Judicial Assistance between the Republic of Moldova and the Republic of Turkey

Turgay SEN,
doctorant, Law Faculty,
State University of Moldova

SUMMARY

A much wider presentation of international judicial assistance in relations between states constitutes on the legal framework a remarkable realization of the XX-th century. International cooperation including the part of the judicial authorities of different states has become a necessity of the first order, under the impact of rising steadily international economic exchanges, and thanks to the influence of the more emphasized scientific or technical activities taking place on the worldwide scale.

Key-words: *agreements between states, international legal assistance, Hague Conventions of 1954, Republic of Moldova, Republic of Turkey.*

The Republic of Moldova and the Republic of Turkey desiring to promote their cooperation in the legal field on the basis of mutual respect of sovereignty, equality and mutual benefit have decided to conclude the agreement on legal assistance in civil, commercial and criminal matter. The Agreement between the Republic of Moldova and the Republic of Turkey regarding judicial assistance in civil, comercial and criminal matter, was signed at Ankara on May the 22nd 1996 and entered into force on February 23rd 2001[1].

An essential part in this contemporary approach refers to Hague Convention that are duplicated by a network of increasingly dense bilateral agreements between states. The preferred modality in the shown purpose constitutes international legal assistance. Further there will be analyzed the Convention regarding the civil procedure of March 1st 1954, which came into force the Republic of Moldova on November 3rd 1993 and in the Republic of Turkey on July 11th 1973.

International judicial assistance lies at the confluence of legislative imperatives both of the state whose jurisdiction claims to meet, in disputes with foreign elements, some procedural acts beyond its borders, and of the sovereignty of requested state, whose concern is to avoid any foreign interference in the activity of its own authority. Situated between these two opposed extremes the international judicial assistance has succeded to establish a certain balance, reasonably and mutually accepted by the interested states.

International judicial assistance is differentiating clearly in its essence from the collaborative forms established by the states on the political, economic, technic or cultural framework. Within the legal framework this cooperation far from including all sectors, is bounding to realize an assistance of legal matter through the means of accomplishment of adequate services of procedural matter.

a) The legal character of the assistance is independent of quality of subjects that take part at performing acts. It is irrelevant that they function as Ministry Agents, administrative authorities or private contributors.

In reality this cooperation is defined through its subject matter, constituted by its judicial matter.[2] The institution contributes mainly to facilitate the administration of Justice in good conditions in the country of origin, ensuring the normal exercise of its fundamental powers mainly the jurisdictional function.

b) Services with procedural character which can be solicited a broad differ depending on the judicial sector interests. In commercial and civil matter there are distinguished several categories of such services.

[1] Agreement between Republic of Moldova and Republic of Turkey regarding judicial assistance in civil matters, comercial and criminal, was signed at Ankara on the 22nd of May 1996 and entered into force on the 23rd of February 2001. http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=313537 (visited on 20.04.2014).

[2] F.Pocar, L'assistenza giudiziaria internazionale in materia civile, Padova, 1967, p.42, nota 4.

Asistența juridică dintre Republica Moldova și Republica Turcia

SUMAR

O prezentare mai largă a asistenței juridice internaționale dintre state constituie o remarcabilă realizare privind cadrul juridic al secolului XX. Cooperarea internațională, inclusiv partea cu autoritățile judiciare ale diferitor state, a devenit o necesitate de ordinul întâi sub impactul creșterii, în mod constant, a schimbărilor economice internaționale și datorită influienței tot mai multor activități științifice sau tehnice accentuate care au avut loc pe scară largă.

Cuvinte-cheie: *acorduri înre state, asistența juridică internațională, Convenția de la Haga din 1954, Republica Moldova, Republica Turcia.*

According to the 1st article of the agreement, „citizens of any other Contracting Party shall enjoy on the territory of the other Contracting Party, the same legal protection on which the other Contracting Party attaches to its own citizens, having the right to institute court proceedings or to submit requests to the legal authorities of the other Contracting Party, in civil matters, commercial and criminal, under the same conditions as its nationals".

Thus, firstly it should be mentioned, communication of judicial or extrajudicial documents to a recipient residing or to the place of residence in another state. Secondly, it should be retained the possibility to give some samples by an authority or qualified person from abroad. It is also possible to resort to international judicial assistance to obtain information regarding the legal system of another state, applicable under *lex causae*.

According to the Agreement, the article 12, the purposes of legal assistance are:

1. Transmission and operation of legal documents;
2. Collecting evidence through letters of request;
3. Recognition and enforcement of judicial decisions and arbitration bodies;
4. Another type of assistance stipulated in the Agreement.

International judicial assistance arrangements are established by regulations coming from both conventions concluded between states, and in the national legislation of the States concerned.

In the absence of bilateral conventions between states, the situation of the international legal assistance is quite poor. Indeed, legal and administrative authorities instituted by each state to satisfy local needs are not abilitated to put their services at the disposal of a foreign sovereignty. In this sense, F. Rigaux wrote „the sovereignty or jurisdiction of a country is not disposed to respond to the request for information, no-more – to comply with things that would be from a foreign authority, in the absence of the international agreement, providing for such cooperation".[3] Such a request could consequently be denied discretionary.

However the states authorize, through Tacitus their authorities to give developing such claims, even in the absence of such convention of international judicial assistance. This practice is by the interest of fully explicable of every Government to ensure within its own territory a good administration of Justice in disputes with foreign elements, in its road map. A. Huet observes „it is practically impossible that a state which is preoccupied to conform to the requirements of an organized justice, to circumvent this cooperation and legal assistance imperative".[4]

A. Pillet, had been writing since 1924 that states to ensure the reign of the justice in international relations of private nature, and contrary are obliged to accept the measures which are imposed by the justice and especially to admit everything that it is necessary to administer justice. More than that it is being solicited by foreign countries, remaining of course master, each on its territory, as regards the fulfillment of the duties"[5]. It is a point of view, of course, seductive but till present days, it remained a desideratum rather than a reality.

If it is necessary that an international judicial assistance procedure can no longer be purely optional and become mandatory for the requested State, the conclusion of a bilateral Convention is indispensable. As R. Picard wrote, „the enclosed provisions in a conventional document create a veritable climate of international legal assistance".[6]

The Hague Conference in International Private Law has elaborated the Convention of Novembrer 15th 1965 regarding notification abroad of judicial and extrajudicial documents in civil and commercial matter[7], into force for the Republic of Moldova on February 1st 2013 and in the Republic of Turkey on April 28th 1972.

So, it can be observed an ascending tendency to ensure a balance between the interests of applicants more judiciously in the State of origin and that of the defendant established abroad. Of course, the fundamental principle of the adversariality had much to win.

To specify the features that is common now to all the Hague conventions, independently of the date of their entry into force. Firstly, should be mentioned that any of these Conventions give as any valid international agreement concluded, mandatory execution of requests of legal assistance, in relations between the Contracting States. The consequence is natural, in accordance with the principle *pacta sunt servanda*. Article 26 of the Convention on the law of treaties, signed at Vienna on May 23rd 1969[8], says „any treaty in force obliges the parties and must be performed by them in good faith".

The Conventions under the discussion are also defined by their even and in general transactional solutions. Their malleability has been emphasized due to the plurality of techniques and procedures which has consecrated. In this way the Contracting States benefit from multiple possibilities to exercise its option between various ways which are offered by texts.

It should be underlined the tolerance which Hague Conventions shows in this field. A significant number of bilateral agreements have been perfected with the purpose to fit some procedures to legal particularities from contracting parties.

At any rate, the Hague Conventions, deliberately refraining to unify rules of international judicial assistance and also avoiding to define a series of essential notions as international civil notification or commercial nature of procedures, with domicile or residence of the recipient, they left the gate opened for the incidence

[3] F. Rigaux, Droit international prive, vol.1, Bruxelles, 1977, p.213.
[4] A. Huet, Les conflit de lois en matière de preuve, Paris, 1965, p.348.
[5] A. Pillet, Traite pratique de droit international privé, vol.2, Paris, 1923, p.503.
[6] R. Picard, Aide mutuelle judiciaire internationale. Droit commun, nr.8, în Jurisclasseur de droit international, fasc. 583.
[7] http://www.hcch.net/index_fr.php?act=conventions.text&cid=17 (visited on 20.04.2014)..
[8] http://www.parlament.md/LinkClick.aspx?fileticket=4mKw8lxR66Y%3D&tabid=144 (visited on 03.05.2014)

of domestic laws of the Contracting States. This is because of „the mixture of conventional duty and the internal rules of procedure". This spirit of independence and moderation illustrates both the merit of the Hague conventions, but also their precariousness, the opinion entitled to prof. Nagel.[9]

In any matter without special regulations of conventional nature, the vocation to govern, at least in part, the international judicial assistance operations can return the law of the home Member State or the requested State. But to which one of them? The Hague conventions states in these order of ideas many solutions without stating a complete system of rules specified in this matter.

Thus, the first responsibility in conventions enshrines exclusively to each Contracting State to determine competent authorities, to act in this area, establishing the powers and mode of operation.

In the same time, the Conventions enclose a series of Notes on the law applicable to the proceedings of international judicial assistance. With regard to the applicable law of procedure, to be carried out abroad, solution is according to prof. Batiffol, „ to combine the law of the Forum and the law of the place where they are made". The criteria of this collaboration established by each national system of private international law have not been unified by the Hague Convention.[10]

From here it follows that in the field of international judicial assistance, applies mainly on one side *lex fori processus* in the State of origin and *lex fori executionis* in the requested State.

Laws of the State of origin is applicable in the field of international judicial assistance in all cases when a diplomatic agent, or in all cases, when a diplomatic or consular agent exercise their powers in the State of residence. In this quality of extraterritorial authority have the obligation to comply with the formalities laid down by the laws of the State, which awarded the function, but not the law of the State where they perform the functions.

Regardless of the problems of private international law regarding the procedure, may occur conflicts of laws also in matter of citizenship. These collisions, subject to specific matter are related to the operations that are performed by diplomatic or consular agents of the State of origin authorized to interfere in the State of residence for the benefit of their own citizens. But if the person is in the same time the citizen of the State of residence, it is imposed to establish firstly the nationality that prevails.

Diplomatic or consular agents that should regalement in their activity „the limits imposed by international law"[11], must take into account in case of bipartite, of the nationality of the State of residence, and not of the State which sent them as attorneys. A sound argument in this sense constitutes the Vienna Convention on consular relations, according to which the international judicial assistance operation must be met by these agents in the State of destination „in a manner consistent with the laws and regulations of the State of residence " including, of course, local laws relating to citizenship. This rule also functions to any diplomatic missions, where it is exercised the consular functions. Each of the Contracting Parties can transmit documents and collect data from citizens that are on the territory of the other Contracting Party through its diplomatic and consular representations from there, provided that the laws of the other Contracting Party should not be violated and may not apply any coercive measures (art. 11).

The peculiarities, which distinguish international notification of judicial documents for obtaining evidence from abroad or information relating to the laws of another State are of course numerous, without excluding, however, common features.

In this perspective it should be mentioned firstly the bilateral character of international judicial assistance procedures. Bringing them to fulfillment involves relationships which are established mainly between the State of origin and the requested state.

The similarities have as their object the successive phases that are browsed by any legal assistance request, starting with preliminary initiatives and operations established in the state of origin. The following stage refers to the transition of the documents abroad, and the last one that is met in the requested State has the measures necessary for the performance of this act. Finally, the obtaining results are sent to the requesting State to produce the effects considered in view of the date of initiation. Let's look at each of the stages that have been enunciated, to retain the points of convergence.

In the initial stage which is taking place in the State of origin, the local legislation determines the authorities or the people to be given the judicial assistance in the cases it is needed, the admission conditions, the formalities that should be fulfilled, as for a request is validly issued, the Department stages and which interferes by the time of application abroad.

The next stage is the transmitting the request abroad.

The direct ways ensure, as their titles indicate it, an immediate connection between the authority of origin and requested, from, on the other hand the indirect ways imply the existence of a certain number of intermediate links.

From other point of view, discern ways of transmission of general application (in particular, the diplomatic and consular) and certain special mechanisms that can be used in notification of documents abroad, as well as communication between officials of ministries from those two different states.[12]

The Hague Convention of 1965 approached in a significant measure, justified by a change of orientation, direct methods of transmission of legal aid applications.

According to this concept, of course a contemporary one, the main function has been assigned to an authority in each of the Contracting States. Power is back to the

[9] H. Naghel, IntertationalesZivilprozessrecht, 1980, pp. 176-179.

[10] H. Batiffol, P. Lagarde, Droit international privé, Paris, vol. 2, p.454.

[11] Art.3, par.1 lit. b) Vienna Conventionof 18 April 1964 regarding diplomatic relations art.5, lit. a) Vienna Convention of 24 April 1963 regarding consular relations.

[12] O. Căpățînă, Asistența judiciară internațională în materie civilă şi comercială, Bucureşti, Universul Juridic, 2008, p. 50-51.

Ministry of Justice in both the Republic of Moldova, and Turkey, the 2nd art. of the Agreement.

During the final phase, which locates in the requested State, it is taking place the enforcement of legal aid application. The measures that have to be taken in this perpsective are very various and, depending on the intervention of more or less direct measures on the requested authorities can be differentiated an active and a passive form.

a) *The active form* implies the excessive participation from the behalf of the authorities from the requested state (as the Ministry of Justice, Ministry of Foreign Affairs, justice courts, processing), in order to fulfill, through their own means, the requests from abroad. This participation has the character of common law and of general application.
b) *The passive Form* which is subordinated to a consent of the requested State, corresponds to the particular exercise attributes of international judicial assistance by consular and diplomatic agents of the State of origin which are accredited in the State of residence.

Material execution operations are preceded usually by checking the admissibility of the application for legal aid. The object of this preliminary control depends firstly on the existence or abscense of a Convention of Judicial Assistance with the state of origin. If such a Convention does exist, preliminary examination is no longer useful concerning the timeliness of enforcement,and regarding the condition of reciprocity, these requirements being accomplished in this case through the means of a hypothesis. The only necessary control is designated to the state whether the solicitation is framed in the field, ruled through the bilateral Agreement, and respects the conditions of form and substance,which the agreements subscribes.

The formal motives do not justify the rejection of legal aid application. In fact, the eventuality of a rejection of a rogatory committee, on the ground, that the authenticity of the document is not set, dissapeared.

Eventually, any interference brought to the sovereignty and security of the requested State can justify refusal of enforcement. It is an imperative norm provided by the 5th article of the Agreement. But the international cooperation support demands that these notions should benefit of a lenient interpretation. As Niboyet observes, the public opinion „doesn't have in this matter rather than a relative exigence as it is not a law suit pending in the requested State".[13]

In general, the services performed in the requested State do not involve the reimbursement of fees or other charges. The 4th Article of the Agreement provides that legal assistance should be free of charge, except for the fees of experts. The explanation lies in the consideration that this State is obliged to ensure the normal functionning of its own authorities and to bear the costs concerned. Eventually, in this way are compensated the services that have been already obtained or expected in future in mutual relations of international judicial assistance with other Contracting Parties.

The results that have been obtained in the above mentioned manner always produce immediate effects in the State of origin without to exclude some eventual and indirect repercurssions of a different nature in the requested State.

In the State of origin, the solicited authority, after getting the entries and certification required from abroad, passes to their verification.

The final point of the international judicial assistance operation corresponds with the moment when requesting authority disposes the final point of the international judicious assistance proceeding corresponds with the moment when the requested authority has the qualifications or sample elements obtained from abroad.

However, the role of international judicial assistance can not be considered closed because the taken decision in the above mentioned conditions is susceptible to be invoked subsequently in the requested State. Here are to be examined and these problemes.

In the requested State, any act of notification or instruction (research) realized on its territory at a request of a foreign authority, can through the means of above mentioned decision have the connection with a call for execvatur rules or incident. But similar eventual and indirect effects can not be incorporated in the domain of international judicial assistance.

As for the control of international legality, it is inevitable in the court of execvatur, in case of notification of the act in justice for the recipient with domicile or residence in the requested state, due to respect for the right of defence conditions, the recognition and enforcement, the decision handed down in the state of origin.

The procedure of international notification constitutes the means to bring officially to the knowledge a recipient from abroad acts of civil or commercial matter, originated from the state of origin.[14]

From the point of view of terminology are necessary some preliminary observations. Meanwhile, in the English Vocabulary is used the expression „service abroad" or „service in a foreign country", but in German *Zustellungen,* that refers to any kind of judicial acts communication abroad, the French vocabulary is more varied. Thus, in addition to the usual notion of *notification,*is used the term *signification,*in the case of communication carried out through the mediation of a*huissier de justice* (servant of Justice specializing in transmission of official documents to be), as well as to the expression *assignation*, submitted by defendant is summoned to appear to a judge. To simplify things, it is ruled to use the generic term *notification*, to avoid some shades that the majority of legislations do not know it.

It is retrieved in the 20th article of the Agreement procedure of notification of the execution.

The area of the concept implies two different categories of records that must be communicated, on the

[13] J.P. Niboyet, Traite de droit international privéfrançais, vol. 6(I), Paris, 1949, p.121.

[14] E. Poisson, Notification et signification des actesenmatièrecivile et commerciale, nr.1, în Repertoire Dalloz de Droit international; F. Pocar, op. cit., în nota 3, p. 104; Fr. Rigaux, La signification des actesjudiciaires a l'étranger, în Revue critique, 1963, p. 449.

one hand judicial acts that form the object of analysis presented below and on the other hand extrajudicial acts to which there will be made some referencies as a basis of meaningful comparison.

a) *Judicial acts,* which detain the central position in the matter of international judicial assistance, have as an object any document referring contentinous or graceful proceedings or a performance of the debtor pursued. These acts include *inter alia* introductory application instance, the intervention of the third person in a criminal case, on the role of the court, and summonses in justice or judicial decisions.

The effects deriving from the notification acts abroad vary according to their specific nature. Thus, the fact of receiving action instance introductory requires the recipient to be present at the trial and to formulate his deffence. Communication of the judgment that was given in the state of origin gives the possibility to pursue the legal remedies governed by the law of the state mentioned above. Often these rights and procedural obligations are subject to certain time limits, being liable for revocation, in case in the event of expiry of preset duration.

b) The category of *extrajudicial acts* includes, as it is assumed in their title, a series of documents that produce its effects independently from a procedure done before a competent judicial body. These entries satisfy finality to prevent an eventual contestationor preserve a right, often being an antecedent or following a dispute. In this sense it can be reminded, by the way,for example, the notice to pay an amount of money, the protest promissory note, the promissory or cheque, and an order of enforcement.

International notifications have in common some characteristics which allow to complete their definition.

First of all,it should be retained the high enough frequency of these operations. They are abundantly the most numerous of international judicial assistance procedures.

Of course, it is necessary to know the recipient's residence abroad. Otherwise, notification becomes *de facto* unfeasible.

The notification request gets in the requested State, usually, about the Consulate, according to art. 1 of the Convention of 1954 or by submitting to the central authority of reception of the requested State, according to art. 2 of the Convention of 1965, not to exclude any other direct communication channels, and exceptionally by the method of rogatory letters.

The central authority from the State of destination assumes the obligation to receive application forms from the other Contracting state and to collaborate to bring them to fruition. In prinicple, this authority may be notified by any competent institution or official from the State of origin and by a *solicitor* from *common law* countries or by other persons having the quality to perform notification abroad.

Central authorities from the requested State give the notification formalities, in general, through the intercession of their officials, competent in this domain, sending them a request for assisstance and the annex.

Conducting the procedure is preceded by the control of legality of the records, especially from the point of view, to respect for the sovereignty and security of the requested State.

The notification can be brought to fruition in two different ways, either by simple delivery of documents, or the completion of the procedure in preset time limits.

Simple remitence makes the recipient part to recieve the act, which is adressed to, and to sign the proof that it was handed. Any way the mere remission is excluded if the recipient refuses to recieve it, or if the applicant prefers communication through explicitly formal notification method.

The formal procedure of submission of documents takes place, usually, according to the conditions provided by *lex fori executionis* for the documents drawn up in the requested State and which are targeting people who are situated on their territory. This procedure leads to, even if the recipient refuses to recieve the act, to fill and complete effects of the operation.

Practicing this simplified method of the notification operation is stated in art. 6, 2nd paragraph of the Convention of 1954, an agreement to this effect held among the interested states or at least, through a tacit acceptance by the state on whose territory will be performed its submission records. This consent is presumed, in the 10th Article of the Convention of 1965, only if the destination state declares that it opposes to it.

The competent officials from the requested State can do at a simple handover of recipient entries, and at a special operation carried out in the form requested by the author of the cooperation request or, lastly, in terms of *lex fori executionis*.

The Contracting Parties have the same possibility according to the Hague Conventions, through its consular and diplomatic agents, the notification of judicial documents sent to some persons with the residence abroad..

However, according to the Hague Conventions of 1954 (art. 6 paragraph 2), this faculty does not exist except by virtue of an agreement between interested states. In the absence of the agreement, the State of destination may object to the receipt, but it would not be entitled to oppose, if there is a communication, addressed by notification to a citizen, from the state of origin. For this purpose, it is required a bilateral agreement, the consent of the state being presumed. However, each state can declare that it is opposing to the legislation concerning the citizen of that state. Usually, the recipient is invited to diplomatic or consular office to raise the act. In case of justified foreclosure to be present, the entry must be mailed. But the recipient cannot under any circumstances be forced to receive it.

Implementation of the procedure will be tested, according to the 5th article of the Convention of 1954, through the signature of consignee, completed and notarized, or if it is not possible to be obtained, by means of a certificate from the authority of the requested State, stating the fact, form and date of notification. If the recipient signed the proof of delivery, the lack of official certificate to which it have been made the references,

or eventually, a certificate error, who would talk, for example, about sending a summons, instead of passing judgments, does not invalidate the notification, if it was accomplished according to the 2nd and 3rd articles of Hague Convention of 1954.

According to the Convention of 1965, a certification, conforms to formula-model proposed in the 6th art., must be completed in all cases. The attestation will talk about the fulfillment of the procedure, indicating the place and date of entry, as well as the person to whom it was handed, with his consent or in a different way, but if it is the case, it will give a more detailed explanation on the circumstances that obstructed the execution. This attestation will be sent then directly to the communication solicitant.

The cycle of the international notification, from the moment of sending the request from the State of origin and till the return of the results, can last a long time.

Receiving the judicial act by the recipient ensures the opportunity to participate in the proceedings, personally or by representative, to defend and, eventually, to pursue legal remedies against the decision, if one considers it unfair.

But let's suppose that the recipient lost the case due to the defective notification of the action started by the Court also that ignores the judgments because they have not received it.

If an instance is being judged, and the defendant from abroad is absent, art. 15 of the Convention of 1965 oblige in principle a judge of origin to suspend debate, establishing some measures, which are justified by the defendant's interests, or which are necessary for the good justice administration.

The suspension of the debate can intervene, both the heritage nature of litigation, and in those relating to the status of persons.

In any of these disputes, the lack of the Party residing abroad or residing beyond borders bring forth the presumption that did not receive Introductory Act of the Court. In this case, the judge of origin could not pronounce final judgment, only if it appears that both conditions provisioned in art. 15 § 1 of the Hague Convention are fulfilled.

The first condition has an objective character, imposing that the notification has been made validly. The sample in this respect is the responsibility of the applicant, that needs to prove that the notice, requirements are provisioned in *lex fori executionis* or those instituted by the Hague Convention of 1965.

If it is carried out according to methods from *lex fori executionis,* it should be stated according to the 15 paragraph 1, a) of the Hague Convention, the introductory act of court or any other equivalent has been notified in accordance with the requirements of that legislation.

In case of a notification fulfilled according to a procedure instituted at the Hague Convention of 1965, it is necessary, according to the art. 15 par. 1, b), to note that the entry was actually given to the defendant in person or at his place of residence. The condition is more exigent, the hypothesis that it applies *lex fori executionis,* because neither post services nor direct intervention of consular and diplomatic agents do not ensure as many guarantees to the defendant as the fulfillment of notification formalities realized through the means of central authorities from the requested state. According to the second condition, of a subjective nature, it should be stated that the formal notification or the effective delivery of the entry had taken place in an instrumental time so the defendant could defend himself.

The size of the suspension of the trial, in such a way motivated, has a temporary character. It could not be, as a result, evocated only on the date when the conditions, that were mentioned above, were obeyed.

Suspension may, however, become injurious for the interests of the complainant. To avoid such consequences caused by delay the judge can dispose; if there is a need for emergency, provisional measures, including protective measures that are appreciated as helpful (art. 15 par. 3). This time the requirements pass before the principle of adversariality.

The proper administration of justice may suffer and because of a too long suspension. As a remedy, art. 5 par. 2 admits an important exception, in the sense that every Contracting State has the faculty to declare that its judges may, even in the absence of a certificate relating to notification, or of an official delivery, take certain measures to protect against the defendant.

These are three. Firstly, the Judiciary Act was passed according to one of the ways provided for in the Convention of 1965. Secondly, as a term, left under the judge appraisal in every case, but at least for 6 months, to have been passed from the sending of the act. Thirdly, no attestation has not been obtained, although has been made all the steps and the efforts of the authorities in requested State. This regulation sets out the balance in favor of the applicant with out the defendant from abroad to have reason to complain justifiably.

In the case of a judgment given in its absence, the defendant may invoke, if it has been revoked because of time limits to appeal, the provisions laid down in favor of his art. 16 of the Convention of 1965, authorizing the filing in the rights deprived.

The scope of the latter action is, but narrower than that, of the suspension of trial. So, the defendant would not, obtain a confirmation of decadence in the domain of patrimony, excluding any other decision referring to persons' situation (art. 16 par. 3). Plus, this benefit is refused whether the decision was pronounced in the contradictory conditions, even though the notification would present deficiencies, because „from the moment he got the summons, the defendant has the obligation to be vigilant". Finally, the judge of origin, far from being forced to decide whether to cancel the decay, as in the matter of the suspension of the process, disposes the „faculty" to decide in favor of the defendant, all the three conditions set out in art. 16 are brought together.

According to the first condition with the subjective character, the defendant must not be at fault. Must be provided evidence of that he was unaware about the introductory act of the court (or any equivalent document which has served with legal forms). No judgment against

which would be given an opportunity to exercise a remedy. Although the Convention of 1965 does not have anything as regards the burden of proof. However good faith must be assumed *juris tantum*.

According to the second condition, of an objective nature, the judge has the right to determine the legal value of the defense put forward by the defendant, to be convinced that they are out of base. Without eventuality of withdrawal of the decision, removal of the decay would be useless.

Thus, the request under discussion must be introduced in a reasonable term, considering the day when the defendant knew about the decision. In the event of delay, the request is inaccessible. However, has the right to declare any claim submitted after expiry of the period specified in its official statement. This time limit may not be lower, however, the duration of one year, calculated from the day of the decision open to challenge.

The conditions laid down shall be satisfied to enable the defendant to obtain his reinstatement in rights.

Very important aspect relates to the obtaining of evidence and information on foreign law therefore art. 7 of the Agreement provisions, exchange of information, the application of laws and regulations, who are or have been in force, as well as on their application in judicial practice.

The mechanisms of international judicial assistance, with the purpose of obtaining information from abroad, needed in the dispute in the country of origin, are used both for the Administration in a foreign State, and in order to get information on the legislation in question.

The procedure in question is the method of international judicial assistance aiming to gather in the requested State, at the request and in the interests of the authorities concerned in the State of origin, the evidence that it cannot get, because of the remoteness.

The procedure for fulfillment by a judicial authority in the requested State of the operations concerned is known as the traditional „rogatory committee" *(letters of request)*.

However different from each other, procedures for obtaining evidence abroad, we note, however, that presents some common features.

Firstly, they all have as purpose to facilitate in the State of origin the Mission of Justice that must have all the sample elements, that leads to finding out the truth. Without this information, obtained from the outside, the judgment could not overcome stage of an artificial construction.

On one hand, obtaining of the evidence through the delegation abroad derogates from one essential rule of the civil and commercial case, requiring the judge to form intimate conviction regarding the dispute through direct contact with the parties, with witnesses and experts. Interposing the requested authority abroad, however it would be necessary to, however puts the court of origin in a position to take into account information whose truthfulness may sometimes be viewed with reserve and to estimate them from a perspective that is not always the one that it belongs to them. The decision to obtain evidence through delegation and not therefore present a non-mandatory for the Court for that trial. The contrast is striking, from this point of view, with international notifications, which are analyzed, as it was mentioned before, as a common law procedure and mandatory nature, whenever the defendant is abroad.

Finally, access to facilities involved in the international judicial assistance is narrower than the international notifications. Vocation to use the path of a rogatory committee belongs exclusively to the courts appellate litigation, while international trade arbitration does not dispose in general, than the ability to empower certain private individuals, to perform acts of instruction in the requested State.

The procedure of rogatory letters is the method preferred by the cooperation of States as written, as the European ones but it is regarded with reticence by the *common law,* do not use that in the alternative preferring less solemn arrangements.

In the States that give priority to it, the procedure generally starts with a judicial judgment, that settles the question of admissibility and the usefulness of the sample and the question is whether an investigation should be carried out abroad. In this respect the requirements *lex fori processus* and the imperatives of sound administration of justice are decisive. If the advantage to avoid moving parties and witnesses in another State, sometimes distant is an argument in favor of the rogatory Committee, instead some shortcomings may oppose, especially as the possibility of delays are inevitable or faulty cooperation.

From here results, that approval by the judges of a rogatory committee abroad is based on the consideration that the law allows for this approach and only after he praised himself the opportunity of such measures; initially the forum system is consulted with decisive role, and if the sample is administered according to the foreign conditions. This happens under the initiative of the judge referred the matter to, acting in accordance with its own law; its vocation to decide in matters of administration of the sample, is not therefore, in any way ignored.

Request, drawn up in the form and in the language prescribed by the Agreement, art. 3 and 13, it has to originate from the authority of origin.

In principle, this procedure includes both acts of instruction, and other judicious acts.

The notion *acts of instruction* included in the general hearing of witnesses, the provision of an oath, an interrogator, personal presentation, technical or accounting expertise, any examination of the documents, books, or other trade entries, obtaining copies of resolutions, as well as those of public notaries, and a research on the site.

An act of instruction can be requested to let the parties to get a means of expertise with other finality rather than to be used within a framework of an ongoing or future procedure.

The second category, which includes „other judicial acts", cannot be identified rather than through the means of some examples. In this sphere is included displaying or publication in the requested state media of

foreign decisions or to obtain information from the social services of this state.

As for the execution measures solicited from a rogatory committee it can be retained that these are adverse to the public order from the requested state because are subtracted the proceedings destined through their specifics to give executive power to a foreign judgment.

Anyway, the category that forms „other judicial acts" excludes in equal measure the material facts, which are delivered by the parties, without the intervention of any authority, as well as legal consultations, legalizing the entries or the transfer of titles of values.

Establishment of a rogatory committee *stricto sensu* rests to the court of destination, that was seized according to the 9th article of the Hague Convention of 1954, by consular agent of the State of origin, directly or through the means of central authority from the requested state.

The proceedings take place, in principle, in conformity with instructions from *lex fori executionis,* besides the admitted exceptions by the Hague Conventions favoring some special forms instituted *lex fori processus.* However, the usage of these foreign procedural forms is excluded if there is incompatibility with the law of the requested state or impossibility to be applied whether, because of the legal methods of this state, or because of some serious real applicable difficulties.

The accomplishment of the acts of instruction and of other acts of legal nature is conditioned, in the requested State, on solvency of two problems. One deals with reglementation of positive or negative conflicts of local competence and the other deals with the legal control of the rogatory committee.

In case of incompetence *ratione materiale* or *ratione loci* of a judicial authority that was seized by the rogatory committee must be transmitted from the office and without delay of competent authority to take evidence. The latter, if it is not capable to do the requested operations as well as in the situation in which *lex fori executionis* leaves for the parties to gather evidences, may be with the consent of the requested authority, to give authority to a qualified person in the field.

The control of validity of rogatory committee constitutes an obligation, but the judicial authority executes it even though there has been made an inspection by the governmental authority. Verification has as an object, besides the conditions of forms and used language, the solicitor's quality. The request must come from a legal authority from the State of origin. It must be stated that the instruction measures or any other requested belong effectively to judiciary power, according to the requested. This prior control has the function to ensure the respect of sovereignty and the security of the requested state, avoiding any interference to public order. It is demanded that this one to be interpreted with proper understanding in the matter of international judicial assistance. In this way, the authority of a state that is not provisioned in the legislation to take a religious oath, however, accepts it to carry out the rogatory committee from abroad, within the framework of the solicitor's request.

Even though, the utility of this tolerance cannot be contested, the interpretation that was given to the notion of public order is far from being unitary. In the same order of ideas, that tends to restrain the intervention in public order it is imposed to dissociate that could possibly take place. As such, the rejection of a rogatory committee is not justified, unless the public order aggrieved by the very fact, is execution of the requested documents, and not in the report, with a goal probably had in mind by transmitting by the authority of origin. It follows, that the mentioned authority is required to examine whether the instruction is satisfied or not, violates public order, but without putting problem in addition, if any of the parties may not invoke, or later in the State of origin, of the findings of fact in this way, under the law of the State of destination, may not form the object of observation.

Although public policy is invoked only rarely in order to „circumvent a rogatory committee", examples of rejection are not excluded. Thus, a judge will not accept to designate, on the basis of a request for international judicial assistance, an expert, if such would facilitate fraud abroad, either whether a public notary submits any of its resolutions or hears as witnesses persons who, under the law, professional secrecy or put at risk, in their statement, committing a defamation, thus risking a prosecution.

Acts of instruction and any other judicial acts can be carried out in the requested State respecting the principle of the adversariality, and within the limits of the competence of the authority requested materials.

In accordance with the principle of adversariality, the requested authority is entitled, at his own request, to be informed regarding the date and place of implementation of the research (survey) in order that interested parties or their representatives may be present.

Material competence of the judicial authority which carries out cuts of instruction or other judicial acts is strictly limited to the specific subject-matter of the application in question. These proceeding do not give to the requested judge „an adequate jurisdiction and power of decision, it is not seized down with disputes, it does not attribute any power of appreciation, it just solicits to purely carry out certain material acts of execution"[15], excluding any other legal act.

As a result, the solicited judge is not competent to decide upon the eventual risen exceptions by the parties. Without the rejection of the request, the judge needs to take note of the reasons given and continue the procedure, reserving final decision of the Court of origin.

The requested judicial authority, taking into account the degree of urgency apply suitable coercive means and referred to as such by its own procedural law in terms of internal rogatory commission.

Thus, according to the Convention of 1954, the means of coercion mentioned, sable against witnesses, are not yet applicable as it is, against the parties concerned, to compel them to be present (article 11).

As soon as the Act of instruction or other judicial act has been fulfilled, those documents will be sent to

[15] A. Huet, op.cit., p.359.

the authority which carried out the work in the State of origin, using the established ways of transmission of the Hague Convention. In the event of total or partial non-execution of the Rogatory Commission, the requesting authority shall be informed immediately, through the same methods, the statement about the causes of refusal or the difficulties that have impeded finalizing.

Also, samples can be obtained from abroad, with the consent of the requested State, by a person authorized for that purpose, or by a diplomatic or consular agent, in accordance with the rules applicable to them.

Intervention on the persons named emissaries, as well as diplomatic agents or consular, under three different aspects of the work performed in this area by judicial authorities. The particularities that refer to the conditions that precede execution, to the domain of exercised dispositions and to the law applied in the field.

The execution is conditioned, normally, by a preset authorization, which is given, whether with general title or for each cases separately, the competent authority from the destination state.

The scope of duties that they perform the persons named Commissioners, as diplomatic agents or consular officials, is narrower than the jurisdiction of the judicial authorities from the requested State, being deprived of the opportunity to carry out acts of instruction and receive a statement duly sworn. In addition, they must meet the double condition to refer to a procedure in progress before a judicial authority of the State of origin, or are not inconsistent with the laws of the State of enforcement or contrary to the authorization granted.

The evidence obtained from the requested State enjoys, in fact, the effectiveness in the State of origin, subject to the control of legality exercised by the authority vested with the judicial resolution of the dispute.

The examination should be based on the *lex fori processus,* the samples were obtained by diplomatic or consular agents of the state of origin and by the persons designated as commissioners. In case of the proper rogatory committee is applied *lex fori executionis.*

The obtained entries from abroad can be cancelled in case there were not applied during the fulfillment of the competent law, procedural law or the law of the requested State is sanctioned nullity. Also, the requesting authority may pronounce the nullity, the samples that have been obtained in accordance with the procedural law of the requested State, although this was strictly observed, violate the public policy of the State, however, or, are incompatible with its legal system. However, it is reasonable, if reckoned the difficulty and the delays inherent in international, of rogatory committees not to pronounce the nullity of such acts only with great caution, limiting as much as possible the effects of cancellation.

Vocation of a foreign law to be applied, by virtue of the private international law of the Forum in whole or in part, some elements of civil litigation, of course complicates the process, civil or commercial. While in a purely internal litigation judge overrules the fully applicable law, the principle of *jura novit curia* expressing a reality however, on the contrary, the situation is completely different, if the vocation *lex causae* represents responsibility rules from another system of law edited by a foreign State.

The content and the scope of these provisions, whether they are regarded as a *quaestio juris,*or as *quaestio facti,* almost always have a sample problem. And if, the means of information available to national scientific institutes are insufficient, documentation must be achieved on the path of cooperation with the foreign State concerned.

Methods of international judicial assistance that can be used for this purpose, although less developed than in terms of material evidence submit forms variables.

Rogatory Commission itself also serves to issue certificates relating to foreign law, be issued by the authority of the requested State, and at the request of the court seized, either by qualified persons such as teachers in scientific research from that state. Certification may be verbal, as British judges are allowed or Americans, times to materialize into a custom certificate, as is customary in the States of French influence.

Diplomatic or consular agents of the State of origin are also competent to obtain legal information in the state of residence. These proceeded either on the direct way, or through the consultation of official publications of laws or the works of doctrine, either directly obtaining the necessary certifications at local authority.

The ways mentioned above currently, however, tend to give priority to international judicial assistance techniques, which are better adapted to the finality.

The Hague Conference, without having adopted so ferrules of general application in the matter, except for an old project, which gave up long ago, adopted a number of measures and restricted the scope documents, signed to facilitate the knowledge of the foreign legislation, either through direct contacts between the authorities concerned, either through the central authority of the requested State.

Legislative information also can be obtained through the intervention of central authorities operating in Contracting States pursuant to the Hague Convention of October 25th 1980 regarding the civil aspects of international child abduction[16]. These authorities are required to cooperate with each other and take in the States concerned, all necessary steps, in particular, to make available, whether directly or through an intermediary, information of a general nature relating to the law of their State, concerning the application of the Convention (art. 7 par. (2)). In addition, it is competent to issue certificates regarding the regulations of their State applicable in the matter (art. 8 par. 2) which is in force in both countries, in the Republic of Turkey on the August 1st 2000 and in the Republic of Moldova from July 1st, 1998.

Section III of the agreement is devoted to recognition and execution of decisions.

[16] http://www.just.ro/Portals/0/Cooperare_Judiciara/Ghid_Cooperare_Civila/info%20utile%20rapiri_10022010.doc (visited on 05.05.2014).