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Developments in expert inquiries since the Belgian law of December 30th 2009

by

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I Introduction

1. Soon after a first drastic reform of the expert inquiry by the Act of May 15th 2007[1] [2] it became clear that it contained different insufficiencies and caused all kind of practical problems. The legislator wanted to repair these problems with the Act of December 30th 2009.[3] [4] The repair was necessary as a "*quick win"* against certain delaying, incomplete, inconsequent and time-consuming procedures.[5] The great achievements of the former reform (subsidiary of the expert inquiry, active role of the judge, and the respect for terms and deadlines,…) have not been altered.

2. The legislator mainly repaired the rules governing the choice of expert by the litigant parties (article 962, second section of the Judicial Code[6]), the suspension of the judgements' notification (article 972 §1, second section JC), the terms and procedures concerning the acceptance or refusal of the expert's assignment (article 972 §1, second and third section JC), the extension of the experts' assignment by the litigant parties (article 962, third section JC), the time limit for parties to communicate their procedural documents to the expert (article 972bis §1, second section JC), the organisation of the installation meeting (article 972 §2 JC), the conciliation procedure (article 977 JC), the time limits for litigant parties to communicate their remarks and for the expert to execute additional investigations (article 976 JC), the replacement of the expert (article 979 JC), the extension of the expert's time limit to deposit his final report (article 974 §2 JC), the consignation of advances (article 987 and 989 JC), the appraisal procedure (article 991 JC), the withdrawal of advances (article 991bisJC), the limited intervention of experts (article 986 JC) and the remedies at law against the judicial decisions regarding the expert inquiry (article 963 JC).

3. I comment in this paper the different modifications made by the Act of December 30th 2009, comparing the new rules with the former situation before and after the Act of 2007.

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[1] Wet tot wijziging van het gerechtelijk wetboek betreffende het deskundigenonderzoek en tot herstel van artikel 509quater van het strafwetboek, *BS* 22 augustus 2007.

[2] Cfr. D. SCHEERS en P. THIRIAR, *Het gerechtelijk recht in de hoogste versnelling?*, Antwerpen, Intersentia, 2007, 123-206; A. DEMOULIN en F. POTTIER, "La réforme de l'expertise judiciaire. Analyse critique des incidences envisageables pour le domaine de la construction", *TAann* 2008, 7-30; B. VANLERSBERGHE, "De wet van 15 mei 2007 tot wijziging van het Gerechtelijk Wetboek betreffende het deskundigenonderzoek en tot herstel van artikel 509*quater* van het strafwetboek", *RW* 2007-08, 594-608; T. LYSENS en L. NAUDTS, "Wet van 15 mei 2007 tot wijziging van het Gerechtelijk Wetboek betreffende het deskundigenonderzoek en het herstel van artikel 590*quater* Strafwetboek: een eerste bespreking", in *Bestendig Handboek Deskundigenonderzoek*, Mechelen, Kluwer, losbl., afl. 7, 17 september 2007, 29-69; D. MOUGENOT, "La réforme de l'expertise judiciaire", *RGAR* 2007, nr. 14281.

[3] Wet *houdende diverse* bepalingen betreffende Justitie; Parl.St. Kamer 2008-09, nr. 52K2161/001, 45; Parl.St. Kamer 2007-08, nr.52K0844/001.

[4] D. SCHEERS en P. THIRIAR, "Repareer de reparatie! De aanpassingen door de wet van 30 december 2009 inzake het deskundigenonderzoek", *RW* 2009-10, 1410-1427; D. MOUGENOT en O. MIGNOLET, "La loi du 30 décembre 2009 "réparant" la procédure d'expertise judiciaire", *JT* 2010, 201-215; L. CEULEMANS, "Belangrijkste wijzigingen in het deskundigenonderzoek na de wet van 30 december 2009", *Tax Audit & Accountancy* maart 2010, 33-40; D. LAVIGNE, "De wet van 30 december 2009 houdende diverse bepalingen betreffende Justitie – Wijzigingen aan het Gerechtelijk Wetboek betreffende het deskundigenonderzoek: 'quick wins' of 'slow losses'?", *Con M* 2010, 13-23; N. SOLDATOS, "Un nouveau visage pour l'expertise judiciaire: lifting opéré par la loi réparatrice du 30 décembre 2009", *Con M* 2010, 3-12.

[5] *Parl.St.* Kamer 2008-09, nr.52K2161/001, 13.

[6] Hereafter: JC.

I The choice of expert

4. Before the coming into force of the Act of May 15th 2007, a judge had the obligation[7] to assign the expert chosen by the parties in mutual consent. In these circumstances the judge could only ratify their agreement (old article 964 of the Judicial Code).[8] The Belgian courts and tribunals could also establish official lists of experts, respecting the rules set down by the Government (old article 991 JC), but this article has never been executed.[9]

5. Article 964 of the Judicial Code has been abolished by the Act of May 15th 2007. Since then, only the judge decided which expert would be assigned for the inquiry (old article 972 §1 JC)[10] in anticipation of the establishment of official lists of experts that would determine the judge's decision.[11] Although a special amendment had been prepared in parliament[12] the establishment of official lists has been postponed.

6. The legislator also forgot to apply this new principle in other situations where a new expert is appointed, namely when an expert is replaced or repudiated. Article 968 JC even assumed that the parties could choose the expert, while this option had just been removed.[13] Article 971, last section JC provided that, in case of repudiation, the judge had to point out *ex officio* a new expert, unless the parties agreed on the choice of the expert. Therefore there was a confusion and controversy about whether parties could choose their expert in case of repudiation or replacement and impose their choice to the judge.[14] [15] In practice little changed because the litigant parties still suggested the judge their choice of expert. The judge could fully grant this suggestion.[16]

7. By the Act of December 30th 2009 the legislator partially returned to the initial rules governing the choice of expert. The legislator did not want to give the judge the only appreciation in the choice of expert. A new article 962, second section JC has been introduced, stating : "*the judge can appoint an expert on which parties agree upon. He can deviate from their choice based upon a duly motivated decision*".

8. According to the parliamentary preparatory documents, parties should once again have the opportunity to chose an expert who is, given parties' previous experiences and/or his or her reputation,

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[7] A. CLOQUET, *Deskundigenonderzoek in zaken van privaat recht*, in *A.P.R.* 1988, 59, nr. 126; G. CLOSSET-MARCHAL, "Considérations générales sur l'expertise", in J. GILLARDIN en P. JADOUL (eds.), *L'expertise*, Brussel, FUSL, 1994, 14-15.

[8] B. VANLERSBERGHE, "De beslissing tot aanstelling van een deskundige", in E. Guldix (ed.), *Deskundigenonderzoek in privaatrechtelijke geschillen*, Antwerpen, Intersentia Rechtswetenschappen, 1999, 24.

[9] Cfr. K. CAERS, "De officiële erkenning van de titel van "Gerechtsdeskundige": een stand van zaken", *Limb Rechtsl* 2002, 83-103.

[10] P. TAELMAN, "Statuut en opdracht van de gerechtsdeskundige", *Ius&Actores* 2007, 24; M. CASTERMANS, *De hervorming van het deskundigenonderzoek*, Gent, Story Publishers, 2007, 25.

[11] Adv.RvS 46.755/2 bij het wetsontwerp houdende diverse bepalingen betreffende justitie (II), *Parl.St.* Kamer 2008-09, nr. 52K2161/001, 96.

[12] Amendement nr. 3 van de heer BORGINON bij het wetsvoorstel tot wijziging van het Gerechtelijk Wetboek betreffende het deskundigenonderzoek, *Parl.St.* Kamer 2005-06, nr. 51K2540/002.

[13] B. VANLERSBERHGE, "De wet van 15 mei 2007 tot wijziging van het Gerechtelijk Wetboek betreffende het deskundigenonderzoek en tot herstel van artikel 509*quater* van het Strafwetboek", *RW* 2007-08, 598.

[14] H. BOULARBAH, "Le nouveau droit de l'expertise judiciaire – Présentation et application dans le temps de la loi du 15 mai 2007…", in H. BOULARBAH (ed.), *Le nouveau droit de l'expertise judiciaire en pratique*, Brussel, Larcier, 2008, 32; D. MOUGENOT, "La désignation de l'expert et la mise en route de l'expertise", in J.-F. VAN DROOGHENBROECK en R. DE BRIEY (eds.), *L'expertise judiciaire: des réformes aux pratiques*, Waterloo, Kluwer, 2009, 22-23.

[15] D. SCHEERS en P. THIRIAR, *Het gerechtelijk recht in de hoogste versnelling?*, Antwerpen, Intersentia, 2007, 129 en 137.

[16] D. SCHEERS en P. THIRIAR, *Het gerechtelijk recht in de hoogste versnelling?*, Antwerpen, Intersentia, 2007, 137; P. TAELMAN, "Statuut en opdracht van de gerechtsdeskundige", *Ius&Actores* 2007, 24.

the most suitable for the assignment.[17] The choice of expert is not a right any more for parties, but a possibility offered only to mutual consenting parties. The judge is not bound by this joint proposal and may deviate from it with a motivated decision. The role of parties and the judge is in this way.[18] The judge can for instance refuse the designation when an expert already has been appointed in other cases and one might fear that he will not be able to comply with the deadlines imposed. [19] The judge can also refuse to assign an expert who has delivered bad work in the past.

9. The possibility to propose jointly an expert is now also applicable in case of repudiation (article 971, *in fine* JC) or replacement of the expert (article 979 §1, second section JC). The legislator ended hereby the pre-existent incoherence[20] and controversy.[21]

10. The rules governing the choice of expert are now clear and coherent when parties agree upon the choice of expert, but remain unclear when they disagree. In that case the judge decides which expert is suitable for the job. His choice can be based upon all kind of criteria, such as the reputation of the expert, his experience, his scientific of technical knowledge, his technical equipment, etc...[22] If considered suitable, a judge can appoint anyone to fulfil the role of expert, apart from some legal exceptions.[23] A judge can determine his choice of expert based on an unofficial list of experts established by a court or tribunal[24], but this list gives no guarantee on the quality of the expert and is often not up to date.

11. Notwithstanding the repeated demand for official expert lists by the federation of Belgian expert associations (FEBEX) and the High Council of Justice[25] the legislator failed to establish these official lists.

II The suspension of the (announcement of the) assigning judgement

12. Before the Act of May 15th 2007, the initiative to start the expert inquiry rested on the shoulders of the litigating parties. The party with the greatest interest to continue the proceedings had to ask the clerk of the court to notify a certified copy of the assigning judgement to the expert by court letter (old article 965 JC)

13. Article 965 JC has been abolished by the Act of May 15th 2007. Due to this reform the expert's assignment was automatically notified by the clerk to the expert within 5 days after the judgement (article 972 §1, second section *juncto* article 973 §2, third section JC). This automatism has been introduced in order to stop one of the causes of the long delays in expert inquiries.[26]

14. However, the legislature realized that the automatic announcement and – as a consequence – the immediate start of the expert enquiry is not always a good thing. If parties are just in a negotiating phase, it is appropriate that the work of the expert is put on hold in order to avoid unnecessary investigations. The simple demand before court for judicial expert can stimulate negotiations between

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[17] *Parl.St.* Kamer 2008-09, nr. 52K2161/001, 46.
[18] Advise State Council n° 46.755/2, *Parl.St.* Kamer 2008-09, 52K2161/001, 96
[19] *Parl.St.* Kamer 2008-09, nr. 52K2161/001, 46.
[20] *Parl.St.* Kamer 2008-09, nr.52K2161/001, 46.
[21] D. MOUGENOT en O. MIGNOLET, "La loi du 30 décembre 2009 "réparant" la procédure d'expertise judiciaire", *JT* 2010, 201-202.
[22] P. TAELMAN, "Het deskundigenonderzoek in burgerlijke zaken", in G. DE LEVAL en B. TILLEMAN (eds.), *Gerechtelijk deskundigenonderzoek. De rol van de accountant en de belastingsconsulent*, in *Recht en Onderneming*, 5, Brugge, die Keure, 2003, 74.
[23] Cass. 5 april 1996, *Arr Cass* 1996, 697; Rb. Brussel 6 november 2001, *TBBR* 2002, 15.
[24] P. TAELMAN, "Statuut en opdracht van de gerechtsdeskundige", *Ius&Actores* 2007, 22-24.
[25] Advises of High Council of Justice (Hoge Raad voor Justitie) October 9th 2002 and June 29th 2005, www.hrj.be.
[26] *Parl.St.* Kamer 2005-06, nr. 51K2549/001, 9.

parties and activate an amicable settlement. The assignment of an expert can also be claimed as a subsidiary or preserving measure.[27] An immediate intervention of an expert might compromise the success of an amicable settlement or undo the preserving character of the measure.

15. Therefore the new article 972 §1, second section JC provides that the *clerk of the court* announces the assigning judgement to the expert, unless all parties present or represented in court demand the suspension of the announcement before this judgement has been issued. Afterwards, the assigning judgement can be announced on the demand of one of the parties (article 971 §1, second section *in fine* JC) and, by doing so, activating the expert inquiry. The demand for this suspension is only possible if asked for by all parties present or represented in court during the introductory hearing and can only be asked for before the assigning judgement has been issued. This innovation requires a number of textual and practical remarks.

16. First of all, the legislator did not indicate to who the joint request for suspension should be addressed.[28] Some say the request should be addressed to the clerk of the court, because he is responsible for the automatic announcement. The preparatory parliamentary documents indicate however that the joint request should be addressed to the judge.[29]

17. Secondly, the legislator failed to prescribe the form in which the joint request should be formulated. Some say that this request can be formulated orally (during the court's hearing, by telephone) or by e-mail or fax.[30] This does not seem to be the intention of the legislator. The legislator envisaged written requests by letter or in the pleadings. Furthermore, the joint request for suspension of the announcement can not interfere with the closure of the debate in court, according to the preparatory documents of the Act of 2009. This is contrary to the text of article 972 §1 JC in which it is stated that the suspension of the announcement can be asked for until the assigning judgement has been pronounced. This article seems to be in contradiction with a basic principal of Belgian judicial law that the judge can not take in consideration new elements after the closing of the debate, unless the debate is reopened.

18. Thirdly, nor the clerk of neither the court, nor the judge seem to have the possibility to refuse the request for suspension of the announcement. Some say that this rule is incompatible with the subsidiary character of the expert inquiry (article 875 JC).[31] Nevertheless, it should be recalled that the suspension of the announcement is without prejudice to free appreciation of the judge in assigning an expert and to rule upon the necessity of this measure. Only the announcement of the judge's decision to appoint an expert is postponed. However, it might indeed be helpful that the judge has a possibility to differ from the joint request for suspension in a reasoned manner, if required by the nature of the case or in order to secure the rights of third parties, or in extremely urgent cases where evidence might get lost.

19. Lastly, the suspension of the announcement seems to be a handy gadget to postpone the ordered expert inquiry, but there is no guarantee that the suspension will last until the parties that asked it decide otherwise. The absent parties can indeed ask for an announcement of the assigning judgement at any time. Article 972 §1, second section JC states that every party (not only the parties that were present in court) can request for this announcement. In order to prevent an undermining of

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[27] L. CEULEMANS, "Belangrijkste wijzigingen in het deskundigenonderzoek na de wet van 30 december 2009", *Tax Audit & Accountancy* maart 2010, 35; D. SCHEERS en P. THIRIAR, "Repareer de reparatie! De aanpassingen door de wet van 30 december 2009 inzake het deskundigenonderzoek", *RW* 2009-10, 1413.

[28] D. SCHEERS en P. THIRIAR, "Repareer de reparatie! De aanpassingen door de wet van 30 december 2009 inzake het deskundigenonderzoek", *RW* 2009-10, 1414.

[29] *Parl.St.* Kamer 2008-09, nr. 52K2161/001, 48.

[30] D. MOUGENOT en O. MIGNOLET, "La loi du 30 décembre 2009 "réparant" la procédure d'expertise judiciaire", *JT* 2010, 203; D. SCHEERS en P. THIRIAR, "Repareer de reparatie! De aanpassingen door de wet van 30 december 2009 inzake het deskundigenonderzoek", *RW* 2009-10, 1414.

[31] D. SCHEERS en P. THIRIAR, "Repareer de reparatie! De aanpassingen door de wet van 30 december 2009 inzake het deskundigenonderzoek", *RW* 2009-10, 1414.

this mechanism the legislator should provide that once suspended the announcement can only be asked for by the same present parties.

20. This new mechanism does not seem to prevent parties to agree upon the suspension of the expert inquiry later on, once the assigning judgement has already been addressed to the expert.

III Acceptance or refusal of the assignment – start of the expert inquiry

21. Under the new act of December 30th 2009 an expert still can refuse his assignment within 8 days after the notification of the judgement (article 972 §2, third section JC). If an expert does not respond, he shall be deemed to have accepted the assignment.[32] The legislator specifies now that the expert must communicate his refusal by ordinary mail, fax of e-mail to the present parties, their councils and the judge and by registered mail to the absent parties.

22. It is also new that parties can formulate their remarks to the judge on the refusal of the expert within 8 days. The judge appoints afterwards a new expert, without involving the replacement procedure. With this new rule the legislator wanted to guarantee the smooth course of the expert inquiry.[33] The expert is thus automatically replaced without a hearing of the parties or the expert.[34] Parties can only propose a new expert of their choice.[35]

23. If no installation meeting is organised (after which the judge indicates the place, day and hour of the further operations – article 972 §2, seventh al, 2° JC) the expert has now 15 days (in stead of the former 8 days)[36] after the notification of the judgement or consignation of the advance, to communicate the place, date and hour for the start of the inquiry (article 972 §1 fourth section JC. The legislator forgot to admit communication by fax of e-mail…

IV Extension of the expert inquiry

24. Before the entering into force of het Act of May 15th 2007, the assignment of an expert could be extended if all parties agreed. In that case, the expert could easily give his advice on other issues or questions then sentenced in the initial judgement (article 974 JC).[37]

25. This article has been abolished by Act of May 15th 2007. This was part of the overall intent of the legislator to give judges a more active role and continuous control over the expert inquiry.[38] According to some authors, parties could therefore no longer have any appreciation of the extension of the expert's assignment.[39] The extension of the expert's mission by mutual consenting parties could not completely be excluded. Article 973 § 2, first section JC provided indeed that only the disputes could be submitted to the judge.[40] In any case, one continued to assume that the assignment of the

[32] D. SCHEERS en P. THIRIAR, *Het gerechtelijk recht in de hoogste versnelling?*, Antwerpen, Intersentia, 2007, 143.
[33] *Parl.St.* Kamer 2008-09, nr. 52K2161/001, 48.
[34] D. MOUGENOT en O. MIGNOLET, "La loi du 30 décembre 2009 "réparant" la procédure d'expertise judiciaire", *JT* 2010, 203.
[35] *Parl.St.* Kamer 2008-09, nr. 52K2161/001, 49.
[36] *Parl.St.* Kamer 2008-09, nr. 52K2161/001, 49.
[37] Cass. 1 maart 1999, *Arr Cass* 1999, nr. 122.
[38] D. MOUGENOT, "La réforme de l'expertise judiciaire", *RGAR.* 2007, nr. 14281, 1.
[39] D. SCHEERS en P. THIRIAR, *Het gerechtelijk recht in hoogste versnelling?*, Antwerpen, Intersentia, 2007, 142.
[40] B. VANLERSBERGHE, "De wet van 15 mei 2007 tot wijziging van het Gerechtelijk Wetboek betreffende het deskundigenonderzoek en tot herstel van artikel 509*quater* van het Strafwetboek", *RW* 2007-08, 599, nr. 19.

expert not only included what was expressly determined by the court order but also all the questions that incidentally or naturally resulted from it.[41]

26. The legislator now returned to the old article 974 JC and introduced of a new Article 962, section 3 JC: *"unless parties agree, the experts give only advice on the assignment in the court's sentence"*. The legislator agreed that the required judicial intervention for an extension of the expert's mission on which parties agree, caused an unnecessary loss of time and entails useless additional or new expert inquiries.[42] According to the preparatory parliamentary documents, the expert can not take his assignment too literally[43], but this was already accepted by the doctrine mentioned above.

27. This modification restored correctly the possibility for parties to extend the assignment of the expert by mutual agreement.[44] After all, litigant parties should first of all be able to determine the limits of the expert's assignment. They determine the boundaries of the dispute.[45] Parties may therefore conclude (procedural) agreements about the scope of the expert's assignment.[46]

V Disclosure of inventoried documents by parties

28. The Act of May 15, 2007 introduced with article 972bis § 1, second paragraph JC a deadline for parties to submit their case file to the expert. Parties needed to submit their inventoried file with all relevant documents to the expert at the latest on the installation meeting and, by lack of this meeting, at the beginning of the expert inquiry.

29. The deadline for disclosure of documents at the installation meeting has been amended by the Act of December 30th 2009. Currently, the inventoried pieces must be communicated to the expert 8 days before the installation meeting. This should allow the expert to prepare the installation meeting properly.[47]

30. This also means that the judge or expert must give parties sufficient time to collect the necessary documents before they are transferred to the expert.[48] [49] This is not provided by article 972bis JC but is a logical consequence of the respect due to the right of defence.

31. Still, the Act of 2009 does not provide any penalty for parties who neglect to communicate their files on time. The legislator only provided a real penalty when parties communicate their remarks on the expert's preliminary report too late (article 976, second section JC). In that case, the expert can refuse to take these observations into account and the judge may exclude them *ex officio* out

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[41] D. SCHEERS en P. THIRIAR, *Het gerechtelijk recht in hoogste versnelling?*, Antwerpen, Intersentia, 2007, 142; cfr. before: P. TAELMAN, "Het deskundigenonderzoek in burgerlijke zaken", in G. DE LEVAL en B. TILLEMAN (eds.), *Gerechtelijk deskundigenonderzoek. De rol van de accountant en de belastingsconsulent*, in *Recht en Onderneming*, 5, Brugge, Die Keure, 2003, 80; A. CLOQUET, *Deskundigenonderzoek*, in *A.P.R.*, Gent, E. Story-Scientia, 1988, 56, nr. 120.

[42] D. SCHEERS en P. THIRIAR, "Repareer de reparatie! De aanpassingen door de wet van 30 december 2009 inzake het deskundigenonderzoek", *RW* 2009-10, 1411.

[43] *Parl.St.* Kamer 2009-10, nr. 52K2161/006, 30.

[44] D. SCHEERS en P. THIRIAR, "Repareer de reparatie! De aanpassingen door de wet van 30 december 2009 inzake het deskundigenonderzoek", *RW* 2009-10, 1414.

[45] P. TAELMAN, "Het deskundigenonderzoek in burgerlijke zaken", in G. DE LEVAL en B. TILLEMAN (eds.), *Gerechtelijk deskundigenonderzoek. De rol van de accountant en de belastingsconsulent*, in *Recht en Onderneming*, 5, Brugge, Die Keure, 2003, 80.

[46] D. MOUGENOT en O. MIGNOLET, "La loi du 30 décembre 2009 "réparant" la procédure d'expertise judiciaire", *JT* 2010, 202; Cass. 1 maart 1999, *RDJP* 1999, 329.

[47] *Parl.St.* Kamer 2009-10, nr. 52K2161/001, 51.

[48] D. SCHEERS en P. THIRIAR, "Repareer de reparatie! De aanpassingen door de wet van 30 december 2009 inzake het deskundigenonderzoek", *RW* 2009-10, 1418.

[49] *Parl.St.* Kamer 2009-10, nr. 52K2161/001, 50.

of the debate.[50] Nevertheless, the judge may consider the untimely or non disclosure of documents as a lack of cooperation. He may therefore take the conclusions that he considers to be appropriate (article 972*bis* §1, first section JC).[51] If the party who asked for an expert inquiry fails to provide the necessary documents his claim could be judged unfounded by lack of evidence. If the defendant fails to produce documents, the judge may presume the validity of the plaintiff's claim.[52] Finally, the judge may force an unwilling party to produce certain documents under pain of penalty.[53]

VI The installation meeting

32. The "*installation meeting"* has been introduced for the first time as a legal concept by the Act of May 15th 2007, but was already organised in practice by the experts.[54] [55] The installation meeting was compulsory unless the judge decided otherwise with the consent of the litigant parties (old article 972 §1 JC). The compulsory character of the installation meeting has strongly been criticised.

33. First of all, the presence of the expert on this meeting was not required unless one of the parties or the judge requested it (old article 972 §2, second section JC). Therefore, the utility of the installation meeting was questioned.[56]

34. Secondly, the installation meeting took place in the court's chambers (old article 972 §2, first section JC),[57] but the expert can only have a good idea of the case once he has visited the place or has seen the object of his investigation (e.g. in construction disputes).[58]

35. After the installation meeting, the judge needed to take a decision about the possible adjustment of the expert's assignment, the need for technical advisors, an estimation of the costs and advances etc. These could only be duly estimated after the first investigations and analysis of the problem/scene.[59]

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[50] Cfr. *infra*.

[51] D. MOUGENOT en O. MIGNOLET, "La loi du 30 décembre 2009 "réparant" la procédure d'expertise judiciaire", *JT* 2010, 205.

[52] O. MIGNOLET, *L'expertise judiciaire*, Brussel, Larcier, 106-107.

[53] B. PETIT en R. DE BRIEY, « La réforme de l'expertise opérée par la loi du 15 mei 2007, ou la loi qui n'eût pas dû exister », *JT* 2008, 242 ; Beslagr. Brussel 18 januari 2000, *AJT* 1999-00, 654, noot X., «Loyale medewerking aan een deskundigenonderzoek kan worden bevolen onder verbeurte van een dwangsom».

[54] As provided by (old) article 965 JC; D. MOUGENOT, "La réforme de l'expertise judiciaire", *RGAR* 2007, nr. 14281, 3; R. VERBEKE, "De rol van de deskundige, de partijen en de rechter", in *Deskundigenonderzoek in privaatrechtelijke geschillen*, E. GULDIX (ed.), Antwerpen, Intersentia Rechtswetenschappen, 1999, 40-41; P. TAELMAN, "Het deskundigenonderzoek in burgerlijke zaken", in G. DE LEVAL en B. TILLEMAN (eds.), *Gerechtelijk deskundigenonderzoek. De rol van de accountant en de belastingsconsulent*, in *Recht en Onderneming*, 5, Brugge, Die Keure, 2003, 98.

[55] T. LYSENS en L. NAUDTS, *Deskundigenonderzoek in burgerlijke zaken*, Mechelen, Kluwer, 2005, 93; D. SCHEERS en P. THIRIAR, *Het gerechtelijk recht in hoogste versnelling?*, Antwerpen, Intersentia, 2007, 144.

[56] B. VANLERSBERGHE, "De wet van 15 mei 2007 tot wijziging van het Gerechtelijk Wetboek betreffende het deskundigenonderzoek en tot herstel van artikel 509*quater* van het Strafwetboek", *RW* 2007-08, 600.

[57] T. LYSENS en L. NAUDTS, *Deskundigenonderzoek in burgerlijke zaken*, Mechelen, Kluwer, 2005, afl. 7, Inl.3-6, 44; contra : D. SCHEERS en P. THIRIAR, *Het gerechtelijk recht in hoogste versnelling?*, Antwerpen, Intersentia, 2007, 144.

[58] D. MOUGENOT en O. MIGNOLET, "La loi du 30 décembre 2009 "réparant" la procédure d'expertise judiciaire", *JT* 2010, 204.

[59] B. VANLERSBERGHE, "De wet van 15 mei 2007 tot wijziging van het Gerechtelijk Wetboek betreffende het deskundigenonderzoek en tot herstel van artikel 509*quater* van het Strafwetboek", *RW* 2007-08, 600; D. SCHEERS en P. THIRIAR, *Het gerechtelijk recht in hoogste versnelling?*, Antwerpen, Intersentia, 2007, 145-146; D. MOUGENOT, "La réforme de l'expertise judiciaire", *RGAR* 2007, nr. 14281, 3.

36. The installation meeting was also of little use for many routine assignments, such as assignments in social security litigation and disputes about the estimate of human injury or car accidents. In these cases mostly the same experts are appointed and the scales of fees are determined.[60]

37. The mandatory installation meeting was finally not applied in practice because the parties generally renounced from it in advance. The courts and tribunals were also very creative in avoiding installation meetings.[61]

38. The compulsory installation meeting has been abolished by the Act of December 30th 2009[62] and replaced by a possibility for the judge if he considers such a meeting necessary or if all present parties request for this meeting (article 972 §2, first section JC).

39. The expert must now be present at the installation meeting, unless the judge considers this unnecessary and a telephone contact or other means of telecommunication seem to be sufficient (article 972 §2, fourth section JC.). This intervention also increases the usefulness of the installation meeting and the proper conduct of it.[63]

40. In the event of an unauthorized absence of the expert at this installation meeting, the judge immediately takes a decision about his replacement.[64] (article 972 §2, fifth section JC). The judge is not obliged to replace the expert and rules discretionary if the expert has a valid reason for his absence.[65] For example, the absence of the expert due to *force majeure* will not lead to his replacement.[66] If the expert is replaced, a new installation meeting is immediately organized with the new expert in order to guaranty the continuation of the expert inquiry.[67]

41. The judge further sets the place, day and hour of the installation meeting after consultation with the expert (article 972 §2, second section JC). The installation meeting can now be held in an other place than the court's chambers, depending on the nature of the case (article 972 §2, third section JC).

The unilateral contact between the judge and the expert in order to determine the place, date and hour of the installation meeting clashes in the opinion of some authors with *inter partes* character of the judicial procedure and transparency principle.[68] However, this problem should not be exaggerated since the judge and the expert can only discuss practical arrangements of the expert's inquiry at that stage.

42. After the installation meeting, the judge must mention nearly the same elements in his judgement as before under the Act of May 15th 2007 (article 972 §2, seventh section JC).

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[60] D. MOUGENOT en O. MIGNOLET, "La loi du 30 décembre 2009 "réparant" la procédure d'expertise judiciaire", *JT* 2010, 204 ; T. LYSENS en L. NAUDTS, "De wet van 15 mei 2007 tot wijziging van het Gerechtelijk Wetboek betreffende het deskundigenonderzoek en het herstel van artikel 590*quater* Strafwetboek: een eerste bespreking", in *Bestendig Handboek Deskundigenonderzoek*, Mechelen, Kluwer, 2007, afl. 7, Inl.3-5, 43.

[61] Kh. Brussel 28 december 2007, *RW* 2009-10, 637; Rb. Namen 12 oktober 2007, *RRD* 2007, 164; contra : Vred. Andenne 22 november 2007, *JT* 2008, 14; D. SCHEERS en P. THIRIAR, "De wet der traagheid. Wie is er bang van de actieve rechter?", in R. DE CORTE, J. MEEUSEN, M. PERTEGAS, S. RUTTEN en A. VAN OEVELEN (eds.), *Hulde aan Prof. Dr. Jean Laenens*, Antwerpen, Intersentia, 2008, 281; Rb Brussel 24 januari 2008, *JT* 2008, 392.

[62] *Parl.St.* Kamer, 2009-10, nr. 52K2161/001, 47.

[63] *Parl.St.* Kamer, 2009-10, nr. 52K2161/001, 50.

[64] Cfr. point IX.

[65] [65] D. SCHEERS en P. THIRIAR, "Repareer de reparatie! De aanpassingen door de wet van 30 december 2009 inzake het deskundigenonderzoek", *RW* 2009-10, 1416.

[66] *Parl.St.* Kamer 2009-10, nr. 52K2161/001, 50.

[67] *Parl.St.* Kamer 2009-10, nr. 52K2161/001, 50.

[68] D. SCHEERS en P. THIRIAR, "Repareer de reparatie! De aanpassingen door de wet van 30 december 2009 inzake het deskundigenonderzoek", *RW* 2009-10, 1416.

43. The possibility to adjust the assignment of the expert "*if the parties so agree"* is new (article 972 §2, seventh section, 1° JC).[69] A modification of the expert inquiry is also possible without that mutual agreement of litigant parties: *"any dispute concerning the extension of the expert inquiry"* can be determined by the judge (article 973 §2 JC).

44. Furthermore, article 972 §2 seventh section, 6° JC, contains an anomaly. According to this article, the judge can determine the reasonable part of the consignation that can be released, *"by the party or parties"*, although litigant parties are forbidden to pay advances directly to the expert. The expert risks a criminal penalty is he asks or accepts these direct advances (article 991*bis*, second section JC and article 509*quater* of the Criminal Code). Only the clerk of the court or a financial institution can release the consigned advance, not one of parties (article 987, last section JC).[70]

45. If no installation meeting is organized, the judge must provide in his court order the following elements: 1) the need for the expert to rely on technical advisors, 2) the estimate of the overall cost of the inquiry, or at least how the costs and fees of the expert and any technical advisers will be calculated, 3) if applicable, the amount of the advance to be consigned by the party or parties required to and the period within which the deposit should be done, 4) the reasonable part of the advance that can be released to the expert (and the deadline for this release), 5) the deadline for the final report (article 972 § 2 *in fine* JC).

46. The judge may insert in his decision other elements (such as the place, date and hour of the investigation or the time limit that parties need to respect if observations are made on the preliminary report of the expert). The judge can contact the expert in order to complete these elements (article 972 § 2 *in fine* Judicial Code). Once again, one may criticise this unilateral contact between the judge and the expert. Although not expressly provided, nothing prevents the judge to request parties' opinion on these matters before the closure of the debate.

47. Finally the deadline for the first investigations to start, in case no installation meeting is organised, has been changed from 8 to 15 days after the notification of the assigning judgement or after the notification of the consigned advance (article 972 §1, fourth section JC). The former time limit of 8 days was too short for experts to make proper arrangements with all parties and their councils.[71]

VII Conciliation

48. An attempt to conciliate litigating parties, belongs in Belgian legal tradition to the mission of the judicial expert.[72] It is automatically a part of his assignment.[73] A conciliation proposal at the beginning of the judicial expert inquiry can reduce the costs of the inquiry significantly.[74] Usually, the reconciliation proposal is only useful after the notification of the primarily report and the comments of parties on that report.

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[69] *Parl.St.* Kamer, 2009-10, nr. 52K2161/006, 32-33.
[70] D. SCHEERS en P. THIRIAR, "Repareer de reparatie! De aanpassingen door de wet van 30 december 2009 inzake het deskundigenonderzoek", *RW* 2009-10, 1417.
[71] *Parl. St.* Kamer, 2009-10, nr. 51K2161/001, 49.
[72] A. CLOQUET, *Deskundigenonderzoek in zaken van privaat recht*, in *A.P.R.* 1985, 54.
[73] P. TAELMAN, "Het deskundigenonderzoek in burgerlijke zaken", in G. DE LEVAL en B. TILLEMAN (eds.), *Gerechtelijk deskundigenonderzoek. De rol van de accountant en de belastingsconsulent*, in *Recht en Onderneming*, 5, Brugge, Die Keure, 2003, 80, nr. 31, 102, nr. 76.
[74] T. LYSENS en L. NAUDTS, "Deskundige. Verzoener, bemiddelaar of arbiter", *NJW* 2010, 346.

49. Before the Act of May 15th 2007 the judicial expert had to promote the conciliation between parties and had to record any agreement in his official report. Parties could also ask the judge to ratify their amicable agreement by court order (old article 972, third and forth section JC).

50. The Act of May 15th 2007 retained the conciliation task of the expert. In case of conciliation the expert had to make record of this agreement in a new procedural piece, being the *"establishment of conciliation"*. The expert needed also to note the formal aimlessness of his assignment. Parties could formalise their agreement in a consent judgement (article 1043 JC) (old article 977 §1 JC). Ones the parties were conciliated, the expert had to file the *"establishment of conciliation"*, the documents, notes of parties and a detailed statement of fees and charges at the clerk of the court's office and send these same documents by registered mail to the litigant parties and by ordinary post to their councils (old article 977 §2 JC).

51. This procedure was unnecessarily complex.[75] After a conciliation it is practical and cost effective that the expert sends back all documents directly to the parties. The filing of the document at the clerk's office was too formalistic and offered no added value. The *"establishment of conciliation"* and the formal record that his inquiry had become aimless seemed also without any added value.[76]

52. The amended article 977 § 1 JC now states that any conciliation shall be recorded in a written agreement that can be confirmed by court order. It is unlikely that an expert draws up such an agreement. Article 977 §1 second section JC seems to leave it up to the litigant parties to draw up their agreement. According to the preparatory parliamentary documents the written agreement can be drafted by the parties but also by the expert.[77] Nevertheless, the expert must be careful in drafting settlement agreements if he's not skilled in this matter and does not want to risk his professional liability.[78] [79]

53. In case of an agreement the expert must file the *"establishment of conciliation"* and his detailed statement of fees and charges at the clerk of the court's office and send the same documents by registered mail to the litigant parties and by ordinary mail to their councils. Wrongly, article 977 § 2 JC still refers to *"the establishment of conciliation"* and not to the *"written agreement"* as stated in the first paragraph of that article.[80] This must be repaired with a new restoration act in order to avoid any possible confusion. [81] The expert must no longer send over the notes and documents to the parties by registered mail. He must return the original pieces to the parties,[82] but he can choose the most appropriate way of communication.[83]

54. The Act of December 30th 2009 leaves some delicate questions about the conciliation task of the expert answered, such as whether the expert should have special training in conciliation, the

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[75] D. SCHEERS en P. THIRIAR, *Het gerechtelijk recht in de hoogste versnelling?*, Antwerpen, Intersentia, 2007, 1420.
[76] *Parl.St.* Kamer 2009-10, nr. 52K2161/001, 53.
[77] Amendement nr. 23 DÉOM a.o., *Parl.St.* Kamer 2009-10, nr. 52K2161/004, 13; *Parl.St.* Kamer 2009-10, nr. 52K2161/006, 37.
[78] D. MOUGENOT en O. MIGNOLET, "La loi du 30 décembre 2009 "réparant" la procédure d'expertise judiciaire", *JT* 2010, 206.
[79] R. DE BRIEY en B. PETIT, "Le déroulement de l'expertise", in *L'expertise judiciaire: des réformes aux pratiques*, Waterloo, Kluwer, 2009, 58.
[80] D. SCHEERS en P. THIRIAR, "Repareer de reparatie! De aanpassingen door de wet van 30 december 2009 inzake het deskundigenonderzoek", *RW* 2009-10, 1420.
[81] D. SCHEERS en P. THIRIAR, "Repareer de reparatie! De aanpassingen door de wet van 30 december 2009 inzake het deskundigenonderzoek", *RW* 2009-10, 1420.
[82] Article 977 §2, *in fine* JC.
[83] *Parl.St.* Kamer, 2009-10, nr. 52K2161/001, 53.

question about the neutrality of expert and confidentiality during the conciliation attempt, and whether the expert must be paid for his conciliation efforts.[84]

VIII Term for remarks on the primarily report

55. Previously, article 978 JC stated that upon completion of the operations the expert had to give knowledge of his findings to the parties *"whose observations[the expert] notes"*. There was no time limit for making comments on the report of the expert. Parties could thus still challenge the expert's report in court, even if they did not make any observations during the inquiry.[85]

56. After the entering into force of the Act of May 15th 2007 article 976 JC stated that the expert had to send his findings and preliminary advice[86] to the judge, the parties and their councils. By lack of an installation meeting (and in case the judge did not set a deadline for remarks) the expert had to respect a reasonable term (taking into account the nature of the dispute) within parties could make their observations on the preliminary report. The expert was no longer obliged to take into account late submissions, but the judge could do so since he was not obliged to exclude these untimely observations from the debates)[87]

57. The discretion of the judge has strongly been questioned. It would require the judge to supervise the expert's inquiry and to analyse the content of the preliminary and final report in order to decide on the opportunity of the exclusion. Finally, one feared that the debate on the (un)timely character of observations could be held again before the judge dealing with the case itself.[88]

58. This system is still retained in the Act of December 30th 2009. The expert still imposes a reasonable term for parties to submit their observations, unless the judge imposes a deadline himself. The judge must only indicate a term after the installation meeting or in the judgement assigning the expert if he thinks this is necessary (cfr. article 972 §2, seventh section, 7° and eight section JC).

59. The new Act only adds that the reasonable term for parties to formulate theirs comments counts at least 15 days, unless decided otherwise by the judge or *"by the expert in case of special circumstances referred to in his preliminary report"* (Article 976 §1 JC). This term should offer parties enough time to consult their technical advisors and lawyers before responding to the preliminary report.[89]

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[84] D. MOUGENOT en O. MIGNOLET, "La loi du 30 décembre 2009 "réparant" la procédure d'expertise judiciaire", *JT* 2010, 205.

[85] Cass. 5 oktober 2000, *Verkeersrecht* 2001, 55; Cass. 16 februari 1995, *Arr Cass* 1995, nr. 94; D. MOUGENOT en O. MIGNOLET, « La loi du 15 mei 2007 modifiant le Code judiciaire en ce qui concerne l'expertise et rétablissant l'article 509*quater* du Code pénal – Evaluation de la loi et propositions de modifications », in P. VAN ORSHOVEN en B. MAES (eds.), *Les lois de procédure de 2007… revisited !*, Brussel, Die Keure, 2009, 243 ; B. VANLERSBERGHE, "De wet van 15 mei 2007 tot wijziging van het Gerechtelijk Wetboek betreffende het deskundigenonderzoek en tot herstel van artikel 509*quater* van het strafwetboek", *RW* 2007-08, 602.

[86] Hiermee werd een einde gesteld aan de controverse in de rechtspraak en rechtsleer over de vraag of het voorverslag van de deskundige, naast de vermelding van zijn vaststellingen en verrichtingen ook voorlopige besluiten mocht bevatten (cfr. D. SCHEERS en P. THIRIAR, *Het gerechtelijk recht in hoogste versnelling?*, Antwerpen, Intersentia, 2007, 160-161 met verwijzingen aldaar).

[87] D. MOUGENOT en O. MIGNOLET, "La loi du 30 décembre 2009 "réparant" la procédure d'expertise judiciaire", *JT* 2010, 206.

[88] D. SCHEERS en P. THIRIAR, *Het gerechtelijk recht in de hoogste versnelling?*, Antwerpen, Intersentia, 2007, 162.

[89] Amendement nr. 25 DÉOM, *Parl.St.* Kamer 2009-2010, nr. 52K2161/004; *Parl.St.* Kamer 2009-10, nr. 52K2161/006, 35-36.

60. Observations that are received too late will not be taken into account by the expert . He has to exclude them automatically in order to preserve a swift conclusion of the expert inquiry.[90] On the other hand the judge can still take the late remarks into account (article 976, second section JC). The judge decides whether late remarks can be justified or not.

61. Some authors wondered whether the expert can undertake additional investigations after receiving the remarks of parties, whether he should allow other parties to respond to these remarks if there were made the last day of the term and whether he still can take into account late but relevant remarks.[91]

62. The legislator answered only the first question. The expert must ask the judge's permission for further necessary additional investigations (article 976, third section JC). The expert can request for this judicial permission by ordinary letter (article 973 §2 JC).

63. Furthermore, article 976 JC does not provide an opportunity for parties to make observations after the additional inquiry. The new Act did not determine that the expert should establish a new preliminary report regarding his additional findings.[92] Nevertheless, it is obvious that parties should be informed about the result of the additional investigations and should have the opportunity to make their comment. The right of contradiction is indeed *sacrosanct*.

64. Finally, the above mentioned remaining questions will be settled by the judge who surveys the terms and the right of contradiction.[93] [94]

IX Replacement of the expert

65. Before the entering into force of the Act of May 15th 2007 any party could ask the judge for a replacement of the expert *"for any founded reason"* (e.g. when the expert's work was unsatisfactory or in case he disregarded the term for his report).[95] Parties could choose a new expert, and by lack of choice, the judge could do so *ex officio.*[96]

66. The Act of May 15th 2007 changed these rules. Article 979 JC provided that an expert could be replaced by the judge if he did not duly execute his assignment. The judge could replace an expert on the demand of parties or *ex officio.* If all the parties asked for his replacement, the judge was obliged to replace the expert. Still, it remained unclear whether the judge was bound by the choice of parties, but had to motivate the replacement of the expert in his court order. [97]

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[90] D. MOUGENOT en O. MIGNOLET, "La loi du 30 décembre 2009 "réparant" la procédure d'expertise judiciaire", *JT* 2010, 206.

[91] D. MOUGENOT en O. MIGNOLET, "La loi du 30 décembre 2009 "réparant" la procédure d'expertise judiciaire", *JT* 2010, 206; B. PETIT en R. DE BRIEY, "La réforme de l'expertise opérée par la loi du 15 mai 2007 ou la loi qui n'eût pas dû exister », *JT* 2008, 246.

[92] D. SCHEERS en P. THIRIAR, "Repareer de reparatie! De aanpassingen door de wet van 30 december 2009 inzake het deskundigenonderzoek", *RW* 2009-10, 1420.

[93] Article 973 §2 JC; B. PETIT en R. DE BRIEY, "La réforme de l'expertise opérée par la loi du 15 mai 2007, ou la loi qui n'eût pas dû exister, *JT* 2008, 246-247; D. MOUGENOT en O. MIGNOLET, "La loi du 30 décembre 2009 "réparant" la procédure d'expertise judiciaire", *JT* 2010, 206.

[94] A. DEMOULIN en F. POTTIER, "La réforme de l'expertise judiciaire. Analyse critique des incidences envisageables pour le domaine de la construction", *T Aann* 2008, 12.

[95] Kh. Hasselt 16 mei 2007, *Limb Rechtsl* 2008, 76, noot J. DEHAESE, "Wraking of vervanging van een deskundige: Waar ligt de grens?".

[96] Old article 977 JC.

[97] B. PETIT en R. DE BRIEY, "La réforme de l'expertise opérée par la loi du 15 mai 2007, ou la loi qui n'eût pas dû exister, *JT* 2008, 244-245.

67. The new Act of December 30th 2009 retained largely this situation. The right of initiative for a replacement request has been preserved (by one party (article 979 §1, first section JC), on parties' united request (article 979 §1, second section JC) or *ex officio* (article 979 §1, third section JC).

68. On the other hand, it is now clear that the judge can deviate from the choice made by parties by motivated court order. The legislator also changed the procedure for a concerted or united replacement request. This request must now he *"motivated"*. This new condition seems to be redundant. A united replacement request means *ipso facto* that the expert's work is unsatisfactory. Moreover, if the request is made by all parties, the judge is obliged to grant this request. He can only deviate from the *choice* of a new expert.[98] [99]

69. The legislator also clarified how the motivated united request for a replacement should be issued. Although long time accepted[100], the new Act explicitly states that this request can be demanded by ordinary letter to the judge (article 979 §1, second section JC).

70. The judge must pass his judgement within 8 days, but the legislator did not indicate the *dies a quo* of this term. Logically, this term should start on the day that the clerk of the court's office receives the replacement request. Nevertheless, there is no sanction if the judge passes his judgment after the 8 day-term. Therefore there is no guaranty that the replacement procedure will be settled faster than before.

71. The judge passes a court order without summoning the parties or the expert. In case of a united request the expert shall be replaced without any possible justification on his behalf. Nor can parties exemplify their request.[101] This is logical because the judge is obliged to replace the expert under these circumstances. By granting the request for replacement, the judge has tot appoint another expert. He is not bound by the choice the parties made..[102] Another hearing in this matter would only slow down the inquiry.[103]

X Term for the final expert report - extension

72. Until the Act of May 15th 2007 no compulsory term existed for the expert to deliver his final report. This term was normally indicated in the initial appointing judgement (old article 964 JC). The exceeding of this term was in practice rather the rule than the exception[104] and was one of the main reasons for the long duration of expert inquiries. The parties involved in the proceedings usually granted the demand for extension of the expert's term,, in fear of offending the expert.[105]

73. The Act of May 15th altered this situation. The experts' term for filing his final report has to be indicated in the judgement in which he is appointed or in the judicial decision rendered after the installation meeting (article 972 §2 JC). If this term exceeded six months, the expert has to deliver an intermediate report to the judge and the parties' councils regarding the actual state of the inquiry (article 974 §1 JC).

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[98] *Parl.St.* Kamer 2009-10, nr. 52K2161/001, 53.

[99] D. SCHEERS en P. THIRIAR, "Repareer de reparatie! De aanpassingen door de wet van 30 december 2009 inzake het deskundigenonderzoek", *RW* 2009-10, 1421.

[100] Cfr. artikel 973 §2 Ger.W.; D. MOUGENOT, "La réforme de l'expertise judiciaire", *RGAR* 2007, nr. 14281, 5.

[101] D. MOUGENOT en O. MIGNOLET, "La loi du 30 décembre 2009 "réparant" la procédure d'expertise judiciaire", *JT* 2010, 206.

[102] Article 979 §1, second section JC; D. SCHEERS en P. THIRIAR, *Het gerechtelijk recht in de hoogste versnelling?*, Antwerpen, Intersentia, 2007, 171.

[103] *Parl.St.* Kamer, 2009-10, 52K2161/001, 53.

[104] P. TAELMAN, "Het deskundigenonderzoek in burgerlijke zaken", in G. De Leval en B. Tilleman (eds.), *Gerechtelijk deskundigenonderzoek. De rol van de accountant en de belastingsconsulent*, in *Recht en Onderneming*, 5, Brugge, die Keure, 2003, 105

[105] M. CASTERMANS, *De hervorming van het deskundigenonderzoek*, Gent, Story Publishers, 2007, 48.

74. Nowadays only the judge can grant an extension of the expert's inquiry term. The judge can refuse the prolongation if it can not be reasonably justified (article 974 §2 JC

75. If the term for delivering the expert's final report has been exceeded and he did not ask for an extension of it, the judge can summon the expert and the parties *ex officio* for a hearing in the court's chambers (article 974 §3 JC). This can result in the replacement of the expert (article 979 JC) and the reduction of his fees and charges (article 991 JC).[106] [107] Other sanctions, such as the exclusion of the final report, were not retained because they would penalise parties for the inactivity of the expert.[108] The automatic replacement of the expert (cfr. old article 976 JC) has been abolished.

76. Furthermore, the Act of 2007 provided that the expert had to file his request to extend his term "on time" (article 974 §3 JC). The legislator neglected to define this last term and to establish an appropriate procedure.[109]

77. The Act of 2009 corrected this ambiguity and (logically) provides now that the expert must address his request to the judge before the end of his (initial) term. [110] The expert's request is now notified to parties and their councils within 5 days (article 973§2, third section JC). The parties can communicate their observations to the judge within 8 days. Depending on the reasonable character of the expert's extension request, the judge will or will not grant the extension. The new Act provides thus a simple and purely written procedure, *inter partes*, without a court hearing.[111] [112]
However, a summons for a hearing in the court's chambers remains possible if the judge considers it necessary (new article 974 §2, section 1 *in fine* JC).

78. The legislator did not provide any term for the judge's verdict, nor did he provide a notification procedure. The term and notification provided by article 973 § 2, fourth and fifth section JC, is only applicable when parties have been heard in the court's chambers.[113] This should be rectified in a new restauration Act. However it seems logical to apply these rules *per analogiam* in the meantime.

XI Advance(s)

79. Before the Act of May 15th 2007 article 990 JC stipulated that the expert could postpone his task until the party with the greatest interest to continue the proceedings has given an advance in consignation at the court's registry. This advance served as certainty for the payment of his honorarium and the compensation of his costs. The expert himself determined in principle the required advance.[114] The advance did not serve to remunerate the expert during the duration of his task.[115] The

[106] B. VANLERSBERGHE, "De wet van 15 mei 2007 tot wijziging van het Gerechtelijk Wetboek betreffende het deskundigenonderzoek en tot herstel van artikel 509*quater* van het strafwetboek", *RW* 2007-08, 601.
[107] Brussel 30 oktober 2007, *JT* 2008, 9.
[108] B. VANLERSBERGHE, "De wet van 15 mei 2007 tot wijziging van het Gerechtelijk Wetboek betreffende het deskundigenonderzoek en tot herstel van artikel 509*quater* van het strafwetboek", *RW* 2007-08, 601.
[109] D. SCHEERS en P. THIRIAR, *Het gerechtelijk recht in de hoogste versnelling?*, Antwerpen, Intersentia, 2007, 158.
[110] *Parl.St.* Kamer 2009-10, nr. 52K2161/001, 52.
[111] D. MOUGENOT en O. MIGNOLET, "La loi du 30 décembre 2009 "réparant" la procédure d'expertise judiciaire", *JT* 2010, 205.
[112] *Parl.St.* Kamer 2009-10, nr. 52K2161/001, 52.
[113] Contra : D. SCHEERS en P. THIRIAR, "Repareer de reparatie! De aanpassingen door de wet van 30 december 2009 inzake het deskundigenonderzoek", *RW* 2009-10, 1419.
[114] A. CLOQUET, *Deskundigenonderzoek in zaken van privaat recht*, in *A.P.R.* 1988, 191;
[115] J. EMBRECHTS, "Het ereloon van de deskundige en de kosten van het deskundigenonderzoek", in E. GULDIX (ed.), *Deskundigenonderzoek in privaatrechtelijke geschillen*, Antwerpen, Intersentia Rechtswetenschappen,

advance remained thus in consignation until the final estimate of the statement of fees and charges. The expert could in principle only be remunerated after his activities.[116] However when the inquiry caused high cost for the expert, the court could authorise the expert to take a part of the consigned advance.

80. The party with the greatest interest to continue the proceedings could perform the consignation of the advance. This was not necessarily the party that requested the expert inquiry, but rather the party with the greatest interest in an effective fulfilment of the expert's assignment.[117] The consignation had to be performed any way by the party that is always condemned to the payment of the costs, according to some special Acts or article 1017 JC (old article 990, third section JC).

81. The consignation could only be fulfilled at the court's registry. If parties paid the advance directly to the expert, he had to return this advance to them (old article 990, second section JC). In case of dispute or when the advance was not paid, the judge could give an order of enforcement for an amount that he determined (old article 990, fourth section JC). Finally, the expert could postpone the fulfilment of his assignment until the consignation of the advance was performed (old article 990, first paragraph JC).

82. The above mentioned regulation (which was in practice *not* respected) has been modified by the Act of May 15th 2007. Due to this modification it no longer belonged to the expert to stipulate and claim the amount of the advance. Only the judge *could* stipulate the advance that "*each party*" had to give in consignation and the part of it that could be released, as well as the term in which the consignation of the advance had to be fulfilled (article 972 §2, section 3 and 4 – article 987 JC).

83. Article 987 JC wrongfully gave the impression by using the words "each party" that all parties were obliged to consign.[118] The judge can not impose the consignation to the party which, according to article 1017 JC, can *not* be condemned in the costs. This last new criterion was for that matter unclear. At the phase of the assignment of the expert it can not be determined who shall be the loosing party. For this reason, it is stipulated in the last section of article 1017 JC that the costs concerning an inquiry measure must always be reserved.[119] Moreover, article 1017 JC does not stipulate who "can not" be condemned in the payment of the costs, but who *"must"* be (cfr. old article 990, third section JC).

84. Furthermore, the judge could impose the consignation of an advance but he was not obliged to.[120] The Constitutional Court clarified that this optional character only refers to the possible release of an advance, not to the consignation of it. Thus, the Constitutional Court excluded that the judge can exempt parties of consignation and pays the advances directly to the expert.[121]

85. If the advance or the released part of the advance was not enough, the expert could, just as before, ask the judge for an additional advance or another release. The expert did no longer need to prove that this release was due to the high costs of the expert inquiry (article 998 JC). The legislator no longer considered the advance as guarantee, since it was explicitly foreseen that a part of the advance could be released for covering the part of the inquiry that was already carried out (article 988, second

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1999, 93; D. SCHEERS en P. THIRIAR, *Het gerechtelijk recht in de hoogste versnelling?*, Antwerpen, Intersentia, 2007, 192.

[116] P. TAELMAN, "Het deskundigenonderzoek in burgerlijke zaken", in G. De Leval en B. Tilleman (eds.), *Gerechtelijk deskundigenonderzoek. De rol van de accountant en de belastingsconsulent*, in *Recht en Onderneming*, 5, Brugge, die Keure, 2003, 121.

[117] Antwerpen 5 februari 2007, *T Verz* 2007, 460.

[118] D. MOUGENOT, "La réforme de l'expertise judiciaire", *RGAR* 2007, nr. 14281, 7.

[119] D. SCHEERS en P. THIRIAR, *Het gerechtelijk recht in de hoogste versnelling?*, Antwerpen, Intersentia, 2007, 194.

[120] B. PETIT en R. DE BRIEY, "La réforme de l'expertise opérée par la loi du 15 mai 2007, ou la loi qui n'eût pas dû exister, *JT* 2008, 247.

[121] D. MOUGENOT en O. MIGNOLET, "La loi du 30 décembre 2009 "réparant" la procédure d'expertise judiciaire", *JT* 2010, 207.

section JC). However, some criticised the fact that no procedural framework had been foreseen for the requests of additional advances or further releases.[122] Thus, some presumed that the expert could request the judge, with an ordinary letter, for the release of an additional advance.[123]

86. Since the Act of May 15th 2007, the consignation can be fulfilled at the courts registry or at a credit institution chosen jointly by the parties. In practice the consignation only occurred at the courts registry resulted in massive work overload.[124] The court's registry or the credit institution had to inform the experts regarding the performed consignation. Once performed, the courts registry transferred the released part of the advance to the expert (article 987, third section JC). The hypothesis concerning the consignation of the advance at a credit institution, was however overlooked.

87. If a party did not consign the advance within the imposed period, the judge could only deduce the conclusions he considered necessary (article 989 JC). It was unclear to what kind of conclusions the judge could come. Certain authors criticised rightly the effectiveness of this kind of stipulation.[125]

88. According to certain authors, the only relevant conclusion the judge could derive from the refusal to consign, was that the concerned unwilling party refused to give its full cooperation to the expert inquiry. However, the judge could for this reason not deem its claim unfounded.[126] Others thought that the judge in such a case could reverse the burden of proof on the unwilling party or that he could impose that party a fine due to the provocative and reckless character of the lawsuit.[127]

89. Finally it was no longer provided that an expert had the right to postpone the fulfilment of his assignment until the full consignation of the advance. Though certain authors thought that the expert could still do so, because otherwise the provision that the expert must be informed of the consignation, would be of little substance.[128]

90. The legislator took most of these remarks into account in the Act of December 30th 2009.

91. Now, the judge can stipulate the amount of the advance that must be consigned, the party or parties that must consign, the term for the consignation and the reasonable part of the advance that can be released in his assigning judgement or in his decision taken after the installation meeting, (article 972 §2 JC). Article 987 JC still gives the impression that "*every party*" must consign an advance. It would be more appropriate to provide "*a party*" or "*the party that must consign*" or the "*obvious party*", since the consignation of the advance can not be imposed to the party that can not be condemned to the payment of the costs (article 987, first section JC).

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[122] B. PETIT en R. DE BRIEY, "La réforme de l'expertise opérée par la loi du 15 mai 2007, ou la loi qui n'eût pas dû exister, *JT* 2008, 237.
[123] D. SCHEERS en P. THIRIAR, *Het gerechtelijk recht in de hoogste versnelling?*, Antwerpen, Intersentia, 2007, 196.
[124] D. MOUGENOT en O. MIGNOLET, "La loi du 30 décembre 2009 "réparant" la procédure d'expertise judiciaire", *JT* 2010, 207.
[125] B. PETIT en R. DE BRIEY, "La réforme de l'expertise opérée par la loi du 15 mai 2007, ou la loi qui n'eût pas dû exister, *JT* 2008, 248, nr. 73; D. SCHEERS en P. THIRIAR, *Het gerechtelijk recht in de hoogste versnelling?*, Antwerpen, Intersentia, 2007, 199; D. MOUGENOT, "La réforme de l'expertise judiciaire", *RGAR* 2007, nr. 14281, 7.
[126] D. SCHEERS en P. THIRIAR, *Het gerechtelijk recht in de hoogste versnelling?*, Antwerpen, Intersentia, 2007, 198.
[127] D. MOUGENOT, "La réforme de l'expertise judiciaire", *RGAR* 2007, nr. 14281, 7.
[128] B. VANLERBERGHE, "De wet van 15 mei 2007 tot wijziging van het Gerechtelijk Wetboek betreffende het deskundigenonderzoek en tot herstel van artikel 509*quater* van het strafwetboek", *RW* 2007-08, 607; D. SCHEERS en P. THIRIAR, *Het gerechtelijk recht in de hoogste versnelling?*, Antwerpen, Intersentia, 2007, 193.
[128] D. MOUGENOT, "La réforme de l'expertise judiciaire", *RGAR* 2007, nr. 14281, 7.
[128] P. TAELMAN, "Kosten en ereloon van deskundigen", *Ius&Actores* 2007, 60.
[128] Brussel 9 mei 2008, *JT* 2008, 390.

92. The legislator also wanted to clarify which party can not be held to consign. The previous formulation can therefore be interpreted in such a way that the consignation of the advance could not be imposed on the party that is expected to win the case. The legislator repeated[129] his intention that with the reference to article 1017 JC only the government and the institutions listed in article 1017, second section JC were intended, because they are always referred into the costs[130], which is now explicitly mentioned in article 987 JC.

93. Furthermore, the party that according to an agreement concluded on basis of article 1017 JC, first section or that is free of payment of the costs according article 1017, second section JC is not obliged to consign its advance. Parties can therefore conclude an agreement concerning the burden of the costs to which the judge is held (article 987, first section JC). [131]

94. The opponent of a party that is held to consign but refuses to do so, can inform the expert of this refusal (article 987, fifth section JC). If necessary that party can on its own motion proceed to consign the advance (article 987, second section JC).

95. If a party does not consign within the term, the judge can now, as before the law of May the 15th 2007, also give an order of execution for the amount that he determines (article 989, first subsection JC)[132], without prejudice of the conclusions that he can still draw from this refusal.

96. The expert also needs to inform the judge if he is subordinated to VAT. The judge needs then to determine explicitly if the liberated amount needs to be increased with the VAT. (article 987, third section JC). This stipulation was introduced to avoid that experts subordinated to VAT should calculate VAT on the liberated advance.[133]

97. Finally the expert can, as before the law of May the 15th 2007, suspend or postpone the execution of his task until he is informed of the consignation of the advance (by presentation of the receipt by the party obligated to consign (article 989, third section JC)). It can not be expected of the expert that he advances all costs without having any certainty about his pay. [134] If the expert suspends his task, it is however recommendable that he informs the judge. If necessary, it gives the judge the opportunity to intervene within the scope of his control competence. [135]

98. To relieve the work of the registry and in order to simplify the procedure[136] **,** the party that has consigned the advance needs to inform the expert, by handing over the receipt (article 987, fourth section JC).

99. The slip of the legislator[137] concerning the liberation of the consigned advance was eliminated. The law now provides that the credit companies pay the liberated part of the advance at the expert. (new article 987, *in fine* JC).

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[129] *Parl.St.* Kamer 2005-2006, 52K2540/001, 17 en 52K2540/007, 21.
[130] *Parl.St.* Kamer 2008-2009, 52K261/001, 55.
[131] D. SCHEERS en P. THIRIAR, "Repareer de reparatie! De aanpassingen door de wet van 30 december 2009 inzake het deskundigenonderzoek", *R.W.* 2009-10, 1424.
[132] *Parl. St.* Kamer 2008-09, 52K2161/001, 56.
[133] *Parl.St.* Kamer 2008-09, nr. 52K2161/001, 55; cfr. M. BINARD en F. DE GERANDON, "Les frais et honoraires de l'expert: le point de vue de l'expert", in *Le nouveau droit de l'expertise judiciaire en pratique*, Brussel, Larcier, 2007, 101; D. SCHEERS en P. THIRIAR, "Repareer de reparatie! De aanpassingen door de wet van 30 december 2009 inzake het deskundigenonderzoek", *RW* 2009-10, 1425.
[134] *Parl.St.* Kamer 2008-09, nr. 52K2161/001, 56.
[135] D. MOUGENOT en O. MIGNOLET, "La loi du 30 décembre 2009 "réparant" la procédure d'expertise judiciaire", *JT* 2010, 208.
[136] *Parl.St.* Kamer 2008-09, nr. 52K2161/001, 55.
[137] *Parl.St.* Kamer 2008-09, 52K2161/001, 56; L. CEULEMANS, "Belangrijkste wijzigingen in het deskundigenonderzoek na de wet van 30 december 2009", *Tax Audit & Accountancy* maart 2010, 38.

100. Finally the legislator remarked that some courts already take in account certain rules (so called "good practices") regarding the consignation of advances. If it would appear in the future to be necessary, the law provides the possibility to determine further rules regarding the consignation by Royal Decree. [138]

XII Statement of fees and charges

101. Under the Act of May 15th 2007 the expert had to lodge his statement of fees and charges together with his final ʳeport at the court's registry after the completion of his inquiry, and send these over to the parties by registered mail and by ordinary mail to their councils (article 978 §2 JC). This statement had to mention in detail his fee rate, his travel costs, his accommodation costs, the general costs and the fees, the costs paid to third persons and the settlement of the released advances (article 990, first section JC). The former criteria (old article 982 JC) regarding the statement of costs and fees, namely the proficiency of the expert, the difficulty and duration of the work and the value of the litigation were no longer mentioned.[139] If the expert neglected to draft his statement of fees and charges, parties could ask the judge to estimate them (article 990, second section JC).

102. After filing the statement of costs and fees at the registry, the parties had to inform the judge within 15 days whether they agreed upon this statement. Hereafter, the judge estimated the fees and costs of the expert at the bottom of the original of this statement. An enforcement order was attached to that statement in accordance with the cost agreement between parties or issued against the party or parties who were sentenced to deposit the advance (article 991 §1 JC).

103. f the parties did not consent with the statement within the term of 15 days, the expert or the parties could ask for a convocation and hearing in the court's chambers in order to obtain an estimation by the judge (article 991 §2 JC) (so called "appraisal procedure"). The judge settled the costs and fees mainly taking into account the care by which the work has been carried out, the respect of terms and the quality of the work, without prejudice to the payment of damages and interests (article 991 §2 third section JC).

104. Nevertheless, one accepted that these criteria were not exhaustive. The judge still could use the former criteria[140] such as the expert's limited experience or the limited financial capacity of (one of) the parties.[141] The judge could also reduce the statement of fees and charges if the report was unsatisfactory.[142] In case the caused damage was not fully compensated by this reduction the judge could also sentence the expert in the payment of damages (article 991 §2, *in fine* JC).[143]

105. The Act of December 30th 2009 switched the conditions for the appraisal *procedure.* If parties did not inform the judge that they contest the statement fees and charges within 30 days after the filing of the statement at the court's registry, the judge immediately estimates this statement (article 991 §1 JC).

106. This reversal was necessary because most proceeding parties did not react within the provided term although they agreed with the expert's statement. This caused redundant convocations and court hearings.[144] On the other hand, the reversal of the appraisal procedure means that parties and their

[138] *Parl.St.* Kamer 2008-09, 52K2161/001, 55.
[139] B. VANLERSBERGHE, "De wet van 15 mei 2007 tot wijziging van het Gerechtelijk Wetboek betreffende het deskundigenonderzoek en tot herstel van artikel 509*quater* van het strafwetboek", *RW* 2007-08, 607.
[140] D. MOUGENOT, "La réforme de l'expertise judiciaire", *RGAR* 2007, nr. 14281, 7.
[141] P. TAELMAN, "Kosten en ereloon van deskundigen", *Ius&Actores* 2007, 60.
[142] Brussel 9 mei 2008, *JT* 2008, 390.
[143] *Parl.St.* Kamer 2005-06, nr. 51K2549/001, 56.
[144] *Parl.St.* Kamer 2008-09, nr. 52K2161/001, 56-57; D. MOUGENOT en O. MIGNOLET, "La loi du 15 mai 2007 modifiant le code judiciaire en ce qui concerne l'expertise et rétablissant l'article 509*quater* du code pensection

lawyers must duly take this new term into account. Furthermore, the judge no longer seems to have discretion regarding the estimation of the statement if the parties neglect to contest this statement within 30 days.[145] The legislator considered the silence of parties as an acceptance of the statement.[146] Nevertheless, some authors question this far-reaching consequence.[147] A pure silence of parties can not be considered as an acceptance, especially when exceeding the term of 30 days is not sanctioned. In their opinion, only a circumstantial silence can be considered as an acceptance.[148]

107. If one of the parties contests the statement of the expert within 30 days, parties are summoned by the judge *ex officio* in order to avoid any further delay.[149] Parties need to motivate their contestation and the judge will settle this dispute and estimate the fees and charges of the expert (article 991 §2 JC). The expert must be heard and offered the opportunity to defend his statement, although the legislator forgot to provide that the expert should also be summoned. [150]

108. The method for estimation by the judge has also additionally been changed. Until now no legal tariff or rates exists for experts in civil cases.[151] The judge is not bound by the rates used by professional expert organisations.[152] The judge shall therefore always motivate his estimation on the diligence of the inquiry, the respect of terms and the quality of the work. The judge can now also take into account the difficulty and the duration of the work, the proficiency of the expert and the value of the litigation (article 991 §2, third section JC).[153]

The judge can only evaluate the quality of the inquiry *prima facie.* This means that the judge can only take into account obvious irregularities of the report.[154]

109. The costs of the expert investigation are part of the costs of the proceedings, which, in the end, have to be paid by the party losing the case[155].

Evaluation de la loi et propositions de modifications", in *De proceswettten van 2007… revisited!*, Brugge, Die Keure, 2009, 262.

[145] D. SCHEERS en P. THIRIAR, "Repareer de reparatie! De aanpassingen door de wet van 30 december 2009 inzake het deskundigenonderzoek", *RW* 2009-10, 1426.

[146] *Parl.St.* Kamer 2008-09, nr. 52K2161/001, 57.

[147] D. SCHEERS en P. THIRIAR, "Repareer de reparatie! De aanpassingen door de wet van 30 december 2009 inzake het deskundigenonderzoek", *RW* 2009-10, 1426.

[148] D. MOUGENOT en O. MIGNOLET, "La loi du 30 décembre 2009 "réparant" la procédure d'expertise judiciaire", *JT* 2010, 210.

[149] Amendement nr. 31 van mevrouw DÉOM c.s., *Parl.St.* Kamer 2009-10, nr. 52K2161/004, 18; *Parl.St.* Kamer 2009-10, nr. 52K2161/006, 40.

[150] D. MOUGENOT en O. MIGNOLET, "La loi du 30 décembre 2009 "réparant" la procédure d'expertise judiciaire", *JT* 2010, 210, nr. 40; D. SCHEERS en P. THIRIAR, "Repareer de reparatie! De aanpassingen door de wet van 30 december 2009 inzake het deskundigenonderzoek", *RW* 2009-10, 1426.

[151] (K.B. April 27th 2007 *houdende algemeen reglement op de gerechtskosten in strafzaken, BS* 25 mei 2007; K.B. November 14th 2003 *tot vaststelling van het tarief van de erelonen en de kosten voor de deskundigen aangewezen door de arbeidsgerechten in het kader van medische deskundige onderzoeken inzake de geschillen betreffende de tegemoetkomingen aan gehandicapten, de gezinsbijslag voor werknemers en zelfstandigen, de werkloosheidsverzekering en de regeling voor verplichte verzekering voor geneeskundige verzorging en uitkeringen, BS* 28 november 2003. (GwH 25 januari 2007, nr. 22/2007; GwH 22 december 1999, nr. 137/1999).

[152] P. TAELMAN, "Kosten en ereloon van deskundigen", *Ius&Actores* 2007, 62; Brussel 11 september 2009, *Res Jur Imm* 2009, 191.

[153] *Parl.St.* Kamer 2008-09, nr. 52K2161/001, 57; D. SCHEERS en P. THIRIAR, "Repareer de reparatie! De aanpassingen door de wet van 30 december 2009 inzake het deskundigenonderzoek", *RW* 2009-10, 1426.

[154] P. TAELMAN, "Kosten en ereloon van deskundigen", *Ius&Actores* 2007, 60.

[155] Cass., 16 November 1989, *Arr. Cass.*, 1989-90, 373.

XIII Limited intervention of experts

110. A classic expert report is not always required to settle a dispute. After all, appointing an expert as an investigative measure has a subsidiary nature (article 875bis JC). Since the law of December May the 30th 2009 article 986 JC stipulates that the judge could appoint an expert to be present at "*an investigative measure [the judge] has ordered"* to provide either technical explanations (first section) or to present an oral report at the court session fixed for that purpose (second section). A third kind of limited intervention of the expert exists in his attendance at a court session to provide orally more detailed explanation upon some aspects of his report (art. 985 JC).

XIV Conclusion

111. The law of December 30th 2009 brought useful and necessary changes to the rules concerning the expert inquiry with the goal of optimalizing this investigative measure. To this end the legislator often feel back on the former regulation: choice of expert – article 962 JC; extension of the task – article 962, third section JC). The big accomplishments in that context are mainly the abolition of the mandatory installation meeting, the simplified procedure for term extension for the deposit of the final report and the renewed valuation procedure.

Some old problems still remain (like the question who can be obliged to consignation – article 987 JC) and other novelties start showing their first deficiencies or gaps (for example the new procedure concerning the suspension of notification of the assignment decision (article 972 §1, second section JC), the obligation for parties to send their documents to the expert 8 days prior to the installation meeting (article 972bis JC).

112. Finally the amendment of the law by the Act of December 30th 2009 still leaves a few important questions unanswered, such as the question of confidentiality during the conciliation attempt, the question if the expert also can appeal the decisions and last but not least the question whether a formal list of judicial experts is advisable and, if so, how this list should be composed.

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