

Originality in Belgian civil law: comparing the Code Napoleon with Book 8 of the New Belgian Civil Code

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Introduction

Originality requirements can be found in several branches of Belgian law.¹ Within civil law, the originality requirement stems from its preference for evidence in writing, according a higher probative value to written evidence than to other forms of evidence. Moreover, the originality requirement also exemplifies a certain formalism intended to protect the weaker contract party. As a result of this formalism, the original is accorded a higher evidential value than a copy.

During the last two decades we have seen the introduction of electronic information processes – most importantly the electronic signature – in civil law. These processes allow parties to draft and conclude legally valid and binding agreements in electronic form. These processes put a strain on the original-copy dichotomy.

Despite the issues posed by new technologies, the rules on evidence of the Napoleonic Code have barely been amended throughout its more than 200 years. The only changes made are a few amendments to articles 1317 and 1322 – introducing electronic signatures – the abolishment of article 1351 in 1967, a 1976 amendment to article 1319, a 2016 minor addition to article 1334, a few amendments of the monetary sum included in articles 1341 – 1345, and a new 2018 article on evidence by and against businesses.

The Belgian legislator decided to conduct a more thorough overhaul of the Belgian Civil Code (BCC), adopting on 13 April 2019 Book 8 on evidence, the first of the books of the ‘Nieuw Burgerlijk Wetboek’ (new Belgian Civil Code, hereafter NBCC). On 31 October 2018 the proposal² was sent to the House of

Representatives (*de Kamer*) and after some small changes³ was approved on 4 April 2019 and published in the Belgian State Gazette on 14 May 2019.⁴ The legislation enters into force on 1 November 2020.

As explained at the hearing, the commission drafting Book 8 had considered abolishing the legal system of evidence,⁵ which provides for legal certainty regarding evidence that is written and signed.⁶ However, it was decided to keep the regulated system of evidence, since France and other European countries also maintain a degree of formalism in their systems of evidence.⁷ Nevertheless, the commission considered that excessive formalism could impede daily business. For this reason, it was proposed that the existing

54 3349/001, 31 October 2018)

<http://www.dekamer.be/FLWB/PDF/54/3349/54K3349001.pdf>

³ For example was the title changed to indicate that the legislation will introduce the new Civil Code: Belgian House of Representatives, ‘Draft Bill introducing a Civil Code and inserting Book 8 “Evidence” in that Code’ (‘Wetsontwerp tot invoering van een Burgerlijk Wetboek en tot invoeging van boek 8 “Bewijs” in dat Wetboek’) (DOC 54 3349/006, 28 March 2019) <https://www.dekamer.be/FLWB/PDF/54/3349/54K3349006.pdf>.

⁴ Act of 13 April 2019 introducing a Civil Code and inserting Book 8 ‘Evidence in that Code (Wet van 13 April 2019 Tot Invoering van Een Burgerlijk Wetboek En Tot Invoeging van Boek 8 ‘Bewijs’ in Dat Wetboek)’, C – 2019/12168 *Belgian State Gazette* 14 May 2019.

⁵ In Belgium, the legislation is codified and takes precedence over case law. The new Book 8 would be part of the Belgian Civil Code.

⁶ Gautier Calomne and Özlem Özen, ‘Report on behalf of the Commission for Justice regarding the draft Bill including Book 8 “Evidence” in the New Civil Code’ (‘Wetsontwerp Houdende Invoeging van Boek 8 ‘Bewijs’ in Het Nieuw Burgerlijk Wetboek - Verslag Namens de Commissie Voor de Justitie’) (DOC 54 3349/005, 28 March 2019), p.31 <https://www.dekamer.be/FLWB/PDF/54/3349/54K3349005.pdf>.

⁷ Gautier Calomne and Özlem Özen, ‘Report on behalf of the Commission for Justice regarding the draft Bill including Book 8 “Evidence” in the New Civil Code’ (‘Wetsontwerp Houdende Invoeging van Boek 8 ‘Bewijs’ in Het Nieuw Burgerlijk Wetboek - Verslag Namens de Commissie Voor de Justitie’) (DOC 54 3349/005, 28 March 2019), p.31 <https://www.dekamer.be/FLWB/PDF/54/3349/54K3349005.pdf>.

¹ This research was published as: Niels Vandezande, *When an original is not original*, (Cambridge: Intersentia, 2019).

² Belgian House of Representatives, Draft Bill including Book 8 in the New Civil Code (‘Wetsontwerp houdende invoeging van Boek 8 “Bewijs” in het nieuw Burgerlijk Wetboek’) (DOC

system should be relaxed while maintaining the old rules for proving agreements with a significant financial interest and in case of complex agreements.⁸ Article 8.8 of the NBCC therefore establishes that, except in cases where the law provides otherwise, proof can be provided by any means of evidence. This provision has been taken from article 1358 of the French Code Civil.⁹

Article 8.9 NBCC sets out the provisions regarding a regulated evidence system, stating that any legal act with regard to a sum or a value equal or higher than EUR 3.500, a significant increase compared to the previous limit of EUR 375, must be proven by the parties with a duly signed paper or electronic document – i.e. an authentic instrument or private instrument.¹⁰ In circumstances where a party disputes the content in the written document, the proof can only be by another signed writing, even if the signed writing does not refer to a legal act with a sum or value above EUR 3.500.

The new Book 8 also provides exceptions to the regulated evidence system, for example in case of unilateral legal acts (article 8.10 NBCC); in the event of a material or moral impossibility of obtaining an instrument, or if it is customary not to draft an instrument (article 8.12 NBCC). Furthermore, it is possible that the signed instrument may be replaced by a confession, a decisive oath or a beginning of evidence in writing if the latter is supplemented by another means of evidence (article 8.13 NBCC).

In this paper, we will explain the issue of the concept of originality and then compare the old rules on written evidence in Belgian civil law with the new

rules as set forth by Book 8 NBCC. Before anything else, we will first introduce the concept of originality, and its potential issues when dealing with electronic evidence (section 2). We will then focus on authentic instruments (section 3), private instruments (section 4), and the beginning of evidence in writing (section 5). Last, we will look deeper at the original-copy dichotomy in Belgian legislation (section 6). In each section, we will briefly sketch the prevailing rules on evidence as set forth by the 1804 Code Napoleon. We will then indicate where those rules may have become outdated or where there may be a conflict in light of the more recent digitalization processes introduced in law. In each section we sketch out the new rules on evidence as proposed by Book 8, and analyse whether, and if so, how, these can ameliorate the existing situation.

The concept of originality

Originality is determined by a quality or state of being novel, displaying independent creative thought or action.¹¹ An original is then the first form or source of something, from which other work is derived or copied.¹² In the context of documents, an original is ‘the primary or earlier writing or document of which another is a copy or transcript’.¹³ The notion of originality rose to particular importance during the period of Romanticism in the eighteenth century.¹⁴ It is in that period that this concept became linked to the notion of authorship, which in turn would form the basis of modern copyright law.¹⁵

The main idea is that there can, in principle, only be one original. The question then becomes what constitutes an original when dealing with electronic information. Here, it can be argued that there may not even be an original at all, as digital bits are constantly in flux, storage media may degrade, and

⁸ Gautier Calomne and Özlem Özen, ‘Report on behalf of the Commission for Justice regarding the draft Bill including Book 8 “Evidence” in the New Civil Code’ (‘Wetsontwerp Houdende Invoering van Boek 8 ‘Bewijs’ in Het Nieuw Burgerlijk Wetboek - Verslag Namens de Commissie Voor de Justitie’) (DOC 54 3349/005, 28 March 2019), p.32 <https://www.dekamer.be/FLWB/PDF/54/3349/54K3349005.pdf>.

⁹ Gautier Calomne and Özlem Özen, ‘Report on behalf of the Commission for Justice regarding the draft Bill including Book 8 “Evidence” in the New Civil Code’ (‘Wetsontwerp Houdende Invoering van Boek 8 ‘Bewijs’ in Het Nieuw Burgerlijk Wetboek - Verslag Namens de Commissie Voor de Justitie’) (DOC 54 3349/005, 28 March 2019), p. 18 <https://www.dekamer.be/FLWB/PDF/54/3349/54K3349005.pdf>.

¹⁰ An authentic instrument is also signed by a public official (such as a notary) within the scope of his authority, and such an instrument has, therefore, a higher evidentiary value than a private instrument, which is only signed by the contracting parties.

¹¹ “originality, n.”, *OED Online*, Oxford University Press (2015); “originality”, *Collins English Dictionary*, HarperCollins Publishers (2015).

¹² “original, adj. and n.”, *OED Online*, Oxford University Press (2015); “original”, *Collins English Dictionary*, HarperCollins Publishers (2015).

¹³ “original, adj. and n.”, *OED Online*, Oxford University Press (2015).

¹⁴ Rose, M., “The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship”, *Representations* (1988), 56.

¹⁵ Rosenthal Kwall, R., “Originality in context”, *Houston Law Review* (2007), 871-872. An in-depth discussion of the relationship between authorship and originality is, however, beyond the scope of our research.

metadata will change over time.¹⁶ It may therefore be better to speak of first-in-time data, rather than an original in the true sense of the word.¹⁷

When using contracts written on paper, one party will sign that paper and hand it over to the other party, therefore, unless contracts are signed in duplicate and exchanged, or counterparts are exchanged, one party may lose possession of the signed original. The paper version will contain the manuscript signature of one or both parties. When using electronic contracts, one party will electronically sign the contract and send it to the other party. In sending the contract, the first-in-time data remains with the first party. The electronically signed information is duplicated, thus leading to both parties possessing an exemplar that is validly signed by the first party. However, the first party will still need to receive the countersigned electronic document from the other party. While both parties now see the same content, there will still be a difference in the sense that some metadata will be added, and some metadata will be changed.¹⁸

This brief introduction to the concept of originality is necessary, as we will see further on that there are some issues with how this concept is defined in Belgian law.

Authentic instrument

Old legislation

Authentic instruments or deeds rely on the duties imposed on a public official – in the Franco-Belgian tradition generally the public notary. Such instruments must comply with a number of requirements.

First, the public official must act within the scope of his authority and within the boundaries of his jurisdiction in terms of territory and subject matter. They may not act against public order, decency and

mandatory law.¹⁹ Second, if an authentic instrument does not comply with the formal requirements, or if it was drafted outside of the competence of the public official, it cannot be accepted as an authentic instrument.²⁰ However, it could still be considered as a private instrument – a contract with consideration – if duly signed by the parties.²¹

Authentic instruments are accorded the highest probative value. They provide absolute proof of the legal acts between the parties recorded in them.²² There are, however, still distinctions between the different statements they contain. Authentic statements made by the public official are presumed to be valid because of the trust placed in the person from whom they emanate.²³ The instrument can also contain statements not verified by the public official. These statements are accorded the same value as any statement in a private instrument.²⁴ Counterproof against authentic statements in an authentic act is only possible on the grounds of fraud or forgery.²⁵ Third parties can provide evidence of counterproof against non-authentic statements.²⁶

The problems

Since 2003, article 1317 of the Belgian Civil Code has provided that authentic instruments can, principally, be concluded electronically. Such was, however, the theory. In practice and over 15 years later, we are

¹⁹ Minjauw, H., Vandendriessche, J., 'Titel VI. Het bewijsrecht in burgerlijke zaken', in: *Bestendig Handboek Verbintenissenrecht*, ed. by R. Roodhooft, (Mechelen: Kluwer, 2008), pp. VI.3-19-20.

²⁰ Article 1318 Belgian Civil Code.

²¹ Mougnot, D., *Droit des obligations: la preuve*, (Brussel: Larcier, 2002), p.153.

²² Article 1319 Belgian Civil Code. However, counterproof is still possible: Mougnot, D., *Droit des obligations: la preuve*, (Brussel: Larcier, 2002), p.154.

²³ Van Gerven, W., Covemaker, S., *Verbintenissenrecht*, (Leuven: Acco, 2006), p.672; Minjauw, H., Vandendriessche, J., 'Titel VI. Het bewijsrecht in burgerlijke zaken', in: *Bestendig Handboek Verbintenissenrecht*, ed. by R. Roodhooft, (Mechelen: Kluwer, 2008), p. VI.3-36.

²⁴ Minjauw, H., Vandendriessche, J., 'Titel VI. Het bewijsrecht in burgerlijke zaken', in: *Bestendig Handboek Verbintenissenrecht*, ed. by R. Roodhooft, (Mechelen: Kluwer, 2008), p.VI.3-38.

²⁵ Minjauw, H., Vandendriessche, J., 'Titel VI. Het bewijsrecht in burgerlijke zaken', in: *Bestendig Handboek Verbintenissenrecht*, ed. by R. Roodhooft, (Mechelen: Kluwer, 2008), p.VI.3-37.

²⁶ Minjauw, H., Vandendriessche, J., 'Titel VI. Het bewijsrecht in burgerlijke zaken', in: *Bestendig Handboek Verbintenissenrecht*, ed. by R. Roodhooft, (Mechelen: Kluwer, 2008), pp. VI.3-38-39.

¹⁶ Mason, S. "Electronic evidence and the meaning of "original"", *Amicus Curiae* (2009), 79, 26-28, <https://space.sas.ac.uk/2565/>.

¹⁷ Mason, S., Seng., D., *Electronic Evidence*, (4th edition, Institute of Advanced Legal Studies for the SAS Humanities Digital Library, School of Advanced Study, University of London, 2017), 9.24, https://humanities-digital-library.org/index.php/hdl/catalog/book/electronic_evidence.

¹⁸ Mason, S., Seng., D., *Electronic Evidence*, (4th edition, Institute of Advanced Legal Studies for the SAS Humanities Digital Library, School of Advanced Study, University of London, 2017), 9.19 and 9.109.

only just now seeing some evolution toward making this a reality.

The initial 2003 amendment to article 1317 of the Belgian Civil Code aimed to enable authentic instruments to be drafted in a dematerialized form, meaning by the use of electronic means and signed by an electronic signature.²⁷ However, a Royal Decree was needed to define a number of practical rules for this to be effective. That Royal Decree was never adopted.

A second attempt was made in 2009, when the legislator added that a Notary Deed Database would serve as the authentic source for dematerialized notary deeds.²⁸ That database was also never put into practice.

A third attempt followed in 2016 and 2017, when the legislator determined that dematerialized notary deeds would need to be signed using a qualified electronic signature. Moreover, the qualification of the persons signing the deed would need to be cross-checked using an authentic database.²⁹ Once more, it appeared that this change would remain purely theoretical. While work continues behind the scene, it is, as of 2019, still only possible to view notary deeds in the online platform MyMinfin, though this serves only as reference without legal value.

New legislation

Article 8.1 (5) NBCC defines an authentic instrument as:

een geschrift dat in de wettelijke vorm is verleden voor een openbare of ministerieel ambtenaar die de bevoegdheid en hoedanigheid heeft om te instrumenteren.

a document that has been legally drawn up before a public or ministerial official who has the authority and capacity to act.³⁰

This definition is taken from the old article 1317 BCC. The new article 8.15 NBCC ensures that an authentic instrument may be on any carrier, as long as it is made and preserved according to certain requirements, which are to be defined by a Royal Decree. The notarial instruments in dematerialized form, however, should be drawn up and kept in accordance with the Act of 16 March 1803 regulating the office of the civil-law notary. The 'Notariële Aktebank' (Notary Deed Database) then serves as an authentic source for the instruments included therein. A qualified electronic signature is required for authentic instruments that are made by a public or ministerial official in dematerialized form. As previously established in article 1317 BCC, it must be possible to check the status of the signatory by an authentic database determined by law.

Article 8.16 NBCC provides that where an instrument cannot be considered an authentic instrument, due to, for example, a lack of competence by the official or a defect in form, it will still count as a private instrument if it has been signed by the contracting parties, which is the same as the current article 1318 BCC. Also, the content of article 1319 BCC can be found back in article 8.17 NBCC, and provides that the probative value of an authentic instrument is such that, providing it has not been charged as false, it is considered a proof of what the public or ministerial official has personally done or determined, without the parties being able to depart from it. Any agreement that deviates from this rule is void.³¹ The new article is inspired by article 1371 of the French civil code, in that it restricts the probative value to what the public or ministerial official has personally done or determined.³²

²⁷ Parliamentary question of 24 February 2001, de Fabienne Winckel, 'Senaat Schriftelijke vraag nr. 5 – 1485', (21 February 2011) <https://www.senate.be/www/?MIval=/Vragen/SVPrint&LEG=5&NR=1485&LANG=nl>.

²⁸ Article 25 Act of 6 May 2009 holding diverse provisions, *Belgian State Gazette* 19 May 2009.

²⁹ Article 129 Act of 4 May 2016 holding internment and diverse provisions in the field of justice, *Belgian State Gazette* 13 May 2016; article 199 Act of 6 July 2017 holding simplification, harmonization, informatization and modernization of provisions of civil law and of civil procedural law, as well as of the notary and holding diverse provisions concerning justice, *Belgian State Gazette* 24 July 2017.

³⁰ All translations into English are by the authors.

³¹ Article 8.17 NBCC, original text: "Een authentieke akte levert tot betichting van valsheid een bewijs op van wat de openbare of ministeriële ambtenaar persoonlijk heeft verricht of vastgesteld, zonder dat het voor partijen mogelijk is om daarvan af te wijken. Iedere overeenkomst die afwijkt van deze regel is nietig.

In geval van betichting van valsheid kan de rechter de uitvoering van de akte schorsen."

³² Explanatory Memorandum of the Draft Bill including Book 8 in the New Civil Code ('Wetsontwerp houdende invoeging van Boek 8 "Bewijs" in het nieuw Burgerlijk Wetboek') (DOC 54 3349/001, 31.10.2018), p.27 <http://www.dekamer.be/FLWB/PDF/54/3349/54K3349001.pdf>

Whether the changes solve the problems

The new legislation closely follows the old article 1317 BCC, and therefore, until the required Royal Decree and the database become operational, the old problem persists. The new legislation at least clarifies that for the notary, the requirements for preservation of documents can be found in the Act of 16 March 1803 regulating the office of the civil-law notary, and that the 'Notariële Aktebank' serves as an authentic source. However, although already first envisaged in 2009,³³ neither the Royal Decree nor the Notariële Aktebank (NABAN) has become operational. The reference to the Royal Decree and the database are retained, which raises the hope that there will be an impetus to put the new legislation into effect. Indeed, at least regarding NABAN, further pressure is added with the evolving legislative reforms, such as the introduction of the Act of 5 May 2019 where the final version of the title specifically includes reference to 'Notariële Aktebank'.³⁴ According to the Explanatory memorandum of that law, this database, *once operational*, will be the authentic source for all Belgian notarial deeds.³⁵

Private instrument

Old legislation

While authentic instruments require the intervention of a public official, private instruments can be drafted and signed between the parties themselves.³⁶ There

are less stringent formal requirements than with an authentic instrument, but there are still a few points to be considered.

First, the private instrument must document legal acts as part of its disposal.³⁷ Second, the private instrument must be appropriated by whom against it is invoked. This means that there must be an intentional element in accepting the content of the instrument.³⁸ Third, the private instrument must be duly signed.³⁹ The signature serves as identification of the signatory, as appropriation of the document's contents, and as means to safeguard the document's integrity,⁴⁰ although some authors dispute this last characteristic.⁴¹

Although in principle the private instrument does not need to correspond to specific formalities, there are two exceptions.

First, is when the private instrument establishes mutual obligations: there must be as many 'originals' of the document as there are parties with a discernible interest.⁴² Moreover, each of such 'originals' must mention how many 'originals' there are. This is a confusing peculiarity of Belgian law: the Belgian Civil Code considers each duly signed document as an original, meaning that there can – and even must – be multiple 'originals'. This is of course a complete deviation from the accepted usage and meaning of the word 'original', as introduced above in the section on originality.

³³ Introduction of a 'future' article 13 in the Act of 16 March 1803 Law of 25 ventôse year XI on the notary office ('Wet van 25 ventôse jaar XI op het notarisambt'), by the Act of 6 May 2009 holding diverse provisions (Wet houdende diverse bepalingen), *Belgian State Gazette* 19 May 2009.

³⁴ Act of 5 May 2019 containing various provisions on computerization of the judiciary, modernization of the status of judges in corporate matters and on the notarial deed bank ('Wet van 5 mei 2019 houdende diverse bepalingen inzake informatisering van Justitie, modernisering van het statuut van rechters in ondernemingszaken en inzake de notariële aktebank'), *Belgian State Gazette* 19 juni 2019.

³⁵ Belgian House of Representatives, 'Bill containing Various Provisions on Computerization of Justice and Modernization of the Statute for Judges in Corporate Affairs' ('Wetsvoorstel Houdende Diverse Bepalingen Inzake Informatisering van Justitie En Modernisering van Het Statuut van Rechters in Ondernemingszaken'), (DOC 54 3549/001 14 February 2019), p.79

<https://www.dekamer.be/FLWB/PDF/54/3549/54K3549001.pdf>.

³⁶ Van Gerven, W., Covemaker, S., *Verbintenissenrecht*, (Leuven: Acco, 2006), p.675; Minjauw, H., Vandendriessche, J., 'Titel VI. Het bewijsrecht in burgerlijke zaken', in: *Bestendig Handboek Verbintenissenrecht*, ed. by R. Roodhooft, (Mechelen: Kluwer, 2008), p.VI.3-21; Dumortier, J., *ICT-Recht*, Leuven: Acco, 2010), p.128.

³⁷ De Page, H., *Traité élémentaire de droit civil Belge, Tome Troisième (Les Obligations)*, (Brussel: Bruylant, 1967), pp.788 – 790.

³⁸ Van Eecke, P., 'Naar een juridische status voor de elektronische handtekening: Een rol voor de handtekening in de informatiemaatschappij?', (doctoral dissertation, KU Leuven, 2004), p.324.

³⁹ Cornelis, L., *Algemene theorie van de verbintenissen*, (Antwerpen: Intersentia, 2000), p.221; De Page, H., *Traité élémentaire de droit civil Belge, Tome Troisième (Les Obligations)*, (Brussel: Bruylant, 1967), pp.756 and 795.

⁴⁰ Van Eecke, P., 'Naar een juridische status voor de elektronische handtekening: Een rol voor de handtekening in de informatiemaatschappij?', (doctoral dissertation, KU Leuven, 2004), pp.322 and following.

⁴¹ See, for instance: Vandendriessche, J., 'An overview of some recent case law in Belgium in relation to electronic signatures', 7 *Digital Evidence and Electronic Signature Law Review* (2010), 90-100; Montero, E., 'La signature électronique au banc de la jurisprudence', *Revue internationale du droit des affaires* (2011), 231-239.

⁴² Article 1325 Belgian Civil Code. Minjauw, H., Vandendriessche, J., 'Titel VI. Het bewijsrecht in burgerlijke zaken', in: *Bestendig Handboek Verbintenissenrecht*, ed. by R. Roodhooft, (Mechelen: Kluwer, 2008), p.VI.3-24.

Second, if there is a unilateral promise of payment, the private instrument should be fully handwritten by the signatory, or it could be typewritten, but at least the sum of the payment promise should be written out in full in manuscript, and the signature preceded by a handwritten declaration of 'good for' or 'approved for'.⁴³

In terms of probative value, when these elements have been taken into account, the written and duly signed document can be considered as a private instrument. Counterproof against such instrument is possible, but is limited to another instrument or an oath or confession.⁴⁴ Between parties, a private instrument has principally the same probative value as an authentic instrument. Third parties, however, can provide counterproof by all means.⁴⁵

The problems

Legal doctrine has, for a long time, accepted electronic information as writing.⁴⁶ Moreover, thanks to the introduction of electronic signatures, it is clear that private instruments can be fully produced and signed electronically.⁴⁷

However, this in itself does not resolve the formal requirements of articles 1325 and 1326 of the Belgian Civil Code. There must, therefore, still be as many 'originals' as there are parties with discernible interest in the case of mutual agreements. But, as noted before, the whole idea of an original – and certainly that of multiple 'originals' makes little to no sense in the context of electronic information.

⁴³ Article 1326 Belgian Civil Code; Minjauw, H., Vandendriessche, J., 'Titel VI. Het bewijsrecht in burgerlijke zaken', in: *Bestendig Handboek Verbintenissenrecht*, ed. by R. Roodhooft, (Mechelen: Kluwer, 2008), p.VI.3-29.

⁴⁴ Minjauw, H., Vandendriessche, J., 'Titel VI. Het bewijsrecht in burgerlijke zaken', in: *Bestendig Handboek Verbintenissenrecht*, ed. by R. Roodhooft, (Mechelen: Kluwer, 2008), p.VI.3-35.

⁴⁵ Minjauw, H., Vandendriessche, J., 'Titel VI. Het bewijsrecht in burgerlijke zaken', in: *Bestendig Handboek Verbintenissenrecht*, ed. by R. Roodhooft, (Mechelen: Kluwer, 2008), p.VI.3-41; Van Gerven, W., Covemaker, S., *Verbintenissenrecht*, (Leuven: Acco, 2006), p.675.

⁴⁶ Van Eecke, P. 'De elektronische handtekening in het recht', *Tijdschrift voor Belgisch Handelsrecht*, 4 (2009), 322-354, pp.333-334; article 16 §2 Act of 11 March 2003, current article XII.15 §2 Code of Economic Law.

⁴⁷ Van Eecke, P. 'De elektronische handtekening in het recht', *Tijdschrift voor Belgisch Handelsrecht*, 4 (2009), 322-354, p.339; Storme, M.E., 'De invoering van de elektronische handtekening in ons bewijsrecht', *Rechtskundig Weekblad*, 64, 41 (2001) 1505-1525, p.1514; Stijns, S., *Leerboek Verbintenissenrecht Boek 2*, (Brugge: Die Keure, 2009), pp.168-170.

When considering the provisions of article 1326 of the Belgian Civil Code, it can be said that the requirement to include handwritten statements could be fulfilled electronically in a functional equivalent way.⁴⁸

However, not all authors are in favour of allowing the application of functional equivalence in this case.⁴⁹ If functional equivalence is not accepted, it will be necessary for private instruments to continue to be concluded on paper.

New legislation

Article 8.1 (4) NBCC defines a private instrument as:

een geschrift dat rechtsgevolgen beoogt, dat door de partij(en) ondertekend wordt met de bedoeling om met de inhoud ervan in te stemmen, en dat geen authentieke akte is.

a document that seeks legal effects, which is signed by the party/parties with the intention of agreeing to its content, and which is not an authentic instrument.

The legal probative value of a private instrument is such that it provides proof between the signatories of the private instrument, and with regard to their heirs and assignees (article 8.18 NBCC). While the old article 1322 BCC refers to the probative value of an authentic instrument, the new article 8.18 NBCC does not use such a comparison but simply states that the instrument provides proof between the signatories.

Article 1323 BCC can be found in article 8.19 NBCC, which states that:

Tenzij de wet anders bepaalt, kan de partij tegen wie men zich erop beroept, haar handschrift of haar handtekening evenwel ontkennen. De erfgenamen of rechtverkrijgenden van een partij kunnen het handschrift of de handtekening van hun rechtsvoorganger eveneens ontkennen of verklaren dat zij dat handschrift of die handtekening niet kennen.

unless the law provides otherwise, the party against whom it is invoked may deny its handwriting or signature. The heirs or

⁴⁸ Minjauw, H., Vandendriessche, J., 'Titel VI. Het bewijsrecht in burgerlijke zaken', in: *Bestendig Handboek Verbintenissenrecht*, ed. by R. Roodhooft, (Mechelen: Kluwer, 2008), p.VI.3-29.

⁴⁹ Van Eecke, P. 'De elektronische handtekening in het recht', *Tijdschrift voor Belgisch Handelsrecht*, 4 (2009), pp.322-354, p.341.

successors in title of a party may also deny the handwriting or signature of their legal predecessor or declare that they do not know that handwriting or signature.

Article 1324 BCC is now included in article 8.19 NBCC, which establishes that in circumstances where the signature is denied, the authenticity must be examined and, in contrast to article 1324 BCC, specifies that this must be done in accordance with the provisions of article 883 (and following) of the Judicial Code (Gerechtelijk Wetboek).

Also, new Book 8 retains the provisions of article 1325 BCC, which provides, in case of mutual obligations contained in the instrument, that there must be as many 'originals' as there are parties with a discernible interest.⁵⁰ However, article 8.20 NBCC explains that the requirement of multiple 'originals' is deemed to be fulfilled for the contracts in electronic form when the document is drawn up in accordance with article 8.1 (1) NBCC, which defines 'writing', and when the process allows each party to possess or to have access to a written copy. The requirements of multiple 'originals', which need to state how many 'originals' exist, is not applicable in case of contracts concluded via correspondence, whether by mail or electronic correspondence (article 8.20 NBCC).

Regarding the requirement for unilateral promises of payment, it is possible that new article 8.21 NBCC drew inspiration from article 1376 of the French Civil Code.⁵¹ Article 8.21 NBCC now states:

Ongeacht de waarde van de rechtshandeling en zonder afbreuk te doen aan de uitzonderingen bepaald in de wet, levert de eenzijdige verbintenis om een geldsom te betalen of een zekere hoeveelheid vervangbare zaken te leveren enkel een bewijs op indien zij de handtekening bevat van de persoon die zich verbindt, alsmede de vermelding, door hemzelf geschreven, van de som of van de hoeveelheid voluit in letters

uitgedrukt. Iedere overeenkomst die afwijkt van deze regel is nietig.

regardless of the value of the legal act and without prejudice regarding the exceptions stipulated by law, provides the unilateral promise to pay a sum of money or to deliver a certain amount replaceable items only proof if it contains the signature of the person who undertakes the obligation and the indication, written by himself, of the sum or the quantity expressed in full in letters. Any agreement that deviates from this rule is invalid.

The requirement that it needs to include the wording 'good for' or 'approved for' has been deleted. However, it was decided to keep a certain formalism in order to let a party think about what they are doing and to protect the debtor from signing IOUs where the amount could be amended later or where the debtor is not aware of the full amount of the debt.⁵² The 'exceptions stipulated by law' to which the article refers to are in particular article 2043quinquies, §3 of the BCC, which includes a special clause for free bail.⁵³

Another change regarding private instruments can be found in article 8.22 NBCC regarding a fixed date of a private instrument. Article 8.22 NBCC provides that with regard to third parties, a private deed does not receive a fixed date (a date which can be invoked towards third parties) other than:

- (1) from the day on which it was registered, or
- (2) from the day on which the main content thereof is established in an authentic instrument, or
- (3) from the day on which at least one of the parties can no longer change the deed or the date thereof, among other things as a result of the death of one of them.

As shown in the explanatory memorandum, this provision is inspired by article 1328 BCC, which in

⁵⁰ Article 1325 Belgian Civil Code. See also Minjauw, H., Vandendriessche, J., 'Titel VI. Het bewijsrecht in burgerlijke zaken', in: *Bestendig Handboek Verbintenissenrecht*, ed. by R. Roodhooft, (Mechelen: Kluwer, 2008), p.VI.3-24.

⁵¹ Explanatory Memorandum of the Draft Bill including Book 8 in the New Civil Code ('Wetsontwerp houdende invoeging van Boek 8 "Bewijs" in het nieuw Burgerlijk Wetboek') (DOC 54 3349/001, 31.10.2018), p.29
<http://www.dekamer.be/FLWB/PDF/54/3349/54K3349001.pdf>

⁵² Explanatory Memorandum of the Draft Bill including Book 8 in the New Civil Code ('Wetsontwerp houdende invoeging van Boek 8 "Bewijs" in het nieuw Burgerlijk Wetboek') (DOC 54 3349/001, 31.10.2018), p.30
<http://www.dekamer.be/FLWB/PDF/54/3349/54K3349001.pdf>

⁵³ Explanatory Memorandum of the Draft Bill including Book 8 in the New Civil Code ('Wetsontwerp houdende invoeging van Boek 8 "Bewijs" in het nieuw Burgerlijk Wetboek') (DOC 54 3349/001, 31.10.2018), p.30
<http://www.dekamer.be/FLWB/PDF/54/3349/54K3349001.pdf>

itself was based on old jurisprudence of the French Court of Cassation.⁵⁴ Since Belgian academics had criticized the limited character of article 1328 BCC, the scope of application of article 8.22 NBCC has been broadened to clearly include the case in which either (i) parties are not able to change the instrument anymore (e.g. due to death of one party, or illness), or (ii) when the date has been registered by government or a public official (authentic instrument).⁵⁵ The qualified electronic timestamp as defined by the eIDAS Regulation has not been included since its legal effect only entails ‘the presumption of the accuracy of the date and the time it indicates and the integrity of the data to which the date and time are bound’,⁵⁶ which is not the same as a fixed date.⁵⁷

Similar to article 8.16 NBCC and article 1318 BCC before it, article 8.20 NBCC states that in case a private instrument does not fulfil all requirements, it might still be considered as beginning of evidence in writing if it fulfils the requirements for it (as explained further below).

Whether the changes solve the problems

The requirement (article 1325 BCC) that in case of mutual obligations contained in the instrument there must be as many ‘originals’ as there are parties with a discernible interest,⁵⁸ can, in essence, be found in the new Book 8. Moreover, article 8.20 NBCC clarifies that the requirement of multiple ‘originals’ is deemed to

⁵⁴ Belgian House of Representatives, Draft Bill including Book 8 in the New Civil Code (‘Wetsontwerp houdende invoeging van Boek 8 “Bewijs” in het nieuw Burgerlijk Wetboek’) (DOC 54 3349/001, 31 October 2018), p.30 <http://www.dekamer.be/FLWB/PDF/54/3349/54K3349001.pdf>

⁵⁵ Belgian House of Representatives, Draft Bill including Book 8 in the New Civil Code (‘Wetsontwerp houdende invoeging van Boek 8 “Bewijs” in het nieuw Burgerlijk Wetboek’) (DOC 54 3349/001, 31 October 2018), p.31 <http://www.dekamer.be/FLWB/PDF/54/3349/54K3349001.pdf>

⁵⁶ Article 41 (2) Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on Electronic Identification and Trust Services for Electronic Transactions in the Internal Market and Repealing Directive 1999/93/EC, *OJ L 257*, 28.8.2014, p. 73–114 (eIDAS Regulation).

⁵⁷ Belgian House of Representatives, Draft Bill including Book 8 in the New Civil Code (‘Wetsontwerp houdende invoeging van Boek 8 “Bewijs” in het nieuw Burgerlijk Wetboek’) (DOC 54 3349/001, 31 October 2018), p.31 <http://www.dekamer.be/FLWB/PDF/54/3349/54K3349001.pdf>

⁵⁸ Article 1325 Belgian Civil Code. See also Minjauw, H., Vandendriessche, J., ‘Titel VI. Het bewijsrecht in burgerlijke zaken’, in: *Bestendig Handboek Verbintenissenrecht*, ed. by R. Roodhooft, (Mechelen: Kluwer, 2008), p.VI.3-24.

be fulfilled for contract in electronic form when the document is drawn up in accordance with article 8.1 (1) NBCC, the definition of writing, and when the process allows each party to have or to have access to a written copy. This is an important clarification, which solves the previously existing uncertainties regarding the assessment of electronic documents as copies or ‘originals’ and aligns the legislation with the existing jurisprudence. Furthermore, article 8.20 NBCC explicitly states that the requirements of multiple ‘originals’, which need to state how many ‘originals’ exist, is not applicable in case of contracts concluded via correspondence, whether by mail or electronic correspondence. While this solves the matter of originality in terms of electronic information, it still leaves the peculiarity of there being multiple ‘originals’ in non-electronic documents.

Regarding the requirement for unilateral promises of payment, the old legislation provided that the private instrument should be fully handwritten by the signatory, or at least contain the sum of the payment promise written out in full in letters and the signature preceded by a handwritten declaration of ‘good for’ or ‘approved for’.⁵⁹ This requirement is retained in article 8.21 NBCC. This is because, even though it is no longer necessary for the instrument to be fully handwritten nor to include the wording ‘good for’ or ‘approved for’, it still requires the signature and the indication, written by that person, of the sum or the quantity expressed in full in letters.⁶⁰

However, the change here is not in the wording of the article, but in the clear definition of writing and signature provided for the new Book 8. The new Book 8 clarifies certain notions that were not defined in the previous legislation. Book 8 includes a technology neutral definition of writing in Article 8.1 (1), which entails that writing constitutes:

⁵⁹ Article 1326 Belgian Civil Code; Minjauw, H., Vandendriessche, J., ‘Titel VI. Het bewijsrecht in burgerlijke zaken’, in: *Bestendig Handboek Verbintenissenrecht*, ed. by R. Roodhooft, (Mechelen: Kluwer, 2008), p.VI.3-29.

⁶⁰ Article 8.21 NBCC, translation by authors. Original text: Ongeacht de waarde van de rechtshandeling en zonder afbreuk te doen aan de uitzonderingen bepaald in de wet, levert de eenzijdige verbintenis om een geldsom te betalen of een zekere hoeveelheid vervangbare zaken te leveren enkel een bewijs op indien zij de handtekening bevat van de persoon die zich verbindt, alsmede de vermelding, door hemzelf geschreven, van de som of van de hoeveelheid voluit in letters uitgedrukt. Iedere overeenkomst die afwijkt van deze regel is nietig.

een geheel van alfabetische tekens of van enige andere verstaanbare tekens aangebracht op een drager die de mogelijkheid biedt toegang ertoe te hebben gedurende een periode die is afgestemd op het doel waarvoor de informatie kan dienen en waarbij de integriteit ervan wordt beschermd, welke ook de drager en de transmissiemogelijkheden zijn.

a set of alphabetical signs or of any other intelligible signs applied to a carrier that offers the possibility of access to it for a period that is attuned to the purpose for which the information can be used and where its integrity is protected, independently of the carrier or the transmission options.

Until recently, there was no definition of writing in Belgian legislation.⁶¹ Belgian case law did provide some guidance on what can be considered as 'writing', although the case law in Belgium has lesser precedential value than would be the case in a common law country.⁶² The new definition is inspired by article XII.15 §2 of the Code of Economic Law (Wetboek van Economisch recht), which was amended in 2018 by the Digital Act II.⁶³ The main requirements are that the information needs to be preserved in such a way to be understandable and to have a certain stability and integrity.⁶⁴

A signature did also until now not have a general definition in the Belgian legislation. A signature is now defined in a technology neutral manner as:

een teken of een opeenvolging van tekens, aangebracht met de hand, elektronisch of via ieder ander procedé, waarmee een persoon zich identificeert en waaruit zijn wilsuiting blijkt.

a sign or a sequence of signs, applied by hand, electronically or by any other process, with which a person identifies him/herself and which indicates his/her expression of will.⁶⁵

The definition of signature refers only to two of the basic functions of the signature: the possibility to ascribe the signature to a person, and the expression of a will with regard to the signed document.⁶⁶ While attesting to the integrity of the signed information is also an important function of a signature, this function is not specifically addressed by the definition of article 8.1(2) NBCC, but is included in the definition of writing in article 8.1 (1) NBCC. However, signatures can have many more functions, for instance, as identified by Van Eecke for Belgium, the security (beveiliging) and ritualistic function,⁶⁷ and by Mason from a more international point of view, also the recordkeeping, the cautionary, the channelling and the protective function.⁶⁸ The new Book 8 simply refers to the definition of electronic signatures in the eIDAS Regulation.⁶⁹ The definition of an electronic signature provided for in article 1322 BCC will be deleted.⁷⁰

Since the definition of writing also includes electronic writing, it can be argued that, provided that the person who promises the payment has written it, it

⁶¹ Benoit Samyn, *Privaatrechtelijk Bewijs* (Gent: Story Publishers, 2012), p.203.

⁶² For an overview of such case law, see: Minjauw, H., Vandendriessche, J., 'Titel VI. Het bewijsrecht in burgerlijke zaken', in: *Bestendig Handboek Verbintenissenrecht*, ed. by R. Roodhooft, (Mechelen: Kluwer, 2008), p.VI.3-9 and following.

⁶³ Act of 20 September 2018 on the harmonization of the concepts of electronic signature and durable data carrier and the removal of obstacles to the conclusion of contracts by electronic means ('Wet van 20 september 2018 tot harmonisatie van de begrippen elektronische handtekening en duurzame gegevensdrager en tot opheffing van de belemmeringen voor het sluiten van overeenkomsten langs elektronische weg'), *Belgian State Gazette* 10 October 2018.

⁶⁴ Belgian House of Representatives, Draft Bill including Book 8 in the New Civil Code ('Wetsontwerp houdende invoeging van Boek 8 "Bewijs" in het nieuw Burgerlijk Wetboek') (DOC 54 3349/001, 31 October 2018), p.6 <http://www.dekamer.be/FLWB/PDF/54/3349/54K3349001.pdf>

⁶⁵ Article 8.1. (2) NBCC

⁶⁶ Belgian House of Representatives, Draft Bill including Book 8 in the New Civil Code ('Wetsontwerp houdende invoeging van Boek 8 "Bewijs" in het nieuw Burgerlijk Wetboek') (DOC 54 3349/001, 31 October 2018), p.6 <http://www.dekamer.be/FLWB/PDF/54/3349/54K3349001.pdf>

⁶⁷ Van Eecke, P., 'Naar een juridische status voor de elektronische handtekening: Een rol voor de handtekening in de informatiemaatschappij?', (doctoral dissertation, KU Leuven, 2004), pp.224-225.

⁶⁸ Mason, S., *Electronic Signatures in Law*, (4th edn, Institute of Advanced Legal Studies for the SAS Humanities Digital Library, School of Advanced Study, University of London, 2016), 1.16-1.24, <https://humanities-digital-library.org/index.php/hdl/catalog/book/electronic-signatures>.

⁶⁹ Article 8.1 (3) NBCC.

⁷⁰ Explanatory Memorandum of the Draft Bill including Book 8 in the New Civil Code ('Wetsontwerp houdende invoeging van Boek 8 "Bewijs" in het nieuw Burgerlijk Wetboek') (DOC 54 3349/001, 31.10.2018), p.7 <http://www.dekamer.be/FLWB/PDF/54/3349/54K3349001.pdf>

does not matter whether it is handwritten or electronically written. The main aim of the provision, as explained in the preparatory discussions, is to let the party think about what they are doing and to protect the debtor from signing IOUs where the amount could be amended later or where the debtor is not aware of the full amount of the debt.⁷¹ This purpose can also be fulfilled when electronic documents and signatures are used, which is now clearly possible under the new definitions, and therefore this problem should be solved.

Beginning of evidence in writing

Old legislation

When a document does not comply with the requirements of a private or authentic instrument,⁷² it could still be regarded as the beginning of evidence in writing. This form of evidence can be considered as ‘any written instrument emanating from against whom it is invoked – or by his representative – and which can make the alleged fact probable’.⁷³ Any kind of written document can be taken into consideration for this.⁷⁴ It does, however, constitute incomplete evidence, as it must be supplemented by other means of evidence, such as witnesses or presumptions.⁷⁵

While the beginning of evidence in writing is less strictly regulated than private and authentic acts, there are still a number of requirements to be fulfilled. First, there must be a form of written document.⁷⁶ However, it is not a requirement that the

⁷¹ Explanatory Memorandum of the Draft Bill including Book 8 in the New Civil Code (‘Wetsontwerp houdende invoering van Boek 8 “Bewijs” in het nieuw Burgerlijk Wetboek’) (DOC 54 3349/001, 31.10.2018), p.30, <http://www.dekamer.be/FLWB/PDF/54/3349/54K3349001.pdf>

⁷² An example is a letter or an e-mail that has not been signed. Also an unsigned copy of a document can be considered as the beginning of evidence in writing.

⁷³ Article 1347 Belgian Civil Code. According to established jurisprudence, this article must be interpreted as meaning that the instrument must emanate from against whom it – and its alleged facts – is invoked. Cass. 29 September 1956, pp.53-55 <https://cass.justitie.belgium.be/cass/ac/1956-1.pdf>.

⁷⁴ Cornelis, L., *Algemene theorie van de verbintenissen*, (Antwerpen: Intersentia, 2000), pp.222-223; Minjauw, H., Vandendriessche, J., ‘Titel VI. Het bewijsrecht in burgerlijke zaken’, in: *Bestendig Handboek Verbintenissenrecht*, ed. by R. Roodhooft, (Mechelen: Kluwer, 2008), p.VI.3-9.

⁷⁵ De Page, H., *Traité élémentaire de droit civil Belge, Tome Troisième (Les Obligations)*, (Brussel: Bruylant, 1967), p.911.

⁷⁶ Cornelis, L., *Algemene theorie van de verbintenissen*, (Antwerpen: Intersentia, 2000), pp., 222-223; Moulon Beernaert, F., Gaudy, A., ‘Partie VI. Le droit de la preuve –

document is handwritten or signed.⁷⁷ Second, the document must emanate from or be appropriated by the party against whom it is invoked.⁷⁸ Such appropriation can be established by any means, be it explicitly or implicitly.⁷⁹ Third, the document must make the alleged facts probable, and not just possible.⁸⁰

As noted, the beginning of evidence in writing is not complete evidence on its own. It must therefore be supplemented by other means of evidence.⁸¹ Together with any supplemental evidence, the document must make the alleged fact probable.⁸² Supplemental evidence can include witness statements and presumptions.⁸³

The problems

The qualification of electronic information as the beginning of evidence in writing was especially important before the introduction of the EU rules on electronic signatures, when not all Belgian judges accepted that electronic information could be signed. Even today, it is still possible that a certain electronic signature is not considered as valid by the judge because it does not fulfil the necessary criteria.⁸⁴ One example is the simple e-mail signature, being the text

La prééminence de la preuve écrite’, in *Obligations. Traité théorique et pratique*, (Brussel: Kluwer, 2006), p.VI.4.1-8.

⁷⁷ Cornelis, L., *Algemene theorie van de verbintenissen*, (Antwerpen: Intersentia, 2000), pp., 222-223; Moulon Beernaert, F., Gaudy, A., ‘Partie VI. Le droit de la preuve – La prééminence de la preuve écrite’, in *Obligations. Traité théorique et pratique*, (Brussel: Kluwer, 2006), p.VI.4.1 – 8.

⁷⁸ Article 1347 Belgian Civil Code.

⁷⁹ Minjauw, H., Vandendriessche, J., ‘Titel VI. Het bewijsrecht in burgerlijke zaken’, in: *Bestendig Handboek Verbintenissenrecht*, ed. by R. Roodhooft, (Mechelen: Kluwer, 2008), p.VI.3-11.

⁸⁰ Cornelis, L., *Algemene theorie van de verbintenissen*, (Antwerpen: Intersentia, 2000), pp.223; Moulon Beernaert, F., Gaudy, A., ‘Partie VI. Le droit de la preuve – La prééminence de la preuve écrite’, in *Obligations. Traité théorique et pratique*, (Brussel: Kluwer, 2006), pp.VI.4.1 – 8-9.

⁸¹ Minjauw, H., Vandendriessche, J., ‘Titel VI. Het bewijsrecht in burgerlijke zaken’, in: *Bestendig Handboek Verbintenissenrecht*, ed. by R. Roodhooft, (Mechelen: Kluwer, 2008), p.VI.3-8-9; Cornelis, L., *Algemene theorie van de verbintenissen*, (Antwerpen: Intersentia, 2000), p.223.

⁸² Stijns, S., *Leerboek Verbintenissenrecht Boek 2*, (Brugge: Die Keure, 2009), p.182.

⁸³ Van Gerven, W., Covemaker, S., *Verbintenissenrecht*, (Leuven: Acco, 2006), p.683; De Page, H., *Traité élémentaire de droit civil Belge, Tome Troisième (Les Obligations)*, (Brussel: Bruylant, 1967), p.920.

⁸⁴ Mason, S., *Electronic Signatures in Law*, (4th edn, Institute of Advanced Legal Studies for the SAS Humanities Digital Library, School of Advanced Study, University of London, 2016), 126.

underneath an e-mail message, which may cast doubts regarding the identity of the signer. For instance, it is possible that multiple people have access to an e-mail account or that the account was otherwise compromised. On most free e-mail services, it is not difficult to create an account in someone else's name. The system administrator could manipulate e-mails. Moreover, e-mail addresses can be spoofed, meaning that an e-mail appears to be sent by a particular address, but is actually sent by another address. In each of these cases, an e-mail signature can be included identifying another person than the one actually sending the message. As a result, while an e-mail signature can be considered as a simple electronic signature under EU and Belgian law, a judge could theoretically reject the validity of this type of signature for not sufficiently identifying the signatory. It should, of course, be clarified that this will only occur when at least one of the parties disputes the validity of the signature. Cases before Belgian courts where the validity of an e-mail signature was rejected mainly pivoted on elements other than the status of the signature status as a simple electronic signature.⁸⁵ Where an electronic signature of such nature is not recognized as a valid form of electronic signature, the electronic information cannot be considered as constituting a private instrument. In such case, the beginning of evidence in writing remains the contingency option when a higher probative qualification fails. It is important that there is a writing, which is appropriated by the person against whom it is invoked, and that it makes the alleged fact probable. However, as noted previously, the beginning of evidence in writing does not constitute complete proof and must therefore be supplemented with additional proof.

The main issue here lies in the appropriation. In some cases – relating to telegrams and telex messages –

⁸⁵ See, for instance: De Backer, S. 'Naam onder e-mail is elektronische ondertekening', *De Juristenkrant* Nr 78 (19 November 2003); Montero, E., 'A propos de la valeur probante des e-mails: note sous Hof van beroep te Gent (7de k. bis), 10/03/2008', *Revue internationale du droit des affaires* (2009), 316-319; Van Eecke, P., Verbrugge, E., 'Case translation: CSWARE bvba v Pepijn Descamps, 2007/AR/462, Ghent Court of Appeal, Chamber 7bis, 10 March 2008', 5 *Digital Evidence and Electronic Signature Law Review* (2008) 99-102; Van Eecke, P., Verbrugge, E., 'Case translation: AR n° 2002/71, Ghent Labour Court of Appeal (Bruges department, 7th chamber), 23 September 2003', 5 *Digital Evidence and Electronic Signature Law Review* (2008) 98.

appropriation failed as the authorship was insufficiently proven, while in other cases authorship was accepted.⁸⁶ This illustrates the importance of the need for a judge to understand the technology in a civil law jurisdictions. This matter is different in common law countries, where form is less important, and the focus is on the intention of the parties. A common law judge is therefore less dependent on legislation informing him of which types of (electronic) signatures should be accepted.⁸⁷

New legislation

Article 8.1 (7) NBCC refers to the beginning of evidence in writing as:

elk geschrift dat uitgaat van degene die een rechtshandeling betwist of van degene die hij vertegenwoordigt, en waardoor de aangevoerde rechtshandeling waarschijnlijk wordt gemaakt.

any document emanating from the person who disputes a legal act or from the person he represents, and which makes the legal act invoked likely to be made.

This definition is close to the old definition in article 1347 BCC, although the explanatory memorandum points to article 1362 of the French Code Civil.⁸⁸ Though the legislation regarding the beginning of evidence in writing has not really changed, what is interesting is a change regarding the burden of proof. Article 8.4 NBCC still provides for the old allocation of burden of proof, but states that in exceptional circumstances the judge can reallocate the burden of proof if in the circumstances it would not be unreasonable.⁸⁹

⁸⁶ Minjauw, H., Vandendriessche, J., 'Titel VI. Het bewijsrecht in burgerlijke zaken', in: *Bestendig Handboek Verbintenissenrecht*, ed. by R. Roodhooft, (Mechelen: Kluwer, 2008), p.VI.4-4; Mougnot, D., *Droit des obligations: la preuve*, (Brussel: Larcier, 2002), p.247.

⁸⁷ Mason, S., *Electronic Signatures in Law*, (4th edn, Institute of Advanced Legal Studies for the SAS Humanities Digital Library, School of Advanced Study, University of London, 2016), chapter 1. See also: Mason, S., *International Electronic Evidence*, (British Institute of International and Comparative Law, 2008).

⁸⁸ Belgian House of Representatives, Draft Bill including Book 8 in the New Civil Code ('Wetsontwerp houdende invoeging van Boek 8 "Bewijs" in het nieuw Burgerlijk Wetboek') (DOC 54 3349/001, 31 October 2018), p.9 <http://www.dekamer.be/FLWB/PDF/54/3349/54K3349001.pdf>.

⁸⁹ Article 8.4 NBCC: "[...] De rechter kan, bij een met bijzondere redenen omkleed vonnis, in het licht van

New Book 8 also includes rules on the standard of proof. Article 8.5 NBCC clarifies that the standard of proof is not scientific or absolute (100 per cent) certainty, but a reasonable degree of certainty.⁹⁰ At the same time, article 8.6 NBCC codifies the existing approach in the case law regarding the proof of negative facts. The party that has to prove the negative fact is not exempted from providing proof. However, in case of negative facts, demonstrating the probability of the fact is sufficient. This is the same for positive facts that, because of the nature of the fact, providing proof with a reasonable degree of certainty is not possible or would not be reasonable (e.g. to prove a theft).⁹¹

Whether the changes solve the problems

The issue of appropriation remains the same, meaning the approval and adoption of the content of a document by a party. As explained, it is important that there is a writing, which is appropriated by the person against whom it is invoked, however, in some cases appropriation failed as the authorship was insufficiently proven, while in other cases authorship was accepted.⁹² Appropriation usually happens via a signature, and the beginning of evidence in writing is usually not signed.

A more considerable change is that article 8.4 NBCC provides that in exceptional circumstances the judge can shift the burden of proof. Like the provisions regarding the standard of proof and the requirement to cooperate for the other party, in certain

circumstances a shift of the burden of proof could be useful. The Explanatory Memorandum provides examples of when the burden of proof could be shifted, for instance where there is a considerable imbalance between the parties, or in circumstances where the opposite party have the evidence in their possession but cannot be ordered to provide the evidence, such as where the evidence has disappeared.⁹³ In such cases, the judge can shift the burden of proof, whereas normally it would remain with the same party.

Regarding the shifting of the burden of proof, the Explanatory Memorandum mentions that a fear exists for arbitrariness in the decisions of judges, or even the failure to conform to the provisions of article 6 ECHR (right to a fair trial).⁹⁴ The Explanatory Memorandum explains that the change of the burden of proof is considered a 'safety valve' and should not be done without care.⁹⁵ The judge is only allowed to reallocate the burden of proof by using a special reasoned judgement when she has already ordered all useful investigative measures and has ensured that the parties cooperate in the taking of evidence, but failed to obtain sufficient evidence to support the proposition. In such a case it seems reasonable that any consequences that follow on from the doubts of the judge should fall to the party responsible, and according to the Explanatory Memorandum, it might even be necessary to consider the 'equality of arms principle' contained in article 6 ECHR.⁹⁶

uitzonderlijke omstandigheden, bepalen wie de bewijslast draagt wanneer de toepassing van de in de vorige leden opgelegde regels kennelijk onredelijk zou zijn. De rechter kan slechts gebruik maken van deze mogelijkheid wanneer hij alle nuttige onderzoeksmaatregelen heeft bevolen en erover gewaakt heeft dat de partijen meewerken aan de bewijsvoering, zonder op die manier voldoende bewijs te verkrijgen."

⁹⁰ Explanatory Memorandum of the Draft Bill including Book 8 in the New Civil Code ('Wetsontwerp houdende invoeging van Boek 8 "Bewijs" in het nieuw Burgerlijk Wetboek') (DOC 54 3349/001, 31.10.2018), p.16
<http://www.dekamer.be/FLWB/PDF/54/3349/54K3349001.pdf>

⁹¹ Explanatory Memorandum of the Draft Bill including Book 8 in the New Civil Code ('Wetsontwerp houdende invoeging van Boek 8 "Bewijs" in het nieuw Burgerlijk Wetboek') (DOC 54 3349/001, 31.10.2018), p.16
<http://www.dekamer.be/FLWB/PDF/54/3349/54K3349001.pdf>

⁹² Minjauw, H., Vandendriessche, J., 'Titel VI. Het bewijsrecht in burgerlijke zaken', in: *Bestendig Handboek Verbintenissenrecht*, ed. by R. Roodhooft, (Mechelen: Kluwer, 2008), p.VI.4-4; Mougenot, D., *Droit des obligations: la preuve*, (Brussel: Larcier, 2002), p.247.

⁹³ Explanatory Memorandum of the Draft Bill including Book 8 in the New Civil Code ('Wetsontwerp houdende invoeging van Boek 8 "Bewijs" in het nieuw Burgerlijk Wetboek') (DOC 54 3349/001, 31.10.2018), pp.14-15
<http://www.dekamer.be/FLWB/PDF/54/3349/54K3349001.pdf>

⁹⁴ Explanatory Memorandum of the Draft Bill including Book 8 in the New Civil Code ('Wetsontwerp houdende invoeging van Boek 8 "Bewijs" in het nieuw Burgerlijk Wetboek') (DOC 54 3349/001, 31.10.2018), p.15
<http://www.dekamer.be/FLWB/PDF/54/3349/54K3349001.pdf>

⁹⁵ Explanatory Memorandum of the Draft Bill including Book 8 in the New Civil Code ('Wetsontwerp houdende invoeging van Boek 8 "Bewijs" in het nieuw Burgerlijk Wetboek') (DOC 54 3349/001, 31.10.2018), p.14
<http://www.dekamer.be/FLWB/PDF/54/3349/54K3349001.pdf>

⁹⁶ Explanatory Memorandum of the Draft Bill including Book 8 in the New Civil Code ('Wetsontwerp houdende invoeging van Boek 8 "Bewijs" in het nieuw Burgerlijk Wetboek') (DOC 54 3349/001, 31.10.2018), pp.14-15
<http://www.dekamer.be/FLWB/PDF/54/3349/54K3349001.pdf>

Original or copy

Old legislation

As noted above, Belgian civil law accords a high probative value to original documents. Articles 1334 to 1336 of the Belgian Civil Code provide that transcripts and copies are accorded a lower probative value. Transcripts are principally handwritten, while copies are machine-produced, and unlike an original, transcripts and copies are generally not signed.⁹⁷ While current technologies allow for a completely faithful and reliable reproduction of the content of an original, it is the absence of a signature that denies them full probative value.⁹⁸ One exception to this is the hybrid electronic signature. This addition to the Belgian legislation on signatures allows an electronic signature to be reproduced in any equivalent form, provided that certain requirements are met. As a result, an electronically signed document can be printed on paper and, if those requirements are met, still be validly signed.⁹⁹ Moreover, deviations may be present in sectoral legislation.

Copies only provide evidence of what is included in the original document, insofar as the latter still exists.¹⁰⁰ The parties can always demand that the original be produced. Copies therefore only serve as reference to the original, and only insofar as their conformity with that original is not disputed.¹⁰¹ Without the original, a disputed copy can at most serve as presumption or beginning of evidence in writing.¹⁰² However, article 1335 of the Belgian Civil

Code provides for cases where the copy can still serve when the original is not available.

The probative value of copies is therefore limited. They form incomplete evidence and must be supplemented with additional evidence. Nevertheless, in 2016 article 1334 of the Belgian Civil Code was amended, adding that when the original no longer exists, a digital copy can have the same probative value as the private instrument of which it – barring proof to the contrary – is presumed to be a reliable and durable copy if produced by means of a qualified electronic archival service.¹⁰³

The problems

As already noted above, the nature of electronic information makes it difficult to apply the original-copy dichotomy in this context. While intended as a means to protect parties against inferior copies of their legally relevant documents, it is clear today that electronic means of reproduction can be fully reliable and trustworthy. It is therefore necessary to reassess whether electronically signed information should not be given the same probative value as an original paper document – even if it is not technically possible to truly consider such electronic information as original.

While the 2016 amendment to article 1334 of the Belgian Civil Code permits a digital copy to gain full probative value when the paper-based original is lost, the requirement that it must be produced by means of a qualified electronic archival service makes this a fairly onerous procedure. In most cases, the parties will only have a simple self-produced scan of the document. This does not fulfil the requirement and

⁹⁷ Mougenot, D., *Droit des obligations: la preuve*, (Brussel: Larcier, 2002), p.248; De Page, H., *Traité élémentaire de droit civil Belge, Tome Troisième (Les Obligations)*, (Brussel: Bruylant, 1967), p.856; Minjauw, H., Vandendriessche, J., 'Titel VI. Het bewijsrecht in burgerlijke zaken', in: *Bestendig Handboek Verbintenissenrecht*, ed. by R. Roodhooft, (Mechelen: Kluwer, 2008), p.VI.3-89.

⁹⁸ Cornelis, L., *Algemene theorie van de verbintenis*, (Antwerpen: Intersentia, 2000), p.225; Wagner, K., 'Recente ontwikkelingen met betrekking tot het bewijs in burgerlijke zaken', in: *Actualia Gerechdelijk Recht*, ed. by Serrus, D. (Gent: Larcier, 2008), p.181.

⁹⁹ Vandendriessche, J., 'Hybrid signatures under Belgian law', 9 *Digital Evidence and Electronic Signature Law Review* (2012), 79-80.

¹⁰⁰ Article 1334 Belgian Civil Code.

¹⁰¹ Minjauw, H., Vandendriessche, J., 'Titel VI. Het bewijsrecht in burgerlijke zaken', in: *Bestendig Handboek Verbintenissenrecht*, ed. by R. Roodhooft, (Mechelen: Kluwer, 2008), p.VI.3-90.

¹⁰² Cornelis, L., *Algemene theorie van de verbintenis*, (Antwerpen: Intersentia, 2000), p.225; Mons 27 February 2007, note by Mougenot, D., 'Le statut probatoire de la

photocopie: nuageux avec éclaircies', *Tijdschrift Voor Belgisch Burgerlijk Recht*, 8 (2007), 470-475; Wagner, K., 'Recente ontwikkelingen met betrekking tot het bewijs in burgerlijke zaken', in: *Actualia Gerechdelijk Recht*, ed. by Serrus, D. (Gent: Larcier, 2008), p.183. Contra: Minjauw, H., Vandendriessche, J., 'Titel VI. Het bewijsrecht in burgerlijke zaken', in: *Bestendig Handboek Verbintenissenrecht*, ed. by R. Roodhooft, (Mechelen: Kluwer, 2008), p.VI.3-90; Mougenot, D., *Droit des obligations: la preuve*, (Brussel: Larcier, 2002), p.249.

¹⁰³ Article 34 Act of 21 July 2016 executing and supplementing Regulation 910/2014 of the European Parliament and of the Council of 23 July 2014 concerning electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, inserting title 2 in book XII "Law of the electronic economy" in the Code of Economic Law and inserting the definitions for title 2 of book XII and of the enforcement rules of title 2 of book XII in the books I, XV and XVII in the Code of Economic Law, *Belgian State Gazette* 28 September 2016.

therefore does not grant any additional probative value to the scanned version. By contrast, it is much easier to introduce a scanned document in common law proceedings, be it that the opposing party may demand authentication thereof.¹⁰⁴

In terms of archival services, this requirement also complicates the process of substitution – by which paper archives are replaced by electronic reproductions. In order to produce electronic reproductions with a reliable probative value, companies and archival institutions will therefore be required to hire a provider of qualified electronic archival services.

New legislation

Regarding the discussion on the status of a document as an original or copy, article 8.25 NBCC defines the legal status of a copy and refers more directly to a qualified archiving service, reinforcing the legal position that a copy made by a qualified archiving service¹⁰⁵ has the same legal probative value as the private document from which ‘it is assumed, barring proof to the contrary to be a true and lasting copy’.¹⁰⁶ The difference with the existing article 1334 BCC is that the original does not need to be submitted in such circumstances. However, if the original still exists, a party can always demand the production of the original. The article mentions that, except in cases where the law provides otherwise (since in certain sectors legal provisions establish the statute of

the copy, e.g. in finance or social security), a copy constitutes a factual presumption or a beginning of evidence in writing if the requirements are met.¹⁰⁷

Whether the changes solve the problems

As explained before, the electronic means of reproduction can often be fully reliable and trustworthy, because a scanned document, for instance, is normally an exact reproduction of the content of the original. The 2016 amendment allowed copies to be accorded a higher probative value, and this has also been maintained in the new legislation. The legislation in new Book 8 still requires a trusted copy to be produced using a qualified electronic archival service. The main change is that, when a qualified electronic archival service is used, a party can no longer be required to provide the original document. The problem is that in most cases, the parties will not have used this type of service. This means the problem has not been solved. The Explanatory Memorandum of Book 8 explains the choice of only permitting copies to have probative value when they are produced by using qualified electronic archival services: the main reason is that digital copies without the use of such a service can be easily changed and therefore remain as ‘fragile means of evidence’.¹⁰⁸ Other reasons are that the judge can still freely decide to accept the copies or not, and where they are not disputed, copies can always be used as evidence.¹⁰⁹ In principle that sentiment is understandable, since digital copies can be changed.¹¹⁰

¹⁰⁴ Mason, S., Seng., D., *Electronic Evidence*, (4th edition, Institute of Advanced Legal Studies for the SAS Humanities Digital Library, School of Advanced Study, University of London, 2017), 7.101.

¹⁰⁵ An electronic archiving service fulfilling the requirements for qualified trust service providers as specified in the eIDAS Regulation (Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on Electronic Identification and Trust Services for Electronic Transactions in the Internal Market and Repealing Directive 1999/93/EC, *OJ L 257*, 28.8.2014, p. 73–114).

¹⁰⁶ Article 8.25 NBCC. Original text of the article: Article 8.25. Juridisch statuut van het afschrift: Het afschrift dat gemaakt werd door middel van een gekwalificeerde elektronische archiveringsdienst conform boek XII, titel 2, van het Wetboek van economisch recht heeft dezelfde wettelijke bewijswaarde als het onderhandse geschrift waarvan ze, behoudens bewijs van het tegendeel, verondersteld wordt een getrouwe en duurzame kopie te zijn. De overlegging van het origineel wordt niet vereist.

Behalve in de gevallen waarin de wet anders bepaalt, vormt in alle andere gevallen het afschrift een feitelijk vermoeden of in voorkomend geval een begin van bewijs door geschrift wanneer de in artikel 8.1, 7° opgelegde voorwaarden vervuld zijn. Indien het origineel nog bestaat, kan de overlegging ervan altijd worden gevorderd.

¹⁰⁷ Belgian House of Representatives, Draft Bill including Book 8 in the New Civil Code (‘Wetsontwerp houdende invoeging van Boek 8 “Bewijs” in het nieuw Burgerlijk Wetboek’) (DOC 54 3349/001, 31 October 2018), p.32 <http://www.dekamer.be/FLWB/PDF/54/3349/54K3349001.pdf>

¹⁰⁸ Explanatory Memorandum of the Draft Bill including Book 8 in the New Civil Code (‘Wetsontwerp houdende invoeging van Boek 8 “Bewijs” in het nieuw Burgerlijk Wetboek’) (DOC 54 3349/001, 31.10.2018), p.32 <https://www.dekamer.be/FLWB/PDF/54/3349/54K3349001.pdf>

¹⁰⁹ Explanatory Memorandum of the Draft Bill including Book 8 in the New Civil Code (‘Wetsontwerp houdende invoeging van Boek 8 “Bewijs” in het nieuw Burgerlijk Wetboek’) (DOC 54 3349/001, 31.10.2018), p.32 <http://www.dekamer.be/FLWB/PDF/54/3349/54K3349001.pdf>

¹¹⁰ Intentionally, but also unintentionally, see e.g. the case of certain Xerox copy machines which inadvertently changed numbers in the copies: Kriesel, D., ‘Xerox-Scankopierer verändern geschriebene Zahlen’, (2.8.2013) http://www.dkriesel.com/blog/2013/0802_xerox-workcentres-are-switching-written-numbers-when-scanning

Concluding comments

Given how little the rules of the Belgian Civil Code with regard to evidence have changed since the initial 1804 Code Napoleon, it should come as no surprise that those rules were never meant to be applied in another context than that of paper-based procedures. The few amendments made in the last two decades to facilitate electronic processes did indeed manage to introduce some improvements – notably that the private instrument can be completely concluded and proven electronically. Nevertheless, several issues remained. First, the electronic notary deed was never realized. Second, the application of the original-copy dichotomy to electronic information is technically incorrect. Third, the formalistic requirement of there being multiple ‘originals’ deviates from the common and accepted use of the notion of originality. These examples only serve to highlight the need for a more thorough overhaul.

The introduction of an entire New Belgian Civil Code certainly provided the opportunity for a more substantial revision. Nevertheless, the Belgian legislator set only fairly modest ambitions for the NBCC. It was to be a recodification and simplification, with only moderate attention to innovation. As a result, the rules on evidence remain firmly rooted in their paper-based origins. While there is indeed more attention to electronic evidence, it still seems like this is more of an option that parties can choose and not the default. Given that electronic information processes have by now become the regular means of concluding agreements, it feels like a missed opportunity that the rules on evidence do not reflect this reality. Also the effect of these reforms on commercial law will probably remain limited. Proof by and against commercial entities remains possible by all means, except where provided otherwise. Proof by commercial entities against non-commercial entities remains bound to the principles discussed in this paper. Moreover, some reforms regarding proof by and against commercial entities were already enacted before the NBCC in 2018.

However, this does not mean that Book 8 NBCC is without merit. It succeeds at codifying a number of evolutions that had been going on in Belgian jurisprudence and legal doctrine over the years, but which had not been explicitly included in law. Moreover, the NBCC leaves more room for parties to deviate from the rules on evidence. For one, the threshold above which written evidence is required

was raised to EUR 3.500, up from EUR 375. This provision alone leaves many more agreements that could fall outside its scope of application, and thus be proven by all means.

These are, of course, developments that had already been continuing in neighbouring countries, or that have been introduced by other amendments – such as the Digital Act II. Book 8 NBCC only codifies and simplifies existing rules, which was indeed the main purpose of the legislator. While that objective has therefore certainly been achieved, one cannot help but feeling that a lofty undertaking such as rewriting the Napoleonic Code could have set grander ambitions.

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