



O. Rybak,
Postgraduate student,
Department of Justice, Law Faculty
Kiev National Taras Shevchenko University

LETTER OF REQUEST IN CROSS-BORDER LEGAL RELATIONS IN THE CIVIL PROCEEDING

Introduction. The current development of integration processes gives rise to the phenomenon of migration. This also requires refinements of law, particularly of the legal institutions of international civil procedure, including the Institute of international legal assistance in civil matters and judicial assistance. There must be certain tools and techniques for the aforementioned institutions to operate. One of them is a Letter of Request.

It follows that the improvement of a Letter of Request institute in the international civil proceeding including its theoretical definition arises as a very important issue.

Research level. This issue has not been well investigated in the procedural literature but some aspects have become the subject of research of both Ukrainian and foreign scholars: Haimo Schack, Jametti Greiner, Harmut Linkel, Wolfgang Hau, S. Fursa, O. Hrabovska and others.

The article's purpose is to analyze current issues of the institute of the Letter of request in the international civil procedure for their theoretical and practical importance.

Body. The requesting authority and the requested authority are the main parts in the legal proceedings arising concerning transmission of the Letter of Request to execute some procedural actions. There are different ways of transmitting the Letter of Request but ultimately their main point is to ensure that the authorized authority (court) will effectuate the request of the foreign assistance and other parts will be involved in the process of sending or it won't, if the direct way of communication is used. These relations have a cross-border character.

Due to the Letter of Request the court can file (directly, through central judicial authority or by using other ways of transmitting of the letter of request) a request for legal assistance (service of documents, obtaining evidence abroad and others) to a foreign state, as the request ordered by the authorities have procedural appointing – a Letter of request is a document which

has an established procedural form. On the one hand, the appeal to the institute of a Letter of Request gives the possibility of obtaining documents abroad and execution of other proceeding actions in the trial, on the other hand, if we consider ways of its transmission, the requirements for the Letter of Request official registration and especially its execution are really very cumbersome. It means that one of the important conditions of a court referring to the institute of the international legal assistance is that kind of necessity and emergency that makes it impossible for the court to view the case without transmitting the Letter of Request in civil cases for obtaining evidence abroad, testimony and for other purpose.

Institute of the Letter of Request in the international civil proceeding is the body of legal regulations governing the peculiarity of the procedural execution, transmission and effectuation of the Letter of Request as a document with statutory form.

Institute of the international legal assistance, including judicial assistance in cases complicated by foreign element is the body of laws governing legal relations arising between the requesting authority and the requested authority, but other entities (Ministry of Justice, diplomatic and consular agents and/or others) the matter of which is the carrying out the action specified in the request of the foreign assistance (the Letter of Request) can also participate in the process of sending and execution of the Letter of Request.

Thereby the main distinguishing features of this civil proceeding's institution are:

- Particularity of the legal parties and legal relations arising with the participation of these foreign parties;
- The cross-border legal relations have a procedural character;
- The legal relationship may arise directly between the courts or with the intermediation of other entities;
- The execution of the Letter of Request has special features.





Concerning the execution of a letter of request the following consequences may occur:

- Decision to enforce a letter of request and its execution without delay;
- Execution of a letter of request only in the part that satisfies both with the national laws and international requirements (in the part that does not violate the sovereignty, public policy of the state, etc.);
- Refusal to enforce the request in its entirety due to some statutory obstacles (Article 12 of the Hague Convention on obtaining evidence abroad in civil or commercial matters on 18.03.1970);
- Failure to perform and to redirect of the letter of request to the competent authority which will execute this request (Article 6 of the Hague Convention on obtaining evidence abroad in civil or commercial matters from 03.18.1970 established the below mentioned rule: "If the authority to whom a Letter of Request has been transmitted is not competent to execute it, the Letter shall be sent forthwith to the authority in the same State which is competent to execute it in accordance with the provisions of its own law") [1].

But beyond that, there are conditions for sending a letter of request by a court to a foreign court or another competent authority, such as the condition specified in Part 1 of Article 415 of the Civil Procedural Code of Ukraine [2]:

"If the court needs to submit documents, obtain evidence abroad or execute some procedural actions in another State during of the proceedings, then the court may apply with the relevant letter of request to the foreign court or other authorized authority of a foreign state".

Consequently, the condition for using a letter of request is the apparent present circumstances under which, for the follow-up trial, the court must apply to the foreign court; otherwise it is impossible to adjudicate in a civil case.

These features and exactly the channels of transmission of the Letter of Request between judicial authorities were being formed for a long period of time.

Amongst the historical stages of development of the legislation dealing with ways of sending and execution of the Letter of Request the following stages (in accordance with the international conventions) can be distinguished:

1) The first historical stage dates from 1954. The Hague Convention on Civil Procedure was adopted, where the legal rules providing the diplomatic way of transmitting

documents between states were consolidated [3]. Thereafter, the first historical way of transmission of the letter of request was the diplomatic one, which was established in the international convention and which was used in the Soviet Union. Joining the Hague Convention in 1954 the Soviet Union stated in the note from 17 September 1966 that the judicial documents of foreign authorities which are intended for service to persons who have residence in the USSR and the letters of request of abovementioned authorities should be transmitted via diplomatic pipelines through the USSR Ministry of Foreign Affairs for execution in the USSR;

2) In 1965, there was an adoption of the Hague Convention on the Service abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters from 11.15.1965, where Article 9 states that each contracting State can additionally use consular channels to transmit documents to the authorities of another Contracting State which are defined by the latter for this purpose [4]. Each State can use diplomatic channels if it is required by the exceptional circumstances with the same purpose.

3) 1970 – the adoption of the Hague Convention on Obtaining Evidence Abroad in Civil or Commercial Matters, where it is affirmed that letters of request are sent via the central judiciary authorities.

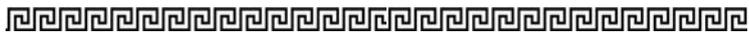
4) 1992 – The Agreement on the Settlement of Disputes related to business activities was adopted on 03.20.1992 [5]. The Article 5 states that the providing the legal assistance to courts and other competent authorities of member-states of CIS (The Commonwealth of Independent States) are directly related to each other (the direct way of transmitting documents).

Between Member states of the EU European Union are used also these legislation:

- 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)

- Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

Comparing the Ukrainian and an EU legislative regulation in matter of the term for execution of letter of request it should be noted that there are some differences. Letter of request should be executed expeditiously. And the general term for execution of the



letter of request is 90 days (be executed within 90 days) (Article 10, Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters) [6]. In the Ukrainian legislation this is clearly defined in the Instruction on the procedure for the implementation of international agreements on legal assistance in civil cases concerning service of documents, obtaining evidence and the recognition and enforcement of judgments of 27.06.2008 № 1092/5/54, where states the general rule, i.e. the letter of request should be executed without delay, within one month from the date of its receipt (Section 3.10) [7].

We can distinguish these two types of the a letter of request:

- regarding the issue of evidence, for example obtaining evidence abroad;
- relating to the person, for example obtaining testimony from persons outside the country in which the case is pending by use of depositions.

Accordingly to German rules, in the article 6 Rules of legal assistance in civil matters is denoted these ways of trasmission (Rechtshilfeordnung für Zivilsachen (ZRHO) [8]:

- 1) the direct way – between the authorities of the requesting and the requested State;
- 2) the consular way;
- 3) the Ministry way, in which requests sends through the Department of Justice of the requesting and the requested State;
- 4) the diplomatic way.

There are also all these types of legal relationships in the Ukrainian legislation. But in theory the third type calls a mixed way of transmission letter of request that also means that letter of request can be send through central justice authority.

We presume that the matter of securing evidence only after filing a claim by a plaintiff must also be comprised to the types of the international judicial assistance in civil cases where a letter of request is used as a means of legal assistance. If the persons involved in the case consider that the submission of required evidence is impossible or they have difficulty in submitting the evidence, they are entitled to file the statement on securing these evidences. If the evidence is abroad, the court sends this court a letter of request in which a request to obtain evidence and taking measures for securing evidence abroad are specified.

Getting, discovery and examination of evidence are just several types of evidence but other types of evidence should be

included in the amount of legal assistance as well:

- Examination of witnesses;
- The appointment of judicial examination;
- Other ways to secure evidence.

Taking measures to secure evidence before the filing of a claim by the plaintiff in civil matters, complicated by foreign element where appealing to the institution of the letter of request is necessary becomes impossible for all practical purposes.

Consequently, the legal assistance may also be granted regarding the effectuation of the special rights (changing the subject or the cause of a claim etc.) and the rights assuring legal protection in the broad sense (securing evidence etc.) of the plaintiff and the defendant. Thus a letter of request can be used not only for service of a copy of the claim together with copies enclosed to it but this instrument can also be used for further notification of the defendant and the plaintiff of the changes occurring during the proceeding.

Conclusions

Based on the above-mentioned points the following conclusions can be drawn:

- We can distinguish two basic historical stages of development and implementation of a letter of request, which were established in international conventions between EU countries members and not and between countries members of the Commonwealth of Independent States;

- At the request of the parties the court may seek foreign assistance by means of a letter of request which is transmitted to the foreign authority;

- The legal assistance in civil cases the execution of which is made by using a letter of request should also be given in the issues of recognition and enforcement of a settlement agreement, as well as providing the implementation of special rights of the parties in civil proceedings and taking actions to secure evidence after filing a claim; before filing a claim only such kind of international legal assistance as the recognition and enforcement of court rulings to secure evidence may be provided.

- Sending letters of request to the court of a foreign state is the ground for granting international legal assistance, including the judiciary assistance, and the condition for its granting is apparent present circumstances in the cases with foreign element that make it impossible to adjudicate in a case without seeking foreign legal assistance (this condition is established in national and foreign legislations).





Key words: Letter of Request, cross-border legal relations, the principle of competition, the agreement of lawsuit, the methods for conservation of evidence, special rights of the plaintiff and the defendant, the reasons and conditions of application of a Letter of Request.

The urgent issues of the Letter of request to the foreign court in theoretical and practical contemplation are dealt with. The new types of legal assistance which includes the recognition and enforcement of the agreement of a lawsuit, judgment on conservation of evidence as well as the reasons and conditions of application of the Letter of Request to the foreign court are analyzed in the article.

У статті досліджуються актуальні питання доручення суду іноземної держави з точки зору аналізу їх теоретичного та практичного значення. Аналізуються такі питання, як підстави та умови звернення із судовим дорученням до суду іноземної держави та нові види правової допомоги, зокрема, визнання та виконання мирової угоди, ухвали щодо забезпечення доказів.

В статье исследуются актуальные вопросы поручения суда иностранного государства с точки зрения анализа их теоретического и практического значения. Анализируются такие вопросы, как условия обращения с судебным поручением в суд иностранного государства и новые виды правовой помощи, в частности, признания и исполнения мирового соглашения, постановления по обеспечению доказательств и основания.

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