

ECJ Rules Experts May Take Evidence Directly Abroad (corrected)

The first version of this post relied on an incorrect English translation of the ruling.

On February 21st, 2013, the Court of Justice of the European Union ruled in *Prorail BV v. Xpedys NV* (Case 332/11) that the Evidence Regulation does not govern exhaustively the taking of cross-border evidence, and that courts of Member states may designate experts to take evidence directly abroad, without following one of the methods laid down by the Regulation.

On 22 November 2008, a freight train bound from Belgium to the Netherlands was derailed near Amsterdam. In 2009, a Belgian Court designated an expert, defining the scope of his task, most of which was to be carried out in the Netherlands. In the course of this investigation, the expert was to proceed to the scene of the accident in the Netherlands, and to all other places where he might be able to gather useful information in order to determine the causes of the accident, the damage suffered by the wagons and the extent of the damage.

One party challenged the decision and requested the task of the Belgian expert be limited to determining the damage in so far as that task could be carried out in Belgium, that no expert's report on the Netherlands network and rail infrastructure or any account between the parties be authorised, or if his appointment were maintained, order that the expert carry out his activities in the Netherlands only in accordance with the procedure laid down in Regulation No 1206/2001.

The ECJ rules that Regulation No 1206/2001 applies as a general rule only if the court of a Member State decides to take evidence according to one of the two methods provided for by that regulation, in which case it is required to follow the procedures relating to those methods.

A national court wishing to order an expert investigation which must be carried out in another Member State is not necessarily required to have recourse to the

method of taking evidence laid down in Articles 1(1)(b) and 17 of Regulation No 1206/2001.

There is one exception, however. The investigation which has been entrusted to the expert might, in certain circumstances, affect the exercise of the powers of the Member State in which it takes place, in particular where it is an investigation carried out in places connected to the exercise of such powers or in places to which access or other action is, under the law of the Member State in which the investigation is carried out, prohibited or restricted to certain persons.

Ruling:

Articles 1(1)(b) and 17 of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters must be interpreted as meaning that the court of one Member State, which wishes the task of taking of evidence entrusted to an expert to be carried out in another Member State, is not necessarily required to use the method of taking evidence laid down by those provisions to be able to order the taking of that evidence.

H/T: Maja Brkan