THEMIS COMPETITION 2019

Semi-final C: EU Civil Procedure

Tuesday 11th June 2019 – Thursday 13th June 2019

Scandicci, Italy

LANGUAGE AND COSTS ASPECTS IN CROSS–BORDER TAKING OF EVIDENCE (REGULATION (EC) No. 1206/2001)

Slovenia team: Sara Likar, Mateja Šukalo, Janja Cigoj

Tutor: Matej Papler

Koper, Slovenia, 10. 5. 2019

KAZALO

1. INTRODUCTION

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 and commercial matters (European Evidence Regulation; hereinafter*:* EER) was proceeded by the Hague Convention of 1 March 1954 on Civil Procedure and the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters (hereinafter: HEC). EER was adopted on the grounds of Articles 61 (c) and 65 of the Treaty of European Community – today Article 81 of the Treaty of Lisbon, which determined and assumed the need to simplify and improve judicial cooperation in cross-border collecting of evidence between courts of Member States. It entered into force on 1. 7. 2001 and became fully applicable on 1. 1. 2004.

In cross-border civil litigation many difficulties may arise because evidence is an aspect of procedural law in which different legal systems diverge very much. The written paper deals with two aspects of cross-border evidence taking: cost and language as fundamental obstacles and finally, cost and linguistic obstacles are presented in conjunction with videoconference, as an increasingly common way of cross-border evidence taking. Videoconferencing may facilitate hearing, however the judge has to be aware of a less direct or accurate perception of the words and reactions of the persons being heard.

Issues discussed in chapters on legal costs and on language, as two main obstacles for effective fact finding, are usually not paid enough attention, even though these topics can both negatively influence efficiency of cross-border litigation and can represent a notable obstacle from the perspective of the parties. The importance of legal costs becomes apparent before the decision to commence litigation is made and might pose serious threshold issues for access to justice.

The purpose of this written paper is to disclose all those obstacles that may hinder cross-border evidence taking on emphasis of costs and language and at the same time to demonstrate particular legislatures among the Member States evaluated as good practices (legislative regulations). Presentation of legal arrangement in foreign countries may furthermore be of great importance according to the phrase: ″Knowledge of foreign laws significantly supports better understanding of the domestic law″.

2. EER SHORT OVERVIEW

The objective of the EER is to enable a court of a Member State to take evidence in a simple, effective and swift manner in another Member State through direct contact with judicial authorities of the later. The EER facilitates and accelerates the search for evidence through the channel of judical cooperation. A standardized request form included in the annex to the EER must be used. This aids the process by being widely recognized by the relevant authorities. The EER enables a simplified route by allowing direct contact between the courts in the Member States. Removes the need to transmit the request to the central authority which will, in turn, forward it to the court: the judge of a Member State, where the process is pending (or is 'contemplated'), directly asks the judge of another Member State where the evidence is located, to collect it. It is furthermore possible for the judge of one Member State to collect the evidence in another State either directly or through other designated person (Article 1). The direct evidence taking is considered to be the most innovative feature of the EER, since it implies the renunciation of the principle of the territoriality as to the evidence taking. This possibility is limited to the spontaneous action of the individual without the need for coercive measures.[1] Cooperation between Member States was considered more important than the retention of the principle of sovereignty within the Member States.[2] The major goal is to protect interests of individual litigants – their right of access to court and the rights of defense.[3]

The EER does not determine when evidence abroad must be taken. It is thus left to the national law of each contracting state fo define when evidence needs to be taken abroad. The EER is only to be used when the court of the first Member State decides to take evidence abroad in accordance to the EER. Therefore we can conclude that the nature of the EER is non-binding – it does not govern taking of evidence exclusively and exhaustively, which means that it does not prevent the court to take evidence pursuant to its national law (e.g. by summoning the foreign witness to appear at the evidentiary hearing in the court where proceedings are pending).4 Furthermore, the aim of the EER

[1] V. Rijavec, T. Kresteš, T. Ivanc, *Dimensions of Evidence in European Civil Procedure*, International BV, (The Netherlands: Kluwer Law, 2016), p. 308-309.

[2] M. Freudenthal, *The Future of European Civil Procedure*, Electronic journal of Comparative Law, vol. 7.5, December 2003, https://www.ejcl.org/75/art75-6.html (last consulted on 22 April 2019).

[3] A. Galič, *The Case Law of the European Court of Justice on Cross-border Taking of Evidence*, EJTN, http://www.ejtn.eu/PageFiles/12474/Trier%202016%20Evidence%20Regulation%20Galic%20-%20ECJ%20case%20law.pdf (last consulted on 22 April 2019)

[4] A. Galič, ibid.

is to accelerate and simplify evidence taking. For this very reason, the EER must not be used when national rules are more convenient than those in the EER are.5

2.1. TWO METHODS OF CROSS-BORDER TAKING OF EVIDENCE (DIRECT AND INDIRECT TAKING OF EVIDENCE)

The EER permits a court in a Member State to request a court in a different Member State to take evidence (indirect taking of evidence, so-called active legal assistance), or even to take evidence directly (direct taking of evidence, so called passive legal assistance) – the requesting judge himself takes evidence in the territory of the requested state (only possible on voluntary basis), whenever such measures are intended for use in judical proceeding, commenced or contemplated. The request for direct taking of evidence must be made by the national court to the central body of a given Member State (Article 17). The requested court shall execute the request without delay, at the latest, within 90 days of receip of the request (Article 10(1)); the authorization allowing the requesting judge to directly collect the evidence must be either given or denied within 30 days of receip of the request (Article 17(4)).

Some states prefer a particular practice for obtaining evidence. Hence Portugal always seeks a video examination of a witness direct to the court seized in the matter. The Swedish courts prefer to use telephone conferences for obtaining evidence.[6]

3. LANGUAGE BARRIERS IN CROSS–BORDER TAKING OF EVIDENCE

3.1. THE EU LEGAL AND POLICY FRAMEWORK ON LINGUISTIC DIVERSITY

Although linguistic diversity remains one of the key values of the European project, the EU holds a relatively limited competences on this field. The principal responsibility for maintaining and enhancing linguistic diversity and multilingualism remains with the Member States. The text of the founding European Economic Community (EEC) Treaty (1957) was drawn up in all four languages (French, German, Italian and Dutch) and, as specified by its Article 248 (now Article 55 of the Treaty of Lisbon), each of these versions was to be treated equally authentic.[7] The formal principle of linguistic equality remained unchanged following several waves of enlargement, however the

[5] V. Rijavec, T. Kresteš, T. Ivanc, p. 355.

[6] R. Turner, *Dimensions of Evidence in European Civil Procedure*, Pravna fakulteta v Mariboru, https://www.pf.um.si/site/assets/files/3223/evidence_in_civil_law_-_united_kingdom.pdf (last consulted on 22 April 2019).

[7] P. Kraus, *Adressing linguistic diversity in the European Union*, Ethnicities, Vol.14, No.4., (Germany: University of Augsburg, 2014), p. 10.

increase in the number of official languages as more states have joined, has affected the internal working of institutions by an increase of the financial burden of funding translation and interpreting services in more and more language combinations.[8]

Despite the formal rule of linguistic equality, an illustration of the limited equality of the official languages comes from a series of court cases Kik v. OHIM[9]. While it is possible to submit a trademark application to OHIM in any of the official languages of the EU, only 5 languages - English, French, German, Italian and Spanish - are recognized as official OHIM languages. The European Court of Justice (hereinafter: ECJ) concluded in its ruling that the language regime of OHIM was justifiable due to economic and voluntary nature of the institution and the need to find a balance in terms of the costs of proceeding.[10]

3.2. INTRINSIC VALUE OR UTILITY?

Likewise, in a case between the European Parliament (EP) and Council, the ECJ marginalized the parliament's effort to ″shift the center of gravity″ towards cultural aspects of linguistic diversity, concluding that ″language is seen not as an element of cultural heritage but rather as an object or instrument of economic activity″ and that ″the object of the program, namely the promotion of linguistic diversity, is seen as an element of an essentially economic nature and incidentally as a vehicle for or element of culture as such″.[11]

3.3. DIFFERENT ASPECTS OF LANGUAGE DIFFICULTIES IN CROSS-BORDER FACT–FINDING

European regulations tend to emphasize the cooperation between courts in different Member States without taking into consideration that there is often no common language and that many judges will not have the language skills to communicate with their colleagues. The use of standard forms available in the 24 official languages is no perfect solution for all situations. Although primary EU law provides a high level of protection against discrimination on grounds of language, this is in some contrast to the situation of EU citizens involved in cross border civil litigation.[12]

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[8] Urrutia, I. and Lasagabaster, I., *Language rights as a general principle of Community la*`, German law journal, Vol. 8, Issue 5, (Germany: German law journal, 2007), p. 482.

[9] Office for harmonization of the internal market.

[10] CJEU 9 September 2003, *Christina Kik v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, C-361/01 P.

[11] CJEU, 23 February 1999, *European Parliament v Council of the European Union,* Case C-42/97.

[12] A. Stadler, *Practical obstacles in cross-border litigation and communication between EU Courts*, Erasmus law review, Vol.5, Issue 3, (Germany: University of Konstanz, Faculty of Law, 2012), p. 151-153.

According to the study on application of the EER, 28 % of the interviewers who took part in the research (central authorities, agencies, judges, lawyers and other professionals) stated that language barriers between requesting and requested courts hinder the effectiveness of the EER.[13] Even more concerning is the opinion of ordinary EU citizens. According to the survey conducted by the European Commission in 2012, language barriers are the second most widely voiced concern of the EU citizens in a situation where they would need to access civil justice in another country (right after a concern that they would not know the procedural rules in that country), with 40 % of participants expressing this concern.[14]

3.4. JUDICIAL COOPERATION WITHIN THE EU - OFFICIAL COURT LANGUAGES

When HEC was displaced by the EER, mutual judicial assistance became less formal. Article 3 of the EER allows direct communication between the courts, and requests must be submitted in the language of the Member State addressed or one of the language that the Member State has indicated it will accept.[15] An example of a Member State that recognizes more than one official language in proceedings, but only for specific regions, is Slovenia: while Slovenia courts generally operate only in the Slovenian language, proceedings may also be conducted in Italian and Hungarian in specifically designated areas with Italian and Hungarian minorities (in parts of Spain: Spanish, Catalan, Basque and Galician; in Netherlands: Dutch and Frisian). In Finland, the language of the proceeding does not depend on the region where the court is located, but on the parties` mother language, of which Finnish, Swedish or in some case Sami, are officially recognized. If the party's native language in one of these official languages but not the same as the language of the proceedings, the court is responsible for ensuring translation without additional costs to the party.[16]

In most Member States, proceedings may only be conducted in the official language and no agreements on the language of the proceedings or exceptions of the general rules are available. In Slovenia, proceeding will likewise be conducted in the official language of the court, but the parties

[13] V. Rijavec, T. Kresteš, T. Ivanc, p. 242.

[14] European Commission, *Europeans and their languages: Report*, Special Eurobarometer, 2012.

[15] A. Stadler, p. 164.

[16] V. Rijavec, T. Kresteš, T. Ivanc, p. 244.

and other persons involved in the proceedings may waive their right to translation, by declaring that they understand the language in which the proceeding are being conducted.[17]

3.5. USE OF STANDARD FORMS

The EER provides court to court communication through the use of standard forms, drafted in all official EU languages. Due to standardization of forms, the task of the court to filling out the form in the language of the requested court should generally not be too demanding and no translation should be required (contrary to the HEC), as the courts can use the form provided in their own language to help them fill in the form in the language of the requested state.[18] The standard form A to be used, however, cannot be completed only by ticking boxes. The requesting court must give information on the nature and subject matter of the case, including a brief statement of the facts. In case of request for witness testimony, the request must set forth the questions to be put to the witness and provide information on the possible rights of the witness to refuse to testify under the law of the requesting Member State.[19]

3.6. INTERPRETATION OF ORAL PROCEDURAL ACTS

According to Articles 11 and 12, EER parties, their representatives and representatives of the requesting court have the right to be present during the taking of evidence and they may ask for their (active) participation (e.g. asking questions of the witness themselves).

The EER does not contain any criteria or requirements for appointment of the interpreters or translators. Instead, the solutions to language related questions which are of the utmost importance for cross-border litigation (e.g. language in which the procedural acts are conducted, the extent to which the documentary evidence should be translated, conditions and requirements for the translators and interpreters, when and by whom they should be appointed, who should cover their costs), are offered by national laws; when the evidence is taken by the requested court, the solutions will be sought in the law of its own Member State (Article 10), and when the evidence is taken directly by the requesting court, the law of the Member State of the requesting court will apply (Article 17).[20] The direct taking of evidence by the requesting court is one of the most important improvements compared with the HEC. It must be performed on a voluntary basis and in accordance with the law

[17] V. Rijavec, T. Kresteš, T. Ivanc, p. 245.

[18] V. Rijavec, T. Kresteš, T. Ivanc, p. 241.

[19] A. Stadler, p. 164.

[20] V. Rijavec, T. Kresteš, T. Ivanc, p. 243.

of the requesting court. Therefore, it is possible to use the official language of the requesting court, which might be a great advantage if all the persons participating are able to understand and speak that language.[21]

In France the judge is not obliged to appoint an interpreter if he knows the language spoken by the witness. In the Netherlands the court may accept testimony in a foreign language, which is then translated to Dutch by the judge hearing the witness. In other Member States an interpreter needs to be appointed if the witness does not speak the official language used by the court.

Member States can further be divided into those where only specifically accredited or sworn professional interpreters (usually accredited by the ministry or the court) can be appointed in the proceedings, and those with less restrictive requirements for potential interpreters, where either no special accreditation is required, or where the court recognizes court interpreters, but may also allow other suitable persons to act as interpreters in the proceedings. Among the Member States where accreditation is required are, for example, Romania, Slovakia, Slovenia and Germany.[22]

3.7. TRANSLATION OF DOCUMENTARY EVIDENCE

From the perspective of written procedural acts, designation of an official language of the proceedings generally means that, firstly, documents submitted by the parties and other participants in the proceedings (especially actions, petitions, motions, writs, etc.) have to be submitted in that language, or, if the documents are drafted in a foreign language, have to be submitted together with their translation; and secondly, that all the documents issued by the court (summons, decisions, other communications), will be drafted in the official language.[23]

A representative of a group of Member States where translation of documents is not required if certain conditions are met, is Germany, where the court may accept a document in a foreign language if it is able to translate it itself. The Netherlands is another example of a Member State where not all documents have to be translated - in most cases, English, French and German texts will not require translation. In Spain the document can also be privately translated by a party or by any other person.[24]

[21] A. Stadler, p. 164.

[22] V. Rijavec, T. Kresteš, T. Ivanc, p. 248-251.

[23] V. Rijavec, T. Kresteš, T. Ivanc, p. 246.

[24] Mallandrich Miret, N., *Evidence in civil law,* (Spain: Mallandrich Miret, Núria, 2015).

In multilingual environments, respecting diverse linguistic identities is a requirement for recognizing the equal dignity of citizens. However it remains questionable to what extent the formal endorsement of the equality of the national languages of the Member States represents a consistent commitment of the EU, as the internal communication within the institutions is typically carried out in much narrower selection of the working languages - English, French and to a much lesser extent, German.[25] In relation to the above–mentioned, it is clear that courts will not always be able to issue requests themselves unless judges have the necessary language skills. Some, particularly young, might have a good command of English language, but very often it will be necessary to ask for the support of interpreters. As cross-border cases are not the everyday business of the judges, it would seem advisable to establish service facilities in large courts to help judges with outgoing requests.

4. COST ASPECT IN THE TAKING CROSS-BORDER EVIDENCE

4.1. REGULATION OF COSTS RELATED TO OBTAINING EVIDENCE IN CROSS-BORDER DISPUTES

Litigation costs in civil and commercial matters are governed by national legislation and costs are not harmonized at EU level. Thus, costs vary from one Member State to another.[26] Legal costs are very important part of every pending proceeding, but they are so much more important in cross-border disputes, because there are legal costs often outstandingly high due to the complexity of such cases. As we already mentioned there is no harmonization between EU countries about legal cost, so the only regulation that states basic harmonization also in this segment of cross-border disputes is EER. EER in Article 16 of the preamble states: "*The execution of the request, according to Article 10, should not give rise to a claim for any reimbursement of taxes or costs. Nevertheless, if the requested court requires reimbursement, the fees paid to experts and interpreters, as well as the costs occasioned by the application of Article 10(3) and (4)*[27]*, should not be borne by that court. In such a*

[25] P. Kraus, p. 11.

[26] European e-justice portal, *Costs of proceedings*, https://e-justice.europa.eu/content_costs_of_proceedings-37-en.do.

[27] EER: The Article 10 (3) and (4) states General provisions on the execution of the request, (3) The requesting court may call for the request to be executed in accordance with a special procedure provided for by the law of its Member State, using form A in the Annex. The requested court shall comply with such a requirement unless this procedure is incompatible with the law of the Member State of the requested court or by reason of major practical difficulties. If the requested court does not comply with the requirement for one of these reasons it shall inform the requesting court using form E in the Annex. (4) 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 the requested court does not comply with the requirement for one of these reasons, it shall inform the requesting court, using form E

case, the requesting court is to take the necessary measures to ensure reimbursement without delay. Where the opinion of an expert is required, the requested court may, before executing the request, ask the requesting court for an adequate deposit or advance towards the costs."

In addition, the EER, Article 18 is worded as follows: "*The execution of the request, in accordance with Article 10, 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, and the costs occasioned by the application of Article 10(3) and (4). The duty for the parties to bear these fees or costs shall be governed by the law of the Member State of the requesting court. Where the opinion of an expert is required, the requested court may, before executing the request, ask the requesting court for an adequate deposit or advance towards the requested costs. In all other cases, a deposit or advance shall not be a condition for the execution of a request. The deposit or advance shall be made by the parties if that is provided for by the law of the Member State of the requesting court*."

As we can see is the main rule about costs that ERR states that legal co-operation between courts of Member Satates should not give rise to claims concerning costs. But there is also an exemption about costs relating to appointing experts and interpreters and also about costs related to the special tehnology which is necessary for requested court to have for fulfilling the request or special procedure which is part of request. The EER does not state who pays this costs or more precisely does not regulate the duty for the parties to bear these fees or costs. This part shall be governed by the law of the Member State of the requesting court, what in addition means that it is very important how legal cost are regulated in specific Member States, that could also be decisive, if some of evidence will even be proposed. For example, in some Member States the costs for experts should be paid in

in the Annex. 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.

advance, in other countries can be paid after the case is closed.[28, 29, 30] In cross-border cases the costs related to obtaining evidence might increase significantly.

4.2. CLASSIFICATION OF COSTS

First of all, it is very neccesary to clasifficate the costs or to find out which part of cost are included in costs for obtainig evidences. We need to divide costs in to the two groups: costs related to court expenses and costs of using legal representation which are mostly made up of lawyers fees, this part of costs in most cases plays the prominent role. In the group of costs related to the court are included court fees[31], usualy fees are progressive depending on the worth of the claim and also costs of taking evidence. As we can see the EER regulates the costs of evidence that are clasificated as court expenses. Usually evidence consist of testimony, documentary evidence and real evidence, which are evidence in the form of material objects[32] and also from opinion evidence (expert opinion).

Examination of a witness is expressly mentioned as the subject of a request in Article 4 (1)(e) of the EER, considering this we need to tell that a significant part of legal costs related to taking evidence form compensations to the witnesses. This kind of costs includes reimbursement of necessary costs and compensations for the lost of earnings. But compensation to the witnesses are not granted in all jurisdictions of EU countries, for example this part of costs arent granted in Spain, where the witness gets returned costs only if there are significant expenditures.[33] In Malta witnesses do not get any

[28] M. João Mimoso, *Evidence in civil law – Portugal*, (Portugal, Universidade Portucalense Infante D. Henrique, 2015), file:///C:/Users/Intel/AppData/Local/Microsoft/Windows/INetCache/IE/TPOQD6Q1/36-Book%20Manuscript-137-1-10-20150930.pdf, p. 38.

[29] C.H. Van Rhee, *Evidence in civil law – the Netherlands*, (The Netherlands: Maastricht University, Faculty of Law, 2015), file:///C:/Users/Intel/AppData/Local/Microsoft/Windows/INetCache/IE/HGEFFFHO/evidence_in_civil_law_-_netherlands.pdf, p. 30.

[30] M. Oudin, Ph.D., *Evidence in civil law – France*, (France: Tours Faculty of Law, 2015), file:///C:/Users/Intel/AppData/Local/Microsoft/Windows/INetCache/IE/HGEFFFHO/28-Book%20Manuscript-106-1-10-20150927.pdf , p. 43.

[31] The most jurisdictions seem to consider that fees of taking evidence are included in the court fees.

[32] E. A. Martin, *A Dictionary of Law*, fifth edition, Reissued with new covers, (Oxford: Oxford University press, 2003), P. 408.

[33] N. M. Mallandrich, *Evidence in civil law - Spain*, (Spain: Institute for Local Self-Government and Public Procurement, 2015), file:///C:/Users/Intel/AppData/Local/Microsoft/Windows/INetCache/IE/HTI2DC93/Evidence_URN_NBN_SI_DOC-UYDI5XJG.pdf, p. 20.

refund of costs.[34] In cross-border cases costs of evidence form the majority of all legal costs, because there are very high.[35]

When we are talking about compensations to the witnesses we do not include costs of experts who are in most jurisdictions differentiated from other witnesses. Because of experts specific knowledge and usually their written opinion, and also because of the time that experts need for preparation of opinion, the expected cost are higher than costs of other wtinesses.

Special segment of costs releated to taking evidence is also using vidoconference. Usually there are no special costs related to this part of taking evidence, but EER in Article 10 states that if the requested court needs to provide special tehnology to make videconference and because of this arise special costs, requesting court should pay this part of costs.

In relation to costs of taking evidence is important to highlight the two methods of taking evidence which are regulated with EER. First method: the requested court may take the evidence and have the ultimate control of conducting the trial (12 Article). Second method: direct taking of evidence by the requesting court through video link (Article 17). The role of the requested court is mostly to call the witnesses to the court and to establish the link while the requesting court conducts the hearing. The costs vary depending which method is used.[36] The costs of taking evidence with the direct method are siginficantly lower.

4.3. ALLOCATION OF COSTS

Usually parties pay their own legal expenses and expenses related to taking evidence in advance, but at the time when the process is closed final judgment of the court stipulates who bears the final burden of costs. In the most Member States the general principle is that the loser of the case must pay the costs of the winner, known also as »costs follow the event«. Usually the final allocation of liability is decided at the end of the proceedings at the court by the judge.[37] The court needs to make a decision to take the risk of obtaining evidence that might have no bearing in the case but increase the litigation costs significantly, or otherwise it does not obtain the evidence, which might be relevant to the case.[38]

[34] I. Sammut, *Evidenc in civil law in Malta*, file:///C:/Users/Intel/AppData/Local/Microsoft/Windows/INetCache/IE/HGEFFFHO/evidence_in_civil_law_-_malta.pdf, p. 38.

[35] V. Rijavec, T. Kresteš, T. Ivanc, p. 227.

[36] V. Rijavec, T. Kresteš, T. Ivanc, p. 227.

[37] V. Rijavec, T. Kresteš, T. Ivanc, p. 225.

[38] V. Rijavec, T. Kresteš, T. Ivanc, p. 228.

Considering costs, which arise when the requesting court makes a request, there are important three questions:

1. has the requested court the right to claim reimbursement in advance,
2. for which requests can the requested court ask the requesting court to make reimbursement and
3. who pays this kind of costs?

..1 Paying costs in advance

In most jurisdictions in EU there is at least the possibility that the parties pay costs related to the taking evidence in advance. EER in Article 18 states that paying costs in advance shouldnt be a condition for the execution of the request.[39] The only exception of this main rule of EER are costs for experts. EER in Article 14 (2)(d) states that the execution of a request may be refused if a deposit or advance asked for in accordance with Article 18(3) EER is not made within 60 days after the requested court asked for such a deposit or advance. In this context, is important to point out that the requested court may only require experts cost in advance and not any other type of costs.

ECJ in case C-283/09[40] took a decision that the requesting court is not obliged to pay an advance to the requested court for the expenses of a witness or to reimburse the expenses paid to the witness examined.

The aim of the EER is to make the taking of evidence in a cross-border context simple, effective and rapid and this is also the reason that there are no need for advances. The taking, by a court of one Member State, of evidence in another Member State must not lead to the lengthening of national proceedings.[41]

..2 Costs for which can requested court ask for reimbursement

The requesting court can be obliged to provide reimbursement only if one of the exceptions laid down in Article 18(2) of EER is applicable. Exceptions are fees paid to experts and interpreters and of costs occasioned by the application of Article 10(3) and (4). Article 10(3) concerns the case in which the requesting court asks for the request to be executed in accordance with a special procedure and Article 10(4) governs the use of modern communications technology in order to take evidence.

[39] A. Galič, N. Betetto, *Evropsko civilno procesno pravo I*, (Ljubljana: GV Založba, 2011), p. 62.

[40] CJEU, 17. February 2011, *Artur Weryński v Mediatel 4B spółka z o.o..,* C-283/09.

[41] CJEU, 6. December 2012, *Lippens and others v. Kortekaas and others*, C-170/11.

The requesting court is not obligied to pay costs that incurred with examining witness, but if the requesting court requires examination with special technology, is the requesting court obligied to pay costs incurred with the acquisition of technology.

..3 Allocation of the costs between the courts

The EER also regulates who bears the costs of evidence. Liable for payment of the costs is always the requesting court, the requested court is creditor. Under no circumstances is the party liable to pay the costs of the proceedings.

1. VIDEOCONFERENCE WITH AN EMPHASIS ON COSTS AND LANGUAGE BARRIER

1.1. VIDEOCONFERENCE

One of the new forms of communication offered by the use of information and communication technologies is videoconferencing facility, which brings speed and quality to the procedure and reduces the distance difficulties in communication between litigants and the court. Advantages of videoconference are also lower costs of travelling long distances and increased efficiency (which leads to increased access to justice). One the other hand the disadvantages are deprivement of personal impression because of a less direct or accurate perception by the judge of the words and reactions of the examinated party, witness or an expert, which is important when evaluating the evidence - determining credibility and admissibility of the evidence, and the fact that the examinated party, witness or expert will feel less involved in the hearing of evidence and the importance of the role as an examined party, witness or expert. Proceeding held by videoconference respect the traditional principles of civil procedure of orality and publicity, but does not provide for the actual presence of the parties, the witnesses or the experts (principle of immediacy).[42]

The EER promotes the use of communication technologies such as telephone conferencing and videoconferencing. The EER provides that the requesting court may ask the requested court to use communication technology for the taking of evidence, in particular videoconference and teleconferencing (sound transmission). Pursuant to the EER a videoconference can be organized both as direct taking of evidence as well as via the requested court. If the requesting court directly hears a witness situated in another Member State by means of video link (the requested judge may be present in order to supervise the hearing), the use of videoconference is allowed under the conditions stated in Article 17 of the EER (direct taking of evidence). The statutory texts require both parties to give consent in order for videoconferencing to be performed (Article 17). Consent must be given by both

[42] V. Rijavec, T. Kresteš, T. Ivanc, p. 267-273.

parties equally, by the party who would come to the court as well as by the party who is to be located outside the court. If the hearing of the witness is executed by the requested court, then the taking of evidence could be realized through the representatives of the requesting court and the parties via videoconference (Article 12). The requesting court may also request the participation of court representatives according to the conditions set by the requested court (Article 12(3) a(4)).

1.2. COSTS OF USING VIDEOCONFERENCE

The court must always consider whether the benefits of immediate arrival to the court and immediate presence in a courtroom outweigh the costs and the loss of time (or the risk that a particular person cannot come to the court), the problem that videoconferencing could solve.[43]

The EER encourages the use of videoconference and teleconference in executing request of obtaining evidence (Article 10), making it possible for the parties to avoid certain costs of evidence taking. In the case of using videoconference there are no costs related to flight tickets, accommodation, living expenses and other similar costs.

Evidence taking with videoconferencing instead to direct hearing witnesses can be obtained with lesser costs and also with less other inconvenience. So there we absolutely can say that videoconferencing is an alternation of taking evidence that means taking evidence with lesser expenses. But we cannot talk in such a way in all the EU countries, it depends on the national legislation and how the EER functions with national procedural rules. Jurisdiction in EU countries about costs according to take evidence with videoconferencing variates. In France there is a possibility for witness testimony via videoconferencing but it is not in common to use this kind of testimony, there is absolute contrast in Netherland where there is in common to testimony witness via videoconference and also there are no provisions for videoconferencing.[44, 45]

When the request is sent to the court that does not have the appropriate technical equipment in according to Article 10(4) is the requesting court obligied to pay costs incured with the acquisition of

[43] V. Rijavec, T. Kresteš, T. Ivanc, p 381.

[44] C.H. Van Rhee, *Evidence in civil law – the Netherlands*, (The Netherlands: Maastricht University, Faculty of Law, 2015), file:///C:/Users/Intel/AppData/Local/Microsoft/Windows/INetCache/IE/HGEFFFHO/evidence_in_civil_law_-_netherlands.pdf, p. 30.

[45] M. Oudin, Ph.D., *Evidence in civil law – France*, (France: Tours Faculty of Law, 2015), file:///C:/Users/Intel/AppData/Local/Microsoft/Windows/INetCache/IE/HGEFFFHO/28-Book%20Manuscript-106-1-10-20150927.pdf , p. 43

technology. And as we can see from the reports during the different EU member states there is still in many Member States the lack of dedicated technical equipment for videoconferencing.

If a video conferencing technology exists in both the requesting and requested courts, obtaining evidence through video link itself should not create any costs, but the costs for translation are always actualized. EER in recital 16 of preamble states that the costs occur to the requested court from the use of translators or experts, this cost should be borne by requesting court. But there is also the possibility to reduce this part of costs that insist with taking videoconference with simultaneous interpretation equipment. An essential factor in simultaneous interpretation is good sound quality in the booth court rooms.

1.3. LANGUAGE OBSTACLES WHEN USING VIDEOCONFERENCING

The most important contribution to more effective judicial cooperation introduced by the EER in relation to language obstacles is a new method for submitting requests to take evidence in the form of direct communication between courts, which is made possible by standard forms. The forms are drafted using standardized phrases, thus allowing the requesting judge to fill out the form without extensive foreign language skills or help of a translator, just by comparing the form with the one drafted in the language of the requesting court.[46]

Each Member State shall indicate an official language or languages other than its own, which is or are acceptable to it for completion of the forms (Article 5). There is no common language accepted by all the Member States, contrary to the HEC (Article 4) that required the contracting states to also accept requests in English and French. However English is the most commonly accepted by the Member States.[47] The fact that there is no common language in which the request must be made can represent an obstacle for the requesting court depending on the language skills of its judges. Communication between courts is made easier with the possibility to draw up the request for evidence taking, in addition to the official language of the requested court, also in other official language or languages of the institutions of the EU (Article 5).

[46] A. Stadler, p. 164.

[47] European e-justice, *European Judicial Atlas in civil matters*, https://e-justice.europa.eu/content_european_judicial_atlas_in_civil_matters-321-en.do.

2. CONCLUSION AND PROPOSALS FOR IMPROVEMENTS

From our representation of the subject we can conclude that there is doubt if the taking evidence in cross-border disputes by videoconferencing brings more positive than negative aspect. The EER as regulative on EU level is of the utmost importance for the regulation of the basic demarcation of costs and the use of language also even in the case of the taking of evidence by videoconferencing. Reports on the application of EER were published by the European Commission in 2007 and 2012. The first study[48] shows that, although of limited application, due to the little knowledge about it, *'the EER, in general terms, has served to simplify and speed up evidence-taking within the framework of the existing cooperation between Member States'*. The use of standard forms was found to be one of the most significant contributions of the EER to the positive assessment; technology differences and incompatibilities between the different systems proved to be a handicap and so did the low proficiency in filling the forms. The study also concluded that the direct evidence taking in different Member States is rarely used, and that there were significant differences and asymmetries between Member States. The second study, performed five years later, reached almost the same conclusions, finding another significant barrier in language knowledge by domestic judges.[49] Therefore, the European Commission in its report notes, inter alia, that is of the view that the modern communications technology, in particular videoconferencing which is an important mean to simplify and accelerate the taking of evidence, is by far not used yet to its possible extent, and encourages Member States to take measures to introduce the necessary means in their courts and tribunals to perform videoconferences in the context of the taking of evidence.[50]

At the end of our contribution, we can safely agree with the European Commission's report on the usefulness of the videoconference, and add to this that videoconferencing is an alternation of taking evidence that means taking evidence with lesser expenses. However, it is important to note that the cost of providing evidence using a videoconference may indeed be lower or there would be no extra

[48] European Commission, *Study on the application of Council Regulation (EC) No 1206/2001, in cooperation between the courts of the Member States in the taking of evidence in civil or commercial matter*, FINAL_REPORT_1206_A_09032007, March 2007, http://ec.europa.eu/civiljustice/publications/docs/final_report_ec_1206_2001_a_09032007.pdf.

[49] Ibidem

[50] European Union, Report from the commission to the council, *The European parliament and the European economic and social committee on the application of the Council Regulation (EC) 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*, (Brussels: Commision of the European Communities, 5.12.2007), https://publications.europa.eu/en/publication-detail/-/publication/bf7821a7-677e-46fd-be39-2ac2deb799e3/language-en.

costs at all, but only in the cases where all the necessary technical means are available. But if the requesting court has no technological equipment for videoconferencing the requested court must pay all additional costs for the installation of additional technical equipment. For this reason, our proposal is that, as soon as possible, Member States should equip themselves with the necessary technology for conducting videoconferencing at EU level and this could possibly be contributed by the specific resources that the EU manages.

And the other costs relevant finding is that the costs for translations are always actualized. But we think that also this kind of costs can be reduced with a simultaneous interpreting facility which could be inserted into the videoconferencing equipment, so that an interpreter can be used in proceedings in which a number of witnesses speak a foreign language.

The other obstacle connected with the taking evidence by videoconferencing is for sure linguistic aspect. The EER has contributed to solving this problem with a unified form for request, but there are still open problems connected to using different languages in every Memeber States court rooms. One of the proposals to bridge language differences in cross-border proceedings would be a single common language, which each Member State should be regarded as an official language in cross border evidenc taking proceedings.