

Cautio iudicatum solvi in Belgium: partly unconstitutional but still in existence

The Belgian Court of Cassation found in a judgment of 10 March 2023 (in Dutch) that the Brussels Court of Appeal was wrong to refuse the granting of a *cautio iudicatum solvi* against a US company, with principal seat in Colorado.

As previously reported, the *cautio iudicatum solvi* as stated in the Belgian Code of Civil Procedure (or Judicial Code), Article 851 was declared unconstitutional by the Belgian Constitutional Court in 2018. The Constitutional Court found that the criterion of nationality as basis for the granting of the *cautio* was not relevant to reach the goal pursued by the legislator, namely to ensure payment of procedural costs and possible damages if the plaintiff loses the suit. The Court called on the legislator to amend the article, but this never happened.

The Brussels Court of Appeal refused to issue the *cautio* requested by a Belgian defendant as against the US plaintiff, on the basis of the unconstitutionality of the provision. The Court of Cassation, however, stated that Article 851 does not in general infringe Article 6 of the European Convention on Human Rights; the Constitutional Court's finding of unconstitutionality was based on the principle of non-discrimination, in so far as a Belgian defendant could not use the *cautio* against any plaintiff without property in Belgium, but only against a non-Belgian plaintiff. As long as the legislator has not rectified the provision, it must according to the Court of Cassation be interpreted in line with the Constitution. This means that the *cautio* may be granted against any plaintiff with insufficient property in Belgium, irrespective of the plaintiff's nationality. The Court reiterated that the *cautio* is outlawed by several international conventions, but none of these conventions applied in the present case.