REGULATION ON SERVICE OF DOCUMENTS: TRANSLATIONS OF DOCUMENTS INSTITUTING PROCEEDINGS SERVED ABROAD

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Abstrakt v rodném jazyce
Cílem tohoto příspěvku je analyzovat kritéria pro posouzení, zda adresát v souladu s čl. 8 odst. 1 nařízení 1393/2007 o doručování oprávněně odmítl přijetí písemnosti, kterou se zahajuje řízení. Nejprve je vysvětlen význam doručování písemností a jejích překladů. Následuje analýza kritérií pro zjišťování jazykových znalostí adresáta uváděných v odborné literatuře a v novém rozhodnutí ESD Weiss. V závěru je rozhodnutí Weiss zhodnoceno.

Klíčová slova v rodném jazyce
Nařízení 1393/2007 o doručování 1393/2007, čl. 5 a čl. 8 odst. 1, odmítnutí přijmout písemnost, překlad písemnosti, kterou se zahajuje řízení, rozhodnutí ESD 14/07 Weiss.

Abstract
The focus of this paper is to analyze the criterions for ascertaining whether the addresse´s refusal to accept a document to be served according to article 8 clause 1 of the regulation 1393/2007 on service of documents was justified. Firstly, the importance of service of documents and their translations is explained. Then, the criterions for the determination of language knowledge of the addressee that are discussed in the legal literature and in the new ECJ´s judgement Weiss are analyzed. Finally, the judgement Weiss is evaluated.

Key words
Regulation 1393/2007 on service of documents, articles 5 and 8 clause 1, refusal to accept the document to be served, translation of the document instituting the proceeding, judgement ECJ 14/07 Weiss.

1. INTRODUCTION

One of the main problems of the judicial cooperation in the European Union is the multilingualism. Its 23 official languages implicate often expensive and time-consuming translations of judicial and extrajudicial documents. Especially in the case of judicial documents instituting proceedings, an incorrect, incomplete or entirely missing translation can cause serious problems to contractual parties: delays in proceedings or a loss of action to the plaintiff, restraint of the right of the defence to the defendant.

The European Civil Procedure, concretely the Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 (hereinafter referred to as the "regulation"), which shall be applied from 13 November 2008, approaches this problem pragmatically: The documents to be served do not have to be necessarily translated in an official language of the Member State addressed.[1] It can also be in any language which the

[1] Currently, in consequence of the four freedoms in the EU is an increasing number of judicial proceedings with a foreign element. Moreover, the languages used in the international commerce are especially English, French

addressee understands. Otherwise, it has to be to be accompanied by a translation into either of these languages (article 8 par. 1).[2]

This sender´s advantage is compensated to the defendant by articles 5 and 8 of the regulation – if the document is not in one of the mentioned languages, the addressee can refuse to accept it. Although the article 8 clause 1 is of a great practical importance, its wording is to general and ambiguous and leads to a great legal uncertainty of both parties.[3] Not even the new regulation on service of documents[4] answered the most burning question: What are the criterions for ascertaining of the fact whether the addressee was really entitled to refuse to accept a document?

The focus of this paper is to analyze these criterions concerning the document instituting the proceedings[5] (hereinafter referred to as "document") in the light of the new decision of the European Court of Justice (hereinafter referred to as "ECJ") Weiss v. IHK Berlin[6].

2. QUESTIONS NOT RULED BY THE REGULATION ON SERVICE OF DOCUMENTS

Since the regulation 1348/2000 entered into force, the conditions for refusal to accept the document to be served have been discussed in the legal literature. It is necessary to answer particularly the following questions:

- What is the level of language skills of the addressee of the document to be served, so that he can exercise his right to refuse to accept it? Which circumstances are decisive?

- What is the standard for translation of such a document?

Considering these problems, it has to be taken into account that the addressee can be a big subject operating in international commerce as well as a private subject (e. g. a person who was injured during his holiday abroad).[7]

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and Spanish. Hence, insisting on translations of documents in official languages of member states addressed would be a big obstruction for the European judicial cooperation. Schlosser, P. Jurisdiction and international judicial and administrative co-operation. Recueil des Cours. Collected Courses of the Hague Academy of International Law 2000. Tome 284 de la collection. The Hague: Martinus Nijhoff Publishers, 2001, p. 103 – 104.

[2] Sujecki, B. Das Annahmeverweigerungsrecht im Europäischen Zustellungsrecht. EuZW, 2007, No. 12, p. 363.

[3] Stadler, A. Neues europäisches Zustellungsrecht. IPRax, 2001, No. 6, p. 517 – 519.

[4] See, e.g. Sujecki, B. Die reformierte Zustellungsverordnung. NJW, 2008, No. 23, p. 1628 – 1631.

[5] It is a document(s) which must be duly served on the defendant in due time in order to enable him to assert his rights before an enforceable judgment is given in the state of origin (judgement ECJ ***C-474/93 Hengst Import v. Campese***, point 19). The Problems with translations are also related to the standard forms used in other regulations (Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure and regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure). Although they are to be filled in mostly by ticking of the relevant information which can be then easily compared with forms in other languages, some pieces of information are to be given in whole sentences so that they have to be translated. The mentioned regulations also do not regulate translations of information given to the defendant.

[6] Judgement ECJ ***C-14/07 Weiss und Partner GbR v. IHK Berlin***.

2.1 CRITERIONS FOR THE ASCERTAINING OF ADDRESSEE'S LANGUAGE SKILLS

For the determination of the conditions for a justified refusal of the document to be served, the aims of the regulation - effectiveness and speed in transition of documents and cost reduction - are decisive (point 2, 6 a 7 of the preamble). This corresponds with the requirement that the possibility of refusing service of documents should be confined to exceptional situations (point 10 of the preamble). Furthermore, it is necessary to differentiate whether the addressee is a natural or a legal person. The addressee's language skills should be verified impartially by an independent body, such as a court.

a) Natural persons

How to prove addressee's language skills in the practice? Should an addressee be examined by court? This would not be practically possible and even if it was, the judicial proceedings would not be faster. Beside that, it would not be sure whether the service of the document was effective until the addressee's language skills level is proved. In-between, e. g. the time could elapse. It has also to be taken into consideration that even a high level of language skills does not necessarily mean that the addressee understands complicated legal texts.

For that reason, it has to be decided according to objective criterions, such as the addressee's nationality[8], his professional qualification, the current extrajudicial correspondence between the parties or memoranda of commercial dealings[9] or addressee's domicile.

b) Legal persons

Concerning the legal persons, beyond the criterions for the verification of the language skills level has to be determined which organ of a legal person has to prove it. A board of directors? Agents of a ltd.? Only one of them or all of them?

Big companies usually have a legal section; the smaller ones are usually represented by an agent before the court. These are the persons who should understand the language of a document to be served and who should decide whether to accept or to refuse it. If this was required from all members of an organ of a company, the service of documents without translation would not be practically possible.[10]

Hence, for the decision whether the addressee can understand the document to be served, again just objective criterions have to be applied, such as the statutory seat of a company or its

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[7] Stadler, A., para 3, p. 518.

[8] The nationality does not necessarily mean that a person has a very good knowledge of the official language of the state. E.g. the children of Turkish parents in Germany, who were born and grew up in Germany, cannot be automatically supposed to speak Turkish. Ibid, note 48. Therefore, it would be better to decide e.g. according to addressee's domicile.

[9] Ibid., p. 518.

[10] Ibid. Accordingly Sujecki, B., para 2, p. 364 – 365.

branch,[11] the current extrajudicial correspondence between the parties and memoranda of commercial dealings.[12]

2.2 STANDARD FOR THE TRANSLATION OF THE DOCUMENT TO BE SERVED

A further important factor for the decision if the refusal to accept the document is rightful, is the standard of its translation. Is it sufficient if it is clear from the text what it is about and how the addressee shall respond? Or does it have to be a professional translation? Or even a translation without any mistakes?

It is to be emphasized that the mistakes in translation of the document[13] are for the plaintiff much worse than a completely missing translation. The confusion of one term can completely change the content of a document (e. g. a confusion of two legal institute with the same aim whereas on the base of one of them, a judgement can be issued and on the base of the second not).[14] Such mistakes result in inefficiency of the service of the document, even though it was translated by an official translator. Since the defendant does not have a duty or right to refuse to accept that document. If it is later proved that the document had not been served efficiently and therefore, the judicial decision can not be enforced, the plaintiff is only entitled to damages towards the translator.

On the contrary, the inefficiency of the service can not be caused by every mistake. Crucial is the fact, whether a reasonable man can understand the translation. It has to be clear what is the relief sought, the cause of action and how he should respond. This condition is fulfilled also when instead of a usual phrases different words are used.[15]

3. JUDGEMENT WEISS

The ECJ expressed his opinion to the discussed problems in his last judgement concerning the service of documents in the EU - Weiss v. IHK Berlin.

3.1 ISSUE OF FACT

The reference has been made in the context of proceedings between the Chamber of Industry and Commerce Berlin („IHK Berlin“) and the firm of architects Nicholas Grimshaw &Partners („Grimshaw“), a company governed by English law, concerning an action for damages for defective design of a building, the latter company joining

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[11] The disadvantage of this solution is that the plaintiff cannot take the advantage of the incidental language knowledge of the addressee. Sujecki, B., para 2, p. 365.

[12] Stadler, A., para 3, p. 518, note 49.

[13] The mistakes in translation are caused especially by an insufficient qualification of a translator. There are no rules for it in the regulation. By contrast, there are usually no problems with translations of legal terms in foreign languages that do not have any equivalent in the language they are translated in. Schütze, R. A. Übersetzungen im europäischen und internationalen Zivilprozessrecht – Probleme der Zustellung. RIW, 2006, No 5, p. 353.

[14] E.g. the confusion of the French „demande en garantie“ and German „Streitverkündigung“.

[15] E.g. the use of the older spelling rules cannot cause the ineffectiveness of the translation. Geimer, R., Schütze, R. A. Europäisches Zivilverfahrensrecht. Kommentar. 2. Aufl. München: C. H. Beck, 2004, p. 873. With the standard of translation of the document to be served abroad dealt also OLG Nürnberg in the judgement 4 VA 72/05 from 15. 2. 2005. See Krapfl, C., Wilske, S. Zur Qualität von Übersetzungen bei Zustellung ausländischer gerichtlicher Schriftstücke. IPRax, 2006, No. 1, p. 10 - 13.

Ingenieurbüro Michael Weiss und Partner GbR ('Weiss'), established in Aachen, to the proceedings.

The architect's contract stipulated that the services, correspondence between the parties and the authorities and public institutions should be in German, the contract was governed by the German law and the German courts had the jurisdiction.

The application of IHK Berlin referred to the various items of evidence to support its submissions. These file consisting of approximately 150 pages was annexed to the application.[16] The content of those documents were partially reproduced in the application. After Grimshaw had initially refused to accept the application in German on the ground that there had been no English translation, an English translation of the application and the annexes in German were delivered to it. None of the organs, which represented Grimshaw, could speak German. Therefore, Grimshaw refused to accept the application, submitted that it was not properly served and raised the objection that the application was time-barred. The Landgericht Berlin held the second service for effective. Grimshaw's appeal against that decision was dismissed. Weiss lodged an appeal against the judgment before the Bundesgerichtshof which referred the following questions to the ECJ for a preliminary ruling:

1) Does the addressee have the right to refuse to accept the document to be served where only its annexes are not in one of the languages stipulated in article 8 par. 1?

2) Is the addressee deemed to „understand" the language of a Member State of transmission when, in the course of his business, he agreed in a contract with the applicant that correspondence was to be conducted in that language?

3) If not, under which conditions can be refused the acceptance of annexes to a document which are in the agreed language?

3.2 JUDGEMENT OF THE ECJ

First of all, it is to be noted that judgement concerns only documents instituting proceedings.[17]

To answer the referred questions, the interpretation of the term „document to be served", where the document is a document instituting proceedings, is crucial. On this interpretation depends whether the document can or must include annexes consisting of documentary evidence.[18] The provision must be given an autonomous interpretation so that it may be applied in a uniform manner.[19]

The base for the ECJ´s interpretation is the guarantee of the fundamental right of the defence which derives from the right to a fair hearing guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. This forms a part

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[16] The architect's contract concluded between the parties, an addendum thereof, an extract of the contractual specifications, a large number of documents or extracts such as technical reports or statements of account, as well as several letters, including some from Grimshaw etc.

[17] The regulation applies to various judicial or extrajudicial documents to be served which can be very different in nature (a judicial decision, an enforcement measure etc.). Judgement Weiss, point 41.

[18] Judgement ECJ Weiss, point 59.

[19] Judgement ECJ ***C-433/03 Götz Leffler v. Berlin Chemie AG***, points 45 a 46.

of the general principles of law whose observance the ECJ Court ensures. In this respect, the ECJ refers to the interpretation of article 34 par. 2 of the Council regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (regulation Brussels I) in its judgement ASML[20]. Article 34 par. 2 of the regulation Brussels I does not – by comparison to the article 27 par. 2 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters – require the document instituting the proceedings to be duly served. It places the emphasis on effective observance of the rights of the defence. This is the case when the defendant is aware of the pending legal action and the cause of action and has had enough time to arrange for his defence or to commence proceedings to challenge a judgment entered against him.

The regulation Brussels I is systematically related to the regulation on service of documents. The objectives of effectiveness and speed in the transmission of procedural documents have to be reconciled with that of the protection of the rights of the defence.[21] The term „document to be served" where such a document is a document instituting the proceedings, must be in this case interpreted by analogy. Again, the defendant has to be served the document in due time in order to enable him to assert his rights in legal proceedings in the State of transmission. He has to be able to identify with a degree of certainty at least the subject-matter of the claim, the cause of action, the summons to appear before the court or a possible appeal. Documents which have a purely evidential function and are not necessary for the purpose of understanding the fundamental information do not form an integral part of the document instituting the proceedings.[22] That means that the addressee cannot refuse to accept such documents with a solely evidential function because they are not translated in the languages stipulated in article 8 par. 1.[23] It is for the national court to determine whether the content of the document instituting the proceedings enables the defendant to assert his rights in the Member State of transmission. If it is inadequate, the court must resolve that problem in accordance with its national procedural law.[24]

In the second and third question, the Bundesgerichtshof in principal asked whether the language agreed on by the parties belongs to the objective criterions, according which the language skills of the addressee are proved.[25] ESD stated that the court must examine all the relevant evidence on the defendant's language skills submitted by the applicant. The decision cannot be left only to the addressee because the effectiveness of the service would depend

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[20] Judgement ECJ ***C-283/05 ASML Netherlands BV v. SEMIS***, points 20 a 21.

[21] Judgement ECJ Weiss, point 49.

[22] Judgement ECJ Weiss, point 73.

[23] To support its position, the ECJ mentions also the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and the Convention on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters which were the basis for the regulation on service of documents. Neither of them considered it to be a necessary that the applicant provides a translation of the document instituting the proceedings. These questions were governed by national procedural laws. On the contrary, the ECJ does not mention the article 6 of the regulation establishing a European Small Claims Procedure. It stipulates that the document instituting the procedure has only to describe the base of the subject matter. Hess, B. Übersetzungserfordernisse im europäischen Zivilverfahrensrecht. IPRax, 2008, No. 5, p. 400.

[24] Judgement ECJ Weiss, points 75 and 76.

[25] Sujecki, B., para 2, p. 365.

only on his will to accept the document.[26] By contrast, the sole signature of a clause which provides that a particular language is to be used for correspondence and performance of the contract cannot give rise to a presumption of knowledge of the agreed language. It is to be stressed that the degree of language knowledge required for correspondence is not the same as that needed to defend an action.[27] Consequently, all circumstances have to be taken into account.

The signature of such a clause must be regarded only as an indirect evidence of knowledge of the language of the document served. Greater weight will attach to it where the clause refers not only to correspondence between the parties but also to correspondence with the authorities and public institutions. It may be supported by other circumstantial evidence, such as that the correspondence was actually conducted by the addressee of the document in the language of the document served, the jurisdiction of the courts of the Member State addressed was stipulated in the contract or that the contract was subject to the law of that Member State. [28]

4. REVIEW OF THE JUDGEMENT WEISS

In summary, according to the judgement Weiss, for the refusal of the acceptance of the document is substantial the translation of the cause of action, i. e. of the all matters of fact, from which the plaintiff derives the requested legal effects. On the other hand, the evidence supporting those claims does not have to be translated because it is not necessary for the understanding of the cause of action. Nevertheless, the content and not their description as evidence are decisive.[29]

The language skills of the addressee are to be examined by the court, the burden of proof is on the plaintiff. The agreement upon the language for correspondence between the parties is only an indirect evidence of addressee's knowledge. But it can be supported by other circumstantial evidence, such as a long-term activity of the addressee (or of his employee[30]) in the state where that language is spoken etc.

The interpretation of the ECJ enables a careful differentiation between the specific circumstances, which ensures the maintenance of the procedural rights of both parties. In the cases like the analysed one, the plaintiff is logically in good faith that the defendant understands the language agreed upon. A contrary decision of the ECJ would enable the defendant to delay or even to hinder the procedure.[31]

In other words, through their private agreement, the parties actually agree on not exercising of their right to refuse the acceptance of the document instituting proceedings according to the

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[26] Judgement ECJ Weiss, point 84.

[27] Ibid., points 83 a 85.

[28] Ibid., point 86.

[29] Ahrens, M. Neues zur Annahmeverweigerungsrecht im europäischen Zustellungsrecht. NJW, 2008, No 39, p. 819.

[30] It can also happen that the plaintiff had an employee who could spoke the language agreed on but who has not worked for him at the time of service of the document any more. In my opinion, if the current correspondence was in the language agreed upon and the plaintiff was in good faith that the addressee understands that language, the addressee can not exercise his right to refuse the acceptance of the document justly. Contrary opinion Ahrens, M., para 29, p. 819; Hess, B., para 23, p. 403.

[31] Sujecki, B., para 2, p. 365 – 366.

article 8 par. 1. This is not the case if the language was concluded in a consumer agreement where the weaker party could have been pushed to sign that agreement.[32]

For the determination whether annexes to the claim have to be translated, the uniform European law is applicable. Conversely, whether the annexes have to be served together with the claim has to be decided in compliance with national procedural laws. The judgement of the ECJ ensures both the autonomy of national rules for service of documents as well as the minimal standards for the translation of documents served among the member states of the EU.[33] The clarifying of these rules contributed a lot to the legal certainty of the plaintiff.[34]

On the base of rules stipulated by the ECJ, the growth of importance of English being a common language in the international commerce is to be awaited. This is because the amended article 8 par. 1 only stipulates that the document or its translation has to be in a language the addressee understands. It does not have to be a language of the transmitting state any more.[35]

5. CONCLUSION

In the decision Weiss, the ECJ in principal confirmed and extended the criterions for the examination of addressee's language knowledge that have been developed in the legal literature.

In the judgement Weiss as well as in the judgements Leffler[36] and ASML[37] the ECJ departs from rigidly formal to material rules for the service of documents. The crucial point is the protection of addressee's right of defence and the ensuring of procedural economy at the same time. The judgement strengthens the position of the plaintiff as he can rely on addressee's knowledge of the language agreed upon in their contract. If the defendant insists on translation of the document or its annexes, the plaintiff can remedy the translation according to article 8 par. 3. For the addressee, the judgement means that he has to think much before he rejects to accept the document, decides not to take part on the proceedings and risks the issue of judgement of recognition.[38]

To sum it up, the argumentation in the judgement Weiss is very persuasive and it is very good that the criterions for the examination of addressee's knowledge have been clarified.

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[32] Ibid., p. 366.

[33] Ahrens, M., para 30, p. 819.

[34] The recent legal regulation forced him to translations of all documents under all circumstances which was not in compliance with the aims of the regulation. Ibid.

[35] Ibid.

[36] See note 20. The regulation 1348/2000 did not regulate the possibility of remedy of service of the document. The ECJ stated that the document can be served again accompanied by a translation into a language provided for in article 8 par. 1. In the new regulation, this rule is stipulated in article 8 par. 3. In compliance with the judgement Leffler, it has to be done in the shortest period possible.

[37] See note 21.

[38] Hess, B., para 23, p. 403.

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