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Principles of the Law of Evidence in Relation to the EU Cross-border Civil Proceedings

Team Czech Republic 2

Veronika Černovská
Kristýna Hánělová
Jan Chmel

tutor: Pavel Pražák

CONTENTS

1. INTRODUCTION

Even in the field of evidence law, the civil justice has to face the consequences of the growing number of cross border disputes in the EU, especially the need to take evidence located abroad. This paper is divided into four main parts. First part starts right after the introduction and covers the general information about the notion of evidence and the basic principles of the European civil procedure law, mainly the evidence law and its sources. It is also focused on cross-border judicial proceedings that are related to civil or commercial matters pending before a court in one of the EU Member States which needs to take evidence in another, including relevant regulations dealing with this issue. In the second part we try to present specific cases associated with hearing of a witness. The third part, which may be considered as a fundamental part of this paper, looks at the most significant problems or inequalities arising from the EU Member States cross-border cooperation concerning the taking of evidence and at the same time, it offers solution which may be considered while tackling the problems described. The final part - conclusion - briefly summarises content of this thesis. In order to achieve complex comprehension of the matter in question, we also introduce relevant court decisions. We believe this paper highlights the most important problems caused due to the current state of affairs and may help to give guidance for the future European civil procedure law regulation.

2. BASIC PRINCIPLES OF EVIDENCE PROCEDURE

2.1 What is evidence?

The word “evidence” has its origin in a Latin term “evidentia”, which means to “show clearly, prove,” to make clear to the sight or to ascertain.[1]

[1] See THE ONLINE ETHYMOLOGY DICTIONARY. *Ethymonline.com [online]*. Douglas Harper, cited Apr. 21, 2016. Available at: http://www.etymonline.com/index.php?term=evidence.

Nowadays, the very basic definition sees evidence as the available body of facts or information that indicates whether a belief or proposition is true or valid.[2] In other words, evidence is something which serves to prove or disprove the existence or non-existence of an alleged fact.

However, all facts traditionally considered as evidence may or may not be evidence in the eyes of law. Within the judicial process we understand evidence as any "type of proof legally presented at trial (allowed by the judge) which is intended to convince the judge of alleged facts relevant to the case. It can include oral testimony of witnesses, experts on technical matters, documents, public records, objects, photographs and depositions (testimony under oath taken before trial). It also includes so-called "circumstantial evidence" which is intended to create belief by showing surrounding circumstances which logically lead to a conclusion of fact."[3]

2.2 Basic principles

It is obvious that evidence is the key factor to reach a decision in judicial process. Because of its extreme importance, it is quite desirable to set out rules that would regulate "evidence procedure", especially in judicial process. Such regulation, known as evidence law, represents "the system of rules and standards by which the admission of proof at the trial of a lawsuit is regulated."[4]

The most of the world´s countries treat evidence law as the essential part of the legal system. We can even say that there are as many evidence laws as there are countries in the world. But what may this variety of national rules cause in case of cross-border proceedings?

It is quite understandable that the EU seeks to regulate judicial cooperation in the field of evidence law of EU Member States. Through the Regulation on the Taking of Evidence[5] the

[2] See OXFORD DICTIONARIES. *Oxforddictionaries.com* [online]. Oxford University Press, cited Apr. 10, 2016. Available at: http://www.oxforddictionaries.com/definition/english/evidence.

[3] See LEGAL DICTIONARY. *Dictionary.law.com* [online]. ALM Media Properties, LLC., cited Apr. 10, 2016. Available at: http://dictionary.law.com/Default.aspx?selected=671.

[4] See LEAGLE. *BLACKFORD CTY. SCH. v. EDUC. EMP. REL. BD.* [online]. Leagle, Inc., cited Apr. 15, 2016. Available at: http://www.leagle.com/decision/1988688519NE2d169_1677/BLACKFORD%20CTY.%20SCH.%20v.%20EDUC.%20EMP.%20REL.%20BD.

[5] See *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*. p. 1-24 (hereinafter the "Evidence Regulation").

EU has created an EU-wide system of direct and rapid transmission and execution of requests for the performance of taking of evidence between courts. This system is laying down precise criteria regarding the form and content of the request. The Evidence Regulation has been applied since 1 January 2004 with respect to all EU Member States, except Denmark. As regards Denmark, the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters[6] is applicable as it is binding between the remaining EU Member States and third states parties to the Evidence Convention. However, not all EU Member States have as yet ratified or acceded to the Evidence Convention.[7]

Although this kind of regulation is more detailed below, we believe it is necessary to mention at least one of the basic principles thereof: the requested court shall execute the request in accordance with its national law. This undeniably leads to a need to share some fundamental and important principles of evidence law between EU Member States.

In general, it is possible to say that there is a wide array of fundamental principles of civil justice in the EU which are contained in different sources such as the Charter of Fundamental Rights of the European Union or the European Convention on the Protection of Human Rights and Fundamental Freedoms, Rules of Procedures of the Court of Justice, the case law of the EU courts or the Court of Justice, etc.[8] The fundamental rights in question, framed in these sources, include in particular the following elements:

- the right to an independent, impartial court (tribunal) previously established by law,
- the right to an effective remedy,
- the right to a fair trial,
- the right to a fair and public hearing,
- the right to a hearing organised within reasonable time, i.e. without undue delay,
- the right to be advised, defended and represented and

[6] See Hague *Convention on the Taking of Evidence Abroad in Civil and Commercial Matters*, opened for signature Mar. 18, 1970 (hereinafter the "Evidence Convention").

[7] See EUROPEAN COMMISSION. *Judicial cooperation in civil matters. A guide for legal practitioners*. *Europa.eu* [online]. Published 2014, cited Apr. 10, 2016. Available at: http://ec.europa.eu/justice/civil/files/civil_justice_guide_en.pdf.

[8] See BIAVATI, Paolo. *European Civil Procedure*. Wolters Kluwer, 2011, ISBN 978-90-411-3634-3, p. 129 et seq.

- the right of persons lacking sufficient resources to legal aid, if necessary.[9]

Still, the sources mentioned above are restricted to the largely uncontroversial “high terrain” of constitutional guarantees of due process. On the other hand, the EU feels a strong need to define the basic principles of civil procedure as "intersection between uncontroversial procedural axiom and the fine texture of national codes."[10]

In the past years, we "have seen the emergence of a growing body of rules at European level in the field of procedural law, in the wake of the enlargement of the EU competences towards judicial co-operation."[11] This is the reason why International institute for the unification of private law (UNIDROIT) follows in cooperation with American Law Institute an "aim at reconciling the differences among various national rules of civil procedure, taking into account the peculiarities of transnational disputes as compared to purely domestic ones."[12] Nevertheless, it can be said that many different perspectives and wide range of potential legal options are “a blessing and a curse at the same time”.[13]

In this regard, we can draw up a list of fundamental principles (Principles of Transnational Civil Procedure) which, provided these are respected from the EU Members States, could serve as a "useful tool to avoid a fragmentary and haphazard growth of the European civil procedure law."[14] These principles are in particular:

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[9] See MAŃKO, Rafał. *Europeanisation of civil procedure. Towards common minimum standards?* EPRS/European Parliamentary Research Service, Members' Research Service, June 2015. ISBN 978-92-823-7232-6, p. 5.

[10] See KRAMER, X. E. and VAN RHEE, C. H. (eds.). *Fundamental Principles of Civil Procedure: Order Out of Chaos, Civil Litigation in a Globalising World*. T.M.C. ASSER PRESS, The Hague, The Netherlands, and the authors, 2012, ISBN 978-90-6704-817-0, p. 21.

[11] See UNIDROIT. *STUDY LXXVIA - TRANSNATIONAL CIVIL PROCEDURE - FORMULATION OF REGIONAL RULES* [online]. UNIDROIT, cited Apr. 10, 2016. Available at: http://www.unidroit.org/work-in-progress-studies/current-studies/transnational-civil-procedure.

[12] See COUNCIL OF EUROPE. *International Judicial Cooperation in Civil Matters* [online]. Council of Europe, cited Apr. 12, 2016. Available at: https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/Civil/Paper4_en.asp.

[13] See EUROPEAN LAW INSTITUTE. *ELI Updates November-December 2015*. p. 2. Published 2015, cited Apr. 10, 2016. Available at: http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Newsletter/Newsletter_N-D_TD.pdf.

[14] See UNIDROIT. *STUDY LXXVIA - TRANSNATIONAL CIVIL PROCEDURE - FORMULATION OF REGIONAL RULES* [online]. UNIDROIT. cited Apr. 10, 2016. Available at: http://www.unidroit.org/work-in-progress-studies/current-studies/transnational-civil-procedure.

- judicial competence, judicial independence, judicial impartiality, procedural equality, due notice or the right to be heard, publicity, reasoned decisions,
- prompt and accelerated justice,
- professional independence of counsel, right to assistance of counsel, attorney client privilege ("legal professional privilege"),
- privilege against self-incrimination,
- party's definition of scope of proceedings, joinder rules, allocation of burden and nature of standard of proof, pleadings, parties' duty to avoid false pleading and abuse of process,
- judicial initiative in evidential matters,
- judicial management of proceedings, sanctions against default and non-compliance, need for proportionality in use of sanctions,
- parties' duty to act fairly and to promote efficient and speedy proceedings, parties' duty to co-operate,
- right to oral stage of procedure, final hearing before ultimate adjudicators, judicial responsibility for correct application of the law,
- effective enforcement, recognition by foreign courts, international judicial co-operation.[15]

Some of these basic principles shared by the EU Member States and relevant to this paper are also recognised by the European Court of Human Rights case law as parts of the right to fair trial guaranteed by Article 6 of the European Convention of Human Rights. Those are, among others the principle of equality of arms and right to adversarial proceedings. The principle of equality of arms "requires that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent."[16] This includes i. a. the right of both parties to proceedings to cross examine

[15] See KRAMER, X. E. and VAN RHEE, C. H. (eds.). *Fundamental Principles of Civil Procedure: Order Out of Chaos, Civil Litigation in a Globalising World*. T.M.C. ASSER PRESS, The Hague, The Netherlands, and the authors, 2012, ISBN 978-90-6704-817-0, p. 23.
[16] See the Judgement of the European Court of Human Rights, Feb. 24, 1997. De Haes and Gijsels v. Belgium, application no. 19983/92.

witnesses.[17] Right to adversarial proceedings, according to the ECHR, means "the opportunity for the parties to have knowledge of and comment on the observations filed or evidence adduced by the other party."[18]

Based on the principles above, it is possible to select those of them which are the most important in the field of evidence law (such as procedural equality, self-incrimination, need for proportionality in use of sanctions, allocation of burden and nature of standard of proof, venue rules, etc.). However, the question remains whether these principles are preserved or not in the case of EU Member States cross-border cooperation based on the Evidence Regulation.

2.3 Cross-border evidence in the EU: the Evidence Regulation

As briefly described above, mechanism that facilitates taking evidence located abroad is laid down by the Evidence Regulation. Stated by the Court of Justice: „the aim of the regulation is to make the taking of evidence in a cross-border context simple, effective and rapid."[19] Therefore it allows the evidence to be taken by a requested EU Member State's court upon a direct request from other EU Member State's court, without the need to involve any other public authorities. Before describing the particular problems, that may arise in cross-border "taking evidence" cooperation, it is necessary to briefly introduce the procedure following the Evidence Regulation.

When a court needs to take evidence located in another EU Member State, the Evidence Regulation offers two possibilities of the direct taking of evidence, and that is either by the requesting court or the taking of evidence by the requested court itself.

The second option, the taking of evidence directly by the requesting court, is quite rare, because this way is, from the viewpoint of the requesting court, more demanding and in addition it can often turn out to be less efficient due to its voluntary basis – the courts are forbidden to use any

[17] See the Judgement of the European Court of Human Rights, Mar. 13, 2016. Blokhin v. Russia, application no. 47152/06.

[18] See the Judgement of the European Court of Human Rights, Jun. 23, 1993. Ruiz-Mateos v. Spain, application no. 12952/87.

[19] See Judgement of the Court of Justice, Feb. 17, 2011. *Artur Weryński v. Mediatel 4B spółka z o.o.* Case C-283/09.

coercive measures when taking evidence abroad directly.[20] That is why we will further focus on taking evidence by the requested court and especially on the process of requesting examination of a witness or of a party to proceedings, because those are the cases, where most controversies may arise.

Any EU Member State's court may request the competent court of another EU Member State to take evidence intended for use in judicial proceedings.[21] The Evidence Regulation lays down concrete procedural requirements. The request must be made using a prescribed form and it must contain i.a. information about the nature and subject matter of the case, a brief statement of the facts, a description of the taking of evidence to be performed and the questions to be put to the person to be examined or a statement of the facts about which he or she is to be examined.

The requested court has a duty to execute the request within 90 days on receipt of the request.[22] The key provision of the Evidence Regulation, as regards the topic of this work, is Article 10 para 2. According to this provision, „the requested court shall execute the request in accordance with the law of its EU Member State". If there are differences between the procedural rules of the two concerned EU Member states, this should influence evaluation of evidence and in extreme cases may even cause inadmissibility of evidence taken abroad.

To prevent potential problems arising from differences between the procedural rules the Evidence Regulation offers the requesting court certain instruments. According to the Article 4 para 1 (e) the request for taking evidence should, where appropriate, contain also a reference to a right to refuse to testify under the law of the EU Member State of the requesting court, any requirement that the examination is to be carried out under oath or affirmation in lieu thereof, and any special form to be used and any other information that the requesting court deems necessary. In addition, the requesting court may require that the request was executed in accordance with a special procedure provided for by the law of its EU Member State.

The requested court shall comply with such a requirement unless this procedure is incompatible with the law of the EU Member State of the requested court or by reason of major practical

[20] See Article 17 para 2 of the Evidence Regulation.

[21] See Article 1 (a) of the Evidence Regulation.

[22] See Article 10 para 1 of the Evidence Regulation.

difficulties.[23] Also the representatives of the requesting court have the right to be present in the performance of the taking of evidence by the requested court,[24] which may be helpful for evaluating evidence.

The regulation thus offers the Member States Courts a practical instrument to obtain evidence located in another Member State. However, the differences between Members States procedural law regulating taking of evidence may cause difficulties. We will demonstrate this on examples concerning procedural rules of hearing witnesses.

3. TAKING OF EVIDENCE BY HEARING WITNESSES

The hearing of a witness is the key means of proof because oral testimony is a significant instrument to find the truth in court decision and often it is also the only available means of proof which a judge can use. That is why most of the EU Member States regulate the process of getting testimony from witnesses in detail and that is also the reason why considerable differences in EU Member States procedural rules exist.

3.1 The right to remain silent

The right to remain silent constitutes an exception from the rule that everyone has a duty to attend a trial to testify as witness about all facts within his or her knowledge. It is recognized by most of the world's legal systems. Moreover, it is sometimes considered as one of the fundamental rights, at least in the extent to provide everyone right to avoid self-incrimination.[25] However, as already outlined, there are substantive differences between EU Member States procedural rules in the scope of this right.

[23] See Article 10 para 3 of the Evidence Regulation.

[24] See Article 12 of the Evidence Regulation.

[25] According to Article 14 para 3 of the *International Covenant on Civil and Political Rights* opened for signature Dec. 16, 1966: "In the determination of any criminal charge against him, everyone shall be entitled (…) not to be compelled to testify against himself or to confess guilt."

See BERGER, Mark. *Europeanizing Self-Incrimination: The Right to Remain Silent in the European Court of Human Rights.* Columbia Journal of European Law, Spring 2006, vol. 12, p. 340.

The core of the right to remain silent lies in the rule that evidence obtained against the will of a person shall not be used in the criminal proceedings against such person – and as such it is also recognized as a part of right to a fair trial by the European Court of Human Rights.[26] But although the right to remain silent is rooted in criminal procedure, where it constitutes one of the key rights of the accused person, it also has an important position in the rules of civil procedure. Although there is a concern of the parties to the proceedings to obtain as much information as a witness can provide, important interests of the witness (especially not to cause himself or herself a risk of being prosecuted) also have to be protected. That is the reason why also civil procedure codes contain provisions laying down the right not to testify in specific situations.

The scope of the right of a witness to remain silent differs substantially in procedural rules of the EU Member States. On one hand, some countries, such as Germany, provide a (potential) witness with a widely defined right to silence: according to German Code of Civil Procedure law the fiancé, spouse, former spouse, partner, former partner and other relatives of a party to proceedings are entitled to entirely refuse to testify[27]; in addition every witness can refuse to answer a particular question, if the answer would cause him or her or his or her relatives direct financial loss, dishonour, risk of being prosecuted for a criminal or administrative offence or if the answer would mean disclosing a technical or trade secret;[28] there are also other exceptions from the general duty to testify, mainly concerning clerics, journalists and other professionals to whom facts are entrusted confidentially.[29] Very similar rules to the German legislation are laid down in the Slovenian Civil Procedure Act, with only slight differences such as the requirement of a qualified intensity of the reason to refuse answering a question (it would have to cause serious shame, considerable financial damage, risk of prosecution for criminal – but not administrative – offence).[30]

[26] See Judgement of the European Court of Human Rights, Dec. 17, 1996. *Saunders v. United Kingdom*. Application no. 19187/91.

[27] See Section 383 para 1, 2, 2a and 3 of the German *Code of Civil Procedure – Zivilprozessordnung* (hereinafter the "German Code of Civil Procedure") as promulgated on Dec. 5, 2005, last amended Oct. 10, 2013.

[28] See Section 384 of the German Code of Civil Procedure.

[29] See Section 383 para 4, 5 and 6 of the German Code of Civil Procedure.

[30] See Section 231 – 233 of the Slovenian *Civil Procedure Act of 25 March 1999 – Zakon o pravdnem postopku* as promulgated on Mar. 25, 1999, last amended Jun. 12, 2007 (hereinafter the „Slovenian Civil Procedure Act").

On the other hand, there are countries with only few exceptions from the general duty of any person to attend to court when summoned as a witness to testify. Thus in the Czech Republic it is only possible to refuse to give testimony if the witness would expose himself or herself to danger of a criminal prosecution,[31] or if the witness is under the obligation of professional secrecy. In Italy witnesses even have the right to refuse to give testimony only if they are bound by professional secrecy, official secrecy or State secrecy.[32]

Observing the differences is not just an interesting academic issue of comparative law. These differences may constitute a very practical problem when using witness testimonies taken in different EU Member States together in one civil proceeding. Considering the differences mentioned above, it is easy to imagine some of the problems arising from the different extent of the right to remain silent. For example when a German court requests Italian court to hear a witness, the witness who is giving the testimony, in accordance with Italian procedural rules, is deprived of many of his/her rights. For example of the right to refuse to answer a question if the answer could cause him/her or his/her relatives direct financial loss, dishonour, or risk of being prosecuted. It is also important to be aware of the fact that witnesses are forced to give testimony under the threat of various sanctions such as disciplinary fines, forcible production of the witness or even imprisonment. It is important to take into consideration that the witness may be a key witness for one of the parties and he/she may reside in Italy only temporarily. Is it permissible to use all the information provided by such a witness before the German court?

3.2 Course of the examination

While in some EU countries the examination of a witness is led by court and the parties almost cannot influence it, somewhere the party that proposed the witness conducts his or her examination and the court does not interfere.

[31] See Section 126 of the Czech republic *Law No. 99/1963 Coll. Civil Procedure – Občanský soudní řád* as promulgated on Dec. 4, 1963, last amended Dec. 27, 2012 (hereinafter the "Czech Code of Civil Procedure").

[32] See EUROPEAN JUSTICE. *Table of contents. Italy* [online]. Published 2015, cited 10 April 2016. Available at: https://e-justice.europa.eu/content_taking_of_evidence-76-it-en.do?init=true&member=1.

In Italy, for instance, the court itself leads all the examination and the parties cannot ask the witness directly, they can only suggest their question to the judge.[33] In the Czech Republic the hearing of witness is normally led by court and when the judge is finished with questioning, the parties can ask other questions. The judge does not allow a question only in three specific cases: if the question is not related to the subject of the examination, if it implies the answer or if it is misleading.[34] On the contrary in Cyprus the witness is examined by the party which has required the witness to be summoned. Afterwards the other party can ask its own questions and in the very end the judge can ask more detailed explanation if it is deemed necessary.[35]

We assume that these differences are able to constitute conflict with the adversarial principle and the principle of the equality. For example, there is a lawsuit in Cyprus and an important witness lives in Italy. Cyprian court requests Italian court to examine the witness in place where he lives. Italian judge examines the witness and does not let the party, in whose favor the Italian witness testifies, ask him his own question. The other witnesses who are heard before the Cyprian court are examined by the parties themselves. But what if the party whose witness lives in Italy is in weaker position?

3.3. Instruction and swearing an oath

Because of the significance of the examination of a witness in the proceedings, it is necessary to make sure that the witness tells the truth. Various possibilities how to assure the truthfulness of witnesses exist. The first option, typical of the Czech civil procedure law, is the obligatory instruction of a witness to tell the truth. Prior to any examination, the witness shall be instructed by a judge about his duty to tell the truth and about the consequences of giving false testimony which is considered a criminal offence.[36] Another possibility is to oblige witnesses to take an oath while for example in Germany both instruments are set down.

[33] See EUROPEAN JUSTICE. *Table of contents. Italy* [online]. Published 2015, cited 10 April 2016. Available at: https://e-justice.europa.eu/content_taking_of_evidence-76-it-cs.do?member=1.

[34] See Section 126 para 3 of the Czech Code of Civil Procedure.

[35] See EUROPEAN JUSTICE. *Table of contents. Italy* [online]. Published 2015, cited 10 April 2016. Available at: https://e-justice.europa.eu/content_taking_of_evidence-76-cy-cs.do?member=1.

[36] See Section 126 para 2 of the Czech Code of Civil Procedure.

The German Civil Procedure Code provides that prior to the examination, the witness shall be informed of his/her obligation to tell the truth and possibility to take an oath concerning his/her testimony afterwards.[37] The witness shall be placed under oath if the court believes it is necessary in view of the importance of the testimony or in order to provide a truthful statement.[38] Following his examination, the witness shall swear that he/she has said nothing but the truth to the best of his/her knowledge and that he/she has not concealed anything.[39] Only people who are not yet sixteen years old and who have no sufficient understanding of the nature and importance of an oath, due to a lack of intellectual maturity or incapacity, shall be heard before court without being placed under oath.[40]

This variance, in the field of cross-border cooperation in „taking of evidence", may cause problems. We consider the truthfulness of the testimony given under an oath to be ensured more strongly than when the witness is only simply instructed. It is indisputable that an oath has much stronger impact on human conscience. Let´s imagine a situation, when an action has been brought before a German court, while one of the key witnesses has its residence in the Czech Republic. The German court requests the Czech court to examine the witness in place where he or she lives. Czech judge examines the witness in accordance with the Czech Code of Civil Procedure, instructs him/her about the obligation to tell the truth and about the consequences of giving false testimony. The other witnesses, who are examined before the German court, are all placed under an oath. Will the German judge evaluate the testimony of the Czech witness equally with the testimonies of their German counterparts?

3.4 Sanctions

If a duly summoned witness fails to appear before a court or refuses to testify without proper reason, there are various instruments to encourage the witness to cooperate. One possibility is to impose a fine on a disobedient witness. Second eventuality is to ensure the presence of a

[37] See Section 395 para 1 of the German Code of Civil Procedure.

[38] See Section 391 of the German Code of Civil Procedure.

[39] See Section 392 of the German Code of Civil Procedure.

[40] See Section 393 of the German Code of Civil Procedure.

witness by the police. Another, and the most repressive option, authorised in some EU Member States, is a detention order.

In the Czech Republic the judge shall have the power to use first two options. If a summoned witness fails to appear before the court without proper justification and after being instructed about the possibility of being brought by force, the judge can ask the police to ensure his/her presence.[41] If someone rudely impedes civil proceedings by not appearing at court without serious reason, a coercive fine of up to 50 000 CZK (approximately €1 850) may be levied on him.[42]

Slovenian Civil Procedure Act provides more possibilities of administrative coercion. In addition to fine the witness up to €1.300 or using the police, Slovenian procedural law allows also to detain the witness. If the witness refuses to testify or to answer particular questions without proper reason, the court shall sentence the witness to detention until he/she is willing to give the testimony or until his/her testimony is no longer needed, with the maximum length of the detention of one month.[43]

Very stringent attitude towards witnesses refusing to testify is represented in Cyprus where failure to fulfil obligations of a witness is considered a contempt of the court, a criminal offence which can be punished by imprisonment of up to two years.[44]

We can imagine the problem in a situation when a requested court imposes coercive instruments on witnesses. For instance, there is a lawsuit in the Czech Republic while the crucial witness lives in Slovenia. Czech court requests Slovenian court to examine the witness in place where he/she lives. The witness refuses to give the evidence without any reason and the compulsive fine does not change his/her determination, therefore the Slovenian judge decides to detain the witness for one month, although this „punishment" does not exist in the Czech Republic. During that time, the witness changes his mind and is willing to testify. Afterwards he is heard by the court and his testimony should have the same relevance as the other ones made right before the Czech court.

[41] See Section 52 para 1 and 2 of the Czech Code of Civil Procedure.

[42] See Section 53 para 1 of the Czech Code of Civil Procedure.

[43] See Section 241 para 1 and 2 of the Slovenian Civil Procedure Act.

[44] See EUROPEAN JUSTICE. *Table of contents. Italy* [online]. Published 2015, cited 10 April 2016. Available at: https://e-justice.europa.eu/content_taking_of_evidence-76-cy-cs.do?member=1.

4. PROPOSED SOLUTIONS

As demonstrated, there are some substantial differences between EU Member State's procedural rules of taking of evidence and judges using evidence taken abroad should take those differences into consideration. It ultimately means that judges should know the procedural rules used by the requested court and adapt the assessment of the evidence to this knowledge. For example, when an Italian judge requests another EU Member State's court to hear a witness, he should take into account that some of the questions can be asked by the parties directly – which is important for assessing trustworthiness of concrete answers.

It follows from the above that taking of evidence abroad may result in violation of some basic principles and rights of procedural law. Especially the principle of equality of arms and adversarial principle may be impaired easily. In general, both parties to proceedings should have equal right to provide evidence to support their arguments. This requirement is hardly met, when witnesses provided by those parties, are heard under different conditions. This may give advantage to one of the parties for example by obtaining information against the witness's will. Moreover, from the point of view of law of the requesting courts, the procedural rights of the witnesses might appear violated.

One of the institutes ensuring abovementioned principles is inadmissibility of evidence, in other words court should not evaluate illegally obtained evidence or evidence that was not taken in accordance with procedural law.

However, considering evidence taken abroad inadmissible because of the difference between the procedural rules should be very exceptional. Otherwise the cross-border taking of evidence would be pointless. In addition, one of the key principles governing EU Member State cooperation is the principle of mutual trust according to which EU Member States consider national legal systems as capable of providing an equivalent and effective protection of fundamental rights, recognised by EU[45]. It appears more appropriate to use the principle of free evaluation of evidence, that may enable the court to achieve the equality of parties, for example

[45] See Judgement of the Court of Justice, Dec. 22, 2010. *Joseba Andoni Aguirre Zarraga v Simone Pelz*. Case C-491/10.

by considering a testimony given under oath more trustworthy. Nevertheless, the principle of free evaluation of evidence cannot always solve the inequality of the parties completely satisfactorily. For example, when a witness would be forced to testify by measures unknown in the requesting state procedural law or when forced to testify about the facts on which the witness would be, under the law of requesting court, entitled to refuse to give evidence.

The problem of potential inadmissibility of evidence obtained from another EU Member State has already been discussed on the EU level in the area of criminal matters.[46] Article 82 of the Treaty on the Functioning of the EU[47], governing the judicial cooperation in criminal matters, enables the EU authorities to adopt a directive regarding mutual admissibility of evidence between EU Member States. Unlike that, Article 81 of the Treaty on the Functioning of the EU governing judicial cooperation in civil matters, does not explicitly presuppose such need, probably because inadmissibility of evidence is rarer.

One of the possible solutions of the problems mentioned above is regulation embodying rules of evidence at the Community level. On the other hand, impediment in complete harmonisation is not only the lack of political will but in particular consistency of law. The rules of evidence, and the rules of civil procedure in general, are strongly connected with substantive law of each state. Substantive and procedural law are two parts of one law, they influence each other and can work efficiently only in mutual interaction. Also Community substantive civil law establishment appears nearly impossible.

The aim of evidence is to make a fair decision in civil proceedings, bearing in mind the equality of the litigants. From this point of view it would be sufficient if all the proofs in proceedings are taken according to the same rules, i.e. the rules of a requesting court. It means that whichever EU Member State requested to take evidence in cross-border litigation has to act according to the law of requesting EU Member State. The equality of arms would be preserved and the deciding judge could evaluate all the evidence in the same way . Whereas proposed procedure appears to be the ideal solution, we conclude it would be tough for requested judges to follow

[46] See the *Commision Green paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility* adopted on Nov. 11, 2009. This document argues, that the best solution lies in the adoption of Community standards for gathering evidence in criminal matters.

[47] See the *Treaty on European Union and the Treaty on the Functioning of the European Union*, adopted the Treaty of Lisbon, signed on Dec. 13, 2007 (hereinafter the "Treaty on the Functioning of the EU").

different civil procedure code in each case, because knowledge of twenty eight diverse codes of civil procedure is rather an inadequate requirement.

There is only one solution left. The requesting judge is responsible for taking the evidence properly not only in his country but also abroad. The judge who needs the evidence to be taken in another EU Member State shall inform the requested court of all the conditions and difficulties connected with taking the evidence in his home country. This process would prevent the situations when the evidence would break basic EU principles of procedural law. Ultimately the requesting judge should find out if there are some key differences in the rules of taking evidence in country where the evidence is to be taken and ask the requested court not to use it.

This process can be illustrated by the case described above. If a Czech judge requests a Slovenian court to examine the witness who refuses to give the evidence and the Slovenian judge sentences him to the coercive detention, the Czech court should ask the Slovenian court not to detain the witness. If repeated compulsive fine does not help, the request should be turned back to the Czech Republic without realization and then the Czech judge can evaluate the situation by himself, because if the witness would refuse to testify in the Czech Republic, the situation would be identical.

The judge can highlight all the differences in prescribed form through which he or she requests taking of the particular evidence. The differences are well-arranged on "European e-Justice" website[48] so each judge who requests taking evidence abroad can find the information there easily and write to the requested court his requirements. It necessitates some initiative from the requesting court but it is not as difficult as studying foreign legislation. Moreover, it should be in the interest of the requesting judge because proper conduct of proceedings preserving all the basic principles is his/her responsibility.

5. Conclusion

As we can see, the taking of evidence in cross-border litigation is a complicated issue that is able to constitute serious problems in civil proceedings, including possible inadmissibility of evidence in the most serious cases. We concluded that to prevent these complications, any

[48] See EUROPEAN JUSTICE. Available at: https://e-justice.europa.eu/content_taking_of_evidence-76-cs.do.

requesting court should let a requested court know about the main differences in the rules of the taking of evidence between the two involved countries and, where appropriate, ask them not to use some of the institutes.

The law of evidence of the EU Member States is based on similar principles, while the most important ones, such as the free evaluation of evidence are common to all of them. However, it would still be useful to set down the list of some of the principles or rules which should be followed in civil proceedings in all EU Member States. This would significantly facilitate the cross-border civil proceedings.

In spite of many difficulties described in our paper we suppose that the cooperation in the evidence-taking in civil and commercial matters in the EU works very well and it will continue to improve in the future. We tried to delineate our ideas and suggest further improvements.

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