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OVERVIEW OF THE REGULATIONS (EC) ABOUT PROCEDURE CONCERNING EUROPEAN ORDER FOR PAYMENT AND EUROPEAN SMALL CLAIMS

Аннотация: Как отмечает автор статьи, правовое регулирование международных инвестиционных споров между государством и иностранным инвестором носит комплексный характер. Такие споры регулируются как публичным, так и частным правом, как правом международным, так и внутренним. В данной статье изложены основы международного публично-правового регулирования инвестиционных споров.

Ключевые слова: Юриспруденция, право, спор, международный, арбитраж, инвестор, договор, конвенция, инвестиции, регулирование.

Постановление¹ (REGULATION) №1896/2006 Европейского Парламента и Совета, о „Европейской Процедуре Приказа об Оплате“, действует в отношении гражданских и хозяйственных споров с 12 декабря 2008 г. Цель данного Постановления заключается в **упрощении и ускорении процедуры разрешения споров и уменьшении издержек судопроизводства по трансграничным делам**. Предметом Приказа могут быть только денежные, но не ограниченные по сумме, требования истца к ответчику. Постановление (REGULATION) №861/2007 Европейского Парламента и Совета, о „Европейской Процедуре по Малым Требованиям“ действует с 01 января 2009 г. Главные отличия от „Европейской Процедуре Приказа об Оплате“ заключаются как в возможности взыскания не только денежных требований, так и ограничения суммы требования до **2.000,00 евро**. Оба Постановления предусматривают судопроизводство с помощью **стандартизированных бланков** для истца и ответчика, облегчающих им ведение спора.

I. Preface

This article provides general overview of two European Regulations which enable the claimant to enforce his or her rights in different cross-border cases. In most cross-border matters it seems to be difficult for the claimant to file a complaint with the court, especially because of the lack of legal knowledge of the law system in a foreign country. This often prevents the claimant from seeking satisfaction in the foreign country. The aim of the new regulations is to alter this situation.

“REGULATION (EC) No 1896/2006 of 12 December 2006 “creating a European Order for Payment Procedure” and “REGULATION (EC) No 861/2007 of 11 July 2007 “establishing a European Small Claims Procedure” were enacted by the European Parliament and the Council in accordance with the principle of subsidiarity as set out in Article 5 of “the Treaty establishing the European Community”(TEC). The TEC was recently amended by the Treaty of Lisbon and renamed to “the Treaty on the Functioning of the European Union” (TFEU). The Article 5 TEC enabled the European Community to act if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States but can be better achieved by the European

¹ В юридической литературе так же встречается термин “регламент”

Community. The intended actions were at first to simplify and speed up litigation in cross-border cases in the European Community. This task could not be accomplished effectively by the Member States because they had to create 27 national rules which shall have the same content, must not contradict each other in no way and shall apply in all Member State. For the last objective the Member States should have entered into 27 international agreements. All these requirements could not obviously met by all Member States in a short period of time. It was necessary to create a unique rule which shall be binding in its entirety and directly applicable in all Member States. The article 288 TFEU (ex-article 249 TEC) authorizes the Union's institutions to enact regulations which have for all Member States such binding character and direct application. Therefore the European Parliament and the Council adopted REGULATION (EC) No 1896/2006 and REGULATION (EC) No 861/2007 which apply from 12 December 2008 and from 1 January 2009. Although the regulations are directly applicable they leave in limited number of cases some space for national legislators to fill it with national rules².

These two Regulations are described hereunder.

II. REGULATION (EC) No 1896/2006 (European Order for Payment)

This act created a new juridical option for claimants to enforce their rights: a “European Order for Payment Procedure”. This REGULATION applies since 2008 and is recognized and enforced in all Member States except Denmark without the need for a declaration of enforceability. This act consists of 33 articles including 7 annexes. Based on this Regulation the German Parliament (Bundestag) amended a German Civil Procedure Code and put the amendments in new Legislation in sections 1087 — 1096.

1. Purpose (Article 1)

The aim of this law is to simplify, speed up and reduce the costs of litigation in cross-border cases concerning uncontested pecuniary claims. This Legislation does not prevent the claimant from

seeking satisfaction under the law of a Member State. Thus the claimant is free to choose between these two possibilities but he is not entitled to pursue his claim by using this regulation and his domestic law at the same time.

2. Application of the procedure in civil and commercial matters

This law only applies if the following requirements are met:

- cross-border case (article 2 and 3)
- civil and/or commercial matters (article 2)
- pecuniary (monetary) claims (article 4)

a. cross-border case

Under the article 3 “a cross-border case” is the one in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court seised. In other words the law does not require from the parties a nationality (citizenship) of the Member State but at least habitually residence in one of the Member States. The law is not applicable if the both parties (claimant and defendant) have habitually residence in the same Member State as the court which shall issue an order for payment. In this case there is no cross-border matter for the purpose of this Regulation.

b. civil and/or commercial matters

The article 2 stipulates some exceptions and excludes an application in several civil matters, particularly in respect of matrimonial relationship, wills, succession and most claims of non-contractual obligations as well.

c. pecuniary (monetary) claims

The Regulation only applies to pecuniary claims which means that non-monetary relief is not available in this case. Furthermore the claimant is entitled to claim only specific amount of money. The next requirement is that the claim has already fallen due.

3. Jurisdiction

Unfortunately the Regulation does not prescribe the jurisdiction but delegate in this respect to another rule. In accordance with article 6 (1) the jurisdiction of the court shall be determined by “REGULATION” (EC) No 44/2001 (“Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters”). This Regulation is very sophisticated; therefore it is doubtful whether it is

² E.g. Article 26 REGULATION (EC) No 1896/2006

appropriate for the European order for payment³. As mentioned above the one of the aims of the order is to simplify litigation. This complicated Regulation (EC) No 44/2001 contradicts obviously this objective. Nevertheless the European litigator took a decision to determine a jurisdiction by Regulation (EC) No 44/2001. The Regulation No 44/2001 sets forth in section 1 general and in section 2 special jurisdictions of the court of the Member State. Under section 1 the person who is domiciled in a Member State shall be sued in that Member State. According to section 2 a person domiciled in a Member State may be sued in another Member State, e.g. in the case of the sale of goods in a Member State where under the contract the goods were delivered or should have been delivered (article 5 Nr. 1 letter b, Regulation (EC) No 44/2001).

Hereunder two examples⁴:

Example 1: A vendor who is domiciled in France sells goods to the customer in Munich. If the customer does not pay, he shall be sued in Germany, Article 2 (1) of the Regulation (EC) No 44/2001.

Example 2: A vendor who is domiciled in Germany delivers under the contract the goods in Hamburg to the French customer. In this case the French customer can be sued in Germany as well.

However, provided the defendant is a consumer, only the courts in the Member State in which the defendant is domiciled, shall have jurisdiction (article 6 (2)). This exception is necessary to protect consumer's rights effectively, otherwise it would be unreasonable in a case of opposition (article 17) to compel a consumer to go to hearings in another Member State, for instance from The Great Britain to Bulgaria.

4. Application for a European Order for Payment

Article 7 prescribes requirements which shall be met by a claimant. Under article 7 the claimant shall use an application form A as set out in Annex I. The application shall especially include the following:

- the names and addresses of the parties and of the court
- the amount of the claim
- the cause of the action
- a description of evidence supporting the claim
- the grounds for jurisdiction
- the cross-border nature of the case

The form A is available in all official languages of the European Union, i.e. in 27 languages. This application form can be downloaded for free from the official websites of the competent courts. The European Court of Justice offers this possibility as well. The form A contains Appendix 1 and Appendix 2. The claimant is entitled to fill in the Appendix 2 his opposition to a transfer to ordinary civil proceedings in the event of opposition by the defendant (see the passage number 7). Each form, independently on the language, contains very useful guidelines for filling in the application form. Using these guidelines the claimant will be able to fill in the form by himself. That is why the claimant may need to consult a lawyer in a very limited number of cases. The application should be file with a court in a paper form. It is not clear if the application may be faxed. The Regulation permits other than paper form accepted by the Member State of origin. In this respect the Regulation delegates this matter to the Member States. If the Member State does not prescribe how to submit an application the claimant should always choose a paper form as the safest one. Otherwise his or her application can be denied by the court. For instance the German competent court "Amtsgericht Wedding" does not consider fax to be acceptable application form⁵.

³ Bartosz Sujecki, „Das Europäische Mahnverfahren“, Neue Juristische Wochenzeitschrift, 2007, 1622-1625 (1623).

⁴ Gregor Vollkommer, Stefan Huber, „Neues Europäisches Zivilverfahren in Deutschland“, Neue Juristische Wochenzeitschrift, 2009, 1105-1109 (1105).

⁵ http://www.berlin.de/imperia/md/content/senatsverwaltung/gen/justiz/gerichte/europaeischesmahngerichtdeutschland/faq_02.pdf

5. Examination and rejection of the application

The court examines whether the all formal requirements are met. The court does not verify the information provided by the claimant and if the claim is justified it examines whether the claim “*appears to be founded*”⁶. The application will be rejected if the requirements are not fulfilled or the claim is “*clearly unfounded*”⁷. By comparing the terms of the law (“*appears to be founded*” and “*clearly unfounded*”) I may conclude that the doubts of the foundation of the claim shall be interpreted in favor of the claimant. Otherwise the rejection solely on the grounds of the doubts will contradict one of the aims of the REGULATION, i.e. speeding up the litigation. Therefore I conclude that the court will not deny the application even in the events when the case will be likely dismissed, e.g. because the claim seems to be time-barred.

6. Issue of a European Order for Payment

If the form A is filled correctly the court will issue a European Order for Payment within 30 days of the lodging of the application and serve this document on the defendant.

7. Defendant's reaction

a. Necessary Information

In a European order for payment the defendant must be informed by the court about his rights and options in respect of the claim. Article 12 (3) stipulates that the defendant must be advised of his options to pay or to oppose the order by lodging with the court of origin a statement of opposition. Furthermore the court shall inform under article 12 (4) the defendant about following:

- the issued order was solely based on the information the claimant provided the court with. That information was not verified by the court.
- the statement of opposition must be sent to the court within 30 days of service of this order on the defendant
- the order will become enforceable unless an opposition has been sent by the defendant
- in the event of opposition the proceedings shall continue before the competent courts of the Member State of origin.

The terms *court of origin* and *Member State of origin* are defined in article 5. In both cases the law means a place where the order was issued.

b. Opposition

The defendant may lodge a statement of opposition to the European order for payment with the court of origin using standard form F as set out in Annex VI. The defendant shall simply notify that he fights the claim. The defendant does not have to describe reasons supporting his opposition.

c. Paper form and the time limit

The opposition shall be basically sent in paper form within 30 days of service of the order on the defendant. The defendant can submit his opposition in electronic form only if the Member State accepts this form. If the national law does not explicitly allow faxing an opposition the defendant should always choose the safest form and fill the opposition with the court only in paper form. In terms of the time limit the defendant should pay attention that the 30-days period starts on the day following that on which the order for payment was served despite the fact that the following day is Saturday, Sunday or public holyday. However, provided the last day is Saturday, Sunday or public holyday the last day will be postponed to the following working day. Therefore the period will expire on this postponed day.

8. Enforceability

If the opposition is not submitted in the above-mentioned way, the court will declare the European order for payment enforceable and send the enforceable order to the claimant. The order becomes automatically enforceable in all Member States except without Denmark.

9. Costs

As for the European order for payment procedure including the ordinary civil procedure in the case of opposition the court fees must not exceed the ones which are required in the Member State without a preceding European order for payment procedure. The German legislator for instance requires for procedure under the REGULATION Nr. 1896/2006 the same fee sum as if the defendant was sued under the German national law. If one considers that the costs of the European Order for Payment are basically not higher than the ones of the procedure under the national law it can be recommended to use the procedure based on the European Regulation.

⁶ Article 8

⁷ Article 11

III. REGULATION (EC) No 861/2007 of 11 July 2007 establishing a European Small Claims Procedure

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This REGULATION applies since 01.01.2009 and can be enforced in all Member States except Denmark without the need for a declaration of enforceability. This act consists of 29 articles and 4 annexes which include standard forms for filing the complaint with the court. Based on this REGULATION the German Parliament (Bundestag) amended a German Civil Procedure Code and put the amendments in new Legislation in sections 1097 — 1109. The goal of the REGULATION is to simplify and speed up litigation concerning small claims in cross-border cases⁸. The REGULATION prescribes that the claimant shall use the standard claim form for the complaint. All forms can be downloaded for free from www.eurocivil.info. The REGULATION does not differ very much from the REGULATION regarding the European Order for Payment In respect of the objectives, using standard forms and enforceability. Nevertheless, there are some essential variations between two REGULATIONS. In contrast to the European Order for Payment the REGULATION for Small Claims Procedure allows to demand a non-monetary relief. Furthermore, the value of a claim shall not exceed EUR 2.000,00 excluding all interest, expenses and disbursements⁹. However, the REGULATION does not prescribe the method of figuring out the value of the non-monetary claim by the

claimant or court. This question can be answered only under the national law. The next main difference is that the claimant is not entitled to seek satisfaction in the matters of employment law¹⁰. It is not perfectly clear whether the claimant is allowed to sue the defendant in the affairs of the labor law. The labor law governs the dealings of employers and the unions that represent employees, e.g. contracts between an *employer* and *labor union*¹¹. The employment contract is a contract between an *employer* and *employee*¹². The European legislator knows the difference between employment and labor law. That is why the one can come to conclusion that the cases of labor law are not excluded by the REGULATION. However, it is predictable that the courts will be reluctant to accept the claims in respect of labor law.

The standard forms of the REGULATION contain very useful guidelines which make the articles of the REGULATION self-explanatory. There is no requirement that the claimant shall be represented by the lawyer. Therefore the claimant can enforce his or her right by himself.

IV. Conclusion

These Regulations lift obstacles in terms of the legal proceeding in the cross-border cases by stipulating of the unique and simplified rules and emphasize a general trend of the United Europe to harmonize the law principles in the Member States.

⁸ Number 23 of the Preface of the Regulation (EC) 861/2007

⁹ Article 2 (1) of the Regulation (EC) 861/2007

¹⁰ Article 2 (2) f of the Regulation (EC) 861/2007

¹¹ Black's Law Dictionary, 9-th Edition, Page 952, 299

¹² Black's Law Dictionary, 9-th Edition, Page 369