



Tieslietu ministrija

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GENERAL INTRODUCTION OF COUNCIL REGULATION (EC) NO 1206/2001 OF 28 MAY 2001 ON COOPERATION BETWEEN THE COURTS OF THE MEMBER STATES IN THE TAKING OF EVIDENCE IN CIVIL OR COMMERCIAL MATTERS AND ITS APPLICATION

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TYPICAL SITUATIONS

The court would need to inspect a site abroad.

The witness statement of a person having its permanent residence in a foreign country turns out to be necessary.

The damaged goods which would be examined by an expert are stored abroad.

A resident of a foreign country possesses the document that is crucial to the decision on the merits.



LAW OF EVIDENCE – GENERAL REMARKS I.

Lex causae

The lex causae is a specific concept of private international law and refers to the law governing the substance of the case, designated by the rules of conflict of laws.

Lex fori

The lex fori is a specific concept of private international law and refers to the law of the court in which the action is brought. Where an action is brought in a court and has an international dimension, the court must consider the law applicable to the case. In certain circumstances, the lex fori will apply. Traditionally the lex fori governs questions of procedure, regardless of the lex causae.



LAW OF EVIDENCE – GENERAL REMARKS II.

Substantive aspects

Rules governing type, admissibility, probative value (standard) and consideration of proof.

Formal aspects

Provisions pertaining to the actual performance of the taking of evidence.

The tasks (proof of facts in order to reach decision; taking of evidence) can be assigned to different courts/authorities in cross-border cases.



ISSUES RAISED BY TAKING OF EVIDENCE ABROAD

- **Influence on the sovereignty of the state in which the taking of evidence is performed**
- **Who is entitled to perform the taking of evidence?**
 - courts/authorities on request → direct taking of evidence
- **Refusal of request**
 - narrowing the grounds for refusal
- **Which law applies on the taking of evidence?**
 - lex fori → in some aspects the law of the requesting state
- **Cooperation on a voluntary basis or coercive measures?**
- **Formalities**
 - communication channels
 - through diplomatic channels, central bodies, court-to-court communication
 - language
 - forms



LEVELS OF LEGISLATION I.

Multilateral treaties

- The Civil Procedure Convention concluded at The Hague on 17 July 1905
- The Convention of 1 March 1954 on Civil Procedure
- Convention at The Hague on 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

Bilateral treaties



LEVELS OF LEGISLATION II.

European Union

- Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters
 - The regulation prevails over other provisions contained in bilateral or multilateral agreements in particular, in relation to matters to which it applies, the Hague Convention
 - The regulation does not preclude Member States from maintaining or concluding agreements to further facilitate the taking of evidence, provided that they are compatible with this Regulation. (see Article 21)

- Commission's Timetable for 2010-2014:
Report on application of Regulation (EC) No 1206/2001 on the taking of evidence in civil and commercial matters, if necessary followed by a proposal for revision which could include the establishment of common minimum standards (2012-2013)



LEVELS OF LEGISLATION II.

Domestic level

- In lack of international or regional regulation
- International comity
- So called **transatlantic „legal battle”** on the field of taking of evidence abroad in civil and commercial matters
 - Article 23 of the Hague Evidence Convention (1970)
 - *Societe Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. 522 (1987)



THE HAGUE CONVENTION OF 1954

Letters of request may be transmitted by the consul of the requesting state to the authority designated by the state of execution.

Taking of evidence is performed by the judicial authority of the requested state.

The execution of a letter of request may be refused only

- (1) if the authenticity of the document is not established;
- (2) if, in the state of execution, the execution of the letter does not fall within the functions of the judiciary;
- (3) if the state, on the territory of which the execution is to be effected, considers that its sovereignty or its security would be prejudiced thereby.

The judicial authority which executes the request shall apply its own law as to the methods and procedures to be followed.

The judicial authority shall use the same measures of compulsion as for the execution of orders issued by the authorities of the state of execution. Exempt: where the appearance of the parties to the case is involved.



THE HAGUE CONVENTION OF 1970

Taking of evidence by the authority of the requested state

- Contracting states designated **central authorities** for receiving requests and transmitting them to the competent authority.
- **Refusal** of the request, if:
 - a) the execution does not fall within the functions of the judiciary; or
 - b) the state addressed considers that its sovereignty or security would be prejudiced thereby.
- Application of **lex fori**
 - + a special method or procedure on request
 - + the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence -
 - a) under the law of the state of execution; or
 - b) under the law of the state of origin
- **Measures of compulsion** to the same extent as are provided by internal law for the execution of domestic orders.



THE HAGUE CONVENTION OF 1970

Taking of evidence by diplomatic officers, consular agents and commissioners

A **diplomatic officer or consular agent** may, in the territory of another contracting state, take the evidence

- without compulsion,
- of nationals of a state which he represents,
- in aid of proceedings commenced in the courts of a State which he represents.

A **diplomatic officer or consular agent** may, in the territory of another contracting state, also take the evidence

- without compulsion,
- of nationals of the state in which he exercises his functions or of a third state,
- in aid of proceedings commenced in the courts of a State which he represents, if -
 - a) a competent authority designated by the state in which he exercises his functions has given its permission either generally or in the particular case, and
 - b) he complies with the conditions which the competent authority has specified in the permission.



THE HAGUE CONVENTION OF 1970

Taking of evidence by diplomatic officers, consular agents and commissioners

A person duly appointed as a **commissioner** for the purpose may, in the territory of a contracting state, take evidence

- without compulsion,
- in aid of proceedings commenced in the courts of another contracting state if -
 - a) a competent authority designated by the state where the evidence is to be taken has given its permission either generally or in the particular case; and
 - b) he complies with the conditions which the competent authority has specified in the permission.



REGULATION

**Council Regulation (EC) No 1206/2001 of 28 May 2001
on cooperation between of the Member States in the
taking of evidence in civil or commercial matters**



SCOPE

- Council Regulation (EC) No 1206/2001 (Regulation) identifies **two significantly different methods** for the taking of evidence:
 - requests seeking the active participation of the requested court in taking of evidence, and
 - the direct taking of evidence by the requesting court.
- The two solutions are presented as equal alternatives. If no measures of compulsion are required for executing the taking of evidence, the requesting court, i.e. the trial court, may select the method to be used at its discretion.
- A request shall not be made to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.
- Member States with the exception of Denmark.



CENTRAL BODY

- Court-to-court communication
- The central body designated by each Member State performs **coordinating**, **support** and **advisory** functions.
- A federal state, a state in which several legal systems apply or a State with autonomous territorial entities shall be free to designate more than one central body.
- In general, it approves the requests for direct taking of evidence.



DIRECT TRANSMISSION BETWEEN THE COURTS

- Requests shall be transmitted by the court before which the proceedings are commenced or contemplated, directly to the competent court of another Member State, for the performance of the taking of evidence.
- Each Member State shall draw up a list of the courts competent for the performance of taking of evidence according to this Regulation. The list shall also indicate the territorial and, where appropriate, the special jurisdiction of those courts.
- The requested court acknowledges receipt of the request to the trial court within a short time.



LANGUAGE

The request and communications shall be drawn up in the **official language of the requested Member State** or, if there are several official languages in that Member State, **in the official language or one of the official languages of the place where the requested taking of evidence is to be performed**, or in another language which the requested Member State has indicated it can accept. Each Member State shall indicate the official language or languages of the institutions of the European Community other than its own which is or are acceptable to it for completion of the forms.



TRANSMISSION OF REQUESTS AND OTHER COMMUNICATIONS

Requests and communications shall be transmitted by the swiftest possible means, which the requested Member State has indicated it can accept. The transmission may be carried out by any appropriate means, provided that the document received accurately reflects the content of the document forwarded and that all information in it is legible.



REQUEST

- If a request is missing any of the necessary information, the requested court may return the request to be duly completed by the trial court.
- Whether the means of evidence and the matter to be proved have been properly designated is determined by autonomous interpretation rather than under the law of the legal forum.
- Accordingly, the request must include a brief description of the nature and subject matter of the case and of the facts, as the requested court uses this information to determine whether the request falls within the scope of the Regulation.



LAW APPLICABLE

- **As a main rule**, the law of the state of the requested court, i.e. **the lex fori**, must be applied to the taking of evidence.
But:
 - a special procedure provided for by the law of requesting Member State ,
 - the use of communications technology at the performance of the taking of evidence ,
 - performance with the presence and participation of the parties,
 - performance with the presence and participation of representatives of the requesting court.



TELECOMMUNICATION MEANS

- The requesting court may ask the requested court to use communications technology at the performance of the taking of evidence, in particular by using videoconference and teleconference.
- The requested court shall comply with such a requirement unless this is incompatible with the law of the Member State of the requested court or by reason of major practical difficulties.
- If there is no access to the technical means referred to above in the requesting or in the requested court, such means may be made available by the courts by mutual agreement.



PERFORMANCE WITH THE PRESENCE AND PARTICIPATION OF THE PARTIES

- If it is provided for by the law of the Member State of the requesting court, the parties and, if any, their representatives, have the right to be present at the performance of the taking of evidence by the requested court.
- The requesting court shall, in its request, inform the requested court that the parties and, if any, their representatives, will be present and, where appropriate, that their participation is requested.
- The requested court shall notify the parties and, if any, their representatives, of the time when, the place where, the proceedings will take place, and, where appropriate, the conditions under which they may participate.



PERFORMANCE WITH THE PRESENCE AND PARTICIPATION OF REPRESENTATIVES OF THE REQUESTING COURT

- If it is compatible with the law of the Member State of the requesting court, representatives of the requesting court have the right to be present in the performance of the taking of evidence by the requested court.
- The term "representative" shall include members of the judicial personnel designated by the requesting court, in accordance with the law of its Member State. The requesting court may also designate, in accordance with the law of its Member State, any other person, such as an expert.



COERCIVE MEASURES

Where necessary, in executing a request the requested court shall apply the appropriate coercive measures in the instances and to the extent as are provided for by the law of the Member State of the requested court for the execution of a request made for the same purpose by its national authorities or one of the parties concerned.



REFUSAL TO EXECUTE

A request for the hearing of a person shall not be executed when the person concerned claims the right to refuse to give evidence or to be prohibited from giving evidence,

(a) under the law of the Member State of the requested court; or

(b) under the law of the Member State of the requesting court, and such right has been specified in the request, or, if need be, at the instance of the requested court, has been confirmed by the requesting court.



REFUSAL TO EXECUTE

Request may be refused only if:

- (a) the request does not fall within the scope of the Regulation; or
- (b) the execution of the request under the law of the Member State of the requested court does not fall within the functions of the judiciary; or
- (c) the requesting court does not comply with the request of the requested court to complete the request within 30 days after the requested court asked it to do so; or
- (d) a deposit is not made within 60 days after the requested court asked for such a deposit.



DIRECT TAKING OF EVIDENCE

- The direct taking of evidence, is an act performed in the territory of another Member State that would not be permitted under the classic interpretation of international law.
- The taking of evidence shall be performed by a member of the judicial personnel or by any other person such as an expert, who will be designated, in accordance with the law of the Member State of the requesting court.
- Direct taking of evidence may only take place if it can be performed on a voluntary basis without the need for coercive measures. Where the direct taking of evidence implies that a person shall be heard, the requesting court shall inform that person that the performance shall take place on a voluntary basis.



DIRECT TAKING OF EVIDENCE

- The central body or the competent authority may refuse direct taking of evidence only if:
 - (a) the request does not fall within the scope of the regulation;
 - (b) the request does not contain all of the necessary information; or
 - (c) the direct taking of evidence requested is contrary to fundamental principles of law in its Member State.
- As a main rule, the law of the requesting state applies.



COSTS

- The execution of the request, shall not give rise to a claim for any reimbursement of taxes or costs.
- Nevertheless, if the requested court so requires, the requesting court shall ensure the reimbursement, without delay, of
 - the fees paid to experts and interpreters;
 - the costs occasioned by the requested special procedure or the requested telecommunication means.
- The law of the Member State of the requesting court
 - governs the duty for the parties to bear the above fees or costs;
 - provides for deposit or advance.



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You may want to visit Prof. Varga under

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