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Issues on Comparative Civil Procedural Law

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Comparative law is one of the most vibrant disciplines in the legal sciences research world in the 21st century. In the European Union (EU) alone, for the period of 2007/2013, comparative law research will receive some 543 million euros of EU funding distributed by four specific programs: Fundamental Rights and Citizenship, Civil Justice Programme, Consumer Programme and Criminal Justice Support Programme.

The effort and investment of the EU in comparative law is not new. It dates back to the early 80's the creation of the Commission on European Contract Law (later known by The Lando Commission[1]) with the goal of setting the Principles of European Contract Law (PECL) that would, in future, and in pursuit of the European Community method of successive approach[2], eventually lead to the adoption of an European Civil Code. This goal is not yet achieved and it is now unclear if it will ever be. Nonetheless, the Lando Commission was the first of various research groups[3] that, during the 80's and 90's, appeared in the EU and boosted comparative law research in Europe.

European funding is heavily supporting research in the field of Law and Justice: 543 million euro are available for the Fundamental Rights and Justice Framework Program 2007-2013 and from this grand total, 60 million + euro are to be spent with the Specific Programme Civil Justice mostly in Comparative procedural law research.

Comparative law in general and Comparative procedural law in particular are, therefore, at the cutting edge of European legal research. This means legal scholars have the obligation of rise the awareness about Comparative Law within the legal professionals. The aim of this lecture is precisely that.

It will start by presenting the concept of Comparative law, its paradigms and epistemological concerns and its methodologies. It will then move into Comparative procedural law specifics, especially in those aspects referred to in general, to finalize with a brief illustration of the particular difficulties arising in the way of the procedural comparativiste.

[1] Named after its Chaiman, Ole Lando.
[2] As conceived by Jean Monet.
[3] The groups include, among others, The Acquis Group, The European Group on Tort Law, The Study Group on a European Civil Code. These groups, with some others, established the Joint Network on European Private Law (COPecl), probably the biggest legal research network in the world.

Jezikovna problematika pri čezmejnem vročanju

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1. Uvod

Vidik varstva suverenosti pri čezmejnih vročitvah izgublja na pomenu. V ospredju ostaja le želja, da se zagotovi spoštovanje procesnih jamstev za stranki. Za toženca pravica do obrambe (povezano z jamstvi glede jezika, v katerem je pisanje, ki se vroča), z vidika tožnika pa želja, da se zagotovi čim bolj hitra in uspešna vročitev. Spreminjanje izhodišča je očitno v ureditvi čezmejnega vročanja v evropskem pravu (Uredba št. 1393/2007[4]). Še posebej je to očitno pri ureditvi neposrednega poštnega vročanja, če evropsko uredbo primerjamo s Haaško konvencijo iz leta 1965[5] kot najpomembnejšo multilateralno konvencijo s področja čezmejnega vročanja. Pri slednji je glede neposrednega poštnega vročanja do izraza prišel le vidik suverenosti. Država po Haaški konvenciji namreč lahko izrazi nestrinjanje s tem načinom vročanja.[6] Vendar pa, če se država s tem načinom vročanja strinja, sama Konvencija ne daje nobenih jamstev glede jezika ali možnosti odklonitve pisanja, ki ni v jeziku namembne države in ustrezne poučitve naslovnika o možnosti odklonitve sprejema (jamstva glede jezika veljajo le za vročanje prek centralnih organov; glede poštnega vročanja pa lahko države sicer postavijo pogoje glede jezika). V sistemu Uredbe št. 1393/2007 pa je ravno nasprotno: države več ne morejo nasprotovati neposrednemu poštnemu vročanju. Vendar pa Uredba vzpostavlja režim, ki naslovniku učinkovito omogoča, da odkloni sprejem, če ni v jeziku, ki ga razume in bi s tem bila lahko ogrožena njegova pravica do učinkovitega izjavljanja v postopku (gl. spodaj).

2. Temeljno o jamstvih glede jezika v Uredbi o vročanju

Uredba določa več različnih načinov vročanja. Med seboj so sicer formalno enakovredni, praktično pa (vsaj v Sloveniji) najpomembnejša ostajata vročanje prek tim. organov za pošiljanje in organov za sprejem na eni strani ter možnost neposrednega vročanja po drugi strani. Pomembne in enake so pri vseh načinih vročanja omejitve glede jezika. Pri tem uredba uporablja drugačen standard kot Haaška konvencija[7]: dovolj je, da naslovnik jezik razume ali pa gre za uradni jezik zaprošene države članice ali, če je v tej državi več uradnih jezikov, v uradni jezik ali v enega od uradnih jezikov kraja, kjer je treba opraviti vročitev. V nasprotnem primeru

[4] Uredba: št. 1393/2007 Evropskega parlamenta in Sveta z dne 13. novembra 2007 o vročanju sodnih in izvensodnih pisanj v civilnih ali gospodarskih zadevah v državah članicah (vročanje pisanj) in razveljavitvi Uredbe Sveta (ES) št. 1348/2000.

[5] Haaška Konvencija z dne 15 novembra 1965 o vročanju v tujino sodnih in izvensodnih pisanj v civilnih in gospodarskih zadevah

[6] Direktno poštno vročanje (kot subsidiarna možnost – primaren način je po Haaški konvenciji vročitev prek centralnih organov) po poštni poti je mogoče samo za države, "ki ne nasprotujejo" (Čl. 10). Pregled stanja notifikacij in zadržkov na spletni strani Haaške konference omogoča zaključek, da je pri tej konvenciji treba dati uraden zadržek. Zahteva po notifikaciji, drugače kot pri Konvenciji iz leta 1954, izrecno izhaja tudi iz čl. 21 (in čl. 31) Konvencije. Slovenija tega ni storila.

[7] Najpomembnejši način vročanja, predviden s to konvencijo, je sicer sistem vročanja prek centralnega organa namembne države. Ta se v praksi obnese. Pisanje mora biti načeloma prevedeno v jezik države vročitve. Vendar je to v resnici nujno le pri tim. formalni vročitvi (tj. ko centralni organ zaprošene države opravi vročitev na način, kot se vročajo sodna pisanja domačega sodišča). Če pa se zahteva tim. neformalna vročitev prek centralnega organa v državi sprejema, in je naslovnik pisanje pripravljen sprejeti, je možna tudi vročitev brez prevoda.

lahko pisanje odkloni (v roku od sedmih dni od dejanskega prejema). Pomembna je določba, da organ za pošiljanje pouči prosilca, od katerega prejme pisanje v pošiljanje, da lahko naslovnik odkloni sprejem pisanja, če ta ni v enem od jezikov iz člena 8 (čl. 5/1 Uredbe). Ni torej mogoče odkloniti izvedbe vročitve, če prevod ni priložen (prim. čl. 146.a ZPP). Vročitev je treba poskusiti tudi v primeru, če je povsem jasno, da je pisanje v jeziku, ki ga naslovnik ne razume. Določeno je tudi, da prosilec krije vse stroške prevajanja, nastale pred pošiljanjem pisanja, brez poseganja v morebitno naknadno odločitev sodišča ali pristojnega organa o teh stroških (čl. 5/2 Uredbe). Tudi glede tega je ureditev v čl. 146.a ZPP ustrezna. Če naslovnik upravičeno odkloni sprejem pisanja, ker ni priložen prevod v ustrezen jezik, organ za sprejem nemudoma vrne pisanje organu za pošiljanje. Če je nato pisanje v ustreznem jeziku ponovno poslano v roku enega meseca, se glede rokov, ki se nanašajo na tožnika, kot datum vročitve šteje datum, ko je prvič prišlo do poskusa vročitve. To Uredba sedaj izrecno določa v tretjem odstavku 8. člena in s tem sledi stališčem, ki jih je že SES izoblikovalo že v času veljave Uredbe št. 1348/2000.[8]

Ureditev glede jezika pisanja, ki velja za vročanje prek organov za pošiljanje in organov za sprejem, veljajo tudi za vročanje po pošti (14. člen) in za neposredno vročanje. Tudi v postopku vročanja po pošti se namreč uporabljajo pravila o pravici odkloniti sprejem zaradi neustreznega jezika iz 8. točke Uredbe (ki se sicer nanaša na vročanje prek centralnega organa). To jasno določa 5. odstavek 8. člena Uredbe (žal je v praksi slovenskih sodišč mogoče najti tudi odločbo, ki je to jasno določbo spregledala[9]). Za odklonitev sprejema ima naslovnik rok 7 dni (torej pisanje lahko odkloni tudi po tem, ko ga dejansko prejme in odpre).

3. Razumevanje jezika pri fizičnih in pri pravnih osebah

Merilo »jezika, ki ga naslovnik razume« je očitno treba razumeti v subjektivnem smislu. Pomembno je, ali jezik razume konkretni naslovnik. Za objektiviziranje kriterijev (npr. da je treba šteti, da naslovnik razume jezik države, katere državljan je), kar bi sicer bilo v prid pravni varnosti in predvidljivosti, v Uredbi ni opore.[10] Objektivne okoliščine (npr. da je naslovnik državljan države, v kateri je jezik pisanja uradni jezik ali da je naslovnik dlje časa živel v državi, kjer se uporablja ta jezik) so pri tem lahko le indic oziroma ena od okoliščin, ki so lahko upoštevne pri ugotavljanju okoliščine, ali konkretni naslovnik jezik razume. SES je že zavzelo stališče, da dogovor strank, da bodo vso korespondenco vodili v določenem jeziku, še ni zadosten dokaz, da stranka ta jezik obvlada (kar je kriterij glede presoje veljavnosti vročitve). To je le ena od okoliščin, ki jih je treba upoštevati pri presoji znanja jezika.[11] Še posebej pri potrošniških pogodbah jezik pogodbe ali jezik, v katerem so sestavljeni splošni pogoji poslovanja, na katere se pogodba sklicuje, nikakor ne morejo biti dokaz, da stranka (potrošnik) ta jezik razume.[12]

[8] Leffler v. Berlin Chemie AG, C-443/03, 8.11.2005.
[9] Sklep VSL III Cp 2979/2010 z dne 15.12.2010.
[10] Enako Heiderhoff v Rauscher, str. 626.
[11] Sodba v zadevi Ingenieurbüro Michael Weiss und Partner GbR v. Industrie- und Handelskammer Berlin, C-14/07 z dne 8.5.2008. Deloma drugače Mnenje generalne pravobranilke Trstenjak z dne 29.11.2007 (Par. 92, točka 2), ki je predlagala, da naj bi tak dogovor strank vzpostavil izpodbojno domnevo, da stranka jezik razume.
[12] Enako Heiderhoff v Rauscher, str. 626.

Postavlja se vprašanje, kako presojati, ali naslovnik pisanje razume, če je naslovnik pravna oseba. Ali mora jezik razumeti zakoniti zastopnik, pravna služba, kdorkoli ali morda tisti, ki je na sporni zadevi pri pravni osebi dejansko delal, nekdo od "vodilnih" ali morda zadošča, da gre za jezik države, v kateri je sedež pravne osebe (tudi ko gre npr. za podružnico v drugi državi in spor izvira iz poslovanja te podružnice)?[13] Določeno objektiviziranje je pri pravnih osebah verjetno nujno, saj pravna oseba kot taka nobenega jezika ne govori in ne razume. Stališče, da bi moralo biti odločilno, ali določen jezik razume oseba, ki pravno osebo zastopa (zakoniti zastopnik), je neživljenjsko. Smiselno je presojati, ali jezik razumejo tisti, ki so znotraj pravne osebe vsebinsko delali na zadevi.[14] Gotovo gre predaleč stališče, da bi v čezmejnem gospodarskem prometu morali šteti, da pravna oseba razume angleščino kot jezik mednarodne trgovine.[15] Po stališču SES dogovorjeni jezik poslovne komunikacije sicer ni sam po sebi odločilen, gotovo pa je to okoliščina, ob kateri bo težko ugovarjati stališču, da oseba ta jezik razume.

Težave lahko nastanejo tudi v zvezi z vprašanjem, kakšna stopnja znanja jezika je potrebna, da odklonitev sprejema ni več upravičena. Verjetno ni mogoče šteti, da zadošča že splošno oziroma temeljno znanje določenega jezika. Tudi od vsebine pisanja je odvisno, v kakšni meri je potrebno znanje pravne in strokovne terminologije; pri vabilu na narok ali pri vročitvi enostavnih sodnih odločb položaj ni enak kot pri vročitvi zapletenih tožb.[16] Po drugi strani je treba upoštevati, da je cilj Uredbe zmanjšati stroške s prevajanjem in da je smisel garancij v zvezi z jezikom po stališču SES v tem, da se zagotovijo temelji možnosti obrambe.[17]

Sporno je, ali je glede jamstev v zvezi z jezikom vlog v postopku dopustna avtonomija strank tj. dogovor strank o jeziku, v katerem se lahko opravijo vročitve. Pri tem (v kontekstu vročanja) ne gre za avtonomijo strank glede jezika postopka, pač pa za vprašanje, ali se stranke lahko dogovorijo, da se pri čezmejnem vročanju soglaša z vročitvami pisanj v določenem jeziku (praviloma v jeziku postopka). Sodba SES v zadevi *Weiss* se na to vprašanje ne nanaša.[18] Tam je šlo za dogovor strank o jeziku komunikacije v materialnopravnem razmerju, ne za dogovor o jeziku komunikacije za primer sodnega postopka. Vendarle se zdi, da za upoštevanje dogovora strank o jeziku komunikacije v sodnem postopku v Uredbi o vročanju ni podlage.[19] Tudi takšen dogovor bi kvečjemu lahko šteli za indic, da stranka določen jezik razume.

4. Dokazno breme in način ugotavljanja znanja jezika

Sporno je tudi, kdo nosi trditveno in dokazno breme za ugotavljanje dejstva, da naslovnik jezik pisanja (ne) razume.[20] Po eni strani se zdi, da je pravica odkloniti pisanje

[13] Gl. npr. Schlosser, robna št. 2 k čl. 8 EuZVO, Mankowski, str. 182, Lindacher, str. 187.
[14] V tem smislu Heiderhoff v Rauscher, str. 629.
[15] Tako sicer Schlosser, robna št. 2 k čl. 8 EuZVO.
[16] Gl. npr. Lindacher, str. 179- 187.
[17] Sodba v zadevi Ingenieurbüro Michael Weiss und Partner GbR v. Industrie- und Handelskammer Berlin, C-14/07 z dne 8.5.2008.
[18] Sodba v zadevi Ingenieurbüro Michael Weiss und Partner GbR v. Industrie- und Handelskammer Berlin, C-14/07 z dne 8.5.2008.
[19] Za upoštevanje avtonomije strank v tem smislu: Heiderhoff v Rauscher, str. 624.
[20] Gl. npr. Wautelet, str.14, Stadler, Ordnungsgemaesse …, str. 121.

zaradi nepravilnega jezika, pravica naslovnika in bi zato on moral nositi dokazno breme.[21] Vendarle pa se bolj utemeljeno zdi nasprotno stališče. Izhodišče mora biti, da naj bo pisanje v jeziku, ki ga naslovnik razume. Če naslovnik pisanja ne sprejme z utemeljitvijo, da jezika ne razume, je ustrezno, da je dokazno breme, da to ne drži, na nasprotni stranki.[22] To je tudi v skladu s splošnim načelom, da se negativnih dejstev ne dokazuje. Vendar vprašanje ostaja sporno vse dokler ga ne bo rešilo Sodišče EU.

Uredba ne ureja vprašanja, kako se sploh ugotavlja, ali naslovnik pisanje razume. Standard »razumevanja jezika« je načelno ustrezen, v praktični izvedbi pa ustvarja težave. Gotovo ne more biti smisel Uredbe v tem, da bi sodišče za ugotavljanje okoliščin glede znanja jezika naslovnika izvajalo širok dokazni postopek. Vendarle pa se to lahko izkaže za nujno.[23] Ker bo naslovnik sam praviloma trdil, da določenega jezika ne zna, pride za dokazovanje nasprotnega v poštev predvsem izvedba dokazov s pričami in listinami (npr. dopisi, ki jih je v določenem jeziku opravila stranka ali listinami, iz katerih izhaja, da je naslovnik dlje časa živel v državi, kjer se govori jezik, v katerem je pisanje…). Omeniti velja še, da težave lahko nastanejo tudi pri dobrovernem naslovniku, ki ne ve, ali je njegovo (pomanjkljivo) znanje določenega jezika zadostno, da ne sme odkloniti sprejema pisanja.

5. Posledice neupravičene odklonitve sprejema in nepravilne poučitve

Ni povsem jasno, kakšne so posledice, če naslovnik pisanje razume, pa kljub temu odkloni sprejem. Glede na to, da Uredba o tem ne vsebuje nobenih določb, je verjetno treba šteti, da je treba upoštevati ureditev v nacionalnem pravu.[24] V Sloveniji bi torej morali izreči, da je vročitev pravilno opravljena – podobno kot če naslovnik pri navadnem vročanju odkloni podpis vročilnice.[25] Ni mogoče vnaprej izključiti možnosti, da stranka, ki jezika pisanja ne razume, sploh ni pravilno poučena o pravici odklonitve sprejema (npr. če pisanju niso priloženi obrazci iz priloge II k Uredbi o vročanju, ki vsebujejo ustrezen pouk v vseh uradnih jezikih EU). Če si stranka v tem primeru prevod priskrbi sama in se v postopek vključi, bi morali šteti, da je nepravilnost vročitve opravljena (je pa to treba upoštevati pri kasnejši odločitvi o stroških).[26] Če se stranka v postopek ne vključi in če pride do zamudne sodbe, pa je podan razlog za odklonitev priznanja po 34. členu Bruseljske uredbe.[27]

6. Kvaliteta prevoda

Omeniti velja, da določena praktična in dejanska vprašanja glede prevodov niso bila neznana tudi doslej (in so še vedno aktualna npr. pri Haaški konvenciji); npr. vprašanje, kdaj je prevod po kvaliteti ustrezen. Gotovo ni merilo, da mora biti povsem ”čist” (tj. brez kakršnih koli slovničnih in pomenskih napak); po drugi strani pa vsako ”skrpucalo”

[21] Tako Schlosser, robna št. 1 k čl. 8 EuZVO.
[22] Tako tudi Heiderhoff v Rauscher, str. 632.
[23] Prim. sklep VSL 459/2009 z dne 31.3.2010.
[24] Ibidem.
[25] Prim. Mankowski, str. 182.
[26] Schlosser, robna št. 2 k čl. 8 EuZVO.
[27] Heiderhoff v Rauscher, str. 633.

tudi ne more zadostiti zahtevam glede jezika. Upoštevati je treba, da je pomen prevoda v zagotavljanju učinkovite pravice do obrambe. Nekvaliteten prevod (še posebej če je zavajajoč ali vsebinsko neustrezen) lahko to pravico izniči.[28] V Nemčiji sodna praksa ni pretirano stroga.[29] Vprašanje je tudi, ali mora biti prevedeno res vse, kar je v originalnem pisanju. Če gre za vabila na narok, je dovolj prevod v povzetku glede bistvenega. Nasprotno pri vročanju tožbe, sodbe in podobnih pisanj ne zadošča približen prevod, pač pa mora biti prevedeno vse.[30]

7. Način uresničitve pravice do odklonitve sprejema

Ustrezno je sedaj rešeno vprašanje, kako je z odklonitvijo sprejema zaradi neustreznega jezika, če pride do nadomestne vročitve (npr. sorodniku, ki živi v istem gospodinjstvu). Ni dvoma, da te oseba pisanje za naslovnika lahko oz. morajo sprejeti. Ne more pa ista logika veljati tudi za vprašanje odpovedi pravici, da naslovnik pisanja, ki ni sestavljeno v pravilnem jeziku, ne sprejme. Volja osebe (npr. sorodnika), ki sprejme pisanje namesto naslovnika, ne more nadomestiti naslovnikove volje glede (ne)sprejema pisanja zaradi nepravilnega jezika. Sedaj je ustrezno določeno, da ima naslovnik 7 dni časa, da se odloči, ali bo pisanje sprejel. To pride v poštev pri vseh načinih vročitve – nadomestni vročitvi, vročitvi v poštni nabiralnik in osebni vročitvi »v roke« naslovniku. Torej se s pisanjem lahko seznani, nato pa se še vedno lahko odloči, da sprejem odklanja. V zakup je treba vzeti, da se bo najbrž povečalo število primerov, ko bo naslovnik sprejel pisanja, ki so zanj ugodna - npr. sklepe o dedovanju -, zavrnil pa sprejem neugodnih pisanj – npr. tožb. Vendar je ta ureditev kljub temu ustrezna. Tudi če naslovnik sam prejme pisanje, pogosto ob trenutku vročitve za pravico odkloniti sprejem niti ne ve. Prav tako ne ve, ali je pisanje zanj razumljivo. Enostavnejša pisanja morda so, zapletene tožbe pa ne. Utemeljevanje, da je naslovnik ”vedel, da je pisanje v tujem jeziku, saj je podpisal vročilnico v tujem jeziku” ni prepričljivo. Ta ureditev tudi rešuje problem, kako naslovnik sploh ustrezno zve za pravico odkloniti sprejem. Zanašanje na pravilne pravne pouke poštarjev ne more biti realno. Po Uredbi mora biti pisanju priloženo obvestilo v vseh uradnih jezikih EU, ki naslovnika poučuje o pravici odklonitve sprejema, pogojih za uresničitev te pravice ter nujnih ravnanjih (poslati pisanje nazaj).

Če naslovnik sprejem pisanja (upravičeno) odkloni, ima nasprotna stranka možnost, da poskrbi za prevod in pisanje se nato vroča znova (konvalidacija napake). Za datum vročitve se bo v tem primeru štel dan, ko je bilo pisanje vročeno znova; če pa je po pravu države postopka treba vročiti tožbo v določenem roku, je tožnik varovan, saj se (s tega vidika) šteje, da je bilo pisanje vročeno že pri prvem poskusu (čl. 8/3 Uredbe). Uredba 1393/2007 je s to ureditvijo, ki ustrezno upošteva interese obeh strank, v bistvenem povzela stališče, ki ga je že prej zavzelo SES. [31]

[28] Gl. npr. Wilske, Krapfl, str. 10-13, Mankowski, str. 182.
[29] Heiderhoff v Rauscher, str. 629.
[30] Ibidem.
[31] Sodba v zadevi Götz Leffler v. Berlin Chemie AG, C-443/03 z dne 8.11.2005. Gl. npr.Mankowski, Uebersetzungserfordernisse und Zurueckweisungsrecht des Empfaengers im europaeischen Zustellungsrecht, IPRax 2009, št. 2, str. 180.

8. Prevod prilog?

Pri čezmejnem vročanju je pogosto sporno vprašanje glede jezika, ali zadošča, da je prevedena vloga, ali pa morajo biti prevedene tudi vse priloge. SES je glede tega izreklo, da absolutna obveznost prevoda velja glede vlog, glede prilog pa je treba oceniti, ali je za pravilno razumevanje zadeve in pripravo učinkovite obrambe prevod dejansko nujen.[32] Če gre zgolj za listine, ki imajo pomen dokaznega sredstva, niso pa nujne za pravilno razumevanje zadeve in zahtevka, prevod z vidika Uredbe ni nujen.

9. Sklepno

V primerjavi s klasično ureditvijo v Haaških konvencijah Uredba o vročanju po eni strani veča jamstva glede jezika. Predvsem zato, ker je nedvoumno, da ta jamstva veljajo tudi pri neposrednem poštnem vročanju in je pri tem zagotovljeno, da naslovnik svojo pravico, da odkloni sprejem, tudi učinkovito lahko izkoristi. Po drugi strani pa Uredba s tem, ko uveljavlja kriterij, da mora »iti za jezik, ki ga naslovnik razume« tudi znižuje določen standard, ki sicer tradicionalno velja v ureditvah čezmejnega vročanja. Ureditev na načelni ravni ni sporna, saj ustreza temeljnemu načelu pri ureditvi čezmejnega vročanja – namreč zagotovitvi učinkovite pravice do obrambe. Po drugi strani pa je pozitivna z vidika zagotavljanja nekaterih drugih enako pomembnih procesnih jamstev – tistih, ki so povezana s stroškovnim vidikom zagotavljanja učinkovitega sodnega varstva. Težava pa je v tem, da novi standard v praksi povzroča številne probleme in vprašanj, na katera še ni zanesljivih odgovorov, je veliko. Ko se bodo pojavila pred sodiščem, bi bilo za številna med njimi smiselno postaviti vprašanje za predhodno odločanje na Sodišče Evropske unije.

[32] Sodba v zadevi Ingenieurbüro Michael Weiss und Partner GbR v. Industrie- und Handelskammer Berlin, C-14/07 z dne 8.5.2008.

Notarial deeds in international legal relations - with a special review of the Macedonian legislature and practice -

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Abstract:

This article aims to analyze the current position and effects of the notarial deeds in international legal relations. The paper starts with the definition of the notarial deed as a core area of notarial activity, in legal theory and Macedonian legislature, followed by the elaboration of some effects of notarial deeds. The elaboration of the evidence effect of the notarial deeds in internal and international legal relations occupies a special place in the work, as well as the presentation of the notarial deed as an enforceable title. The opportunity for using the foreign notarial deed as the basis for compulsory enforcement is analyzed. The last part of the work addresses the question of composing notarial deeds in matters with international connections. Besides the principle lex loci actus which is fundamental in drawing up the notarial deed, the authors point out the principle of assignation of the notarial deed, as one of the mechanisms for providing the free circulation of notarial deeds.

Key words*: notary, notarial deed, evidence effect, enforceable title, international legal relations*

1. Introduction

The trend of globalization understood as "freedom of the individuals and the companies to initiate voluntary economic transactions with citizens of different countries", presupposes revocation or at least minimization of the obstacles that inhibit the international legal relations. In the circumstances of intensive international legal relations, including the relations concerning public deeds, each bureaucratic obstacle that inhibits the free circulation of people, goods and services, instead of globalization, leads to particularism, an idea which is being abandoned in international relations. This trend of globalization does not pass by the area of public notary, as an institution which, although is a part of the sovereign authorities of a particular state, has the mission amongst others to provide for efficient cross-border legal relations and legal certainty in international transactions[33].

In this contextual framework, the purpose of this article is to analyze the position of the notarial deeds in international legal relations. The fundamental premise of our analysis is the need to recognize universal effects to the notarial deed, therefore an analysis of the current mechanisms for providing external efficiency of domestic notary

[33] See art. 10 of the Declaration of the International Union of the Latin Notaries on the role of the public notary in the society, from the XXI International Congress of the Latin Notaries, Berlin 1995.

deeds will be given, and respectively the mechanisms for internal efficiency of foreign notarial deeds. That should lead us to the answer of the question whether further liberalization of the legal regime for international relations with notarial deeds is necessary, in order to provide the notarial deed with *"fidem and auctoritatem"* not only within, but also outside the state borders of the native country.

2. About the notion and the effects of the notarial deeds

It is well known that the core of the notarial work is the regulation-certificatory function which comprises the official composition of public deeds for legal matters and statements with which certain rights are established (Triva - Dika, 2004: 239). The notarial deeds are deeds drawn up by the notary in the range of his legal public competence, in the legally prescribed form, which have effects provided by law.

In that sense, for example, in the legislature of the Republic of Macedonia[34] *notarial deeds are: deeds for legal matters and statements drawn up by the notary in the form of a notary act; minutes for legal matters composed by the notary or which have been composed in his presence, as well as certificates for facts which the notary has affirmed by direct observation or by means of documents.*

The notary act is mandatory for the following legal matters:
a) agreements for regulation of the property relations between spouses and between people living in non-marital partnership;
b) gift contracts without handing of the object in possession of the receiver of the gift;
c) each act on constitution, organization, termination, statute and changes of legal entities which perform economic actions, institutions, foundations and other bodies, except for companies;
d) all legal matters taken by visually and hearing impaired persons which can not read or mute people which can not write; and
e) agreements for disposal of property of minors and persons who have been deprived of legal capacity or have a limited legal capacity[35].

The legal significance and the effects of notarial deeds respectively, can only be posed and answered from the perspective of a particular legal system[36]. Within different legal systems, usually more legal effects of the notarial deeds can be identified, but in this occasion, from the aspect of the international legal relations with notarial deeds, we shall confine to the review of the evidence effect of the notarial deeds and the notarial deeds as enforceable titles (instruments). In addition, the question of composition of notarial deeds in matters with international elements shall be reviewed as well.

[34] See art. 4 of the Law on Notaries (LN), Official gazette of the Republic of Macedonia, No.55/2007, 86/2008, 139/2009 and 135/2011.
[35] Art. 42 of LN. This does not affect the provisions of this or any other law under which for the validity of the legal action it is necessary for the deed to be drawn up by a court or a notary.
[36] As *prof. Geimer* would say, the Archimedes Principle apllies to the notarial deeds: "a notarial deed does not have any effect per se and of itself; rather, it needs to be embedded in a particular legal system." See *Notary professor Dr. Reinhold Geimer, Munchen, The Circulation of Notarial acts and their effect in law, XXIII International Congress of Latin Notaries, Report of German Delegation, p.14*, on http://www.bnotk.de/_downloads/UINL_Kongress/Athen/GEIMER_ENGLISH.pdf.

3. Evidence effects of the notarial deeds in internal and international legal relations

The notary deeds (as well as their copies and transcripts), issued in accordance with law, *are public deeds* if in the course of their composition and issuance the necessary conditions specified in law have been complied with (art.4, para.2 of the LN). We shall recall the definition of public deed: "*As a public deed will be considered every deed which, in the prescribed form, has been issued by a state body or a body of state government within its competence, as well as a deed which in such form has been issued by an organization or other institution exercising public authority which has been entrusted by law*"[37].

The deeds issued by a notary within his public legal authorities in the state in which he has been appointed are *domestic notarial deeds*, while every other notarial deed from the aspect of that country represents a *foreign notary deed*.

The public deeds, including the notarial deeds, are one of the most commonly used and particularly secure means of proof, in the legal relations, both in judicial and administrative proceedings. Taking in consideration the fact that in the field of procedural (evidentiary) law, the principle of national procedural autonomy is still dominant, the evidence effects of the public deeds, including the notarial deeds, vary from one legal system to another.

In the Republic of Macedonia, similar to the other countries from the continental procedural area (for example Germany, Italy, France, Spain, Slovenia, Croatia and others), the evidentiary rule for veracity of the public deeds applies, as a limitation to the principle of free appraisal of evidence. A rebuttable presumption is set for the public deeds: *the public deed proves the veracity of what is confirmed or determined in it (assumption of veracity), but it is allowed to prove that in the public deed the facts are untruthfully established or that the deed is incorrectly composed* (art.215, para.1 and 3 of the LLP). This entirely applies for the notarial deeds as public deeds[38]. The assumption of veracity of the public (including notarial) deeds does not apply in the states that are not familiar to the Latin notary (for example, England, USA, Sweden and others), in which the procedural laws do not recognize the public deeds bigger evidentiary force that other evidences.

It should be emphasized that the *assumption of veracity* of public deeds, with the possibility to prove otherwise, as a principle, applies in every procedure, except for the criminal procedures, where the principle of free appraisal of evidence applies to the public deeds as well. Certainly the evidentiary rules which apply to the public deeds

[37] In this direction see also art. 215, para.1 of the Law on litigation procedure (LLP) of the Republic of Macedonia (Official gazette of the Republic of Macedonia, No.79/2005, 110/2008, 83/2009 and 116/2010; consolidated text in No.7/11).

[38] This is a general rule for the evidence effect of the notary deeds, since the evidence effects of the notarial deed depend on the type of notary deed (notarial act, notarial minute, notarial certificate).

refer to the notaries as well, when they while performing their official tasks use the submitted public deeds[39].

Taking in consideration the fact that the assumption of veracity refers to what is confirmed or determined in the public deed, as the notary deeds are concerned the assumption of veracity refers not only to the content of the declaration, but also to the statements in the notarial deed about the identity of the person making the declaration, the declarant's age (relevant for contractual capacity), the notary's belief about the declarant's contractual/testamentary capacity, the place, time and other circumstances of the declaration. What has evidentiary force is not only notarial deeds, i.e. written instruments prepared by a notary, but also declarations attested by the notary *(*Geimer, 2001: 14-15*).*

Such evidence effect of the public (including notarial) deeds arises from the *assumption of authenticity (originality)*, which is also connected to the public deeds. The public deed is original if it has been issued by a body, an organization or an institution respectively, which is quoted in the deed as issuerer. For the domestic public deeds the authenticity is presupposed, unless the body in an appropriate proceeding where the deed is used, suspects in its authenticity. Thus, if the court suspects the authenticity of the deed, it may request the body, or the institution from which the deed is supposed to originate to declare themselves over the issue (art.215, para.4 of LLP). In addition, the authenticity of the deed may be examined with other evidences (Triva - Dika, 2004: 514) – (for example, the authenticity may be contested by any party in the proceedings with an appropriate counter-evidence). Furthermore, a separate litigation proceeding can be conducted upon a declaratory claim for establishment of the authenticity or the non-auntenticity of the deed[40].

As already stated, the evidence effect of a public deed arises from its authenticity. The deed which it shall be established that is not original does not have the effects of the public deed, which makes the assumption of authenticity of the deed pointless.

When it comes to foreign public deeds, most of the countries today allow for a foreign public deed to be used on their territory with the evidence effects of a public deed, provided that it is appropriately verified, unless otherwise provided in an international agreement. In this sense, in the legislation of the Republic of Macedonia as well, the rule that "*in regard of the evidentiary force the foreign public deeds are equalized to domestic public deeds*" applies. *It means that the evidentiary force of the foreign public deeds fundamentally corresponds to that of the domestic ones*. *The equalization is conditioned by the fulfillment of several preconditions*: a) the foreign public deed is properly verified; b) there is reciprocity and c) in international agreement is not provided otherwise (art.216 of LLP). These conditions should be cumulatively fulfilled in order to equalize a foreign public deed with a domestic public deed.

[39] It is considered that concerning the evidencing by public deeds, the notary can not be entailed greater responsibility that a judge in civil proceedings. This is due to the fact that the notarial function covers non- contentious administration of the justice, which usually means preventive justice.

[40] See art.177 of LLP. The same situation is in other countries form the roman procedural area (France - *inscription de faux,* Italy - *querela di falso,* and similar).

The condition "the foreign public deed is appropriately verified" refers directly to the presumption of its originality. Unlike the domestic public deeds, whose authenticity in case of doubt can be controlled by the body conducting the proceedings by addressing to the body which issued the document within the same state, in the case of foreign public deeds, the control of the authenticity of the document is conducted through different mechanisms. The most traditional mechanism is the legalization, while recently i.e. substitutes of the legalization are being developed by international agreements. The evidencing of the originality of a foreign public deed depends on the specific domestic mechanisms for providing of originality depending on the country where the deed comes from.

The term legalization (authentication) of a foreign public deed (including foreign notarial deed) means certification of the originality of the deed which is requested in international legal relations[41]. As an act for proving of the authenticity of the deed, the legalization does not refer to the veracity of the contents of the deed (or the substantive law question of the fulfillment of the notarial form by an authenticator), (Geimer, 2001:41). The procedure for legalization itself is regulated by law and it implies the involvement of multiple bodies (diplomatic body, court, administrative body) with a few chain validations and super-validations, which considerably complicates and delays the proceedings[42].

Foreign public deeds are not subject to certification (legalization) if, on the basis of reciprocity the domestic public deeds are not subject of certification in the country whose deed is in question (art. 3, para.2 of LLDILR). The domestic public deeds are legalized if according to the law of the country where they are going to be used their certification is requested and if by international agreement is not provided otherwise. The legalization is not carried out when it has been abolished on bilateral, regional or multilateral legislative level. By these instruments, other mechanisms are provided for ensuring the originality of the document (i.e. substitution of legalization), which are simplified and alleviate the proving of the originality of the document.

The Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (HCARL) of 1961 (Official gazette of SFRJ, International contracts-supplements, No.10/62), whose main purpose is abolition of the diplomatic or consular legalisation[43], provides for only one formality in function of securing the originality of the deed (document): *issuance of an certificate (l'apostile) by an authorised body of the state from which the deed originates[44], at the request of the person who has signed the document or any bearer (*art.3, para.1 and art.5 of the

[41] In the Republic of Macedonia, the Law on legalization of the deeds in international legal relations –LLDILR (Official gazette of SFRJ, No.6/73) is in force. According to article 3 of this law, by the verification, the authenticity of the signature of the person who has signed it and the authenticity of the seal placed on the deed are certified.

[42] For example, public deeds issued abroad can be used in the Republic of Macedonia only if they are verified by the Ministry of foreign affairs, or a diplomatic or consular office of the Republic of Macedonia abroad (art.3 para.1 of the LLDILP). See also art.6 and 7 of this law.

[43] See the preamble and art.2 of HCARL - "legalisation means only the formality by which the diplomatic or consular agents of the country in which the document has to be produced certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears".

[44] It may be convenient to mention here the idea that in time appeared in the expert public in the Republic of Macedonia for transference of the competence of issuing apostiles to the notaries, within the trend for unloading the courts from the uncontested matters. In that sense, see Tumanovski, 2001:100-114.

HCARL). This certificate is considered to be *sufficient evidence to the originality of the deed*[45], *and it is not be required when either the laws, regulations, or practice in force in the state where the document is produced or an agreement between two or more contracting states have abolished or simplified it, or exempt the document itself from legalisation* (art.3 para.2 of HCARL). It is particularly important that the HCARL expressly mentions notarial deeds (acts) among the foreign public deeds[46].

The apostile is certainly not a final resolution of the international community for the need to provide the authenticity of the deeds. At multilateral level, continuous efforts can be ascertained for further simplification of the formalities for ensuring the authenticity of the deed. We shall mention, for example, the possibilities to place an apostile not only to the original document, but also on its certified copy[47], currently in trial electronic issuance of apostile of notarial public deeds in some countries and others.

On the regional level, the procedure for certifying the authenticity of the foreign public deeds has been even more simplified by the Brussels Convention abolishing the legalisation of documents in the member states of the European communities (BCAL) of 25 May 1987, which practically does not provide for any formalities for evidencing of the authenticity of the public deeds, or respectively it completely abolishes the legalisation of the public deeds between the member states. Among the public deeds, the Convention expressly mentions the notarial deeds. Yet, its application is restricted to only a small number of countries of the Union, who have ratified it and have decided to apply it in their mutual relations[48]. Some other instruments of the European Union (for example, the Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[49], provide for abolishment of the legalisation and the similar formalities for the deeds that fall within their scope[50]. It means that the deeds which are going to be submitted in the exequatur procedure according to this regulations require neither consular certification nor a similar formality.

By bilateral agreements (which usually refer to legal assistance in civil and criminal matters or to the mutual legal relations) the need for legalization of deeds in legal relations between two contracting states is abolished. The Republic of Macedonia itself has concluded more than twenty similar bilateral agreements. Thereby, in a part of these bilateral agreements the notarial deeds are not expressly mentioned as deeds

[45] To the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which the document bears.
[46] See art.1, line c of HCARL.
[47] Understandably, here it is necessary to confirm the functions of both persons: the issuer of the deed and the notary who has certified the copy. See *Conclusions and Recommendations adopted by the Special Commission on the practical operation of the Hague Apostille, Evidence and Service Conventions (28 October to 4 November 2003)*.
[48] These are Belgium, Denmark, France, Italy, Ireland and Latvia.
[49] Also the Regulation (EC) No.2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, Regulation (EC) No.1346/2000 on insolvency proceedings, and Regulation (EC) No.1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents).
[50] On the actions taken within the European Union for abolishment of the formalities for certifying the authenticity of the public deeds, see Green paper, Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records, European Commission, Brussels, 14.12.2010, COM(2010) 747 final.

which are exempt from legalisation[51]. The reason for this state in the bilateral relations of the Republic of Macedonia is the fact that at the time these agreements have been concluded most of the notarial tasks were taken by the courts or other state bodies, and they have been subsequently transferred to the notaries. This may generate controversies in the practise and it may harm the international legal relations with notarial deeds. Namely, if these agreements are interpreted restrictively (in that sense, for example, the notary is not the organ (body) of the contracting state, but an autonomous and independent public service), then they can not be used for the abolishment of the legalisation of notarial deeds. This means that the HCARL should be applied, which provides for an apostile (l'apostille), which additionally burdens the legal relations between the two countries with supplementary formalities. On the other hand, it is a common situation for the courts not to check whether a bilateral agreement has been concluded with a particular country, and at the request of the party they always issue an apostile.

Taking in consideration the aforesaid, we can summarize the following: If a foreign notarial deed has a status of a public deed in the country in which it has been issued, and if in the relations with that country the legalization has been abolished, or legalization or apostile are required, and that formality has been complied with, then the foreign notarial deed in terms of its evidentiary force is equalised with the domestic notarial public deed. If the foreign notarial deed does not have the status of a public deed according to the law of the country where it has been issued or in a case when it should be legalised, and it has not been legalised, then in the procedure it shall be considered as a private deed under the principle of free appraisal of evidence (Wedam - Lukić, 1994: 10).

4. The notarial deed as an enforceable title in international legal relations

Unlike the court decisions and settlements, which acquire the effect of *res iudicata*, the notarial deeds do not have such effect*,* since they always must be verifiable in additional court procedure (Rijavec, 2003: 127, and also Geimer, 2001:17*)*. Yet, the afore mentioned does not mean that the rights arising out of a notarial deed can not be enforced. This possibility arises out of the *effect of enforceability* that certain notarial deeds posess[52]. The possibility the notarial deed to possess characteristic of an enforceable title, aims to contribute to more efficient implementation of subjective civil rights, primarly to protect creditors by facilitating the possibility of enforcement of their due claims (Dika, 1995: 552). It is well known that in the countries where Latin notary profession exist, enforceable notarial deeds are an efficient alternative to court proceedings, and they enormously alleviate the burden on the judiciary. Unlike them,

[51] For example, by the Agreement between Republic of Macedonia and Republic of Slovenia on legal assistance in civil and criminal matters from 1996 (Official gazette of the Republic of Macedonia – International agreements, No.24/96) it has been agreed that "*for the deeds, which in the prescribed form have been issued or certified by the court or other competent body of the contracting state, which have been signed or a seal has been placed on them by the competent body, further certification is not required for use on the territory on the other contracting state"* (art.17, para.1). The contract uses the general term "deed", but does not mention the notarial deeds at all. On the other hand, for example, in the Agreement between Republic of Macedonia and Bosnia and Herzegovina on legal assistance in civil and criminal matters from 2006 (Official gazette of the Republic of Macedonia - International agreements, No.10/06), in the part concerning the abolition of legalization of the public deeds, the notarial deeds are expressly mentioned.

[52] "The notarial deed, in the cases provided by law, represents an enforceable title" – art.4 para.3 of LN.

„the Common Law countries have not implemented the progressive institution of the enforceable deed in their legal systems. A large number of matters that are settled by enforceable notarial deeds in the area of Civil Law notarial profession are settled in a functionally comparable manner, but in conceptually more old – fashioned way, in summary proceedings, by judgment by consent or by confession" (Geimer, 2001:66).

According to the legislature of the Republic of Macedonia*, the notarial deed is an enforceable title (instrument) if a certain obligation for acting on which the parties may agree is determined in the deed, and if it contains a stetement by the debtor that on the basis of that deed, enforcement for the realisation of the action after the obligation is due can be conducted directly* (art. 43, para.1 of LN). The consent of the debtor that direct enforcement may be conducted on the basis of the notarial deed is a procedural disposition which refers to a certain claim and does not affect the origination of the obligation (Rijavec, 2002: 36).

The same legal effect as the notarial act has also the private deed with the specified content which has been confirmed (solemnised) by the notary (Trgovčević – Prokić, 2007: 277). If the private deed does not contain the statement of the debtor that on the basis of the deed enforcement can be conducted, such statement is added by the notary by consent of the parties and in accordance with the conditions provided in the procedure for confirmation (solemnisation) of private deeds (art.43, para.6 of LN).

According to the legislature of the Republic of Macedonia, the attestation of enforceability of the notarial deed is placed by the notary, upon a written request by a party, to which a verified statement that the claim or part thereof is due is attached (art.43, para.7 of LN).

According to the Law on enforcement - LE (Official gazette of the Republic of Macedonia, No. 35/2005, 50/2006, 129/2006, 8/2008, 83/2009, 50/10, 83/10, 88/10 and 171/10; consolidated text in No. 59/11), the enforceable notarial deeds are expressly noted as enforceable instruments[53]. The enforcement on the basis of the enforceable notarial deeds is conducted by the competent (private) bailiff.

Within the analysis of the notarial deeds in international legal relations, the question propounds whether foreign notarial deeds have the effect of enforceable title and are directly enforceable in other countries? Are the legal provisions of the native country that confer enforcement effect of a notarial deed significant per se for the enforcement organs of the other country?

The possibility of enforcement of foreign notarial deeds is evaluated strictly by the law of the country of the enforcement. In that occasion, the internal legislature of the country of the enforcement, as well as any international agreements and conventions whose member is that country can be considered. These may affect the international legal relations with notarial deeds favorably or unfavorably, since "despite all the

[53] Art.12, para.1, line 3 and art.16 of LE - "The notarial deed is an enforceable instrument, if it has become enforceable in accordance with a separate regulation providing for the enforceability of such deeds. On the basis of a notarial deed which has become enforceable only in one part, the enforcement will be conducted only in that part".

globalisation and international interconnections, even today the enforcement effect of a notarial deed attributed to it in its state of origin does not automatically extend to foreign states, especially not those in which the enforcement should take place (Geimer, 2001:45).

According to the legislature of the Republic of Macedonia, enforcement of a decision of a foreign court can be conducted in the Republic of Macedonia if the decision meets the preconditions for recognition provided by law[54] or an international agreement that has been ratified in accordance with the Constitution of the Republic of Macedonia (art.8 of LE). *The LE of the Republic of Macedonia does not contain a specific provision for enforcement on the basis of foreign notarial deeds*[55]. It seems that the Macedonian legislator has overlooked the question of enforcing the foreign notarial deeds. In addition, any of the bilateral agreements concluded by the Republic of Macedonia does not provide for enforcement on the basis of foreign enforceable notarial deeds, but only for the recognition and enforcement of foreign court decisions. In the circumstances when the Republic of Macedonia is not yet a member state of the European Union, and the regulation for enforcement of directly enforceable notarial deeds which have been confirmed as an European enforcement order[56] can not be applied, it is questionable whether enforcement on the basis of a foreign notarial deed can be conducted in the Republic of Macedonia at all.

Enforcement of a foreign enforceable notarial deed by the private bailiff in the Republic of Macedonia can be conducted only if an extensive interpretation of art.7 of LN is accepted. According to this article „*notarial deeds issued abroad, have the same legal validity as if issued pursuant to this law, under the conditions of recipocity*"[57]. If under the notion „same legal validity"[58] the characteristic of direct enforceablitily of the notarial deed is composed, then the foreign notarial deeds can be equalised with the deeds issued in accordance with the LN, under the condition of reciprocity, and direct enforcement of foreign notarial enforceable deed on the territory of the Republic of Macedonia might occur[59]. Regarding the condition of reciprocity, it should be noted that, for foreign court decisions, according to the PIL, the reciprocity is no

[54] In the Republic of Macedonia, that is the Law on international private law - PIL, (Official gazette of the Republic of Macedonia, No. 87/07 and 156/10)

[55] On the contrary, for example, in the legislature of the *Republic of Slovenia* there is an express provision according to which *under conditions of reciprocity, the foreign notarial act is directly enforceable in the Republic of Slovenia if it refers to rights that are not contrary to the legal order of the Republic of Slovenia and if it contains all the elements necessary for enforceability according to the Law on notaries of the Republic of Slovenia* - "Pod pogojem iz prejšnjega odstavka je tuji notarski zapis v Republiki Sloveniji izvršljiv neposredno, če se nanaša na pravice, ki niso v nasprotju s pravnim redom Republike Slovenije, in če vsebuje vse elemente, ki so za izvršljivost potrebni po tem zakonu" (čl.7, st. 2 Zakon o notariatu (uradno prečiščeno besedilo) (ZN-UPB1), Uradni list RS, 23/05. Some other countries in their statutes have legal provisions for this question (according to article 79 of Austrian Execution Act, enforcement can also be conducted on the bases of deeds that have been established abroad and are enforceable there).

[56] Regulation (EC) No.805/2004 creating a European Enforcement Order for uncontested claims.

[57] The starting point is the assumption that in the countries of the Latin notary there are no differences in the procedure for drawing up the notarial deeds itself, or the differences are minimal, and for that reason except for the reciprocity, no other additional substantive criteria for the equivalency of the foreign with the domestic notarial deeds are provided.

[58] The term "same legal validity" is to be understood in the sense that the foreign notarial deed under the condition of reciprocity is equalised to domestic notarial deed. It is a matter of determining the equality of the foreign with the domestic notarial deed, and not recognition in a procedural sense. However, the term "same legal validity" is quite controversial, because it is not clear which are all the effects of the notarial deeds that substitute this term.

[59] The fear that arises in connection with this interpretation is justified, taking in consideration the fact that in the Macedonian system of enforcement no act (decision) for allowing the enforcement is rendered, which might mean an implicit recognition of the enforceability of the foreign enforceable deed.

longer a condition for the recognition of a foreign court decision[60], thus the question arises whether it is not reasonable not to reqiure reciprocity in the event of enforcement on the basis of foreign notarial deed? In addition, on the line of the Slovenian legislature, the question arises whether it is not necessary for the Macedonian bailiff during the enforcement on the basis of a foreign notarial deed to take care whether the enforcement violates the public order of the Republic of Macedonia[61]. In the situation where an express provision in the LE does not exist, this obligation might be imposed to the bailiff through supsidiary application of the provisions of the civil (litigation) procedure in the enforcement procedure[62]. In that sense, the public order of the Republic of Macedonia would be protected by the obligation of the bailiff to take care for the unallowed disposal of the parties, or dispositions which are contrary to the mandatory rules, the provisions of the international agreements ratified in accordance with the Constitution of the Republic of Macedonia and the morality, in terms of art.3, para.3 of the LLP.

5. Composing notarial deeds in matters with international element

As a consequence of the sovereignty of the country, the activity of composing notarial deeds can be conducted only on the territory of the state in which the notary is appointed (territorial principle). Notarial acts which the notary has drawn up outside the area on which the sovereignty of his native country extends have no legal effect[63]. That, however, does not mean that the notary can not compose notarial deeds for legal matters in which there is an international element expressed in the subjects or in the mere content of the legal matter. When the notary takes actions within his native country his area of activities is not limited on account of the international connections of the subject - matter of his notarization, i.e. the fact that foreign law is applied, the persons involved in the transaction are foreigners or have their domicile or registered office abroad, or because the object of the legal transaction are situated abroad (Geimer, 2001:39). In addition, the international element can not be a reason for the notary to refuse to prepare a notarial act[64]. The international competence of the notary for preparation of deeds with international element arises out of the legal system of his native country.

While preparing notarial deeds, the notary takes into consideration the rules for preparation of notarial acts in the native country - lex loci actus (see art.44 of LN)*, regardless whether the relationship in question has international element.* Taking in consideration the fact that in certain cases the notary deed should produce legal

[60] It is considered that the domestic legal system is sufficiently protected by the condition "the effect of the recognition of a foreign court decision is not contrary to the public order of the Republic of Macedonia", and therefore the reciprocity has been abolished.

[61] The violation of the public order is a negative procedural prerequisite for the recognition of a foreign notarial deed as well under the PIL.

[62] According to art.10 of LE, "in the conduction of the enforcement, the provisions of the Law on litigation procedure are appropriately applied, unless otherwise provided by this or any other law".

[63] According to the legislature of the Republic of Macedonia, the area of work of the notary is even more limited. The official area of the notary is the area of the primary court for which he has been appointed, and for the notaries of the city of Skopje, it is the area of the primary court of Skopje. The preparation and the validation of the deeds and other activities can be performed by the notary only in his official area. The deeds prepared by the notary outside his area have no legal effects (art.22, para. 1 -4 of LN).

[64] More extensively see, Veble, 2010:34-93.

effects in foreign country, in the international legal relations with notarial deeds *the principle of assignation of the notary deed is established, which gives the notary the right, apart from the domestic law on notary, to respect the substantive and procedural, as well as the collision provisions of the country in which the deed will be used.* He can do that by himself or, he could be helped by a notary from the designated country (Veble, 2010: 36). In this way, it is provided that the notary deed in formal and substantive sense is composed in accordance or the requirements of the country where it is going to be used.

The principle of assignation of the notarial deed, as one of the mechanisms of providing the free circulation of notarial deeds, is promoted by the autonomous notarial law (for example, the acts of the International Union of Latin Notaries[65], on the Conference of Notaries in the European Union[66]). Thus, the basis for international legal assistance for the notaries of different countries are established, and by adoption of the principle of assignation of the notarial deeds the negative effects of the territorial principle as an expression of the sovereignty of countries are compensated. By the possibility to include elements which are imminent to the legal order of a foreign country in the notarial deed, the universal legal effects of the notarial deeds are provided, and the unimpeded and efficient international legal relations are enabled.

6. Concluding remarks

The above is just elaboration of several issues related to international legal relations with notarial deeds, and only some aspects within these issues. The theme on the notarial deeds in the international legal relations is extremely complex to be exhausted with the previous partial analysis. However, certain conclusions can be deduced from this analysis, which are the features of the current position of the notarial deeds in international legal relations and of actual trends *pro futuro.*

The notarial deeds are a fundamental instrument of international legal relations, which provide for greater legal certainty in international transactions. Because of the prerogative of public deed, the legal regime of notarial deeds in international legal relations is still burdened by numerous rules (*lex loci actus,* legalization or its substitutes, reciprocity etc.) which are an expression of the sovereignty of the country where the notary works and which generally weaken the confidence in foreign notarial deeds. That, in turn, is itself inconsistent with the reputation that the notary has, as a service in which the citizens generally express the greatest confidence. In order to increase the exterior efficiency of the notarial deeds, it is necessary continuously to work on the abolition of the legal barriers which prevent the free cross-border relations with notarial deeds, to fill the existing legal gaps, and in the practice to decrease the skepticism and to strengthen the principle of faith in foreign public deed,

[65] See supra note 1.

[66] See The European Code of Professional Conduct for Notaries, Naples, 3/4 February 1995, which sets a single system of processing cases with international element.

certainly to the extent that does not threaten the public order of the country where the foreign public deed is going to be used.

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Alternative Dispute Resolution (ADR) im österreichischen und europäischen Recht
Alternative Dispute Resolution (ADR) in Austrian and European Law

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»Seat«, »place of central administration« and »COMI - centre of main interest« as a jurisdiction criteria and a point of contacts under the EU rules

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Summary:
Points of contacts which determine the applicable law and jurisdictional criteria are, also in the history, rather important legal rules and always subject to different opinions. Namely, jurisdictional rules and points of contacts are starting points of the court procedures in international cases, which dictate the sole direction of the case and usually also the outcome of the case (not always only court case). It is therefore, why parties of the different court proceedings (including in particular insolvency matters) focus to particularities of each individual jurisdictional rule or point of contacts that would render them better position in the court proceedings and the end of the day also better outcome of the case.

However, not only the parties, but also legislators on the national and also international level, play an important role when defining points of contract and jurisdictional criteria. Defining jurisdiction and applicable law is not only legal, but sometimes also political question of broader horizon and with rather huge and substantive implications.

Rules regarding jurisdiction criteria and point of contacts might be very definitive or might also be drafted in more abstract meaner which gives a lot space for the interpretation. This is, however, not the only issue; it is up to jurisdiction criteria whether forum shopping will apply and also which interests will be protected within the procedure. Sometimes conflict of law rules and jurisdiction rules might also lead to abuse of law or to other negative effects followed by the parties' intensions to influence the case.

All this is also true for the definition of the place of central administration, place of principal place of business, centre of main interest (COMI), which are jurisdictional criteria and also conflict of law point of connection in the field of the insolvency matters and also on the civil matters in general.

Some of them, especially COMI, have generated a lot of disputable solutions as well as different viewpoints of scholars and a lot of problem at national courts; and also at the EU Court of justice. The list of literature addressing issues relating to COMI is rather substantive and articles, deal with the issue, include rather different aspect of COMI. Especially a *centre of main economic interest* (main interests) represent a new and entirely specific type of the determining factor for defining international jurisdiction.

A seat and a place of central administration do not generate so many problems. The location of the main economic interest must constitute a sufficient determining factor for defining local jurisdiction. The registered office (in the sense of the incorporation theory) only represents a disprovable assumption of the existence of the debtor's COMI at the location of such registered parties. This approach is therefore highly protectionist, especially with regard to the countries with the high concentration of investors (countries that export capital).

Namely, COMI enables to take into account a place, which is located in the territory from which debtor's activities are managed or the place where the debtor makes and receives payments, etc. This is why this approach demonstrates also political interest and it is not only a legal issue.

There is not any definition of COMI in the EU legislation. There is only paragraph 13 of the preamble to the insolvency regulation, where it is apparent that the broad possibilities of interpreting this term are not only the result of a purely political compromise, but it also establishes a significant uncertainty in practice.

Determining COMI shall be based on objective circumstances and affects, like where party usually coincides with its registered office, where the centre of main interests are concentrated from the point of view of third parties, etc. It should also be taken into account the intensity of such centre and economic interest; the intensity should also be judged in the light of temporary or continuously based activities.

I do not think that above mentioned criteria would solve all the issues. There are also other questions like *rationae temporis* questions of the applicability of jurisdictional criteria or point of contacts. Also, one should not forget that free movement of legal persons (freedom of establishment) is a fundamental economic right in the internal market and it is therefore up to the legal persons (and also natural persons) to exercise this right and make use of them.

One is however certain; COMI is a legal and political issue which is to be resolved on case by case basis so long as we lack the legal definition in to the EU legal order. This might be confirmed also with the experience from British concept; indeed regarding the jurisdictional rules under Reg. 44/2001; since the British concept of domicile is rather different from Continental (and, indeed, also from American), it is not suitable for EU concept and use of the mentioned regulation. Therefore, a *lex specialis* rule was adopted only for the purposes of the Regulation in order to avoid conflicts of jurisdiction (Schedule 1 to Civil Jurisdiction and Judgments Order 2001). This rule requires a substantial connection with the UK (three months or more). As some scholars (*Stone P.*, EU Private International Law, 2010) point out, there is a remarkable little difficulties created by these rules. Although I am not supporter of over-punctilious rules, I have to admit that in certain circumstances a well and precise drafted rule is simply necessary. COMI would be such a case. There are several reasons for that. Some are mentioned above – like out-of-law effects, such as an attraction of companies to the country with advantageous insolvency rules for the debtors. Another reason would be more legal in nature; namely, jurisdiction issues are to be resolved at

the beginning of the court procedures – if there are difficulties encountered already in the initial stage of the procedure, parties cannot expect expedient end of the procedure and consecutively also not proper remedy of their rights (at least this is true for the creditors). And to my personal view, they are the ones who deserve more attention than the insolvency debtor.

Kompleksnost uporabe člena 5(1) Uredbe 44/2001 – Vpliv prakse Sodišča EU

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Uredba 44/2001 o pristojnosti in priznavanju ter izvrševanju odločb v civilnih in gospodarskih zadevah[67] temelji na splošnem pravilu o mednarodni pristojnosti glede na domicil toženca (člen 2 Uredbe 44/2001). Ta splošna mednarodna pristojnost je dopolnjena z drugimi pravili oziroma vrstami pristojnosti, v skladu s katerimi so lahko pristojna tudi sodišča držav članic EU, v katerih toženec nima domicila. Te vrste pristojnosti torej pomenijo izjemo od splošne pristojnosti, določene v členu 2 Uredbe 44/2001, in so utemeljene z obstojem tesne povezanosti med zadevo, ki je predmet postopka, in sodiščem določene države članice EU. Ena takih vrst pristojnosti je tudi posebna oziroma izbirna pristojnost, določena v členu 5(1) Uredbe 44/2001, glede zadev v zvezi s pogodbenimi razmerji, ki pomeni eno najbolj zahtevnih določb tega pravnega akta EU.

Člen 5(1) Uredbe 44/2001 določa:
»Oseba s stalnim prebivališčem v državi članici je lahko tožena v drugi državi članici:
a) v zadevah v zvezi s pogodbenimi razmerji pred sodiščem v kraju izpolnitve zadevne obveznosti;
b) za namene te določbe in razen, če ni drugače dogovorjeno, je kraj izpolnitve zadevne obveznosti:
- v primeru prodaje blaga kraj v državi članici, kamor je bilo v skladu s pogodbo blago dostavljeno ali bi moralo biti dostavljeno,
- v primeru opravljanja storitev kraj v državi članici, kjer so bile v skladu s pogodbo storitve opravljene ali bi morale biti opravljene;
c) če se ne uporabi podostavek (b), potem se uporabi pododstavek (a).«

Iz tega izhaja, da sta za uporabo člena 5(1) Uredbe 44/2001 pomembna dva elementa: prvi element je zadeva v zvezi s pogodbenimi razmerji, ki obenem predstavlja tudi pogoj za uporabo tovrstne mednarodne pristojnosti, drugi pa je element kraja izpolnitve zadevne obveznosti. Slednji pomeni kriterij za določitev te pristojnosti in je za pogodbe o prodaji blaga in za pogodbe o opravljanju storitev definiran kot kraj dostave blaga oziroma kot kraj opravljanja storitve, kar ima pomembne posledice, saj se pravila za določitev pristojnosti za obveznosti iz omenjenih pogodb razlagajo drugače kot za druge vrste pogodb, kjer kraj izpolnitve zadevne obveznosti ni definiran.

Navedeno pomeni, da je za pravilno uporabo člena 5(1) Uredbe 44/2001 treba razmejiti med različnimi vrstami pogodb, kar v določenih (mejnih) primerih ustvarja težave, prav tako pa težave povzroča tudi razlaga kriterija »izpolnitve zadevne obveznosti«, predvsem v primerih pogodb, katerih predmet ni prodaja blaga ali opravljanje storitev, nadalje v primerih pogodb o prodaji blaga na daljavo in končno

[67] UL EU L 12, 16. 1. 2001, str. 1–23.

tudi v primerih tistih pogodb, ki jih je treba izpolnitvi v več krajih. Ta vrsta mednarodne pristojnosti torej odpira številna vprašanja. Za njeno pravilno razlago pa so pomembne številne odločbe Sodišča EU, ki pripomorejo k enotni in enaki interpretaciji določb Uredbe 44/2001 v vseh državah članicah EU.

Seznam nekaterih pomembnejših odločb Sodišča EU v zvezi s členom 5(1) Uredbe 44/2001:[68]

- *Zadeva 12/76, Industrie Tessili Italiana Como proti Dunlop AG, ZOdl. 1976:*
Kraj izpolnitve zadevne obveznosti [v členu 5(1)(a) Uredbe 44/2001] je treba določiti v skladu s pravom, ki se za zadevno obveznost uporablja.

- *Zadeva 14/76, A. De Bloos, SPRL proti Société en commandite par actions Bouyer, ZOdl. 1976:*
Določitev kraja izpolnitve obveznosti [v členu 5(1)(a) Uredbe 44/2001] se nanaša na obveznost, ki ustreza pogodbeni pravici, na kateri tožnik utemeljuje tožbo [...].

- *Zadeva C-34/82, Peters proti ZNAV, ZOdl. 1983:*
Obveznosti glede plačila denarja iz razmerja med združenjem in člani združenja, nastale na podlagi članstva, so zadeve v zvezi s pogodbenimi razmerji. Pri tem je nepomembno, če zadevna obveznost izvira iz statuta ali v povezavi z odločitvijo organov združenja.

- *Zadeva C-9/87, SPRL Arcado proti Haviland SA, ZOdl. 1988:*
Tožba na odškodnino zaradi neupravičene odpovedi distribucijskega razmerja je zadeva v zvezi s pogodbenimi razmerji.

- *Zadeva 32/88, Cf. Six Constructions proti Humbert, ZOdl. 1989:*
Obveznost, ki jo je za namene določitve pristojnosti treba upoštevati, je tista, ki je značilna za zadevno pogodbo, še zlasti obveznost opraviti dogovorjeno delo.
Če je bila v primeru pogodbe o zaposlitvi obveznost delavca, da opravi dogovorjeno delo, izpolnjena ali bi morala biti izpolnjena izven območja držav članic EU, se člen 5(1) Uredbe 44/2001 ne more uporabiti.

- *Zadeva C-26/91, Jakob Handte & Co GmbH proti Soc. Traitements Mécano-Chimiques des Surfaces, ZOdl. 1992:*
Člen 5(1) [Uredbe 44/2001] se ne uporablja za tožbe med drugim kupcem blaga in proizvajalcem, ki ni tudi prodajalec, v zvezi z napakami blaga ali njegove neustreznosti glede na namen blaga.

- *Zadeva C-106/95, in MSG proti Les Gravières Rhénanes.*
Ustni sporazum o kraju izpolnitve, ki nima namena določiti tudi kraja, kjer mora oseba izpolniti obveznost, ampak ima le namen določiti pristojnost sodišča v določenem kraju, ne sodi v domet člena 5(1) [Uredbe 44/2001], ampak v domet člena [23 Uredbe 44/2001].

[68] Opozorilo: dosti odločb Sodišča EU se nanaša na interpretacijo predhodnice Uredbe 44/2001, tj. Bruseljske konvencije o pristojnosti in izvrševanju sodb v civilnih in gospodarskih zadevah, ki pa se uporabljajo tudi za razlago Uredbe 44/2001.

- *Zadeva C-51/97, Réunion Européenne proti Spliethoff's Bevrachtingskantoor, ZOdl. 1998:*

Tožba, s katero prejemnik blaga na podlagi tovornega lista zahteva odškodnino od dejanskega prevoznika blaga in ne od izdajatelja tovornega lista, ni zadeva v zvezi s pogodbenimi razmerji, ker tovorni list ne razkriva prostovoljnega pogodbenega razmerja med prejemnikom blaga in dejanskim prevoznikom.

- *Zadeva C-420/97, Leathertex proti Bodetex, ZOdl. 1999:*

Sodišče nima pristojnosti, da obravnava celotni zahtevek, ki temelji na dveh enakovrednih obveznostih, ki izvirata iz iste pogodbe, če bi bilo treba v skladu s kolizijskimi pravili države članice sodišča eno od teh obveznosti izpolniti v tej državi članici, drugo pa v drugi državi članici.

- *Zadeva C-334/00, Tacconi proti Wagner, ZOdl. 2002:*

Tožba, ki temelji na obveznosti iz pogajanj za sklenitev pogodbe, ne sodi v obseg člena 5(1) [Uredbe 44/2001].

- *Zadeva C-256/00, Besix proti WABAG, ZOdl. 2002:*

Člen 5(1) [Uredbe 44/2001] se ne uporabi, če kraja izpolnitve zadevne obveznosti ni mogoče določiti, ker izpolnitev obveznost ni geografsko omejena.

- *Zadeva C-386/05, Color Drack GmbH proti Lexx International Vertriebs GmbH, ZOdl. 2007:*

Člen 5(1)(b)(i) je treba razlagati tako, da se uporablja v primeru več krajev dostave v isti državi članici. V takem primeru je za odločanje o vseh tožbah, ki izhajajo iz pogodbe o prodaji blaga, pristojno sodišče, v pristojnosti katerega je kraj glavne dostave, ki mora biti določen na podlagi ekonomskih meril. Če ni mogoče ugotoviti kraja glavne dostave, lahko tožnik toži toženca pred sodiščem kraja dostave po svoji izbiri.

- *Zadeva C-533/07, Falco Privatstiftung in Thomas Rabitsch proti Giseli Weller-Lindhorst, ZOdl. 2009:*

Člen 5(1)(b)(ii) Uredbe 44/2001 je treba razlagati tako, da pogodba, s katero imetnik pravice intelektualne lastnine sopogodbeniku odstopi pravico izkoriščanja te pravice za plačilo, ni pogodba o opravljanju storitev.

Za določitev pristojnosti na podlagi člena 5(1)(a) Uredbe 44/2001 je treba še naprej upoštevati načela, ki izhajajo iz sodne prakse Sodišča, ki se nanaša na člen 5(1) Bruseljske konvencije.

- *Zadeva C-204/08, Peter Rehder proti Air Baltic Corporation, ZOdl. 2009:*

Člen 5(1)(b)(ii) Uredbe 44/2001 je treba razlagati tako, da je pri letalskem prevozu oseb iz ene države članice v drugo, ki je opravljen na podlagi pogodbe, sklenjene z eno samo letalsko družbo, ki je dejanski prevoznik, za odločanje o odškodninskem zahtevku, ki izhaja iz te prevozne pogodbe, po izbiri tožeče stranke pristojno sodišče, v okraju katerega je kraj odhoda ali kraj prihoda letala, kot sta dogovorjena v pogodbi.

- *Zadeva C-381/08, Car Trim proti KeySafety Systems, ZOdl. 2010:*

Kot pogodbe o prodaji blaga je treba obravnavati tudi pogodbe o izdelavi ali proizvodnji blaga, kljub zahtevam naročnika (kupca) v zvezi s pridobivanjem, predelavo in dobavo blaga, če ta ni dal na razpolago materialov in če je dobavitelj odgovoren za kakovost in skladnost s pogodbo.
Pri prodaji blaga na daljavo je treba kraj, kamor je bilo blago dostavljeno ali bi moralo biti dostavljeno, določiti na podlagi določb pogodbe. Če to ni mogoče, je to kraj, v katerem je bilo blago dejansko izročeno.

- *Zadeva C-19/09, Wood Floor Solutions Andreas Domberger GmbH proti Silva Trade SA, ZOdl. 2010:*

Člen 5(1)(b)(ii) Uredbe 44/2001 je treba razlagati tako, da se uporablja v primeru opravljanja storitev v več državah članicah.
V primeru opravljanja storitev v več državah članicah je za obravnavo vseh zahtevkov na podlagi pogodbe pristojno tisto sodišče, na območju katerega je kraj, v katerem je bil opravljen glavni del storitev. Pri pogodbi o trgovskem zastopanju je to kraj, v katerem je trgovski zastopnik opravil glavni del storitev, kot je razvidno iz pogodbenih določil, če takih določil ni, iz dejanskega izvajanja te pogodbe, če pa opredelitev na tej podlagi ni možna, je to kraj, v katerem ima trgovski zastopnik sedež ali stalno prebivališče.

Prorogation under the new Brussels I regulation

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Abstract

In December 2010 the European Commission published the Proposal for the Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Proposal"). The Proposal is the result of works on revision of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Regulation"). If the Proposal is adopted, it will replace the present Regulation.

The Proposal brings several important changes to the text of the Regulation. Some of them concern the choice of court agreements regulated by Article 23. The aim of this paper is to analyse the changes concerning the prorogation agreements under the Proposal, to compare them with the present regulation and to evaluate the benefit of these changes.

Firstly, the way towards the Proposal will be briefly described. Then the particular changes under the Proposal will be analysed. They are mainly: the personal scope of Article 23, the rule for substantive validity of prorogation agreements and the relation between choice of court agreements and lis pendens rule.

IT use in the European Order for Payment Procedure: Status and Outlook

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Ministry of Justice, Vienna

Das Referat gibt zunächst einen allgemeinen Überblick über die Ziele der am 12. Dezember 2008 in Kraft getretenen EU-Verordnung zur Einführung eines Europäischen Mahnverfahrens und erläutert die Voraussetzungen für die Einbringung einer Europäischen Mahnklage.

Da das österreichische (nationale) Mahnverfahren weitgehend Vorbild für das Europäische Mahnverfahren war, wird zum besseren Verständnis auch das österreichische Verfahren überblicksmäßig dargestellt. Vor allem wird auch der „Elektronische Rechtsverkehr“ (ERV) der österreichischen Justiz erläutert, der zu einer wesentlichen Entlastung der Kanzlei- und Schreibressourcen in der österreichischen Justiz geführt sowie zu einer erheblichen Beschleunigung des Mahnverfahrens beigetragen hat.

Ausgehend vom österreichischen Beispiel werden die Bestimmungen in der Verordnung zur Einführung des Europäischen Mahnverfahrens über den möglichen IT-Einsatz bei der Abwicklung eines Europäischen Mahnverfahrens konkret erläutert.

Deutschland und Österreich haben bereits vor In-Kraft-Treten der Verordnung zur Einführung des Europäischen Mahnverfahrens eine IT-Anwendung zur automationsunterstützten Abwicklung des Europäischen Mahnverfahrens ausgearbeitet, die mit dem In-Kraft-Treten der Verordnung im Dezember 2008 in Betrieb gesetzt und in der Folge weiterentwickelt werden konnte.

Aktuelle statistische Daten zeigen, wie das Europäische Mahnverfahren in Deutschland und Österreich in Anspruch genommen wird.

Die Erwartungen Deutschlands und Österreichs, das andere EU-Staaten die IT-Anwendung übernehmen werden, sind bisher nicht erfüllt worden. Lediglich Frankreich hat konkretes Interesse gezeigt, diese IT-Anwendung zu übernehmen.

Ein neuer Ansatz zu einer Verbreitung des IT-Einsatzes auf andere EU-Staaten ist das von der Europäischen Union unterstützte und geförderte Projekt e-CODEX. Ziel von e-CODEX ist ein vollinteroperables europäisches e-Justice-System. Die einzelnen Bausteine und Arbeitspakete des Projektes müssen so entwickelt werden, dass sie in einer Vielzahl von Anwendungsfällen in Ländern mit unterschiedlichen nationalen Justizsystemen angewendet werden können. Als einer der vier Piloten für dieses Projekt wurde das Europäische Mahnverfahren ausgewählt. Die Piloten sollen im Dezember 2012 starten und durch zwölf Monate hindurch in Echt-Zeit-Fällen erprobt werden.

Improved Transparency of the Debtor's Assets in Civil and Commercial Enforcement Matters having Cross-Border Implications in the EU

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1. Introduction

The topic of this article is the problem of insufficient transparency of the debtor's assets in civil and commercial enforcement matters having cross-border implications within the EU. The treatment is limited to some aspects of access to information for enforcement purposes after a title of execution. It departures from some of my previous works in this area and readers should be aware of that references to these works are only made here once, for reasons of simplicity, concerning the following contents of the text of this article. In addition, references are made to sources and recent initiatives to the extent motivated to facilitate for the readers.

The subject is treated by comparing solutions to the problem in: other parts of EU law, conventions, and studies. The purpose is to identify, evaluate, and draw conclusions about possible ways of development and make suggestions for new EU law in order to improve this transparency in support of enforcement matter having cross-border implications in the areas covered by the scope of application of four EU regulations concerning civil and commercial matters.

The four regulations here concerned are: the Council regulation (44/2001/EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I regulation), Regulation 805/2004/EC of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (European Enforcement Order for uncontested claims), Regulation 1896/2006/EC of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (European Order for payment procedure), and Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July establishing a European Small Claims Procedure (European Small Claims Procedure). The Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters does not deal with the problem here treated. This problem is also of equal concern in relation to the three other regulations.

The lack of efficient access to information for enforcement purposes in civil and commercial matters, after a title of execution, results, not only in the national context, but also in the cross-border context, in that the value of the title to a creditor is reduced only into a beautiful picture that he could put on his wall, while the debtor despite of the title actually still may continue undisturbed to dispose over and move his assets. Therefore, an improvement of the private creditor's problem of non efficient access to/lack of information for enforcement purposes about the debtor's

assets for these purposes in the cross-border and national context in civil and commercial matters having cross-border implications is essential in support of securing the result of previous judicial procedures in the quality of titles of execution.

The relatively low frequency use of the four regulations may likely, at least to some extent, be explained by the awareness of the creditor of the problem to obtain efficient access to information for enforcement purposes in matters having cross-border implications both before and after he has obtain a title of execution. Therefore, if the creditor does not have access to any reliable information about the location of the debtor and his assets in other Member States he may not find it worth the time and efforts to obtain a title of execution falling under the regulations, and instead write the claim off. This is not only, but in particular likely in case when the creditor's claim concerns a minor amount. In order to address this problem of the creditor, the transparency of the debtor's assets has to be improved through efficient means in EU law both in the cross-border and national context. No doubt, an improvement in EU law of the problem of transparency would stimulate creditors to make more frequent use of the four regulations here concerned. Also, if debtors become aware of an improved transparency about their assets in the EU this may increase their willingness to pay both before and after a title of execution.

2. New Brussels I Regulation and the European Judicial Network in civil and commercial matters

The proposal for a new Brussels I regulation suggests that a more detailed and updated description of national rules and procedures concerning enforcement, including authorities competent for enforcement, information on any limitations on enforcement, in particular debtor protection rules and limitation or prescription periods shall be included in the European Judicial Network in civil and commercial matters. This is a good initiative, but could be further developed.

2.1. Conclusions

In this context, as a further step of improvement aiming at an increase of efficiency, it should be contemplated that Member States also should be obliged to make available to the network a description of the national information available for enforcement purposes, including any limitations. No doubt, this would be of some value to both the creditors and the legal professionals, but is not sufficient to solve the creditor's problem on a practical level in matters having cross-border implications.

3. EU system for exchange of information for enforcement purposes

There exist several arguments for the establishment in EU law of a new system for exchange of information for enforcement purposes between the Member States. This is evident from the European Council's Tampere conclusions, and the Council's Hague

Programme, which foresees the possibility to develop an exchange of information between Member States related to civil and commercial claims in enforcement matters by means of communication between the regulated enforcement agents in the Member States for the benefit of the creditor. The European Council's Stockholm Programme emphasizes the importance to create a clear regulatory environment allowing small and medium enterprises in particular to take full advantage of the Internal market so that they can grow and operate across borders as they do in their domestic market. The European Council has agreed to important elements of the European Commission's communication about a strategy for smart, sustainable and inclusive growth. The Commission's communication underlines the importance of a more competitive economy, the removal of remaining bottlenecks to cross-border activity that every day business and citizens are faced with despite the legal existence of the single market, and that access for small and medium enterprises to the single market must be improved.

A solution to the creditor's problem of having access to information for enforcement purposes in the cross-border context exists in the Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (Maintenance regulation). The regulation includes some rather advanced provisions on a co-operation between central authorities, as representatives for a creditor, which leaves an option for a private creditor to benefit from an exchange of information for the purpose to recover efficiently a maintenance claim, on the access to information and on the notification of information to the debtor.

Another solution to the creditor's problem of having access to information for enforcement purposes in the cross-border context has been suggested in the recent Proposal for a Regulation of the European Parliament and of the Council Creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters. The proposal suggests to make it mandatory for financial institutions in the Member States to provide information on the debtor's assets on accounts in order to safeguard the interests of the private creditor.

However, in contrast to the Maintenance regulation and the public EU law and convention areas, and then in particular the parts in EU law concerning cross-border recovery of tax and social security claims, which include provisions for an exchange of information for recovery purposes, there exist yet no corresponding solution in the cross-border area for enforcement matters related to the four regulations here concerned in the civil and commercial areas. Therefore, this situation needs to be more efficiently addressed, irrespectively of the amount of the claim, and be substantially further improved by reforms of EU law, based on the Council's reform programmes, with the aim to provide more efficient access to information for enforcement purposes in civil and commercial matters having cross border implications in relation to the scope of application of the regulations here concerned.

The need of efficient access to information has of course to be balanced against the interests of the debtor of humanity, dignity and privacy, including data protection.

Access to information regarding the assets of the debtor for enforcement purposes calls for a balanced equilibrium between the creditor's right to efficient enforcement of his claim and the debtor's right to humanity and privacy in such situations. These rights can be derived from the European Convention on Human Rights. Arguments exist, i.a. based on the interpretation of article 6, 1 of this European convention, in favour of considering a demand of access to information for enforcement purposes an important requirement in order to make the execution of a judgment efficient. Also, it may be argued that efficiency in this context should mean a demand on the availability of all necessary information for enforcement purposes, in order to safeguard the creditor's right of efficient enforcement, and by such means promote a realization of the creditor's claim in the assets of the debtor, in the interest of his right of a peaceful enjoyment of his possessions according to Protocol No. 1, article 1, of this European convention.

There exist strong arguments in favour of the principle to consider the availability of information for enforcement purposes related to the assets of the debtor at the enforcement and seizure of a creditor's claim, to constitute a fundamental right based on article 6, 1 of this European convention. Efficient access to information regarding the assets of the debtor must, however, be balanced against the rights to a treatment of humanity and dignity for the debtor, and in case of a collision between these interests, in favour of the latter. This access to information must also be balanced against the right of privacy for the debtor and be proportionate in relation to the need of information for enforcement and recovery purposes in order to avoid that the debtor is exposed to injuries as far as possible.

Consequently, no more information should be obtainable, and used for the enforcement of a claim than corresponds to the necessary need, for the purpose of efficient enforcement of the creditor's specific claim. In this way only such a proportionate part of information should be made available, which would contribute to avoid an excessive abuse of information related to the assets of the debtor and subsequently minimize the risk to injure the debtor.

Access to information should also be acceptable, and even beneficial, to the debtors under the conditions that it is used in a balanced way for enforcement purposes, not by the creditor in person or by obscure private recovery agencies, but under the control of an independent neutral third party, a regulated enforcement agent, who has the task of establishing this balanced equilibrium between the rights of the creditors and the debtors, under the rules of law and the supervision of State bodies, courts and authorities.

Other important reasons, that motivate why an improved access to information for enforcement purposes should be provided directly to the enforcement agents, instead of to the private creditor, are that these agents, at an application for the enforcement of a claim by the creditor, would anyway have to review and evaluate received information about assets of the debtor from the creditor, as an integrated part of an actual enforcement procedure, in a justified balance between the interest of efficiency

of the private creditor and the interest of privacy of the debtor, which may, or may not, result in the attachment of assets indicated by the private creditor.

In an overall evaluation of these reasons and conditions related to access to information for enforcement purposes, it becomes clear that the creditor's interest of efficiency is of a greater weight than that of the debtor's privacy. This does not, however, mean that this interest of the debtor may be ignored. There are good arguments in favour of that both new EU law and national legislations in the Member States should be more influenced by this interest of efficiency.

The idea of an introduction in EU law of a European Assets Declaration, which would require the debtor to declare his assets on the initiative of a private creditor, in an affidavit, or other corresponding official document, to the enforcement agents, or in court in a matter of enforcement, aims to encourage uniformity across Member States. It is intended leading to the creditors' equal access to information about assets, while the debtor would receive equal protection. This idea comes close to the concept of a general disclosure of information in insolvency proceedings, e.g. in the case of a bankruptcy. The objectives of insolvency and enforcement proceedings are, however, not identical, although one similar feature exists: the realization of the assets of the debtor in the interest of the creditor. Still, other important objectives and structures of insolvency are different from those of enforcement.

Therefore, the principle of universality, as implemented in the area of general civil execution, in bankruptcy and in the area of international insolvency proceedings is not suitable to be introduced for the search for information for enforcement purposes in the area of special execution, the enforcement area, in a European Assets Declaration. The concept of a general disclosure of information in a European Assets Declaration also risks to include more sources of information related to the assets of the debtor in the Member States than needed for the purpose of enforcing the claim of a creditor in the debtor's assets. Consequently, this may, from the debtor's perspective, be disproportionate in relation to his interest of privacy. On the other hand, it satisfies a creditor's right to obtain all information in the European judicial area related to the debtors' assets in order to make a choice between them in a matter of enforcement.

There are States in which only the enforcement agent determines what measures of enforcement to undertake. There are also States where the creditor has an almost completely free choice as to the method of enforcement to be adopted. The actual choice of the assets to be seized should, however, not, for reasons of efficiency and privacy, be entrusted to the creditor, even if he may express his preference of choice, but instead to the regulated enforcement agents. The reason is that these agents have the task to establish a justified and proportionate balance, in terms of access to information for enforcement purposes, in the enforcement proceeding, between conflicting interests, i.e. to make use of no more, or less, information than needed.

The approach of the European Assets Declaration of a general disclosure of information by the debtor in a declaration about his assets in the European judicial area risks, anyway, even to the extent it would be possible to argue that a justified

balance between the conflicting interests of the debtor and the creditor is possible to establish, to be contrary to the interest of efficiency of the creditor for several reasons. The declaration only covers obtained information from the debtor and not access to information from independent sources of information of a reliable and official status.

The debtor may also, despite a threat of sanctions, refuse to declare his assets, or provide insufficient, or incorrect, information in his declaration. If the debtor disappears, a declaration becomes impossible. If, in addition, the debtor repeatedly changes his domicile from one Member State to other Member States, the creditor risks having to apply for a European Assets Declaration correspondingly, that is in several Member States, before such a declaration can be obtained.

A request by a private creditor of a European Assets Declaration seems only possible if it forms part of an application for enforcement measures, based on his title of execution. Otherwise, no enforcement matter is established as the necessary legal basis for the declaration. If the private creditor receives useful information from the debtor in the European Assets Declaration, he will still have to make an application for the enforcement of his claim, based on his title of execution, in one or several other requested Member States in parallel, where the assets of the debtor have been indicated by the debtor.

The enforcement agents of these requested States would, based on the applications, also have to review and evaluate the provided information by the creditor in relation to other possible sources of information available about the debtor's assets as an integrated part of the actual enforcement proceeding. This is motivated in order to establish a justified balance in that proceeding between the interest of efficiency of the private creditor and the debtor's interest of privacy and may, or may not, result in the attachment of assets indicated by the private creditor. Consequently, the possible advantages of a European Assets Declaration are not of sufficient importance to counter balance it's disadvantages to both the private creditor and the debtor.

A European Garnishee's Declaration has been proposed to oblige third-party debtors to give information on the assets seized. A better solution would be, when the enforcement organs have received an application for the enforcement of a judgment and before the actual seizure takes place, in order to deal with the differences in national laws, to oblige any third-party debtor, including an employer or any financial institution, in national laws to provide, at the request of the enforcement organs, to provide information about the debtor's assets to these organs. This would also enable enforcement organs to make a choice between all assets held by this third-party, before their actual decision to seize. As already mentioned, the recent Commission's proposal for a regulation of the Parliament and of the Council Creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters addresses exchange of information for third-party debtors in their capacity of financial institutions. This solution would, however not, if accepted by the EU legislator, be applicable in an enforcement situation where a final enforceable title of execution, i.e. which has gained legal force, has been established.

3.1. Conclusions

The conclusions are, in an overall evaluation, that the Maintenance regulation, which creates an optional right for a private creditor, who holds a title of execution, to make use of an exchange of information for enforcement purposes, is best suited to serve as a model to be adopted and developed to the corresponding needs of a private creditor for an exchange between the regulated enforcement agents of the Member States in civil and commercial enforcement matters having cross-border implications. It is suggested, for practical reasons, that such a reform work rather is conducted aiming to include the relevant provisions in one separate new EU regulation in support of the scope of the four EU regulations here concerned than to enter such similar provisions in the four regulations.

This is for the benefit of a higher degree of service and of efficiency of the private creditor at the enforcement of his title of execution and for a proportionate treatment of exchanged information and privacy in relation to the debtor.

Also, it may be contemplated as a practical and efficient service measure available to the creditor that he should have an optional right, as already available under the Maintenance regulation, to file an application, related to a specific matter, in the Member State of origin of his title of execution, for a following exchange of information for enforcement purposes with another Member State. A request for information, following the private creditors' application, should, for reasons of efficiency and integrity, be transmitted electronically in a closed communication system between Member States.

This solution involving co-operation will, as any other alternative, give raise to the question about the financing of the increased costs created by the needed work. I remains to be discussed to what extent and proportion the private creditors, respectively the Member States, should pay for the services made available under such a possible co-operation, and what possible fees creditors should pay, or not pay, to their national regulated enforcement agents for using their services in relation to this available option in a matter for the exchange of information for enforcement purposes. Also, it remains to be discussed how such a possible co-operation, which would include work in the Member States for communications between the national designated competent authorities, or contact points, and/or the national regulated enforcement agents, and the private creditors, best should be structured. These ideas conform with the objectives of the Council's programmes and would also promote a better functioning of the Common Internal Market.

4. EU harmonization of national legislation

The establishment of a minimum level of harmonization of national legislations for access to information for enforcement purposes and of a sufficiently efficient solution for access to information for enforcement purposes in civil and commercial

enforcement matters having cross-border implications is required in new EU law to meet the objectives of the Council's conclusions and programmes and the standards of the European Convention on Human Rights.

The establishment of such a more equal level of access to information provided to the enforcement organs would guarantee a better efficiency of justice and a more equal treatment of creditors and debtors in the European judicial area. Consequently, the national differences of access to information for enforcement purposes would be reduced and creditors, who are able to present enforceable titles of execution under the four regulations here concerned, at an application for their enforcement, would then come into a more similar position to the creditors, who hold national titles, on the disclosure of assets in all enforcing Member States.

A harmonization of the national legislation is also motivated and required in the interest of States to implement the Council of Europe's recommendation on enforcement and by such means respond to the legal objectives of this recommendation. Such a harmonization corresponds, in addition, to the objective of the general State interest of a more efficient enforcement of claims in society and to the interest of efficiency of the creditor.

The Council of Europe has established the goals in it's recommendation on enforcement. The debtors should provide up-to-date information about their income, assets and on other relevant matters. The search and seizure of the debtors' assets should be made as efficient as possible taking into account relevant human rights and data protection provisions in the Data protection Directive. Also, there should be a fast and efficient collection of necessary information on the debtors' assets achieved through access to relevant information in registers and other sources as well as the option for the debtor of making a declaration of his assets. Consequently, the Council of Europe's recommendation on enforcement may, in a longer perspective, contribute to alter the variety in national laws of the Member States of the Council of Europe into more equal levels of access to information for enforcement purposes.

Several authors have also emphasized the importance, and confirmed the need, for access to information for enforcement purposes based on various aspects, particularly in the civil enforcement law area and including the twofold objectives to increase access to national information and to establish a multilateral co-operation system between States for the exchange of nationally available information.

In order to obtain all these objectives of an improved access to information for enforcement purposes of judgments to enforcement organs in the civil enforcement law area, a harmonization in EU law of national legislation, under the option of any national system, should stipulate the goals of an efficient and up-to-date access to information to enforcement organs for enforcement purposes of judgments achieved preferably by "electronic means", through access to relevant information in registers and other sources of information regarding the debtor.

The establishment of a sufficiently efficient solution for access to information for enforcement purposes in the cross-border civil enforcement law area would also have to take into consideration a sufficiently harmonized level of access to information for enforcement purposes to regulated enforcement agents in national laws in order to guarantee at least some kind of mutually equal acceptable level of exchange of information, which could be used for the benefit of cross-border enforcement of a private creditor's claim within the EU. This means that any attempt to improve efficiency by access to information for enforcement purposes in the cross-border context would also have to consider the establishment of a sufficiently high level of access to national information.

4.1. Conclusions

In order to achieve harmonization through EU law in relation to matters having cross-border implications, detailed provisions for a harmonization of national legislations should be stipulated, under the option of any national system of regulated enforcement agents. It would be an advantage if such provisions could be entered into the same new regulation as suggested for exchange of information for enforcement purposes.

National legislations should preferably provide an efficient and up-to-date access of information to enforcement organs for enforcement purposes of titles of execution related to civil and commercial law claims in order to secure access to information about the debtor's: address, or place of location, employer, or business, through corporate registers, or other sources of income, including private, or social, insurance institutions, incomes and other assets in his possession, e.g. through debtor's registers kept by such officials, declaration of his assets made to the enforcement agents, and status of indebtedness or insolvency, i.e. bankruptcy or other collective insolvency procedures. This access to information should preferably be achieved by/trough "electronic means".

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Odprava eksekvature v predlogu spremembe Uredbe Bruselj I

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1. Odprava eksekvature - pravilo

Evropska komisija je decembra 2010 objavila predlog spremembe uredbe Bruselj I. Eden najpomembnejših ciljev te reforme je odpraviti eksekvaturo oziroma razglasitev izvršljivosti, torej vmesni postopek, ki ga morajo prestati sodne odločbe, preden jih je mogoče izvršiti v drugi Državi članici.

Ideja ni nova, prav tako ne njena izvedba v pravu EU. Vendar pa se uredbe, ki eksekvaturo že odpravljajo, uporabljajo za relativno omejene skupine sodnih odločb, pri katerih je odprava eksekvature (bolj ali manj) upravičena z njihovimi posebnostmi v primerjavi z »običajnimi« civilnimi in gospodarskimi spori. Predlog spremembe uredbe Bruselj I pa predvideva odpravo eksekvature za celotno področje civilnih in gospodarskih zadev (razen seveda tistih, za katere se ta uredba ne uporablja).

Čeprav je celotni proces priprave sprememb kazal na to, da bomo končno lahko govorili o prostem pretoku sodnih odločb v EU, tako da bodo sodne odločbe iz drugih držav članic izenačene z domačimi, je Komisija na podlagi številnih pomislekov, izraženih v stroki, nekoliko odstopila od prvotnega načrta. Kot najbolj sporna se je izkazala morebitna odprava pridržka javnega reda, ki v veljavnem besedilu uredbe omogoča zavrnitev izvršitve odločbe iz druge države članice, če bi s tem prišlo do kršitve temeljnih vrednot države izvršbe, predvsem človekovih pravic (tako procesnih kot vsebinskih).

Komisija tako predlaga odpravo postopka razglasitve izvršljivosti, ne pa tudi vseh razlogov za zavrnitev izvršitve tuje odločbe. V izvršilnem postopku, ki se sicer vodi po nacionalnih pravilih, naj bi toženec še vedno lahko ugovarjal, da bi z izvršitvijo prišlo do nezdružljivih sodnih odločb. Poleg tega pa predlog spremembe uredbe uvaja novo pravno sredstvo v državi izvršbe, s katerim naj bi toženec lahko preprečil izvršitev sodne odločbe iz druge države članice, če mu je bila v postopku njene izdaje kršena katera od temeljnih procesnih pravic. Gre torej za ohranitev pridržka procesnega javnega reda, ki pa ga toženec ne uveljavlja v postopku razglasitve izvršljivosti, pač pa s posebnim pravnim sredstvom, ki ga naperi zoper sodbo, ki je sicer izvršljiva v vseh državah članicah. Toženec, ki v postopku ni sodeloval, ima tudi možnost, da v državi izdaje odločbe zahteva razveljavitev sodbe, če mu začetni akt v postopku ni bil pravočasno vročen ali pa če zaradi višje sile ali izrednih okoliščin in brez svoje krivde ni mogel ugovarjati tožbenemu zahtevku.

Ugotovimo torej lahko, da naj bi bila poleg samega postopka razglasitve izvršljivosti odpravljena tudi dva razloga, ki po veljavnem besedilu uredbe lahko preprečita izvršitev sodne odločbe iz druge Države članice. Tako naj več ne bi bilo (že zdaj zelo ozko določene) možnosti nasprotovanja izvršitvi zaradi nespoštovanja pravil o pristojnosti, kakor tudi ne možnosti uveljavljanja nasprotovanja odločbe vsebinskemu

delu javnega reda. Hkrati pa naj bi bilo v primerjavi s veljavnim besedilom uredbe okrepljeno oz. vsaj natančneje določeno varstvo procesnega javnega reda.

Enako kot izvršitvi, naj bi bilo mogoče ugovarjati tudi priznanju sodne odločbe iz druge države članice, tako s pravnim sredstvom v državi izdaje, kot s pravnim sredstvom v državi priznanja.

Evropski parlament kot eden od obeh zakonodajalcev prenovljene uredbe je junija 2011 objavil osnutek poročila o predlogu Komisije, v katerem predlaga nekatere spremembe v zvezi s pravnimi sredstvi zoper izvršitev sodne odločbe iz druge Države članice. Tako predlaga črtanje določbe o pravnem sredstvu v državi izdaje odločbe, saj naj bi bilo samo po sebi umevno, da ima toženec možnost pravnega sredstva, če mu tožba ni bila vročena ali nanjo ni mogel odgovoriti zaradi višje sile. Predlaga pa tudi razširitev pravnega sredstva v državi izvršbe, in sicer naj bi po predlogu Parlamenta nasprotni udeleženec lahko uveljavljal skoraj vse razloge za zavrnitev izvršbe kot jih lahko uveljavlja po veljavnem besedilu uredbe Bruselj I v postopku razglasitve izvršljivosti. Razlogi so ožji le glede uveljavljanja kršitev pristojnosti, saj naj bi bila zavrnitev izvršbe mogoča le zaradi kršitev pravil o pristojnosti, ki varujejo potrošnika.

Oktobra 2011 je Parlament objavil še nadaljnje amandmaje k predlogu spremembe uredbe. Poslanci med drugim predlagajo obveznost predlagatelja izvršbe, da nasprotnemu udeležencu vroči ali vsaj skuša vročiti potrdilo sodišča, ki je izdalo sodno odločbo, o njeni izvršljivosti ter višini stroškov postopka in obresti, in to vsaj štirinajst dni pred predvidenim dnem, ko se bodo začela opravljati izvršilna dejanja. Zavrnitev izvršbe pa naj bi bila, podobno kot v veljavnem besedilu uredbe, mogoča tudi zaradi kršitev pravil, ki varujejo šibkejše stranke v delovnih, zavarovalnih in potrošniških sporih, ter pravil o izključnih pristojnostih.

2. Odprava eksekvature – izjeme?

Začasno je Komisija iz sistema samodejnega priznanja in izvršitve sodb iz drugih Držav članic izločila sodne odločbe o neposlovni odškodninski odgovornosti zaradi kršitev zasebnosti in osebnostnih pravic ter sodne odločbe, izdane v postopkih o odškodnini za škodo, ki je zaradi nezakonitih poslovnih praks nastala več oškodovanim strankam, ki so jih sprožili državni organi, neprofitne organizacije ali skupina več kot dvanajst tožnikov (t. i. skupinske tožbe). Za te sodne odločbe naj bi se še naprej uporabljal postopek za razglasitev izvršljivosti po sedanjem besedilu uredbe, s tem da razglasitve izvršljivosti več ne bi bilo mogoče preprečiti zaradi nespoštovanja pravil o pristojnosti sodišča, ki je odločbo izdalo.

Evropski parlament je v svojem osnutku poročila junija 2011 zavrnil predlog Komisije, da bi za omenjene sodbe še vedno bila potrebna eksekvatura, in predlagal, da se eksekvatura odpravi za vse sodbe v civilnih in gospodarskih zadevah. Enakega mnenja so tudi številni pravni strokovnjaki.

3. Odprava eksekvature za sodne odločbe o začasnih ukrepih in ukrepih zavarovanja

Začasne ukrepe in ukrepe zavarovanja lahko odrejajo sodišča, ki so pristojna za vsebinsko odločanje o sporu, pa tudi sodišča v drugih državah, če ima ta država s sporom zadostno povezavo. Vendar pa je Sodišče Evropske unije (SEU) s sodbo v primeru *Denilauler* iz sistema olajšanega izvrševanja po Bruseljski konvenciji izvzela ukrepe, ki so bili sprejeti v nekontradiktornem postopku (*ex parte*), tako da se za njihovo izvršitev uporabljajo nacionalna pravila, ki izvršitve takih tujih ukrepov praviloma ne dovoljujejo. To pravilo se uporablja tudi za razlago uredbe Bruselj I.

Komisija v predlogu spremembe uredbe predlaga rešitev, ki sedanji sistem po eni strani omejuje in po drugi strani razširja. Sistem izvrševanja po uredbi naj bi se namreč odslej uporabljal le za ukrepe, ki jih odredi sodišče, ki je po uredbi pristojno tudi za vsebinsko odločanje o sporu. Vendar pa naj bi bila samodejna izvršitev mogoča tudi za ukrepe, izdane *ex parte*, če ima toženec naknadno možnost, da tak ukrep izpodbija v državi, v kateri je bil sprejet.

4. Odprava eksekvature za javne listine in sodne poravnave

Komisija predlaga odpravo eksekvature tudi za javne listine in sodne poravnave, za katere naj bi veljal enak režim kot za sodne odločbe. Parlament v tem delu ni predlagal nobenih amandmajev. V strokovni javnosti pa je ta predlog sprožil kritike, saj je že veljavni režim čezmejnega prehajanja javnih listin po mnenju mnogih preenostaven. Glede na to da pri sestavi javnih listin sodišče ne sodeluje, naj bi bilo preveč liberalno dopustiti, da take listine samodejno učinkujejo v vseh Državah članicah, brez predhodnega preverjanja s strani sodišča.

Der europäische Erbschein

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1. Die Gründe für einen europäischen Erbschein

Es gibt zahlreiche Gründe, die für die Einführung eines europäischen Erbscheins sprechen. Einerseits wird es den Bürgern der Europäischen Union im Rahmen der Niederlassungsfreiheit ermöglicht, Gegenstände in anderen Staaten sowohl als ihren Herkunfts- als auch ihren Wohnsitzländern erwerben. Andererseits besteht eine tendenzielle Einheitlichkeit des Erbschaftsstatuts, so dass die Nachlassangelegenheiten üblicherweise nach einer einzigen Rechtsordnung geregelt werden, unabhängig davon, wo sich die Gegenstände, die den Nachlass bilden, befinden – wobei es sich um das Recht des Herkunftsstaates oder des Wohnsitzstaates handeln kann, oder auch jenes, das der Erblasser selbst bestimmt hat. Diese Einheitlichkeit ist, aber, nur tendenziell: in der Englischen sowohl in der Französischen Rechtsordnung, z.B., gilt das Prinzip der Spaltung zwischen Immobilien (lex rei sitae) und weitere Güter.

Die Kombination dieser beiden Elemente – Vorhandensein einer Mehrzahl von Gegenständen, die einer Person gehören, sich aber in unterschiedlichen Ländern befinden, sowie tendenzielle Einheitlichkeit der Regelungen betreffend den Nachlass oder Anwendung zwei verschiedenen Regelungen – führte dazu, dass dem Phänomen der so genannten grenzenüberschreitenden Erbschaften, in denen Elemente verschiedener Rechtsordnungen zusammentreffen, stetig wachsende Bedeutung zukommt.

Zugleich führten die grenzenüberschreitenden Erbschaften die Notwendigkeit vor Augen, den Rechtsverkehr zu schützen, wenn Gegenstände – und nicht nur Immobilien – betroffen sind, die durch Erbgang übertragen werden. Tatsächlich kann es für denjenigen, der von einer sich als Erbe ausgebenden Person einen Gegenstand erwirbt, schwierig sein festzustellen, ob der Verkäufer als Erbe oder Legatar wirklich berechtigt ist, über diesen Gegenstand zu verfügen.

Das Bedürfnis nach einem europäischen Erbschein rührt daher, ein geeignetes Rechtsinstrument zu schaffen, um die einfachere und sichere Übertragbarkeit von Gegenständen, die durch Erbfall erworben wurden, zu ermöglichen.

2. Das Vorgängermodell: das Haager Übereinkommen vom 2. Oktober 1973 über die internationale Abwicklung von Nachlässen

Dieses heute sicher wesentlich größere Bedürfnis wurde bereits seit längerem von den Juristen erkannt: es führte zur Verfassung des Übereinkommens von Den Haag vom 2. Oktober 1973 über die internationale Abwicklung von Nachlässen, in Kraft getreten im Jahr 1993.

Das Übereinkommen sah die Einführung eines „internationalen Zertifikats" vor, das „die Person oder die Personen, die die beweglichen Gegenstände des Nachlasses verwalten sollen", zu benennen hatte, und „ihre Befugnisse" angeben sollte. Das Zertifikat sollte entsprechend einem Modell, das dem Übereinkommen als Anlage beigefügt war, von der zuständigen Behörde des Wohnsitzstaates des Verstorbenen verfasst werden, unter Anwendung der eigenen Rechtsnormen, wobei einer Justiz- oder einer Verwaltungsbehörde die Zuständigkeit für die Ausstellung des Formulars erteilt wurde.

Das Anerkenntnis des Zertifikats sollte grundsätzlich automatisch erfolgen – es blieb den Beitrittsstaaten nur die Möglichkeit, die Entscheidung einer Behörde nach Durchführung eines Schnellverfahrens vorzusehen – und die hauptsächliche Bedeutung des Zertifikats lag darin, dass demjenigen guter Glaube zuerkannt wurde, der einer Person, die im Zertifikat genannt war, Zahlungen leistete oder Gegenstände übergab bzw. von dieser Gegenstände des Nachlasses erworben hatte.

Das Übereinkommen blieb jedoch erfolglos und kam nie zu einer wirksamen Anwendung, da von den europäischen Staaten lediglich Portugal und die frühere Tschechoslowakei beigetreten sind.

3. Die Gründe für dessen Scheitern: die Unterschiedlichkeit der Rechtsordnungen im Rahmen des Erbrechts

Der erste unmittelbare Grund für das Scheitern des Übereinkommens bestand vermutlich in der Entscheidung, keinen echten Erbschein vorzusehen, sondern nur ein Zertifikat, das die Nachlassverwaltung bzw. –abwicklung regelt: es war in der Tat wenig sinnvoll, in den einzelnen Beitrittsstaaten ein Verwaltungs- oder Gerichtsverfahren einzuführen, das nur der Ermittlung des rechtmäßigen Verwalters der Nachlassgegenstände dient, und nicht des wahren Erben oder Legatars. Der zweite unmittelbare Grund bestand vermutlich in der Entscheidung das Zertifikat auf bewegliche Sachen zu begrenzen.

Die Gründe für das Scheitern sind aber in Wahrheit vielschichtiger und finden sich in der rechtstechnischen Umsetzung des Haager Übereinkommens von 1973.

Zunächst ist festzuhalten, dass das Übereinkommen in hohem Maße die Rechtsordnungen bevorzugt, die dem angloamerikanischen System der Nachlassregelungen nachempfunden sind. Bekanntlich gibt es in den Rechtsordnungen des angloamerikanischen Typus neben dem Erblasser und dem Erben eine weitere natürliche oder juristische Person (des öffentlichen Rechts oder des Privatrechts), die Inhaber sämtlicher Rechtspositionen des Erblassers wird, die die Nachlassgegenstände verwaltet, die Zahlung der Nachlassschulden veranlasst, die Erbteilung durchführt und die verbleibenden Gegenstände dem Erben herausgibt. Das Übereinkommen von Den Haag konzentriert sich nun auf genau dieses Modell, da das von ihr vorgesehene Zertifikat dazu dient, die Person zu bezeichnen, die die beweglichen Nachlassgegenstände verwaltet: mit anderen Worten, bevorzugt das Haager Übereinkommen das angloamerikanische System.

Dabei vernachlässigt das Übereinkommen aber die kontinentaleuropäischen Rechtsordnungen, in denen der Erbe, wenn auch durch im Detail unterschiedliche Verfahren, das gesamte Vermögen des Verstorbenen erhält und ihm in allen seinen Rechtspositionen nachfolgt (d.h. die sogennante Gesamtrechtsnachfolge). Dabei übersieht das Übereinkommen weiter, dass im Bereich der kontinentaleuropäischen Rechtsordnungen zwei unterschiedliche Lösungsmöglichkeiten bestehen.

In den zentraleuropäischen Rechtsordnungen – insbesondere in Deutschland und Österreich – obliegt es den öffentlichen Behörden, mittels eines speziellen Verfahrens, zu ermitteln, wer Erbe wird, und zu wessen Gunsten folglich die Grundbuchspublizität durchgeführt werden kann. In der französischen Rechtsordnung und den ihr verwandten, wie etwa der italienischen Rechtsordnung, gab es hingegen (bis vor kurzem) kein Verfahren, das kraft gesetzlicher Vermutung die Erbeneigenschaft nachweist, so dass in der Praxis ein anderes Mittel gewählt wurde, nämlich der acte de notoriété, eine öffentlichen Urkunde, die aber anderen Zwecken dient und in der Erklärung – manchmal in der Erklärung des Erben selbst - besteht, dass ein bestimmter Umstand (hier die Tatsache, dass jemand Erbe ist), in einem bestimmten Umfeld bekannt ist.

Die Lösung des Übereinkommens von Den Haag ist somit:

- beeinflusst vom angloamerikanischen System, das sich auf die Verwaltung des beweglicher Nachlasses konzentriert und dabei den Erben vergisst;
- nicht geeignet, das Problem der bestehenden Unterschiede in den kontinentaleuropäischen Rechtsordnungen zwischen Erbschein und öffentlicher Urkunde zu lösen;
- nicht vereinbar mit unterschiedlichen IPR Regelungen.

4. Die endgültige Überwindung des Übereinkommens: die jüngste Reform in Frankreich

Ein weiterer Grund für den endgültigen Niedergang des Übereinkommens von Den Haag findet sich in einer jüngeren Reform des französischen Erbrechts, die 2002 umgesetzt wurde und die den code civil mit den neuen Artikeln 730 bis 730-5 betreffend den Beweis der Stellung als Erben ergänzt hat.

Die Novellierung hat insbesondere dazu geführt, dass dem bereits seit langem in der französischen Notarpraxis verbreitetem acte de notoriété volle Wirksamkeit zugestanden wird. Der acte de notoriété wird dadurch zum wesentlichen Beweis für die Stellung als Erben, in dem er – wie Art. 730-3 nun vorsieht – bis zum Beweis des Gegenteils (öffentliches) Vertrauen genießt und die darin genannte Person als Inhaber des Erbrechts angesehen wird, in dem Maße, in dem es sich aus dem acte de notoriété ergibt.

Wer sich bösgläubig eines falschen acte de notoriété bedient, haftet für den entstandenen Schaden und erleidet die zivilrechtliche Sanktion des recel.

Die dadurch in den code civil eingeführten Neuerungen zeigen eindeutig, dass auch in den Rechtsordnungen des französischen Typus die Notwendigkeit eines wirksamen Rechtsinstitut besteht, das die Eigenschaft einer Person als Erbe beweist, wenn auch nur bis zum Beweis des Gegenteils. Zugleich führt die Novellierung zu einer endgültigen Überwindung des Übereinkommens von Den Haag, das nur über ein hinsichtlich der Wirkung allzu eingeschränktes Rechtsinstitut vorsieht, und das außerdem auch noch die Notwendigkeit der Anpassung der unterschiedlichen Lösungen der nationalen Rechtsordnung vernachlässigt.

5. Ausblick auf eine europäische Lösung: Das Grünbuch

Aus diesen Betrachtungen heraus entstand das Grünbuch, das die Kommission der Europäischen Union am 1. März 2005 vorgelegt hat; das Grünbuch wurde nach einer Studie des Deutschen Notarinstitut aus dem Jahr 2002 betreffend “Internationales Erbrecht in der EU - Perspektiven einer Harmonisierung” verfasst.

Das Grünbuch betont, dass:
(i) der Nachweis der Erbeneigenschaft in den verschiedenen Rechtsordnungen auf unterschiedliche Weise geregelt ist;
(ii) es für die Erben wichtig ist, die ihnen zustehenden Rechte, die sie mit dem Nachlass erworben haben, in den verschiedenen Staaten ausüben können, ohne hierfür ein besonderes Verfahren einleiten zu müssen;
(iii) angesichts von harmonisierten Bestimmungen hinsichtlich des Konflikts von Rechtsnormen es möglich sein müsste, einen Erbschein mit für alle EU-Staaten gleichen Wirkungen zu verwenden.

Diesbezüglich stellt das Grünbuch drei Fragen zur Diskussion. Mit dem europäischen Erbschein sollen im Wesentlichen zwei Ziele erreicht werden:
(i) Erleichterung des Nachweises der Erbeneigenschaft;
(ii) Sicherheit im Rechtsverkehr hinsichtlich von Nachlassgegenständen.

Eine Vielzahl von Antworten (fast 60) hat das Grüne Buch bekommen. Im Allgemeinen, sind alle damit einverstanden einen Europäischen Erbschein zu schaffen, mit der Ausnahme, vielleicht, von Großbritannien; verbreitet ist aber die Meinung dass der Europäische Erbschein auch den Verwalter, wenn vorhanden, nennen sollte.

Am 14 Oktober 2009 hat die Kommission einen Entwurf von Verordnung vorgeschlagen wo auch ein Modell für den Europäischen Erbschein dargestellt wird.

6. Der europäische Erbschein: die Wirkungen

Von zentraler Bedeutung sind die Wirkungen des europäischen Erbscheins (s. § 42).

Die wesentlichen Wirkungen manifestieren sich auf zwei Ebenen:
(i) demjenigen, der im Erbschein als Erbe - oder als Verwalter - genannt wird, kommt die rechtliche Vermutung zugute, wonach die Vorlage des Erbscheins es ihm ermöglicht, alle Rechte, die mit der Stellung als Erben verbunden sind, geltend zu machen (d.h. Legitimation im weiteren Sinne);
(ii) Dritte, die Rechtsgeschäfte mit dem im Erbschein genannten Erben (oder Verwalter) abschließen, können sich zum Nachweis ihres guten Glaubens auf den Inhalt des Erbscheins berufen.

Mit einem Wort, der im Erbschein Genannte gilt in jeder Hinsicht als rechtmäßiger Erbe. Die so eingeführte Rechtsvermutung ist jedoch zwingendermaßen widerlegbar: jeder kann die Rechtswirksamkeit anzweifeln, und bei Vorlage des Gegenbeweises den Widerruf des Erbscheins erreichen; niemand kann sich auf den Inhalt des Erbscheins berufen, wenn er aufgrund von Kenntnissen, nach denen die Erbenstellung des im Erbschein genannten auszuschließen ist, bösgläubig handelt.

Diese Lösung – eine Rechtsvermutung für die Stellung als Erben, aber widerlegbar – scheint in jedem Fall passend:
(i) sie harmoniert mit den Bestimmungen zum Anfall der Erbschaft, wonach es durchaus möglich ist, dass eine ursprünglich wirksame Erbenberufung später unwirksam wird, wie etwa dann, wenn nachträglich ein bislang unbekanntes Testament entdeckt wird, oder wenn bekannt wird, dass es ein bislang unbekanntes Kind gibt;
(ii) sie stimmt mit den allgemeinen Grundsätzen der Publizität überein, die zwar den schützen, der gutgläubig auf eine bestimmte veröffentlichte Tatsache vertraut, nicht aber den, der nicht auf sie vertraut oder sogar an ihr zweifelt.

Eine besondere Wirkung wird aber vorgesehen. Der so genannte europäische Erbschein stellt ein geeigneter Titel für die Grundbuch- bzw. Immobilienpublizität dar.

Eine andere Frage stellt sich, wenn man überlegt, wie die Möglichkeiten des Umlaufs des Erbscheins in der Europäischen Union zu regeln ist. Die Lösung ist im Sinne der sofortigen Wirksamkeit durchzusetzen, ohne dass das in der Vergangenheit oft bemühte Verfahren der Legalisation bzw. Anerkennung durchgeführt werden muss.

7. Weiter: der Inhalt

Oben wurde gesagt, dass der europäische Erbschein eine Rechtsvermutung zugunsten der Erbenstellung oder der Erbschaftsverwaltung mit sich bringt: folglich muss der Inhalt des Erbscheins sich auf diesen Umstand konzentrierten.

Der europäische Erbschein muss also weder eine Beschreibung der Nachlassgegenstände enthalten, noch die Bezeichnung der Modalitäten für die Annahme der Erbschaft. Hingegen, muss der europäische Erbschein präzisieren:
(i) das auf den Erbfall anwendbare Recht;
(ii) die Bezeichnung des Erben und die eventuelle Ernennung von Nachlassverwaltern oder Testamentsvollstreckern;
(iii) die genaue Bezeichnung des Titels für die Berufung als Erben (gesetzlich, testamentarisch, vertraglich);
(iv) die Benennung der Erbquote;
(v) im Falle einer testamentarischen Berufung, die Bezugnahme auf Bedingungen, Belastungen, Kautionen, Auflagen oder Vermächtnissen zulasten des Erben;
(vi) die Darstellung der Befugnisse der Verwalter/Testamentsvollstrecker.

Zusammengefasst, muss der europäische Erbschein feststellen, wer nach dem jeweils anwendbaren Recht als Erbe oder berechtigt ist, über die Nachlassgegenstände zu verfügen.

Aus materiellen Gründen ein Modell zu ist der Verordnung beigefügt.

8. Weiter: Ausstellungsbefugnis und Zuständigkeit

Die Erfahrung zeigt, dass die Befugnis, Erbscheine oder vergleichbare Dokumente auszustellen, in allen Rechtsordnung öffentlichen Stellen vorbehalten wird.

Im Allgemeinen handelt es sich um Justizbehörden oder, eventuell, öffentliche Amtsträger wie Notare. Angesichts verschiedener Erfahrungen es jedem Staat wird die Wahl überlässt, welcher öffentlichen Stelle diese Funktion anvertraut werden soll.

Die Frage der örtlichen Zuständigkeit war schwieriger zu lösen: soll die Zuständigkeit bei dem Staat liegen, in dem der Verstorbene seinen letzten Wohnsitz hatte, besser bei jenem, in dem er den gewöhnlichen Aufenthalt hatte, oder auch bei jenem Staat, dessen Recht auf den Erbfall anwendbar ist? Der Entwurf von Verordnung gibt den Vorzug der ersten Lösung.

9. Weiter: Voraussetzungen; Feststellungen

Der europäische Erbschein muss infolge einer im wesentlichen auf Unterlagen basierenden Ermittlung erlassen werden, die auf Antrag des Erben einzuleiten ist. So ist ein schriftlicher Nachweis der Verwandtschaft vorzulegen, wenn es sich um gesetzliche Erbfolge handelt; ebenso ist das Testament bzw. der Erbvertrag vorzulegen, wenn testamentarische bzw. vertragliche Erbfolge vorliegt.

Weiter muss der Antragsteller eine Erklärung vorlegen, aus der sich ergibt, dass keine Rechtsstreitigkeiten über das Erbrecht anhängig sind.

Da dem europäische Erbschein bedeutende Rechtswirkung zukommt, ist es wohl angemessen, den Behörden die Durchführung geeigneter Ermittlungen zu ermöglichen; wie beispielsweise die Anhörung der Verwandten und der Pflichtteilsberechtigten, oder die Veröffentlichung von Aufrufen, auch in Tageszeitungen, oder weiter die Einsichtnahme in öffentliche Register.

10. Weiter: das Verfahren

Die Wahl der zuständigen öffentlichen Behörde beeinflusst naturgemäß die Art des Verfahrens. Wenn es sich um eine Justizbehörde handelt, sind verfahrensrechtliche Regeln im engeren Sinn zu beachten: es ist anzunehmen, dass dabei die Verfahrensgrundsätze der so genannten Freiwilligen Gerichtsbarkeit einzuhalten sein werden.

11. Ein Vorbild: der Erbschein in den italienischen Gebieten, wo ein Grundbuch geführt wird

Ein Vorbild, nach dem das Verfahren für den europäischen Erbschein gebildet werden könnte, stellt auch der Erbschein dar, der in den Gebieten, die bis zum ersten Weltkrieg der Österreich-Ungarischen Monarchie angehörten, erlassen wird.

Bekanntlich wurde in diesen Gebieten das Grundbuch beibehalten, und dies bewegte den Gesetzgeber, auch den Erbschein beizubehalten: der Grund liegt im Wesentlichen in dem Erfordernis, die Eigentumsübertragung im Grundbuch auf den Erben aufgrund einer Urkunde vorzunehmen, die öffentlichen Glauben genießt. Der italienische Erbschein bewies seit langem und beweist weiterhin, dass es diese Funktion bestens erfüllt, und tatsächlich kommt es in Angelegenheiten, die den Erbschein betreffen, nur zu einer geringen Anzahl an Rechtsstreiten.

Bemerkenswert ist, dass dieses Rechtsinstitut in einer Rechtsordnung wie der italienischen besteht und funktioniert, die anderen Grundsätzen folgt als die Rechtsordnung, aus der der Erbschein ursprünglich stammt.

12. Das Zusammenspiel von nationalem und europäischem Erbschein

Der Entwurf der Verordnung hält dazu fest: (i) der europäische Erbschein ist nicht obligatorisch; (ii) durch das neu eingeführte Verfahren werden die nationalen Verfahrensvorschriften nicht abgeschafft; (iii) der Erbschein entfaltet nicht nur im Ausland, sondern auch in dem Staat, in dem er erlassen wurde, Wirkung.

Das Verfahren ist daher offensichtlich stringent: es gilt das Wahlrecht, der Erbe kann entscheiden, welches Verfahren er durchführen möchte.

Allerdings kann diese Wahlfreiheit praktische Probleme hervorrufen: vor allem dann, wenn mehrere Erben vorhanden sind und die Gegenstände des Nachlasses in verschiedenen Staaten liegen.

Konkret könnten etwa mehrere Erbscheine durch verschiedene Behörden erlassen werden, mit dem Risiko, dass diese unterschiedliche Inhalte aufweisen.

Aus diesem Grund, sofern nicht die endgültige Verordnung eine andere Lösung vorsehen sollte, bleibt zu hoffen, dass die zuständigen Behörden bei der Ausstellung des Erbscheins:

- sehr sorgfältig arbeiten, insbesondere dann, wenn nur ein Teilerbschein ausgestellt werden soll;
- insbesondere sehr genaue Ermittlungen hinsichtlich der erforderliche Voraussetzungen für die Ausstellung anstellen;
- rasch und effektiv arbeiten, falls sich nachträglich herausstellt, dass ein bereits ausgestellter Erbschein suspendiert oder widerrufen werden muss.

Aus den genannten Gründen wird die Rolle der gerichtlichen Behörde für die erfolgreiche Anwendung des Verfahrens von zentraler Bedeutung sein.

13. Zusammenfassende Bemerkungen

Abschließend kann gesagt werden:

a) der Anstieg an grenzenüberschreitenden Erbschaften macht die Einführung eines e. E. immer dringender;

b) der europäische Erbschein muss die bestehenden Unterschiede in den verschiedenen europäischen Rechtsordnungen berücksichtigen, in denen, neben dem englischen Modell mit dem Schwerpunkt auf den Nachlassverwalter, auch andere Rechtsordnungen bestehen, die bereits den Erbschein kennen sowie Rechtsordnungen, die einen acte de notoriété vorsehen, dem teilweise (wie in Frankreich) besondere Wirkungen zukommen;

c) die Lösung, die das Übereinkommen von Den Haag aus 1973 vorgesehen hat, darf mittlerweile als überholt betrachtet werden;

d) dem Weg, den die EU-Kommission vorgibt, ist zu folgen;

e) der europäische Erbschein muss eine bestimmte Wirkung aufweisen: er muss die Rechtsvermutung begründen, dass der wirkliche Erbe oder der Verwalter im Erbschein genannt ist;
f) der europäische Erbschein darf die wesentlichen Informationen enthalten (das auf die Erbschaft anwendbare Gesetz; Titel der erbrechtlichen Berufung; Name und Erbquote des Erben oder des Verwalters);
g) der europäische Erbschein muss von einer öffentlichen Stelle erlassen werden – jene des letzten Wohnsitzes – infolge eines Verfahrens, das unter Beteiligung der Interessierten stattfindet;
h) die öffentliche Stelle muss eine positive Rolle spielen, damit der europäische Erbschein einen echten Erfolg in der Zukunft haben kann.

Cross-Border Healthcare Services
- Procedural Restrictions in National Laws -

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Abstract

Freedom to provide services is one of the four freedoms in the EU internal market. Health services, although the least regulated, form a significant part of the cross-border services. Using its law-creating function, the ECJ responded to the needs of the market in a number of cases, such as *Kohll*, *Decker*, *Geraets-Smits* and *Peerbooms* and *Müller-Faure and van Riet*, which establish that medical services are covered by Articles 56 and 57 TFEU.

The goal of the Directive on Services in the Internal Market 2006/123/EC is to create a shift towards the creation of a true internal market for services. Health services are a special kind of services with specific character within the health care policy. Their focus is on the citizen and social benefits (services) provided at national level. Freedom to provide healthcare services cross-borders includes the right of patients to receive healthcare in the Member State of treatment, under the same conditions as the citizens of that State. An example is the provision of highly specialised care or treatment in border areas where the nearest appropriate facility is abroad.

The influence of the freedom to provide services in the area of healthcare also affects other freedoms and different specific areas such as freedom of movement of workers and members of their families and social rights in connection therewith and the worker's demand for health care benefits from other Member States. Co-ordination laws and open methods of co-ordination play a particularly important role in all the fields of cross-border services, as well as in the field of health services.

Internationalisation and globalisation, enhanced capital and worker's mobility and entrepreneurship have raised new issues regarding cross-border provision of health services and competition. There are two types of questions that should be answered. One is the question of boundaries to which health care insurers are ready to open to the market and the other important question includes physicians' freedom to provide services, freedom of recipients from other Member States, free movement of pharmaceuticals and medical-technical appliances and cross-border competition of private providers of health care insurance.

Cross-border health services are excluded from the scope of the Directive 123/2006.

The authors analyse the ECJ's case-law and its influence on legislation and practice of the Member States as well as the implications of these judgments to the regulatory framework and case-law in the Republic of Croatia.

The new Directive 2011/24 of 9 March 2011 on the application of patients' rights in cross-border healthcare aims to establish rules for facilitating access to safe and high-quality cross-border healthcare in the European Union and to ensure patient mobility in accordance with the principles established by the ECJ, as well as to promote cooperation in healthcare between Member States. Notwithstanding the provisions of the Directive that protect the patients on supranational level, many problems at the national level, especially concerning procedural questions (prior approval, justiciability of social rights, etc.) still remain unsolved.