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CROSS-BORDER TAKING OF EVIDENCE: EUROPEAN CASE STUDY NO. 1

Regulation (EC) No 1206/2001 on the cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:174:0001:0024:en:PDF

1. Arbitration proceedings are pending under the Rules of the ICC Court of Arbitration. Seat of arbitration is Ljubljana, Slovenia. The arbitral tribunal should examine a witness residing in France; a former employee of the defendant. His relations with the defendant however deteriorated and he is not willing either to submit a written witness statement nor to attend the evidentiary hearing, wherever the tribunal might schedule it. The tribunal however finds precisely the testimony of this witness to be crucial for the determination of the dispute and wishes to ask a state court for assistance. The Tribunal therefore submits, in accordance with the Arbitration Act, a request to the Ljubljana District Court for a supportive measure of examining the witness. The Tribunal, knowing that the witness lives in France, assumes, that the Slovenian court will ask the French court for assistance in taking of evidence.

   May the Ljubljana District Court reject the request on the following grounds:

- Arbitration falls out of the scope of the »judicial co-operation in civil and commercial matters«;
- Nothing prevents the Arbitral tribunal to submit its request for a supporting measure directly to the French court.

2. Nevertheless, the Ljubljana court decided to assist the arbitral tribunal with the taking of evidence. Since the evidence has to be taken in another MS, the Court proceeds, as the requesting court with submitting the request to the competent French court (»requested court«).

   May the requested court reject the request on the following grounds:

- That the Regulation is concerned with cooperation between state courts; but here the requested taking of evidence ultimately aims at benefiting foreign arbitration proceedings; thus evidence which is to be taken is not »*intended for use in judicial proceedings, commenced or contemplated*«;
- In any case; pursuant to national law of the requested court the witness is entitled to reimbursement of travel costs (in casu cca 50 EUR) in advance. No assistance in taking of evidence may take place before the requesting court complies with this requirement of providing advance on costs or at least ensures that it will reimburse the costs at a later stage.

3. The French court ultimately proceeded with summoning the witness. One of the parties and its Slovenian attorney at law appeared at the hearing The requesting court has previously notified the requested court of the (intended) presence of the parties and their representatives and that their participation is required. In the course of the examination the judge invited the party to pose questions to the witness. When the attorney, on behalf of the party, wanted to pose the question, the judge interrupted him and stated that the foreign attorney has no right of audience in the French court (unless in conjunction with a locally qualified lawyer; in accordance with the EU Establishment Directive for Lawyers). The judge stated that Art. 11 of the Taking of Evidence Directive the representatives of the parties merely have a right to be present at the performance of taking of evidence, without giving them any automatic right or active participation. Neither does this rule affect the existing restrictions as to the right of audience for foreign attorneys in local court proceedings. This restriction applies *ex lege*, thus no specific determination of conditions pursuant to Art. 11(4) of the 1206/2001 Regulation is necessary. *Is this argumentation correct?*

4. Finally, the party wishes to pose a question to the witness. Knowing that the witness speaks Slovenian, the question is put in the Slovenian language. The French judge intervenes again and insists that the witness is examined in the French language and since the witness speaks French it was the responsibility of the parties and not of the requested court to ensure that their active participation is practically possible. *Is this argumentation correct?*

5. The requesting court sent the list of questions to the requested court. The examining judge realizes that some of these questions are leading and as such not compatible with generally accepted rules concerning evidence. *What should the examining judge do?*

6. The requesting court notified the requested court that pursuant to Art. 233 of the Slovenian Civil Procedure Act a witness may refuse to answer a particular question for justified reasons (*emphasis added*), especially if, by answering, he might expose himself, his relatives »to a serious disgrace, considerable financial loss or criminal proceedings«. In addition, A witness may refuse to testify on the grounds of protection of a professional secret unless the disclosure of certain facts is to the benefit of the public or some other person, provided that such benefit outweighs the damage caused by disclosure of the secret (Art. 231, 232 CPA). Protection of business secrets (unlike professional secrets; Art. 231) is not explicitly defined as a legitimate ground for refusing to testify under Slovenian law.

7. During the course of examination the witness stated that he refused to testify on a certain matter because she is required to protect important business secrets. He invokes the Slovenian law. The judge believes that the reference to "justified reasons" in Art. 233 CPA can cover, inter alia, also protection of business secrets. In addition it is also plausible and it has been suggested by some scholars in Slovenia that the notion of "professional secrets" is construed extensively, thus including also "business secrets". However under Slovenian law, this privilege is not absolute; rather it requires the judge to apply the text of proportionality if the witness refuses to testify (as was the case here). On the other hand, protection of business secrets is also privileged under the national law of the requested court. In addition, some information (relating to the sale of weapons) required from the witness might also be covered by military secrets of the requesting state. No instruction as to the possible privileges was included in the request though. *What should the examining judge do?*

8. Finally the evidence was collected and the transcript of the witness statements sent to the requesting court. In the meantime another set of proceedings have already started between the same parties in this court and again, examination of the same witness, concerning identical issues, is requested. Both parties agree that the court should simply use the above witness statement. *May the court follow this proposal?*

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1. A Slovenian Company wishes to bring a lawsuit in the German court against the Company, domiciled in Germany, for the alleged patent infringement in Italy. The prospective claimant (the holder of the right) wishes to obtain a search warrant allowing the to enter without warning the production facilities and warehouses of the alleged infringer in Romania and seize the infringing goods, also to allow the nominated experts of the prospective claimant to inspect the equipment used to carry out the tests even before the commencement of the procedure on the merits. In addition it wants to obtain a »preliminary hearing of a witness, residing in Italy, prior to the bringing of proceedings.« *Can it ask for a preliminary and protective measure pursuant to the Brussels I Regulation or does this matter concern cross-border taking of evidence?*

2. The proceedings were subsequently brought in the German court. The German requested that the court should hear 10 witnesses, residing either in Poland, Romania or Italy and that it should appoint an expert, whose remit includes the carrying out of investigations, including entry into business premises, inspection of premises and public spaces and registers; and obtaining of evidence in Romania. Instead of applying methods, provided for in the Evidence Regulation, simply (1) summon the witnesses to appear in the evidentiary hearing in the German court in accordance with its national law (and serve the summons pursuant to the Cross-border Service of Documents Regulation) and (2) appoint a German expert and instruct him to perform his tasks in Romania.

   The claimant objected the chosen method concerning the examination of witnesses. He argued that the Evidence Regulation prevails over the national law; i.e. the court could only choose between the option of direct taking of evidence (in Poland, Romania and Italy) or the option of taking evidence through the requested court. In addition, even if the Evidence Regulation does not enjoy exclusivity, constitutional procedural guarantees should be respected and the method, which is the most effective, should be chosen. Here, it cannot be realistically expected that most of the foreign witnesses will indeed come to Germany to give evidence. Consequently, the claimant argues that his constitutional right of effective access to court and right to be heard would be violated.

   On the other hand, the defendant objected the appointment of the German expert. He argued that the expert is perceived as an »officer of the court« (»an extended arm of the judge«) and it would thus violate sovereignty of the Italian state if »officers of the court of one member state would, except by methods provided for in the Evidence Regulation, perform official acts in another MS.

   Are the claimant's and the defendant's objections well-founded.

3. The court nevertheless decides to proceed in the described manner. However, 8 of 10 witnesses do not appear at the evidentiary hearing. On the other hand, the German expert, while being able to perform some of its tasks in Romania, is faced with the problem that the owner of one of the warehouses, where the defendant's products are stored, denies him access.

   May the court apply coercive measures – e.g. impose fines – against foreign witnesses who failed to appear in the German court? If yes, can these fines be enforced in another MS pursuant to the Brussels I Regulation?
   Is there any possibility to overcome the problem of the denied access for the expert?

4. Three of the Italian witnesses, while refusing to attend a hearing in Germany, informed the German court, that they would be willing to testify via video-link. The German court (and the parties as well)

agree with the idea. The court, now encouraged by the CJEU findings in *Lippens*, opines that also the Videoconference can be conducted without any use of the Evidence Regulation, thus excluding any involvement of the Italian courts. It is agreed that during the videoconference the witnesses will be in p the conference room of the company, where they are all employed, which is equipped with all necessary facilities for a videoconference. *Can the court proceed in the suggested manner?*

5. Following a proposal of the claimant, the German court finally asked the Romanian court to appoint an expert, in order to ensure that he will be able to perform all tasks in Romania. It further requests that the expert should, during his investigations, be accompanied by two party-appointed experts. The Romanian court, based on the information provided, realizes that in his statement of defence in the proceedings in Germany the defendant challenged the validity of the patent for lack of novelty, and claimed that he had acquired the technology in question from the inventor before the latter deposited a patent request (seeking protection for Italy). The Romanian court holds that the Italian court has exclusive jurisdiction pursuant to Art. 23(4) of the Brussels I Recast since the case is concerned with the validity of patent, although this issue was raised by way of defense. In addition in the court's view some of the tasks of the expert actually relate to the production of documents, whereby this is framed very broad terms (»e.g. submit all relevant documentation and all company files«). It decides to reject the application for the following reasons:

- The German courts lacks jurisdiction; Italian courts have exclusive jurisdiction over the matter;
- The request for documentary evidence is framed so wide as to constitute requests for »fishing expeditions« and must be restricted to documents that could be used as evidence directly in proceedings;
- Under national law it is not possible that the court-appointed expert is accompanied by party appointed experts during his investigations and inspections.
- No advance on costs for the expert was provided.

Are these arguments correct?

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1. A Slovenian customer booked a package tour to Martinique through an Irish tour operator via internet. The price was payable in installments. Due to (alleged) failures in the provided services, the customer finally informs the tour operator that he is entitled to a reduced price. Consequently he refuses to pay the last two installments in amount of 600 EUR. The tour operator does not agree and he brings proceedings in an Irish court, in accordance with the jurisdiction clause, included in the contract. *The Irish court requests the Slovenian court to (1) order the defendant to disclose documents, both those supporting his case as well as those which adversely affect it and consequently, to allow the claimant to inspect the disclosed documents; (2) examine the defendant as a witness.*

2. The Slovenian judge realizes that the case concerns a consumer, and the case falls in the scope of the special protective regime under the Brussels I Regulation, so only a Slovenian court (the place of the consumer's domicile) has jurisdiction. *May it reject to execute the request?*

3. The Slovenian procedural law differentiates between examination of a party and examination of a withess. *How should the Court proceed?*

4. *Should the court make a verbatim minutes of the examination (*by recording; the method applied by Irish courts) or as the judge's summary of main statements (as is usually done in Slovenian courts)

5. Inter alia, the Irish court informed the Slovenian court that the claimant's attorneys will be present during the examination of the witness and requested their participation. Thereby it also requested that the attorneys should, in line with the adversarial approach, be the first to ask questions, and the Slovenian judge only after them.

   May the Slovenian court refuse the request for participation of the claimant's Irish representatives because:
   - cross-examination of witnesses is unknown to Slovenian law and
   - considering the low value of claim it is incompatible with fundaments of Slovenian legal order that such expensive and complex method of taking of evidence applies.

6. In the view of the Slovenian the request for the production of documents does not relate to taking of evidence. In the judges view » in order to have one party produce documents considered necessary for the outcome of the lawsuit it has to settle, a court does not need to make an international application to obtain evidence: it suffices for it to order the party concerned to produce the said evidence.« Such orders cannot be directly enforced, neither it needs to be anyway. It suffices that »intra-procedural« sanctions are imposed; such as preclusion to produce such documents at a later stage or judge drawing adverse inherences from the party's failure to submit documents. *Is this argumentation correct*?

7. Concerning the issue of inadequate services (and whether the claim for the price reduction was therefore well-founded) the court would need, following the defendant's proposal, to hear witnesses residing in Martinique and to have some premises there inspected. The judge, who quite fancies the idea of visiting this tropic island, submits the requests under the Evidence Regulation, applying for the direct taking of evidence (whereby, no facilities for video-link exist). He orders the defendant to advance costs of 2.000 EUR for that purpose, in the same time warning him that in case the advance is not paid, the proposal to take evidence will be deemed withdrawn. *Is there anything the defendant can do?*