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International Dispute Resolution

NEWS

New European seizing proceedings

and more current information

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New European seizing proceedings – Part I

By Johan F. Langelaar & Michiel Teekens

On behalf of the International Dispute Resolution Practice Group, this outline provides an interesting update about European plans to further evolve the possibilities for initiating (international) seizing proceedings within Europe.

There are two important new developments: the first is the proposal for a regulation of the European Parliament and the Council on jurisdiction as well as the recognition and enforcement of judgments in civil and commercial matters (COM, 2010, 748 final). The second is the proposal for a regulation of the European Parliament and the Council, creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters (COM, 2011, 445 final).

Both proposals are being further negotiated by the Council of Ministers of the European Union. While the regulations that will actually be introduced may differ from the proposals, this has set the general course of international seizing proceedings.

This outline contains a short summary of both proposals and their importance, after which the similarities between the proposals are detailed. This is therefore establishing the course of seizing proceedings in Europe.

The proposal for a regulation of the European Parliament and the Council on jurisdiction as well as the recognition and enforcement of judgments in civil and commercial matters (COM, 2010, 748 final)

This proposal contains significant changes. It is felt that the civil judicial cooperation between European member states has developed in the context of the creation of an internal market in Europe based on the premise of mutual recognition of judgments and that this development has gradually improved by lowering controls with respect to foreign judgments, referring to the exequatur proceeding for all judgments to be executed in another European member state. Since this system has reached maturity, the new proposal wants to abolish – with few exceptions – the exequatur proceeding, in favour of limiting costs and consuming proceedings by introducing automatic recognition combined with three safeguards: (i) the defendant can contest the judgment in the Member State of origin if they were not properly informed about the proceedings, (ii) the proposal would create an extraordinary remedy in the Member State of enforcement which would en-

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able the defendant to contest any other procedural defects, and (iii) the defendant would be able to stop the enforcement of the judgment if it is irreconcilable with another judgment which had previously been issued in the Member State of enforcement.

This new development is also applicable to court leaves granting protective measures, including seizing grants. Leaves granted by courts which have jurisdiction on the substance of the case will be provided free circulation within the European Union.

In deviation with the Denilauler case of the Court of Justice (21 May 1980), which provided that ex parte proceedings – proceedings where the defendant is not heard – are not part of Chapter III of the Brussels I treaty, resulting in non-recognition by other Member States, the proposal accepts recognition for grants ex parte issuing seizing proceedings in another Member State.

If the court grant to seize contains a measure or an order which is not known in the Member State of enforcement, the competent authority in that Member State shall, to the extent possible, adapt the measure or order to one known under its own law which has equivalent effects attached to it and pursues similar aims and interests.

The proposal does state some exceptions as well as safeguards in relation to the protective measures. The competent authority of the Member State of enforcement may allow suspension of the court grant if the defendant has challenged the measure in the Member State of origin. Furthermore it may, on application by the defendant, refuse either wholly or in part the enforcement of the judgment if it is irreconcilable with another judgment given in a dispute between the same parties in the Member State of enforcement or if it is irreconcilable with an earlier judgment given in another Member State, or in a third Member State involving the same course of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State of enforcement.

PART TWO IN NEXT EDITION

Italian law bows down to the family:

Natural becomes legitimate!

By Patrizia Giannini

Revolutionary reforms to laws of hereditary succession, No. 219/12

The Italian Parliament has recently enacted a new law, No. 219/12, which became effective on 1 January 2013. This has amended the provisions of the Civil Code relating to filiation (wills and hereditary descent), eliminating all distinctions between "legitimate" children (born in wedlock) and "natural" children (born outside of marriage).

This reform in the law introduces:

- New provisions – both substantive and procedural – in the field of natural filiation and the status of such children under the law, based on the principle that "all children have the same legal status" (Art. 315 of the Civil Code);
- A government mandate to amend the existing provisions in order to

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eliminate all remaining discrimination between legitimate, natural and adopted children (approved as of 6 November 2013 by both the House and Senate);
- A redefinition of the powers of the Ordinary and Juvenile Courts with respect to procedures for custody and child support;
- Provisions to guarantee all children's rights to food and maintenance.

This reform has important implications in matters of succession (including transnational) and from a practical point of view, the effects have been most remarkable among those directly affected by this change.

In particular:
- With regard to succession requirements (officiumpietastis), the natural ascending relatives are now included among the recognised heirs (ex Civil Code Art. 536); so that to the extent the provisions of Art. 538 of the Civil Code, which previously excluded them from entitlement to any portion (portiodebita) therein contemplated, such provisions are now abrogated;
- With regard to intestate succession (successioabintestato), this reform to the law will now include natural siblings that were previously excluded and Art. 572 of the Civil Code will be understood to apply equally to those in consanguinity, rights which were not afforded to children born out of wedlock until now.

Enforcement of Foreign Judgment in Japan

By Seiichi Yoshikawa

In Japan, a judgment rendered by a foreign court ("foreign judgment") can be enforced by obtaining an "enforcement judgment" from the Japanese court. In brief, the party seeking an enforcement judgment must show (1) the foreign court had jurisdiction over the dispute in question, (2) the defendant was properly served in the process before commencement of the case, (3) the contents of the foreign judgment and the procedure for issuance thereof were not in conflict with the Japanese public order and good morals and (4) the country to which the foreign court belongs provides a reciprocal treatment to a judgment rendered by the Japanese court.

These conditions can be normally satisfied without great difficulty, but there have been some cases in which the enforcement was denied. One such case relates to punitive damages. In 1999, the Supreme Court ruled that a California court's judgment ordering a Japanese company to pay punitive damages was unenforceable, because punitive damages were not recognised in Japan and such judgment was therefore contrary to the Japanese public order.

In another case, Party A (American company) obtained a judgment from a U.S. state court ordering Party B (Japanese company) to pay damages arising from product liability. However, before Party A started the enforcement procedure in Japan, Party B sued Party A in Japan and obtained a judgment from Osaka District Court declaring that Party B was not liable to pay any damages to Party A.

Under these circumstances, when Party A sought a judgment to enforce the U.S. judgment, the Osaka District Court refused to issue such judgment on the grounds that the U.S. judgment

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was contrary to its prior judgment which constitutes the Japanese public order.

In a third case, the Tokyo District Court refused to enforce a judgment of the New York State Court which was rendered after the plaintiff sent a process via post directly to the Japanese defendant, instead of complying with the procedures stipulated in the Treaty for service of process.

Although these are exceptional cases, foreign lawyers should still bear them in mind when seeking to enforce a foreign judgment in Japan.

The German Mediation Act 2012

By Dr. Karl Friedrich Dumoulin

The German Mediation Act 2012, which has been in force since 26 July 2012 (hereinafter referred to as "the Act"), not only regulates the mediation of cross-border disputes between EU member states (thereby implementing EU Directive 2008/52/EC) but also the mediation of domestic disputes.

The Act seeks to strengthen mediation as an alternative tool for settling disputes on an amicable basis. It defines the terms "mediation" and "mediator". Moreover, it contains provisions regarding procedure, the mediator's obligations to disclose any information impairing his or her independence and neutrality ("conflict of interest") as well as both the mediator and the involved parties' obligations to treat any information disclosed by either party in the course of the mediation proceedings as strictly confidential (subject to statutory duties or reasons of ordre public).

The Act also provides the essentials regarding standards for the training and acknowledgement of "certified mediators" (to be regulated in detail by secondary legislation yet to be enacted).

The Act has been accompanied by changes to the German Code on Civil Procedure ("the Code"). The Code authorises civil courts to refer a case to a judge – delegated and without decision-making power – for a conciliation hearing and further attempts at conciliation. The judge may use all methods of dispute resolution, including mediation. Additionally, the court may propose mediation proceedings

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Mediation as an alternative tool for settling disputes on an amicable basis.

to the parties and, if the parties agree to mediation, the court may order the suspension of proceedings. It goes without saying that a judge involved in mediation is excluded from deciding the case. The Code also provides for the right of the mediator to refuse to give evidence in court with regard to any information disclosed to him or her in mediation proceedings if called as a witness. The Code does not implement provisions on the access to execution.

The legislator considered the already existing provisions to be sufficient (declaration of enforceability of settlement agreements by a court or a notary) as was also the case for the issue of time limitation (see the general provisions of the German Civil Code on the suspension of the limitation period due to negotiations).

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Arbitration – new Vienna Rules

By Aurelia Tramposch

In order to further enhance the attractiveness of Vienna as an arbitration venue, the revision of the Vienna Rules in 2013 strived to modernise and streamline arbitration proceedings. The revision was followed by an Amendment of the Austrian Arbitration Act this year, ensuring that annulment claims are directly decided by the Supreme Court as first and final instance.

Henceforth, the arbitral tribunal has the authority to order the joinder of third parties at the request of either party or the third party itself. Joinder can be approved for the party with full party status, but also in other ways (e.g. amicus curiae). In addition, a cross claim against the party to be joined is permitted.

The consolidation of two or more proceedings will be permitted where approval must be granted by the Board of VIAC.

With regard to multiparty proceedings, all parties on one side have to agree on the arbitrator they wish to nominate. A lack of a unanimous decision results in the arbitrator's appointment by the Board

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Tramposch & Partner is a boutique law firm handling litigation and business law matters on a national and international scale. The three offices across Austria, based in Innsbruck, Vienna and Eisenstadt, enable the company to provide comprehensive legal counselling as well as representation at all Austrian courts and administrative bodies. Tramposch & Partner offers specialised services in the areas of corporate law, insurance and re-insurance law, debt collection and litigation.

of VIAC. However, a substitute appointment for one side does not automatically result in the other party losing its right to appoint an arbitrator. Under the new rules a state court may remit proceedings to the arbitration tribunal, for example, in the context of annulment proceeding. Since the Austrian Arbitration Act does not foresee such proceedings, remission by a state court can only be made under the following conditions: the seat of arbitration is outside of Austria, Vienna Rules apply and the applicable law of the seat of arbitration allows for such remittance. Changes were made with respect to the registration fee which was decreased to EUR 1,500. The new Rules as well as the Amendment were well received by practitioners, judges and arbitration organisations guaranteeing the competitiveness of Vienna as an arbitration venue.

The advent of court-based mediation in South Africa

By Cornelia van Heerden and Izak Potgieter

While many of South Africa's trading partners have opted for mediation in civil and commercial disputes, the South African legal system has been slow to adopt mediation as an alternative dispute resolution mechanism. Mediation is only actively pursued in a handful of matters which it would benefit, primarily in the area of labour disputes and, to a lesser extent, in divorce matters. This is about to change as the South African legal system braces itself for the introduction of court-based mediation for a trial period. It would theoretically introduce a paradigm shift in the traditional litigation focus and adversarial root of South African legal disputes. Broadly speaking, the mediation rules will introduce voluntary mediation during which Party A invites Party B to engage in a mediation process to solve the dispute. The cost of the mediation process will be at the inviting party's expense. Party B may refuse to attend, at the risk of a trial court finding the refusal to be unreasonable and invoking punitive costs. The rules make provisions for referring a dispute for mediation before or after a summons has been served. In addition, the presiding judicial officer may refer a matter for mediation at any stage during litigation prior to judgment. The hope is that court-based mediation will provide parties with access to relief currently denied by an overburdened court and financial restraint due to prohibitive legal costs.

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Heyns and Partners Inc. was founded in 1958. In 1986, the firm started to operate and conduct business under its current name. It is privileged to represent a very diverse and extensive client base, both corporate and individual, offering litigation, conveyancing and notary services.

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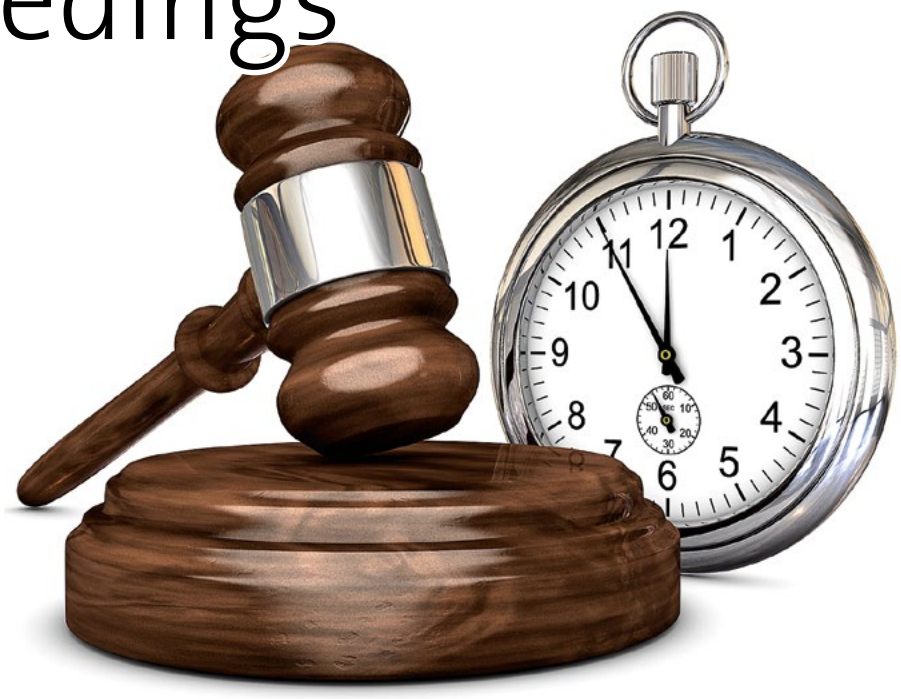
Significant changes in the rules of Hungarian civil proceedings



By Dr. Ágnes Borbás

The Hungarian legislator also continues to apply its best efforts to make sure civil proceedings are concluded within the briefest possible time.

In the current Act on Civil Procedure, actions filed for the enforcement of claims in excess of HUF 400 million have been regulated under the title "high-profile actions".

In such actions, the deadlines of the courts and the parties are shorter than normal.

The new Act on Civil Procedure intends to accelerate the civil court proceedings with a view to adopting a modern act that is in accordance with the international practice and expectations and ensures the effective enforcement of substantive rights.

The Civil Litigation Codification High Commission shall elaborate the concept and theory of the act by the second quarter of 2014. According to the plan, the final proposal shall be discussed by the government at the end of 2015 and drafted by the parliament in 2017.

A change, though independent of the acceleration of the civil proceedings but considered significant, is that the scope of arbitration courts also operating in Hungary has diminished.

Proceedings commencing after 13 June 2012 may not be settled by arbitration where the subject matter of the dispute is an asset owned by the state or municipalities situated in the area within the boundaries of Hungary (national assets), including the rights, claims and privileges related to such asset.

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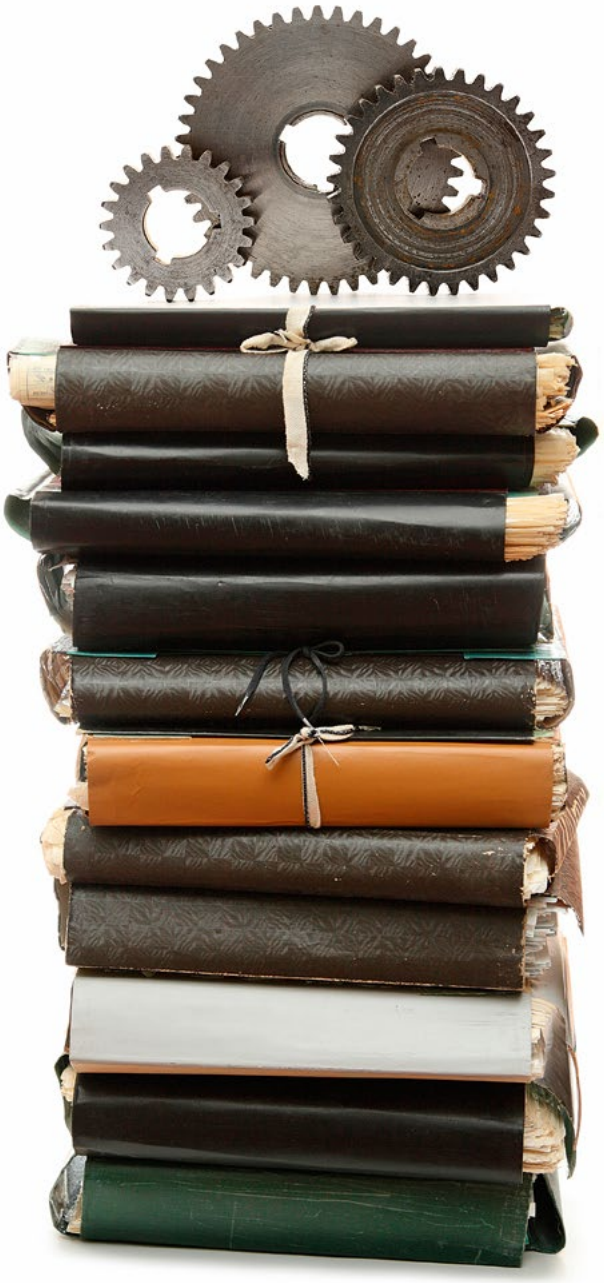
Arbitration as an alternative for solving disputes in Mexico



An excessive workload makes the dispute process very lengthy and costly.

By Rodolfo Sánchez Arellano

Legal disputes in Mexico may be resolved by litigation or through alternative dispute resolution mechanisms, such as negotiation, mediation, conciliation and arbitration. Over the past few years, arbitration has been increasingly used in Mexico to settle commercial disputes.

The Mexican legislation on arbitration is set out in the Code of Commerce, which incorporates most of the provisions established in the United Nations Commission on International Trade Law (UNCITRAL) and applies to domestic and international arbitration. Mexico has ratified the New York Convention and the Panama Convention.

In the case of national arbitration, the fact that local courts normally have an excessive workload makes the dispute process very lengthy and costly. In contrast, an arbitral tribunal has greater time availability, representing an important advantage.

Regarding international arbitration, the principal advantages are generally considered to be that in arbitration, both parties have the possibility of solving their dispute in a neutral forum and that the dispute will be solved by a specialist tribunal with expertise in determining such cases.

There are two main forms of arbitration. Institutional arbitration is entrusted to an arbitration institution, which administers the dispute resolution process according to its set of rules; whereas ad hoc arbitration is conducted independently according to rules specified by the parties. Arbitral resolutions are definitive and not subject to appeal.

In case of public controversies, arbitration cannot be used to resolve disputes relating to territorial resources and territorial waters within Mexican territory and, among others, resources within the exclusive maritime economic zone. Nor can it be used to resolve private disputes relating to family and civil status, agrarian issues, criminal offences, bankruptcy or employment.

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