

Slovenian Supreme Court Rules on Service under Hague Convention

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Summary

In a recent decision (judgement of 19 November 2013 in case III Ips 86/2011) published in March 2014 the Supreme Court of the Republic of Slovenia had to give a ruling in judicial review limited to the points of law of appellate decisions (basically identical to the German *die Revision* and similar to French *la cassation*) on a question of service of documents instituting proceedings (application for payment as debtor's performance of an international sales contract) in Slovenia effected in Belarus on Belarussian defendants according to the Rules of the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. The specifics of the Slovenian case are the link between the service of the application instituting proceedings (writ) and the summons to lodge a reply issued by the Slovenian court abroad and a default judgement (without application of Art. 15(2) of the 1965 Hague convention). However, the two issues that will be of importance for international legal community are (i.) the interpretation of the 1965 Hague Convention on service and (ii.) the interpretation of a contractual clause on prorogation of jurisdiction allegedly foreseeing the application of a foreign *lex fori*. The decision can be found on: <http://sodnapraksa.si/>

Facts

A Slovenian and a Belarussian company had concluded a sales contract on 30 August 2002. The contract contained also the following clause "all disputes by the parties shall be adjudicated before the courts in Ljubljana (*sc.: the capital of Slovenia*) according to the rules of the State of the defendant". The Slovenian seller had supplied the goods, the Belarussian buyer failed to pay for the goods. The Slovenian seller lodged an application for payment as a way of specific performance of buyer's obligations before the competent court in Ljubljana. The application had been served in Belarus on the Belarussian defendant in application of the Hague Convention of 1965 by the Belarussian central authority upon the request of the Slovenian court. The defendant did not lodge a reply, the consequence being a default judgement issued by the Slovenian court of first instance. The default judgement was then contested by an appeal. After the dismissal of the appeal by an appellate court an application for judicial review limited to the points of law was lodged by the defendant.

Decision

The Slovenian Supreme court first examined the requirement of duly correct service as a precondition for issuing a default judgement (par. 7 of the judgement) and concluded that Slovenia and Belarus are both contracting parties to the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, therefore no procedural requirement had been infringed by ordering a service on a foreign defendant according to the cited convention. Referring to the Art. 6 of the 1965 Hague Convention the Supreme Court found that Belarussian judicial authorities did not complete the certificate on service according to the said convention (par. 12). However, considering that Slovenian courts did not issue a special request for service. As the 1965 Hague Convention under Art. 5(1) only provides for two ways of service; namely by methods prescribed by the requested state's internal law for service of documents in domestic actions upon persons who are within its territory (sub-paragraph a), and by a particular method requested by the requesting state (the applicant), unless such a method is incompatible with the law of the state addressed. The interpretation of that provision given by Slovenian Supreme Court is that unless a special method is required by the requesting court (the applicant) then the service abroad is to be performed according to the *lex fori* of the requested or addressed state. If service is performed on a foreign entity according to the *lex fori* of the foreign addressed state, a failure to complete the certificate (on the reverse of the request) has no influence on the whole process of service (par. 13). Perhaps a slightly different approach by the CJEU should be mentioned. Indeed, the CJEU seems to consider that the question whether an application or a document instituting proceedings was duly served on a defendant in default of appearance must be determined in the light of the provisions of the 1965 Hague Convention (CJEU, C-292/10 *de Visser*, par. 54, C-522/03 *Scania Finance France*, par. 30).

The second issue, i.e. an alleged reference to the foreign *lex fori* in the contractual clause on prorogation of jurisdiction has been dealt quite fast. The rules of procedure are always of mandatory nature and belong to the legal order of the court competent for hearing the case and cannot be chosen by the parties. However, even if the parties had agreed on the application of the Belarus procedural law, this would only imply only a partial voidness of the clause on the choice of law and would not have any influence on the choice of substantive law.