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# Some Problems of International Judicial Assistance from an Estonian Perspective

The terms **international legal assistance** have been used for various notions.<sup>1</sup> International judicial assistance can be distinguished from **international judicial co-operation**, which is a broader term, covering international law-creating, administrative and judicial activities for the purposes of facilitating service of documents, taking of evidence, recognition and enforcement of judgements, also as used in the EU, promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.

International judicial assistance is the performing of a procedural act by a judicial authority of a State on request from another State, for a legal procedure, which is taking place in the requesting State. This may be service of summons abroad, taking of evidence abroad or recognition and enforcement of foreign judgements.

The need for a procedural action by authorities of another country is an important characteristic of international judicial assistance. The action is usually made to comply with a request, which can be in the form of Letter of Request. It can also be an expression of a wish for that action in another form. Differing from that, in judicial co-operation in criminal matters more and more conventions foresee in some cases actions taken without request, on own initiative.

Initially mechanisms of international judicial assis-

tance were created for the purposes of judicial procedure, in some cases they are used also for extrajudicial matters.

Other institutions that are related to international civil procedure, but are not international judicial assistance, are the procedural rights of a foreigner, such as prohibition to discriminate with *cautio judicatum solvi*, prohibition of detention in civil and commercial matters, immunity for witnesses and providing legal aid and advice to foreigners. These are rights, the usage of which does not call for a procedure of international judicial assistance. These rights are granted by law or by a treaty.

Also providing information about laws and judicial system on the request of another State is not within the scope of the term international judicial assistance.

Notions and mechanisms of private international law, international element and public order play an important role in international judicial assistance. The international element can here be defined as a circumstance which changes a "purely domestic procedure" into a procedure where a procedural act must be performed abroad. These are situations where the defendant or a witness or any other source of evidence is located abroad or the judgement debtor or his assets are in a State other than the one of the court from which the judgement originates. Co-operation and collision of two legal systems and being regulated by international and internal norms are typical both to conflict

of laws and international judicial assistance.

Principles, mechanisms and institutions specific to a civil procedure, as chronological and logical stages of activities of authorities and interested persons are relevant in the context of international judicial assistance as well.

Both methods of private international law and civil procedure have to be used to analyse international judicial assistance.

## Is International Judicial Assistance Obligatory without a Treaty Obligation and to What Extent?

When there is a treaty regulating international judicial assistance between two countries, complying with requests of international judicial assistance is considered to be obligatory to the extent as regulated by treaty.

No country has a treaty network covering all other countries. So there will always remain the question — should international judicial assistance be given, should the requests from those countries with whom no relevant treaty exists, be complied with? Even more important is the question: why should it be done?

For small countries like Estonia, who, in spite of being a contracting party to the Hague Conventions on the Service of Documents Abroad<sup>2</sup> and Taking of Evidence Abroad<sup>3</sup>, and having bilateral treaties of mutual legal assistance with some countries<sup>4</sup>, but finding it not practical to negotiate a large amount of bilateral treaties, it is a serious practical and theoretical question that has to be solved. The question is even more complicated in the case of enforcement of foreign judgements, as for Estonia at present this is regulated only on a bilateral basis. There has not been a multilateral convention suitable for Estonia to join up until now.<sup>5</sup>

The question of whether there is an obligation to comply with requests of international judicial assistance, should there be no treaty between the respective countries is a consequence of the answer to the question on why requests from another country are complied with at all, why summons of another country are served, why evidence is taken at the request of another country and why judgements of another country are enforced.

To find these grounds, conflict of laws and conflict of jurisdiction from one side and international judicial assistance on the other side should be compared. In the case of conflict of laws, a State is not always able to rule on the case applying its own internal law and in the case of conflict of jurisdiction, a State can not always judge the case; there are limits to its activities. In the case of international judicial assistance, instead, a State has to perform an act for a judicial procedure not accomplished by itself. It has, thus, to perform an activity not needed for its own functions. The consequence of this difference between conflict of laws and conflict of jurisdiction on the one hand, and inter-

national judicial assistance on the other hand is that only some theories in private international law, such as comity, universalist theories and reciprocity, can explain also international judicial assistance. Some theories, such as *res judicata* and vested rights' theory are applicable only to the enforcement of foreign judgements, but not to service of documents or taking of evidence.

As the opposite to theories treating international judicial assistance as done in the interests of another State, the contemporary explanation for international judicial assistance in civil matters is that it is the assistance given to a party having a court procedure in another State to facilitate finding and effecting justice for this party.<sup>6</sup>

If international judicial assistance is in the interests of an individual, it can be hard to justify, why, for example, State A should take action on the request to serve summons for the individual, whose court procedure is taking place in State B, but not for the individual, whose court procedure is taking place in State C, i.e. why interests of individuals in one State should be preferred.

The situation is different, when the act of international judicial assistance needs the use of measures of compulsion. Examples for this can be — compulsory service of summons to an unwilling addressee, or enforcing an unwilling witness to participate in a court procedure by § 106 of Estonian Civil Procedure Code. Enforcement of judgement is always related to coercion.

Usage of compulsion needs special justification. Treaty obligation can be ground for this, but it can also be reciprocity or binding obligation in another form.

Therefore, even without a treaty, requests for service of summons and taking of evidence should be complied with, if, as usually, in these cases there are no coercive measures involved. In the case of enforcement of judgements, measures of compulsion are always used, and therefore there should be a treaty, or else a binding obligation, established in another way between the two countries.

If to follow the principle that generally international judicial assistance is an obligation, there is a need for clear and strong rules specifying exceptional cases when it is not obligatory.

In the conflict of laws, there can be a situation where a law of another country can be contrary to public policy or unfair or conflicting with some important values that are recognised in the country. A similar situation can arise with a request for international judicial assistance from another country.

Also, there can exist a possibility that country A is not following the principle that generally it is an obligation to give international judicial assistance, creating absolute lack of reciprocity. On the one hand, country B should still comply with the requests originating from country A. On the other hand country B has to be able to arrange proper administration of justice on its territory in cases involving

an international element and also to arrange for complying with requests by country A.

In these cases the requested State has to make an exception to its obligation to fulfil the request. The term **value-related or political grounds** for refusal could be used for these reasons for exceptions.

These reasons are: complying with the request is a danger to the sovereignty or to the security of the State<sup>7</sup>; public order reasons<sup>8</sup>; contradiction with the legal system or with the legal principles<sup>9</sup> of the requested State and lack of reciprocity. Lack of reciprocity can have relevance also in the case of taking of evidence and service of summons, but is more often used in enforcement of judgements.

Other cases where international judicial assistance can not be given on purely technical grounds should be distinguished from **value-related or political grounds** for refusal.

The request being manifestly outside the scope of the treaty is specified as such ground in Article 6 of the EU Convention on the Service of Judicial and Extrajudicial Documents in Civil or Commercial Matters.<sup>10</sup>

A request not in compliance with the provisions of the treaty is dealt with by Article 4 of the Hague Convention on the Service Abroad and Article 5 of the Hague Convention on the Taking of Evidence Abroad.

The impossibility of fulfilling a request is foreseen in Article 6 of the EU Convention on the Service of Judicial and Extrajudicial Documents in Civil or Commercial Matters, and in Estonian treaties of legal assistance with Latvia, Lithuania, the Russian Federation and Ukraine.<sup>11</sup>

Special grounds only in the case of taking of evidence — in the State of execution, the execution of the Letter of Request does not fall within the functions of the judiciary — are foreseen in Article 12 of the Hague Convention on the Taking of Evidence Abroad.

If international judicial assistance is given on the basis of a treaty, these grounds for refusal are usually also specified in the treaty. If international judicial assistance is given also without treaty, the grounds for refusal should be contained in the internal law. The system should not be inflexible or autarchic, and therefore some of the grounds for refusal should be obligatory to use, others used at discretion of the courts.

## Use of Special Procedure

As a rule, each State applies its own procedural law when complying with requests for international judicial assistance from another State. However, sometimes the requesting State may require the results of the request in a specific form. For these cases, treaties on international judicial assistance have foreseen usage of a special procedure. The special procedure may be the procedural law of the requesting State, or another set of rules differing from internal procedural law, as e.g. a procedure specified in the

treaty itself, use of it is foreseen in Article 5b of the Hague Convention on the Service Abroad, Article 9 of the Hague Convention on the Taking of Evidence Abroad and also in the Estonian bilateral treaties of mutual legal assistance.

A special procedure may be followed if some specific conditions are fulfilled.

Firstly, the use of the special procedure has to be explicitly requested. Secondly, there has to be a legal ground, either in the form of a treaty or in the internal legislation. Thirdly, the law of the requested State must not forbid the use of it.<sup>12</sup> Simply being unknown in that State should not prevent use in a special procedure. Use of a special procedure should not be contradictory to public order, or a danger to the sovereignty or the security of the State. Fourthly, it should be neither irrelevantly expensive nor technically impossible.

## The Role of Interested Persons

For clarity, two notions here should be distinguished. The interested person is an individual being a party in judicial proceedings. The requesting person is the person who is presenting, sending the request to another State. Usually it is a State authority. It can also be a lawyer acting for the interested person or the interested person himself.

Depending on the legal system, on the traditional roles of parties and judge in an internal civil procedure, and also if international judicial assistance is considered as being in the interests of another State or for individuals, the role of interested person can be more or less active in the process of international judicial assistance.

An important question in the role of interested person is whether and to what extent he has the right to present the request or the application in some other form to another country.

Traditionally, international judicial assistance has been requested by State authorities.<sup>13</sup> However, under some treaties, for example by Article 10c of the Hague Convention on Service of Documents, an interested person is allowed to serve judicial documents directly through officials of the State of destination.

Traditionally it has been stated that a party does not have claims in international judicial assistance,<sup>14</sup> grounded on the view that only a State can submit the request. However, as the rights of individuals in an international context are increasingly discussed,<sup>15</sup> it should be justified also to raise a question about the rights of an individual towards another country, who has caused damages with its improper way of handling a request.

### THE LEGAL CHARACTER OF A REQUEST PRESENTED BY THOSE OTHER THAN A STATE AUTHORITY

If an interested person is allowed to present a request himself, there should also be asked the question, whether the legal character of that request will still remain the same

as it was in the case of a request presented by a State authority.

If the interested person is allowed by Article 10c of the Hague Convention on Service of Documents to serve judicial documents directly through officials of the other State, the Convention does not impose any specific rules on it. The request has an identical legal character to the request presented by State authorities, and the obligations and duties involved should be identical.

Also, the case of enforcement of foreign judgements in Estonia can serve as an example. The character of it is the same, whether the judgement originates from a State with whom enforcement is regulated by a bilateral treaty on international judicial assistance, or will be regulated by the principles that were embodied in the Lugano and Brussels Conventions. In the case of bilateral treaties the request is made by the State authority, in the other case an interested person presents it himself. Again, the Convention between the Member States of the European Communities on the Simplification of Procedures for the Recovery of Maintenance Payments,<sup>16</sup> foresees the possibility that requests under the Brussels Convention may also be forwarded by a Central Authority, instead of by the interested person.

### Additional Obligations in Complying with the Request

Executing a request, the authority has to serve the summons, take the evidence or to arrange the enforcement of the judgement. Both for the purposes of certainty for the interested persons and of guaranteeing standard of procedural rights, legal correctness, and administrative fluency, it is important to bear in mind some other obligations in the course of fulfilling the request.

Many treaties regulate the **obligation to inform the requesting authority and the interested person** about the time and location of fulfilling the request,<sup>17</sup> some of them also regulate the right of the judicial authority or of the interested person, or of both, to participate in performing the procedural act. It is important to keep interested persons and authorities informed. The right to participate has more relevance in the case of taking of evidence, where the exact way of executing the request is important.

For the case that the authority that has received the request is territorially not competent to comply with it, some treaties regulate the **obligation to forward the request to a competent authority**.<sup>18</sup>

When the request does not comply with the treaty — there is missing data, incorrect address, less copies of a document than needed, missing signature etc. — **the obligation to inform the requesting authority is foreseen in the case the request does not comply with the treaty**.<sup>19</sup> The authority can also specify a deadline for presenting the missing elements.<sup>20</sup> By the EU Convention on Service of

Documents, the requested authorities should avoid returning the requests, if it is possible to fulfil them.

The **obligation to use measures of compulsion** is foreseen in Article 10 of the Hague Convention on the Taking of Evidence Abroad. In the Estonian treaties of legal assistance with Latvia, Lithuania, Ukraine and the Russian Federation the use of measures of compulsion is not regulated. By comparing the relevant articles regulating the compliance with requests by diplomats, by whom use of measures of compulsion is not allowed, the conclusion should be that in other cases it could be possible.

As to specifying **an obligation to fulfil the request within a deadline**, there are three types of treaties. The first group does not mention any deadlines. The Hague Convention on the Service Abroad and also Estonian bilateral treaties of legal assistance belong to this group. In the second group, the treaty specifies the obligation to handle the request expeditiously, as in the Hague Convention on the Taking of Evidence Abroad.<sup>21</sup>

By Article 7 of the EU Convention on the Service of Judicial and Extrajudicial Documents in Civil or Commercial Matters, the service should be effected in one month. The additional protocol of the Estonian bilateral treaty of legal assistance with the Russian Federation expects the summons to be served within three months. These treaties mentioning length of deadlines do form the third group.

Regulating the **obligation to inform the parties about their procedural rights** is more elaborate in the case of service of summons. By Article 8 of the EU Convention on the Service of Judicial and Extrajudicial Documents in Civil or Commercial Matters, the receiving agency shall inform the addressee that he or she may refuse to accept the document to be served if it is in a language other than the specified one. Some contracting States to the Hague Convention on the Service Abroad, including Estonia, do follow this rule in practice, despite it not being an obligation deriving from the Convention itself. Article 9 of the Hague Convention on the Taking of Evidence Abroad specifies that the procedures and methods foreseen in the law of the requested country should be followed. So, having as an exception Article 8 of the EU Convention on the Service of Judicial and Extrajudicial documents in Civil or Commercial matters, informing the parties about their procedural rights remains regulated only by the internal laws of the requested State.

Often the authority complying with the request has also **an obligation to give information concerning the request and the course of complying with it**. This can be information about complying with the request or about the impossibility to do it,<sup>22</sup> and by some treaties they have to specify the reasons which made compliance impossible. The EU Convention on the Service of Judicial and Extrajudicial Documents in Civil or Commercial Matters

has a more elaborate system of keeping the requesting person informed. Notice also has to be sent about the receipt of a document, about the need for additional information for complying with the request and about forwarding the request to an authority having territorial jurisdiction to serve the document.

All these obligations are regulated in some treaties, in some of them for taking of evidence, in some for service of summons, in some for enforcement of foreign judgements. Most of these obligations are not directly related to a specific type of request. It is likely that international judicial assistance could profit from more systematic regulation of these obligations.

### Changes in Character of International Judicial Assistance in Time

There has been a shift in the way requests for international judicial assistance have been treated and handled. At the end of last century, it was a diplomatic and political act where the protection of State sovereignty and of own citizens was of utmost importance. Before the first convention on civil procedure worked out by the Hague Conference of Private International Law of 1894, it was regulated by bilateral treaties and only between very few countries, the overall situation being quite anarchic. Now for some countries it is a mere technical co-operation, aiming to facilitate civil procedure.

Partly these changes are caused by different political relations between States and by a grown mutual trust. An increase of the cases to be handled and thus a need to make swifter arrangements has had its influence.

Partly it has also been due to the development of new technologies. For example, if once public service of summons in Edinburgh was done by horn call at Leith Harbour, now it is more likely that the interested person shall read it from a newspaper published on the Internet.

Another change is represented by the fact that the requests are nowadays presented by authorities being administratively lower level. Use of diplomatic channels has become rare. In more cases a decentralised way of communication is used.

The field of international judicial assistance is more regulated, the number of treaties has increased. The rights and obligations of participants are more clearly foreseen. The notion of civil and commercial matters has widened, enabling thus to give international judicial assistance in more cases. More possibilities do exist to use, instead of the procedural laws of the requested country, a special procedure asked for by the requesting State.

After the entry into force of the Amsterdam Treaty, international judicial assistance in civil matters in the EU will be regulated in a more supranational way. With this, the character of international judicial assistance is likely to

change. Until now, even if being considered in some cases as an obligation, it still had traces of the notions of sovereignty and comity. It was still a decision of a judicial or other authority of one country either to perform or not to perform a procedural act. Hopefully, the citizens will profit from international judicial assistance becoming more exactly regulated and more available.

### Notes:

<sup>1</sup> D. McClean. *International Judicial Assistance*. Oxford, Clarendon Press, 1992 pp.1-2.

<sup>2</sup> Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

<sup>3</sup> Hague Convention of 18 March 1970 on the taking of evidence abroad in civil or commercial matters.

<sup>4</sup> The treaty of mutual legal assistance and legal relations between Estonia, Latvia and Lithuania, in force since 3 April 1994, RT (Riigi Teataja = State Gazette) II 1993, 6, 5. The treaty of mutual legal assistance and legal relations between Estonia and the Russian Federation, in force since 19. March 1995, RT II 1993, 16, 27, will be amended by the Additional Protocol to. The treaty of mutual legal assistance and legal relations between Estonia and Russian Federation, text of which is agreed by the parties but not yet signed. The treaty of mutual legal assistance and legal relations between Estonia and the Ukraine, in force since 19.06.1996, RT II 1995, 13, 63. The treaty of mutual legal assistance and legal relations between Estonia and Poland, signed and also ratified by Estonian Parliament, not yet by Polish Parliament.

<sup>5</sup> For arbitration the situation is different, Estonia is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (New York, 10 June 1958).

<sup>6</sup> International judicial assistance in criminal matters instead is given in the interest of another State, not in the interests of an individual.

<sup>7</sup> Used as grounds for refusal in Article 13 of the Hague Convention on the Service Abroad, Article 12 of the Hague Convention on the taking of evidence abroad, Article 7 of the New York Convention of 20 June 1965 on the Recovery Abroad of Maintenance and Bilateral Treaties of Legal Assistance between Estonia and Ukraine and Estonia and Russia, both Article 18. The trilateral treaty between Estonia, Latvia and Lithuania does not give any grounds for refusal of international judicial assistance.

<sup>8</sup> Used in Article 5 of the Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations, the Hague, 2 October 1973.

<sup>9</sup> Treaties of Legal Assistance between Estonia and Poland, Article 19; Estonia and the Ukraine and Estonia and the Russian Federation Article 18.

<sup>10</sup> The Convention of 26 May 1997 on the Service in the Member States of the European Union of Judicial and Extrajudicial Documents in Civil or Commercial Matters, OJ C 261 of 17 August 1997 has not entered into force and will be replaced by a Council Directive.

<sup>11</sup> Article 8(4) in these treaties.

<sup>12</sup> Articles 8 of all Estonian Treaties of Legal Assistance, the Hague Convention of Service of Documents, Article 5 and the Hague Convention on Taking of Evidence, Article 9.

<sup>13</sup> I. Szászy, *International Civil Procedure*. Budapest: 1967, p. 651.

<sup>14</sup> I. Szászy, *International Civil Procedure*. Budapest: 1967, p. 651.

<sup>15</sup> R. Bruno, *Access of Private Parties to International Dispute* 1997. Available at: <http://www.law.harvard.edu/Programs/JeanMonnet/papers/97/97-13.html>

<sup>16</sup> Rome 1990.

<sup>17</sup> Article 7 of the Hague Convention on Taking of Evidence abroad, treaties of legal assistance between Estonia, Latvia and Lithuania, Article 8(3); Estonia

and the Ukraine Article 8(3); Estonia and the Russian Federation Article 8(3).

<sup>18</sup> Treaties of legal assistance between Estonia, Latvia and Lithuania, Estonia and the Ukraine and Estonia and Russia art-s 8, Article 6 of the Convention of 26 May 1997 on the Service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters, OJ C 261 of 17 August 1997, Convention on the taking of evidence abroad in civil or commercial matters. The Hague, 18 March 1970.

<sup>19</sup> Article 5 of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. The Hague, 18 March 1970, Article 4 of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. The Hague, 15 November 1965.

<sup>20</sup> Article 17 of the Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations. The Hague, 2 October 1973, Articles 48 of the Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters of 1968 and the Lugano Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters, Lugano, 16 September 1988.

<sup>21</sup> Article 9.

<sup>22</sup> Article 8 p 4 of Treaties of Legal Assistance between Estonia, Latvia and Lithuania, Estonia and the Ukraine and Estonia and Russia, Article 13 of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. The Hague, 18 March 1970, Article 6 of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. The Hague, 15 November 1965, Article 6(2) of the New York Convention of 20 June 1965 on the Recovery Abroad of Maintenance.