. 721,2° civil procedure code). In this system of communication, the postal services act as a sort of bailiff and make authentic statements regarding the delivery of the judiciary letter.

Replacement by electronic acknowledgement –upon condition that the same guarantees of authentication are met – would obviously require an express adaptation of the provisions of the civil procedure code. One could envisage that the postal services continue to act as Trusted Third Party (TTP)[30].

The electronic acknowledgement should be introduced as a complementary means of communication. Furthermore, in the hypothesis that an electronic acknowledgement has not been received in due time, the court registry should "de lege ferenda" have recourse to communication by registered postal letter with acknowledgement of receipt, for the sake of safeguarding the rights of defence.

4. Communication of bailiffs to registries regarding acts of procedure, such as the deposit of written pleadings[31] :

Article 742 of the civil procedure code prescribes that the original of written pleadings is to be deposited at the court registries. The aim of the deposit of the original is to exclude any possible dispute between attorneys on the content of the act, given that a copy of the original is forwarded to the attorneys of the other parties in litigation.

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[27] Spiritus, A., op. cit.

[28] Mougenot D., op. cit.

[29] Anne I., op. cit.

[30] Anne I., op. cit.

[31] Anne, I., "Naar een electronische neerlegging van conclusies?", Vlaams Jurist Vandaag, nr.8.

The aim of the deposit of the written pleadings is also to certify the date of the document, given that a strict time limit is imposed for the submission of written pleadings.

If the necessary authentication requirements of the electronic document (identification of the sender, integrity of the content, certified date, e.g. by means of a digital signature), as well as its legal equivalence with « paper-based » authentication means are guaranteed, an « electronic » original would be filed to the court registry so that, strictly speaking, there is no need for any adaptation of article 742 of the civil procedure code. As stated earlier, an express mention of electronic filing as complementary means of communication would evacuate any legal uncertainty.

Consequently, given that the means of communication of procedural documents from or to the court registries are not always specified, we could conclude that a general provision in the civil procedure code should be introduced which expressly recognises the validity of electronic data communication as supplementary means of communication between the court, attorneys and parties, upon conditions that – where necessary – the same guarantees of authentication can be acquired. As regards to the communication from the court registries to parties directly, it would be advisable to obtain a preliminary agreement to electronic communication with a view to safeguard the rights of defence. In cases where an acknowledgement is required, the court registry should have recourse to postal acknowledgement when no « electronic » acknowledgement has been received within a fixed period of time.

5. Hearing and evidence : use of videotechniques – law of evidence on electronic documents:

As stated earlier, videohearings are presently not used in civil litigation. However, there would be no legal obstacles to introduce videohearings on condition that article 148 of the Belgian Constitution and article 6 of the European Convention on human rights, prescribing that hearings are to be held publicly, upon exceptions in certain cases. Videohearings in the office of the judge would thus violate this constitutional principle.

Law of evidence on electronic documents: this item will be set out in section C together with the latest legislative developments.

6. Final decision:

As far as communications between the court registry and the attorneys is concerned, currently a copy of the judgement in civil litigation is sent to attorneys by postal mail. There is no legal obstacle as to sending it by E-mail.

Communication between bailiffs and served parties: the function of serving a judgement in civil litigation is to start the strict time limit to appeal against the decision. The serving of judicial decisions is now done physically by bailiffs. The introduction of electronic serving requires modifications of the civil procedure code just as for serving of documents in general. Moreover the same technical and legal guarantees of authentication as the physical serving are to be met.

Judicial decisions have to be archived. Technical difficulties occur when electronic data are to be moved to another support and possibly be converted to a new format (the so-called migration problem). This has also legal consequences. The conversion to another format can cause the loss of the integrity of the electronic document with the loss of evidential value as a consequence. There is no immediate solution for this problem. One possible track to reinforce the evidential value of the migrated information could be the use of independent migration agencies. The electronic data could be consigned to a Trusted Third Party responsible for a reliable migration according to internationally established criteria. This Trusted Third Party would confirm the authenticity and integrity of the data by adding its digital signature to the document. Consequently, technical guarantees, created to offer better evidence but lost because of migration, could be retrieved again[32].

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[32] Van Eecke, P., "Bewijsrecht op de informatiesnelweg", ICRI, K.U.Leuven, 1998, p. 56

7. *Conclusion*

We can conclude that in spite of the current narrow possibilities in the civil procedure code, a general adaptation of civil procedure law towards electronic neutral provisions would widen up the way to a generalised use of electronic case files in civil litigation. In this exercise, the legislator will analyse which procedures and instruments are used and what their function is. Then, the legislator will examine whether the function aimed at, can be reached in an electronic context. Generally this will require a complete re-design of the law.[33]

C Evidence rules in Belgian civil law.[34]

1. *Current legislation regarding evidence rules in Belgian civil law.*

Like in most other countries transactions are legally valid in Belgium, irrelevant of the medium which is used by the parties involved. Only in exceptional case for certain specific transactions and mostly with the aim to protect the weakest party involved or third parties, a written form with a hand-written signature will be required.

With regard to evidence of legal transactions[35], Belgian law is characterised by a regulation and hierarchy of means of evidence. Consequently the admissibility of means of evidence is limited and each means has a relative probative value.[36] Written original documents have the highest place in the hierarchy of means of evidence.

Principally, article 1341 of the Civil Code requires a hand-written signature for the evidence of all transactions involving a value of more than 375 EURO (15000 BEF). However there are so many exceptions that it can not be considered as the general rule anymore. An important exception is that the provisions of the Civil Code with regard to evidence rules are of a supplementary nature (droit supplétif). They only apply when parties at a transaction don't mention their own evidence rules in the contract.[37]

In principle the judge is free to evaluate the content of the means of evidence submitted by the parties in litigation. His evaluation will depend on his trust in the submitted means of evidence.

Thus, strictly speaking, electronic documents are admissible as means of evidence. Nevertheless there seems to be a lack of trust towards those documents. This attitude is not unjustified: as there are presently no standards to determine the electronic evidence as satisfactory evidence, judges evaluate the submission of electronic evidence with greatest precaution and hesitation.

Furthermore, even if electronic documents as means of evidence can be admitted, evidence to the contrary can be submitted by a written act, which has a higher probative value and cannot be refuted by witnesses or presumptions.

We can therefore conclude that nothing forbids a Belgian judge to take into account electronic data as a valuable means of evidence. However this will not be considered as an equivalent to a hand-written act but as one of the elements leading to a presumption about the existence and/or content of the transaction.

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[33] Dumortier J., and Van Eecke P., "De Europese ontwerprichtlijn over de digitale handtekening: waarom is het misgelopen?", Computerrecht 1999/1.

[34] This section is based on the study of Dumortier J., and Van Eecke P., "The legal aspects of digital signature", ICRI, K.U.Leuven, October 1998. This study has been performed for the European Commission, DG XV, in the framework of the draft European directive establishing a common framework for digital signatures.

[35] Evidence of facts can be given by all means

[36] Article 1316 Civil Code

[37] This is the legal basis of evidence in the interchange agreements which are generall concluded by parties before starting an EDI-project.

The above-mentioned precaution with regard to the evidential value of electronic data should, however, be getting eliminated by, on the one hand, the introduction of trustworthy information systems and, on the other hand, by the elimination of « electronic hostile » legislative provisions.

One technology enhancing trust is the « digital signature » allowing authenticating electronic information in such a way that the originator of the information, as well as the integrity (content and secure date) of the information, can be verified. The digital signature is currently accepted to be the most secure technique to authenticate electronic information. Consequently, the digital signature is being regarded as the most secure alternative for a hand-written signature, a symbol accepted by society and evidence law to provide evidence of authenticity, unless the opposite has been proved.

The digital signature as new authentication tool has « de facto » been chosen in the latest legislative proposals.

2. Proposed law amending evidence rules in civil law.

It is exactly at this point that the recent proposal of the Belgian government for a law amending the Civil Code provisions about evidence has to be situated.[38] The most important provision of the proposed law is that, in future, a signature will be considered no longer as a concept restricted to hand-written signature but that it can be « every transformation of data from which follows with certainty the identity of the author and the integrity of the content ». A digital signature, will, according to this proposal, be considered as a legally valid signature, equivalent to the hand-written signature.[39]

Everybody in Belgium agrees that the practical effect of the just mentioned proposal on evidential rules applied by courts will be very limited. As already described before, the Civil Code provisions regarding evidence are, already at present, not very strict anyway. The major effect of the proposal is expected in other domains where the law requires a written form and a signature. As a general rule indeed, the Civil Code definitions of concepts such as 'signature' are applied in every domain of the law. In all legal provisions where the concept of the 'signature' appears, this concept will have to be interpreted in the new, functional manner and no longer be restricted to a hand-written signature.

D Written form required in other specific legal provisions.

Of course, the proposed law amending the Civil Code provisions regarding evidence, has to be considered only as a first step. It is expected that the new definition of the concept of the 'signature' will be generally applied in every domain of the law. Very often, however, this is not enough to permit the use of digital technology. Legal provisions often contain lots of other specific elements, which can only apply to traditional paper documents. Some of these provisions specify not only the number of copies of the legal document but also the colour of each copy. In other cases documents have to be sent 'by registered postal mail '. In certain cases the law has been adapted to the use of microfilm or microfiche but not to the use of digital supports.[40] Therefore the Belgian council of ministers, in its meeting of 30 May 1997, decided also to proceed to a general inventory of the legal provisions in every domain of the law, to examine where other legal obstacles to the introduction of digital technology, still remain to be removed.

A small number of such specific legal provisions have already been amended in the recent past. A typical example is the legislation concerning the social security by which electronic

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[38] Voorontwerp van wet tot wijziging van sommige bepalingen van het Burgerlijk Wetboek met betrekking tot het bewijs van verbintenissen – Avant-projet de la loi visant à modifier certaines provisions du Code civil relatives à la preuve des obligations, adopted by the Council of Ministers, 12 June 1998.

[39] The text of the draft proposal can be found at http://www.law.kuleuven.ac.be/icri.

[40] Art. 299 of the Income Tax Code.

documents originating from the social security authority gain the same evidential value as their paper counterparts.[41] Other examples can be found in the field of financial transaction[42], postal services[43] and some other administrative domains.

Furthermore, regarding indirect taxation, art. 53, octies, 61 of the VAT Code empowers the King to allow the replacement of the invoice « by transfer of the data which it has to contain following a procedure in which telecommunications techniques are applied. » The King can, according to art. 54 of the VAT Code also regulate the way of archiving of this kind of « electronic » invoice. Those two royal decrees have not yet been issued.

E Regulation on cryptography

Belgium has, since 1994, a very ambiguous legislation with regard to the provision and the use of cryptography. This legislation has been modified at the end of 1997 by the law of 19 December 1997[44] amending the law of 21 March 1991. The provision and the use of cryptography in Belgium is from 1 January 1998 regulated by a new article 109terF formulated as follows[45]:

« The use of cryptography is free. The supply to the public of cryptographic services designated by the King is subject to a prior notification of the Institute. This notification has to be done by registered letter at least four weeks before the start of the activities. »

F Proposed law on digital signature and certification authorities.

Conscious of the necessity to enhance trust regarding technical aspects of electronic authentication methods, the Belgian government decided - during its meeting of 30 May 1997 - to draft legislation with regard to the recognition of certification authorities and the use of digital signatures.[46]

The proposed law is drafted by the Minister of Economic Affairs in association with the Minister of Justice and approved by the Council of Ministers.[47]

The draft law is limited to digital signatures in the strict sense, i.e. based on asymmetric cryptographic tools. The regulation establishes a voluntary accreditation scheme for certification authorities and appends legal consequences to digital signatures certified by an accredited CA. The legal framework allows natural persons as well as legal persons and entities to apply for a certificate.

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[41] K.B. van 22 maart 1993 betreffende de bewijskracht ter zake van de sociale zekerheid, van door instellingen van sociale zekerheid opgeslagen, bewaarde of weergegeven informatiegegevens, B.S. 1 april 1993.

[42] Wet van 17 juni 1991 tot organisatie van de openbare kredietsector en van het bezit van de deelnemingen van de opnebare sector in bepaalde privaatrechtelijke financiële vennootschappen, B.S. 9 juli 1991.

[43] Wet van 2 mei 1956 op de postcheck, B.S. 13 juni 1956

[44] Official Gazette (Moniteur Belge) of 30 December 1997

[45] Official text in Dutch: "Het gebruik van versleuteling is vrij. De terbeschikkingstelling aan het publiek van versleutelingsdiensten aangewezen door de Koning is onderworpen aan een voorafgaande aangifte aan het Instituut. Deze aangifte moet per aangetekende brief gebeuren uiterlijk vier weken voor de aanvang van de activiteiten. (Inserted by art. 79 of the Law of 19 december 1997, B.S., 30 december 1997)."

[46] See Dumortier, J. and Van Eecke, P., "Naar een juridische regeling van de digitale handtekening in België, Computerrecht, 1997, 4, 154.

[47] Avant-projet de la loi relative à l'activité d'autorités de certification agréees en vue de l'utilisation de signatures digitales – Voorontwerp van wet betreffende de werking van erkende certificatieautoriteiten met het oog op het gebruik van digitale handtekeningen, approved by the Council of Ministers, 12 June 1998.

Certificates issued by foreign CA's which are established in another European Union or European Economic Area member state will be recognised as certificates issued by a Belgian accredited CA, provided they demonstrate the same security level. The competent administration will lis the foreign CA's of third countries insofar these countries have signed a mutual recognition agreement with Belgium or the European Community.[48]

[48] The text of the draft proposal can be found at http://www.law.kuleuven.ac.be/icri.

V. CONCLUSION

In spite of huge efforts, manpower and financial means being invested in the automation of civil justice, one has to admit that the use of communication and information technologies in civil litigation is still in its infancy. Court registries have thrown away their mechanic typewriters now replaced by personal computers, linked to a central network. On the spot, one is informed that electronic links between courts are not functioning efficiently and that hardware and software need urgently to be modernised and made compatible with other systems.

With the announcement of a project - launched by the Ministry of Justice - to introduce Internet interfaces and communication by email in court registries, the development of automation in courts will no doubt accelerate and open the way to the creation of an intranet between courts and all its actors. This should no doubt increase efficient administration of justice.

The Declaration of Intent of 26 February 1996 between the actors of justice, together with the Action plan of the federal authorities on information society for the years 1997 to 1999 have blown fresh oxygen in the minds of the authorities responsible for effective access to administration and justice: actions are undertaken to improve communication with the citizen; the role of the authorities regarding the principle that “everyone is assumed to know the law” is being implemented through projects aiming at improving the quality of electronic legal databases. These databases should offer readable, comprehensive and exhaustive legislation.

Regarding the use of electronic documents in civil litigation sensu stricto, the judge needs undoubtedly to dispose of crystal clear civil procedure and evidence rules on the admissibility and legal value of electronic documents. The proposed law amending evidence rules in civil law, adopted by the Council of Ministers on 12 June 1998 is a first response to that demand.

Furthermore, the Belgian legislator expressed its concern regarding the existing lack of confidence in the technical guarantees offered by new technologies: the draft law on digital signatures and certification authorities, adopted by the Council of Ministers also on 12 June 1998, introduces the concept of a “controlled” use of communication and information technologies, essential condition for its development in society.

The development of communication and information technologies in civil litigation is, however, not only a national issue. Globalisation of exchanges increases the transnational mobility of persons and services. Consequently, litigation involves more and more international elements.

In his own country, a citizen will generally be faced with a whole range of obstacles when he starts litigation. Those obstacles are multiplied when he is crossing the border.

If a general harmonisation of civil procedures is an impossible task and possibly not desirable due to the different legal cultures, there are no serious obstacles to facilitate electronic communication between courts and involved actors in different countries. Everyone will agree that globalisation of exchanges is nowadays a fact. The logical consequence should be that citizens of democratic societies deserve confidence in access to efficient justice wherever they are.

Leuven, March 1999.