



Transnational civil litigation and International commercial arbitration

Taking of evidence abroad

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TAKING OF EVIDENCE

Introductory remarks

- Often it is not sufficient to assert a claim against another party for actually winning a case because the other party may contest the facts on which the claim is based. Therefore, it is usually crucial to present evidence to the court to prove these facts upon which the claim relies
- Sometimes, it may be necessary to take evidence in a State other than the one where the proceedings are taking place or is about to take place. For example, it may be necessary to hear witnesses or experts in other States, or the court seised may have to visit a scene of occurrence situated in another State
- As in respect of service of document, also taking of evidence abroad implies the exercise of national sovereignty. Therefore, when the need for taking evidence in a State other than the one where the proceeding are pending arises, states must cooperate with each other to allow that part of the civil proceedings pending in one state was completed in another.
- In the European Union, taking of evidence in cross-borders cases is governed by a source of uniform law, **Regulation EU 1783/2020**, which replaced Regulation n. 1206/2001 Outside the EU, the matter is governed by **The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters**

REGULATION 1783/2020

Scope of application

- Regulation EU n. 1783/2020 (hereinafter, the **Regulation**) applies in civil and commercial matters, when the court of a Member State requests:
 - (a) the competent court of another Member State to take evidence; or
 - (b) the taking of evidence directly in another Member State.
- A request shall be made only to obtain evidence which is intended for use in judicial proceedings that have already commenced or are being contemplated.
- The Regulation governs the cooperation between Member States providing that one MS carries out, through its organs, a procedural activity in the interest of another Member State, thereby facilitating the performance of the public judicial function of the latter
- The use of the Regulation is not mandatory. Courts may decide to apply their own national rules for taking of evidence in cross-border cases whereby these provisions are more favourable and ensure a more efficient and effective functioning of judicial proceedings

REGULATION 1783/2020

Scope of application

- The concept of “evidence” is not defined in the regulation. It includes for instance hearings of witnesses of fact, of the parties, of experts, the production of documents
- The taking of evidence before the actual filing of the judicial proceedings in which evidence is to be used is admitted by the Regulation to the extent that there is a need to take evidence which would not be available later.
- The Regulation shall not apply in case of evidence to be taken in arbitral proceedings as well as in other alternative dispute resolution proceedings

REGULATION 1783/2020

Requests for taking of evidence

- The Regulation provides that the request for the taking of evidence in another member state shall be transmitted by the court before which the proceedings are commenced or contemplated (“**Requesting Court**”), directly to the competent court of another Member State (“**Requested Court**”)
- Each Member State shall designate a **central body** that is responsible for supplying information to the courts and seeking solutions to any difficulties which may arise in respect of a request.
- Requests and communications made pursuant to the Regulation shall be drawn up in the official language of the requested Court

REGULATION 1783/2020

Requests for taking of evidence

- Request shall contain the following details:
 - (a) the requesting and, where appropriate, the requested court;
 - (b) the names and addresses of the parties to the proceedings;
 - (c) the nature and subject matter of the case and a brief statement of the facts;
 - (d) a description of the taking of evidence requested;
 - (e) where the request is for the examination of a person: (i) the name and address of the person to be examined, (ii) the questions to be put to the person to be examined or a statement of the facts about which that person is to be examined, (iii) where appropriate, a reference to the right to refuse to testify under the law of the Member State of the requesting court, (iv) any requirement that the examination be carried out under oath or affirmation instead of an oath, and any special form to be used for such oath or affirmation
 - (f) where the request is for any form of taking of evidence other than that mentioned in point (e), the documents or other objects to be inspected;

REGULATION 1783/2020

Requests for taking of evidence

- Within 7 days of the receipt of a request, the Requested Court shall send an acknowledgement of receipt to the Requesting Court
- If a request cannot be executed because it does not contain all the necessary information, the Requested Court shall inform the Requesting Court without delay and, at the latest, within 30 days of receipt of the request, invite the requesting court to send the missing information, specifying the information missing as precisely as possible

REGULATION 1783/2020

Taking of evidence by the Requested Court

- The Requested Court shall execute the request without delay and, at the latest, within 90 days of receipt of the request.
- The Requested Court shall execute the request in accordance with its national law.
- The Requesting Court may call for the request to be executed in accordance with a special procedure provided for in its national law. The Requested Court shall execute the request in accordance with the special procedure unless doing so would be incompatible with its national law or it is unable to do so because of major practical difficulties. If the requested court does not comply with the call for the request to be executed in accordance with a special procedure for one of those reasons, it shall inform the requesting court.

REGULATION 1783/2020

Taking of evidence by the Requested Court

- If the law of the Member State of the requesting court so provides, the parties and their representatives, if any, shall have the right to be present at the taking of evidence by the requested court.
- The Requesting Court shall inform the Requested Court that the parties and their representatives, if any, will be present and that their participation in the taking of evidence is requested.
- The requested court shall notify the parties and their representatives, if any, of the time and the place where the taking of evidence will take place and, where appropriate, of the conditions under which they may participate in the taking of evidence
- Where necessary, in executing a request the requested court shall apply the appropriate coercive measures to the extent these are provided for by the law of its Member State for the execution of a request made for the same purpose by its national authorities.

REGULATION 1783/2020

Refusal of taking of evidence by the Requested Court

- A request for the examination of a person shall not be executed where the person concerned invokes the right to refuse to give evidence or is prohibited from giving evidence: (a) under the law of the Member State of the requested court; or (b) under the law of the Member State of the requesting court, provided that such prohibition has been confirmed by the requesting court
- The execution of any other request may be refused where: (a) the request does not fall within the scope of this Regulation; (b) the execution of the request does not fall within the functions of the judiciary under the law of the Member State of the requested court; (c) the requesting court does not comply with the request of the requested court to complete the request for the taking of evidence; or (d) a deposit or advance asked for in accordance with Article 22(3) is not made within 60 days of the requested court asking for such a deposit or advance
- A requested court shall not refuse to execute a request solely on the ground that under its national law another court of that Member State has exclusive jurisdiction over the subject matter of the case or that the law of that Member State would not admit the right of action on the subject matter

REGULATION 1783/2020

Direct taking of evidence by the requesting court

- A court requests may submit to the central body of another Member State a request for taking of evidence directly in that Member State. The request must be accepted and authorized by the Central Body. If it does not decide within the deadline set out by the regulation, the request shall be deemed accepted.
- The direct taking of evidence may only take place if it can be carried out on a voluntary basis without the use of coercive measures and where it implies that a person has to be examined, the requesting court shall inform that person that the examination can take place only on a voluntary basis.
- The direct taking of evidence shall be carried out by a member of the judicial personnel or by any other person, such as an expert, who is designated in accordance with the law of the Member State of the requesting court
- In principle, the requesting court shall conduct the direct taking of evidence in accordance with the law of its Member State. Where evidence consists of examining a person who is present in another Member State, the court may request that the evidence was taken using videoconferencing or other distance communications technology provided that the court considers the use of such technology to be appropriate in the specific circumstances of the case