



PROJECT NO JUST/2010/JCIV/AG/0010-30-CE-0421163/00-50 „ENHANCING
QUALITY OF JUDICIAL COOPERATION IN CIVIL MATTERS: THE EUROPEAN UNION
CIVIL PROCEEDINGS AND TOOLS PROVIDED BY REGULATIONS ON TAKING
EVIDENCE AND SERVICE OF DOCUMENTS”

TRAINING COURSE „CROSS-BORDER JUDICIAL COOPERATION IN CIVIL MATTERS: TOOLS
PROVIDED BY REGULATIONS ON TAKING EVIDENCE AND SERVICE OF DOCUMENTS”
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THE TRAINING COURSE IS BEING IMPLEMENTED WITHIN THE EUROPEAN COMMISSION SPECIFIC PROGRAMME “CIVIL JUSTICE” PROJECT NO JUST/2010/JCIV/AG/0010-30-CE-0421163/00-50 „ENHANCING QUALITY OF JUDICIAL COOPERATION IN CIVIL MATTERS: THE EUROPEAN UNION CIVIL PROCEEDINGS AND TOOLS PROVIDED BY REGULATIONS ON TAKING EVIDENCE AND SERVICE OF DOCUMENTS”

APPLICATION 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 IN ESTONIA

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Topics



- Introduction
- National law
- Evidence, procedural expenses and minutes
- Direct taking of evidence
- Refusal to execute
- Statistics, examples and problematic issues

1. Introduction

1.1. Scope of the application of the Regulation

- Civil or commercial matters
- Autonomous definition
- Commenced or contemplated judicial proceedings

1. Introduction

1.2. Two methods for the taking of evidence

- On the basis of Articles 10 to 12 of the Regulation, the taking of evidence is executed in accordance with the legislation of the Member State who has received a request. The Code of Civil Procedure (CCP), which entered into force on 1 January 2006, applies in Estonia.
- On the basis of Article 17 of the Regulation - the direct taking of evidence. On a voluntary basis without the need for coercive measures.

1. Introduction

1.3. Competent courts

- County courts - contacts and working areas are provided in the European Judicial Atlas in Civil Matters (http://ec.europa.eu/justice_home/judicialatlascivil/html/pdf/manual_tev_est.pdf)
- The Ministry of Justice is the Central Body referred to in Article 3 of the Regulation.

Address:

Ministry of Justice, Tõnismägi 5a, 15191 Tallinn, Estonia.

2. National Law

2.1. Assistance between the courts

Unless otherwise provided by law or an international agreement, an Estonian court shall provide procedural assistance in performance of a procedural act at the request of a foreign court if, pursuant to Estonian law, the requested procedural act belongs to the jurisdiction of the Estonian court and is not prohibited.

A procedural act may also be performed or a document may be issued pursuant to the law of a foreign state if this is necessary for the conducting of proceedings in the foreign state and the interests of the participants in the proceeding are not damaged thereby (subsection 15(5) of CCP).

- Application of the Regulation, referred in subsection 15(6) of CCP.

2. National Law

2.2. Requirements (Articles 10 to 12)

- Request is submitted directly to the county court from which the taking of evidence is requested
http://ec.europa.eu/justice_home/judicialatlascivil/html/index_en.htm
- The request and all documents accompanying the request shall be exempted from authentication or any equivalent formality (Article 4(2) of Regulation)
- Language: Estonian
- Submitting of request: by post, fax or e-mail

2. National Law

2.3. Procedure of the requested court

- County court shall deem the taking of evidence as matters on petition (subsections 475(2), 15(6) of CCP)
- 10 standard forms (A-J)
- Form A - Request for the taking of evidence (Article 4)
- Form B - Acknowledgement of receipt of a request for the taking of evidence (Article 7(1))
- Form A - Notification of forwarding the request (Article 7(2))
- Form C - Request for additional information for the taking of evidence (Article 8)
- Form D - Acknowledgement of receipt of the deposit or advance (Article 8(2))

2. National Law

2.3. Procedure of the requested court

- The time limit shall begin to run when the requested court received the request duly completed or the deposit or the advance is made (Article 9(1))
- Form E - Notification concerning the request for special procedures and/or for the use of communications technologies (Article 10(3) to (4))
- Form F - Notification of the date, time, place of performance of the taking of evidence and the conditions for participation (Article 11(4))
- Form G - Notification of delay (Article 15)
- Form H - Notification on the outcome of the request (Article 16)
- Form I - Request for direct taking of evidence (Article 17)
- Form J - Information from the central body/competent authority (Article 17)

3. Evidence

3.1. Definition of evidence

- Definition of evidence has not been defined in the Regulation (Judgment of the Court in case C-104/03, Proposition of Advocate General in Case C-175/06)
- Definition of evidence in the Estonian national law - evidence in a civil matter is any information which is in a procedural form provided by law and on the basis of which the court, pursuant to the procedure provided by law, ascertains the existence or lack of facts on which the claims and objections of the parties are based and other facts relevant to the just adjudication of the matter (subsection 229(1) of CCP).

3. Evidence

3.1. Definition of evidence

- Evidence may be the testimony of a witness, statements of participants in a proceeding given under oath, documentary evidence, physical evidence, observation or an expert opinion. The court may also deem other means of proof to be sufficient in order to prove the facts relating to a proceeding on petition, including a statement of a party in the proceeding under oath (subsection 229(2) of CCP).
- Evidence does not belong to hierarchy - no evidence shall have predetermined weight for a court, unless otherwise agreed by the parties.

3. Evidence

3.2. Witness testimony § 251 to 266 of CCP, Article 14

- Every person, who may be aware of the facts relevant to a matter, may be heard as a witness unless the person is a participant in the proceeding or a representative of a participant in the proceeding in the matter (subsection 251(1) of CCP)
- Hearing of witness in a court hearing at the presence and participation of parties
- Written testimony and hearing of witness outside of court

3. Evidence

3.2.1. Prohibition on giving testimony subsections 256(1) to (4) of CCP:

- Procedure for the prohibition on giving testimony
- A minister of a religious association or support staff thereof shall not be heard or questioned with regard to the circumstances confided to them within the context of spiritual care.
- The following persons shall not be heard as witnesses without the permission of the person in whose interests the duty to maintain confidentiality is imposed:
 - Representatives in civil matters or criminal defence counsel in criminal matters and notaries;
 - Doctors, pharmacists or other health care providers;
 - Other persons who, due to their professional or economic activity, have been confided information which the persons are obliged to keep confidential pursuant to law;
 - Professional support staff of the aforementioned persons.

3. Evidence

3.2.1. Prohibition on giving testimony subsections 256(1) to (4) of CCP:

- A person of less than 14 years of age or a person who due to a physical or mental disability is unable to properly comprehend the facts relevant to the matter or to give truthful testimony with regard thereto.

3. Evidence

3.2.2. Right of witness to refuse to give testimony subsections 257(1) to (5) of CCP:

- Plaintiff's or defendant's:
 - ▣ the descendants and ascendants;
 - ▣ a sister, stepsister, brother or stepbrother, or a person who is or has been married to a sister, stepsister, brother or stepbrother of the plaintiff or defendant;
 - ▣ a step or foster parent or a step or foster child;
 - ▣ an adoptive parent or an adopted child;
 - ▣ the spouse of or a person permanently living together with the plaintiff or defendant, and the parents of the spouse or person, even if the marriage or permanent cohabitation has ended.

3. Evidence

3.2.2. Right of witness to refuse to give testimony subsections 257(1) to (5) of CCP:

- The testimony may lay blame on him or her or the aforementioned person for the commission of a criminal offence or a misdemeanour;
- Circumstances to which the State Secrets Act applies;
- Persons who process information for the purpose of journalism.

3. Evidence

3.2.3. Obligation to testify in exceptional cases subsections 258(1) to (4) of CCP:

- the performance and content of a transaction which he or she was invited to witness;
- the birth or death of a family member;
- a fact related to a proprietary relationship which arises from a relationship under family law;
- an act related to the disputed legal relationship which the witness himself or herself performed as the legal predecessor or a representative of a party.

3. Evidence

3.2.4. Court session

- Summoning of witnesses and parties (§ 252 of CCP, Form F)
- Procedure for hearing witnesses
- Warning
 - ▣ Refusal to give testimony without a legal basis and giving knowingly false testimony;
 - ▣ Signing the caution;
 - ▣ A witness shall not be cautioned if the witness does not understand the meaning of the caution due to a mental illness, mental disability or other mental disorder (subsection 262(2) of CCP).

3. Evidence

3.2.4. Court session

- Hearing of witness who is a minor
- Coercive measures (Article 13, subsections 266(1) to (4) of CCP):
 - ▣ fine up to EUR 3200;
 - ▣ compelled attendance;
 - ▣ detention of up to 14 days;
 - ▣ bearing the procedural expenses.

3. Evidence

3.2.5. Use of videoconference

- Court session held in form of procedural conference:
 - ▣ Session in the form of a procedural conference (subsection 350(1) of CCP);
 - ▣ May hear a party, witness or expert;
 - http://ec.europa.eu/justice_home/judicialatlascivil/html/pdf/tev_videoconference_est_en.pdf
 - ▣ County courts:
 - Harju County Court, Liivalaia Courthouse (criminal and misdemeanour matters), Liivalaia 24, Tallinn (Hall 204);
 - Tartu County Court, Tartu Courthouse, Kalevi 1, Tartu (Hall 344);
 - Viru County Court, Jõhvi Courthouse, Kooli 2a, Jõhvi (Hall 1, 4);
 - Pärnu County Court, Pärnu Courthouse, Kuninga 22, Pärnu (Hall 1).

3. Evidence

3.3. Statements of participants in proceeding given under oath § 267 to 271 of CCP

- Procedure for hearing of witnesses apply
- Oath:
 - ▣ “I, (name), swear by my honour and conscience that I shall disclose the whole truth about the matter without concealing, adding or changing anything.”
- Participant in proceeding without active civil procedural legal capacity.

3. Evidence

3.4. Documentary evidence § 272 to 284 of CCP

- Submission of written documents
- Submission of electronic documents
- Presentation of excerpts of documents and examination of documents at their place of storage
- Requiring submission of documents and obligation to submit documents:
 - ▣ a person in possession of a document has the obligation to submit the document to the court at the court's request within the term set by the court;
 - ▣ if a person is in the possession of information relevant to the adjudication of a matter, the person shall, on the demand of the court, prepare a document on the basis of the information;
 - ▣ the court may fine a person who fails to submit the documents without good reason.

3. Evidence

3.4. Documentary evidence § 272 to 284 of CCP

- Obligation to provide information in action related to intellectual property (subsections 280(1) to (5) of CCP)
- Basis of refusal to submit document (subsections 281(1) to (5) of CCP):
 - ▣ a state or local government agency or a public servant employed thereby;
 - ▣ an advocate;
 - ▣ if the document contains information concerning which the possessor of the document cannot be heard as a witness or with regard to which the possessor of the document has the right to refuse to give testimony as a witness;
 - ▣ by a person who has the right to refuse to submit the document due to another reason arising from law.

3. Evidence

3.5. Physical evidence § 285 to 289 of CCP

- Physical evidence is a thing the existence or characteristics of which may facilitate the ascertainment of the facts relevant to the adjudication of a civil matter.
- The provisions concerning the submission of documents apply to the submission and requisition of submission of physical evidence.
- Storage, inspection and return of physical evidence

3. Evidence

3.6. Inspection § 290 to 292 of CCP

- Any direct collection by the court of data concerning the existence or nature of a circumstance, including the inspection of an area or the scene of an event.
- Organisation of inspection:
 - ▣ the object of the inspection and the time and place of organising the inspection shall be set out in a ruling;
 - ▣ one or several experts may be invited to be present at the inspection;
 - ▣ minutes shall be taken of the course of an inspection;
 - ▣ other persons may refuse to enable the inspection on the same grounds as the possessor of a document may refuse to submit the document at the request of the court;
 - ▣ the court has the right to impose a fine on a person who refuses to enable inspection without good reason.

3. Evidence

3.7. Expert opinion § 293 to 305 of CCP

- Expert opinion is required in order to clarify issues relevant to a case which require specific expertise.
- Expert assessment shall be carried out by a forensic expert or other qualified person employed by a state forensic institution, an officially certified expert or another person with specific expertise appointed by the court.
- Obligations and rights of expert (§ 302 of CCP)
- Right to refuse to conduct expert assessment (§ 296 of CCP)

3. Evidence

3.7. Expert opinion § 293 to 305 of CCP

- Conduct of expert assessment and expert opinion:
 - ▣ expert assessment for establishment of parentage (§ 300 of CCP);
 - ▣ written expert opinion (§ 301 of CCP);
 - ▣ providing expert's opinion in a court session (§ 303 of CCP);
 - ▣ reassessment and further expert assessment (§ 304 of CCP).

- Liability of expert (§ 305 of CCP):
 - ▣ a fine
 - ▣ compensation of the procedural expenses

4. Payment and Reimbursement of Procedural Expenses

4.1. Costs essential to proceedings § 143 of CCP

- Costs related to execution of the request:
 - ▣ costs related to witnesses, experts, interpreters and translators and expenses incurred conducting expert assessment by a person who is not a participant in the proceedings;
 - ▣ costs related to obtaining documentary evidence and physical evidence;
 - ▣ costs related to inspection, including travel expenses by the court;
 - ▣ costs on delivery, forwarding and issuing of procedural documents.

4. Payment and Reimbursement of Procedural Expenses

4.1. Costs essential to proceedings § 143 of CCP

- Article 18(2) applies - the fees paid to experts and interpreters
- Unless the court rules otherwise, the costs essential to the proceedings shall be paid, to the extent ordered by the court, by the participant in the proceedings who filed the petition to which the costs are related.

If both parties submit an application or if the court summons a witness or expert or requests that an inspection be conducted, the costs shall be paid by the parties in equal amounts (subsection 148(1) of CCP).

- Judgment in Case C-283/09 (interpretation of Articles 14 and 18)

5. Minutes

5.1. Content and preparation of minutes § 50 to 55 of CCP

- Taking of evidence in a court session
- Submission of objections to minutes and amendment of minutes (§ 53 of CCP).

6. Direct Taking of Evidence

- Governed by Article 17 of the Regulation and subsection 241(3) of CCP
- There is no special regulation in Code of Civil Procedure

7. Basis of Refusal to Execute

7.1. Execution of the request by the requested court (Article 14)

- A person has the right to refuse to give evidence:
 - ▣ under the law of the Member State of the requested court
 - ▣ under the law of the Member State of the requesting court
- Request does not fall within the scope of the regulation
- Execution of the request under the law of the Member State of the requested court does not fall within the functions of the judiciary

7. Basis of Refusal to Execute

7.1. Execution of the request by the requested court (Article 14)

- Requesting court does not complete the request
- A deposit or advance asked for in accordance with Article 18(3) is not made
- Deadline 60 days (Form H)
- Execution may not be refused solely on the ground that under the law of its Member State a court of that Member State has exclusive jurisdiction over the subject matter of the action or that the law of that Member State would not admit the right of action on it.

7. Basis of Refusal to Execute

7.2. Direct taking of evidence (Article 17(5))

- Request does not fall within the scope of the Regulation
- Request does not contain the necessary information
- Contradiction with the fundamental principles of law in its Member State

8. Statistics and Examples

- Statistics
- Request of Romanian Suceavan Circuit Court for taking of evidence (civil matter No 2-12-19040)
- Request of Helsinki City Court for taking of evidence (civil matter No 2-11-56320)

9. Problematic Issues



- Lack of requests for direct taking of evidence
- Language and translation
- Misuse of standard forms
- Expenses
- Absence of means of communication (e-mail address)

9. Problematic Issues

- Lack of the use of means of communication (video- and teleconferences)
- Study on the request of Articles 3 (1) (C) and 3, and Articles 17 and 18 of the 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
http://ec.europa.eu/justice/civil/files/final_report_1206_en.pdf



**Successful taking of
evidence!**