The prerequisites for
THE IMPLEMENTATION OF A COMPULSORY EXECUTION MEASURE

• What steps does a litigant have to take in order to force a debtor to pay his debt?

Although every European country has to ensure that any litigant enjoys the "right to his day in court", this right would prove to be very illusory if there can be no guarantee that the decision obtained will in fact bring about the anticipated effects.

The right to enforcement, then, is a natural extension of the right to go to court.

Even so, before recourse can be made to compulsory execution measures if a person fails to comply with his obligations, a set of prior conditions needs to be met, as laid down by the Belgian Judicial Code:

- the creditor must have an enforceable title or decision;
- the enforcement title must have been formally served and, in general, notice of a payment order must have been given;
- and the claim established by this title must be certain, of a fixed amount and due.

1. A TITLE THAT IS ... ENFORCEABLE

Article 1494 (Judicial Code): *No attachment of movable or immovable property in execution may be made except by virtue of an enforceable title (...).*

An enforceable title or decision is an instrument that may be deployed, where necessary, by recourse to compulsory execution measures against a party who fails to comply with its obligations.

WHAT IS AN ENFORCEABLE RIGHT ?

Such a title may take different forms:

- A court decision;
- A consent order;
- An arbitral award;
- A notarial instrument;
- Or also an administrative document to which the law has conferred enforceability.

The prerequisites for
THE IMPLEMENTATION OF A COMPULSORY EXECUTION MEASURE

THE MORE SPECIFIC CASE OF A COURT DECISION

Where the enforcement title takes the tangible form of a court decision, its enforceability is nonetheless conditional on, for example, the appending of authority to execute, either because provisional enforcement has been granted or because the decision is no longer open to recourse through the ordinary courts (opposition or appeal) and is therefore considered to be final.

It is important to point out that, in the case of a decision declared to be immediately enforceable even though an appeal has been lodged, it will be executed at the risk of the party taking the action. Accordingly, if a first instance judgment has been issued but is the subject of an appeal in the ordinary courts, which then set it aside, the assets attached will have to be restored in their original condition by the party concerned.

As for the period of validity of a court decision, this is limited to ten years. In certain cases this time frame may be extended and, in such instances, the terms used are the causes of suspension or interruption of the limitation period.

2. A TITLE ... THAT HAS BEEN SERVED

Article 1495 (Judicial Code): *A decision ruling against a party may not be executed until it has been served on that party.*

Any enforcement measure adopted on the basis of an enforcement order inevitably calls for the prior service of that order upon the party against whom execution is sought, the aim being to acquire the certainty that the decision made against him has been brought to that party's knowledge. If this prerequisite is not satisfied, the whole of the enforcement procedure would be rendered void.

To have the order served, a Belgian judicial officer (a 'huissier') with territorial jurisdiction should be called upon.

This obligation of service of notice does not, however, apply to a notarial instrument, since it is presumed that it has been signed by all the parties concerned and therefore that they have taken due note of its content.

The prerequisites for
THE IMPLEMENTATION OF A COMPULSORY EXECUTION MEASURE

THE SPECIAL CASE OF THE SERVICE OF A BELGIAN COURT DECISION IN ANOTHER EU MEMBER STATE

Where the defendant resides in another Member State, the court decision should be served on him in accordance with (EC) Regulation no. 1393/2007 regarding the service and notification of judicial and extra judicial documents related to civil or commercial subjects, within the Member States.

This regulation suggests various channels for the service of notice. The one that is most secure in legal terms is the following: the litigant goes to a Belgian judicial officer (in his status as the transmitting agency in the country of origin) and asks him to transmit the court decision to be served on the debtor, together with the necessary papers, to his counterpart with territorial jurisdiction in the other country (in his status as the receiving agency). The receiving agency must then arrange for the actual service of all the documents transmitted on the debtor, in accordance with the national law of the Member State in which the debtor resides. The receiving agency will also keep the transmitting agency informed of the success or failure of this operation.

3. A TITLE ... UNDER WHICH NOTICE OF A PAYMENT ORDER HAS BEEN GIVEN

Article 1499 (Judicial Code): *Any attachment in execution of a judgment on movable property will be preceded by an order to the debtor, given at least one day before the attachment and, if the title is in the form of a court decision, containing the writ of notice of the attachment if this has not already been served.*

Article 1564 (Judicial Code): *An attachment in execution of a judgment on immovable property will be preceded by an order, given by a notice served personally or to the actual address or the address for service stated in the title of the debt.*

The payment order ['*commandement de payer*'], is a judicial officer's writ whereby the debtor receives an order to pay pursuant to the enforceable title, with a warning that, failing voluntary payment, the debtor will be compelled to do so by means of compulsory execution.

The payment order may be served at the same time as the enforceable title and, at all events, is a preliminary to any attachment of movable and immovable property in execution of a judgment, with the exception of a garnishment ['*saisie-arrêt exécution*'].

The service of the payment order is also of significance where a precautionary attachment measure (see section II) has been carried out, since this service will on its own convert that precautionary attachment into an attachment in execution of a judgment, so that the claimant does not need to renew the procedural formalities that have already been performed in the precautionary phase.

The prerequisites for
THE IMPLEMENTATION OF A COMPULSORY EXECUTION MEASURE

4. A TITLE...RELATING TO A CLAIM THAT IS CERTAIN, OF A FIXED AMOUNT AND DUE

Article 1494 (Judicial Code): *No attachment in execution of movable or immovable property will be effected unless it is in pursuance of an enforceable title and for a due and certain claim.*

▸ Certainty

A certain claim is one that, in the light of a summary examination, appears to be sufficiently well founded or to present sufficient elements of certainty for a precautionary attachment to be authorised or maintained.
A conditional, possible or even disputed claim (if the contention does not appear to be sufficiently serious) may therefore serve as a basis for a precautionary attachment.

▸ Payability

A claim is considered to be due and payable from the time at which the creditor may demand immediate payment.
The Belgian Judicial Code nevertheless makes an exception to this principle where the claims are for payments falling due regularly, such as rent.

▸ Liquidity

A claim is said to be liquid, or of a fixed amount, when that amount has been determined or is determinable.

***

• "Precautionary" measures, or how can a litigant protect his rights without already having an enforceable title in his possession?

Even if a creditor is not yet in possession of an enforceable title, he is not without resources, for in a case such as this Belgian law allows him to call upon a judicial officer to carry out a precautionary measure, one that takes the form of an attachment.

The objective of such an attachment is simple: to prevent the debtor, over a given period, from being able to dispose of property making up his assets at his own discretion. In other words, a measure of this kind has the effect of ensuring that the debtor's assets are maintained in their present condition, to give the creditor time to obtain a sufficient title to act.

For recourse to be made to the mechanism of the precautionary attachment, a set of certain conditions need to be met. These are of two different types: conditions of substance and conditions as to form.

The prerequisites for
THE IMPLEMENTATION OF A COMPULSORY EXECUTION MEASURE

1. SUBSTANTIVE CONDITIONS

The substantive conditions are two in number: rapidity, and the qualities of the claim.

RAPIDITY

Article 1413 (Judicial Code): *Any creditor may, in cases in which speed is required, apply (...) to attach as a precaution the seizable assets belonging to his debtor.*

This requirement means that the attachment may be implemented or authorised only if, were this not done, the creditor might fear prejudice. In other words, the debtor's attitude or his asset situation might give reasonable cause to believe that, if no such protection measure were taken, future recovery of the debt would be placed at risk.

The need for a precautionary attachment will therefore be examined in the light of the debtor's existing or threatened insolvency.

By way of examples, the following situations may give rise to such a measure:

- where the debtor deliberately makes himself insolvent;
- where several de facto elements show that the debtor's situation is such that he is unable to meet his financial commitments;
- where, having regard to the documents of the case, the judge is persuaded that the debtor is in an objectively difficult situation (recurring or even constant difficulties in making payments, the debtor's non-responsiveness despite numerous reminders to pay, etc.).

"Rapidity" is therefore not a factor if the sole grounds for the creditor's application are that he is in need of money.

THE QUALITIES OF THE CLAIM

Article 1415 (Judicial Code): *A precautionary attachment may be authorised only for a claim that is certain and payable, of a fixed amount or can be provisionally estimated.*

A precautionary attachment may be authorised only for a claim that is certain and payable or of a fixed amount or can be provisionally estimated.

Reference is made to the explanations set out in section I as regards the scope of these different requirements.

The prerequisites for
THE IMPLEMENTATION OF A COMPULSORY EXECUTION MEASURE

2. CONDITIONS AS TO FORM

The formal conditions to be met can be summarised as the obligation or non-obligation of applying to the judge of attachments ['juge des saisies'] for prior authorisation to carry out the precautionary attachment measure.

ATTACHMENT IMPLEMENTED WITH THE AUTHORISATION OF THE JUDGE OF ATTACHMENTS

In the majority of cases the judge of attachments must authorise an attachment.

To obtain authorisation, the creditor must lodge his application in the form of an ex parte petition setting out certain particulars, some pertaining to the date on which the petition is made, the identification of the parties or the purpose of and grounds for the application, while others are associated with the type of attachment applied for.

All supporting documents must also be included in the case file so that the judge can arrive at a decision with full knowledge of the case.

ATTACHMENT CARRIED OUT WITHOUT THE AUTHORISATION OF THE JUDGE OF ATTACHMENTS

There are, however, certain circumstances in which the creditor may directly instruct a judicial officer to carry out a precautionary attachment without prior authorisation:

- Where he is already in possession of a Belgian judgment, even if it is not immediately enforceable, or a Belgian arbitral award;
- Where he is in possession of a foreign judgment or arbitral award, provided that either one is recognised under Belgian law as complying with the terms of a convention concluded between Belgium and the country of origin of the judgment or arbitral award;
- Where he is already in possession of a notarial instrument, even if authority to execute is not appended, provided that this instrument clearly specifies the debtor's obligation to pay a debt of an amount that has been determined;
- In the case of distraint (this is the seizure of property to secure the payment of rents or land rentals that have fallen due);
- In the case of garnishment, whether the creditor already possesses a title – a judgment or authentic instrument – or a simple private agreement.

By "private agreement"
is meant "a written document in due and proper form, effective against the debtor and testifying to the existence of a claim that is certain, payable and of a fixed amount".

This is the case of:
- an accepted or protested bill of exchange,
- a cheque,
- a promissory note,
- a will,
- an insurance policy,
- a contract,
- an invoice.

3. THE MAIN CATEGORIES OF PRECAUTIONARY ATTACHMENT UNDER BELGIAN LAW

In matters of protection, the creditor has a choice of 5 different types of attachment. For three of these, the period of validity is three years and is renewable, without taking the possible causes of suspension into account.

The purpose of these measures is essentially to render the goods constituting the debtor's personal assets temporarily unavailable to him.

THE ATTACHMENT OF MOVABLE PROPERTY ['*SAISIE MOBILIÈRE*']

This is an attachment of the tangible assets owned by the debtor (furnishings, vehicles, etc.).

THE ATTACHMENT OF IMMOVABLE PROPERTY ['*SAISIE IMMOBILIÈRE*']

This is an attachment of all the debtor's immovables in the form of real property or chattels real. The same applies to the right of beneficial ownership ['*usufruit*'], the leaseholder's rights ['*emphytéose*'] and the right of superficies ['*droit de superficie*'] belonging to the debtor. On the other hand, the rights of use and of habitation cannot be seized.

GARNISHMENT ['*SAISIE-ARRÊT*']

Garnishment is the procedure whereby a creditor attaches moneys or movables (shares, securities, etc.) belonging to the debtor that are in the hands of a third party.

The prerequisites for
THE IMPLEMENTATION OF A COMPULSORY EXECUTION MEASURE

This type of attachment differs somewhat from the previous two in that there are no longer two parties involved (the creditor and the debtor) but three: the creditor taking action by garnishment, the debtor/garnishee and the third party garnishee (in other words, the garnishee's debtor).

For example, garnishment is typically used to attach from a bank the moneys that the debtor lodges in his bank account, or for the direct attachment of the debtor's earnings in the hands of his employer.

MORE SPECIFIC PRECAUTIONARY ATTACHMENTS

There are three other precautionary attachments, although they are employed less often because of their specific features.

They are:

- **Distraint** ['*saisie-gagerie*'], whereby the owner or principal lessor of a rural property may attach the effects and produce that are accretions to the building and land leased, if the property rents or farm rentals are in arrears;
- **Replevin** ['*saisie-revendication*'], whereby the right is exercised to follow property wherever it has passed, to ensure the conservation of tangible personal property and secure its repossession once a ruling has been given on its ownership, possession or custody. This attachment of the property can be made in whoever's hands it may be held.
- **Attachment of vessels** (for information).

- July 2011 -

For further information, please contact eje@europe-eje.eu

The EJE project is cofinanced by the European Union