LEGAL UPDATE

Cross-border disputes: An additional option for pre-trial discovery requests in Germany

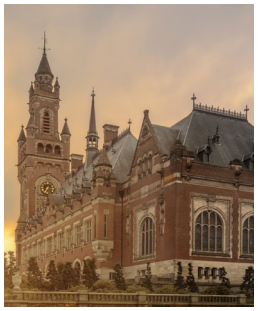
On 1 July 2022, an amendment to Germany's Implementing Act ("Implementing Act") to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Hague Evidence Convention") entered into force. The amendment enables German courts for the first time to provide legal assistance on foreign discovery orders. In practice, the amendment might provide relief for German litigants who want to obey foreign discovery orders (irrespective of their enforceability in Germany), but find themselves in conflict with German law when doing so.

The Hague Evidence Convention and its application to pre-trial discovery

The Hague Evidence Convention is a multilateral treaty which came into force in 1972. It governs the taking of evidence in cross-border situations, where evidence is required for use in judicial proceedings in one signatory state, but located in another signatory state. Under the convention each contracting state designates a "central authority" to receive and review incoming "letters of request" for taking evidence in that state.

Many civil law countries view the common law style of discovery as too broad and intrusive. Broad US style discovery is at the focus of the discussion. However, UK disclosure – while much narrower than the discovery which is allowed in the US and where the courts are generally opposed to "fishing expeditions" – is a similarly unfamiliar concept under a civil law regime. Consequently, Article 23 of the Hague Evidence Convention allows a signatory country to refuse to comply with a request for pre-trial discovery. Of the 64 signatories to the Hague Evidence Convention, 35[1] countries issued a declaration in accordance with Article 23 of the convention that they will not execute a letter of request "for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries". Prior to 1 July 2022, Germany was one of those countries.

1 The Hague Convention website currently shows 35 states have issued a declaration in accordance with Article 23, although the Federal Government of Germany mentions 28 states in its legislative reasons for the new amendment (Federal Government of Germany, Legislative reasons for the draft of 21 March 2022, Federal Parliament of Germany printed matter 20/1110, p. 38)



Germany's Article 23 declaration had the result that foreign courts could not obtain legal assistance in Germany for pre-trial discovery. However, this did not prevent US and UK courts from issuing discovery or disclosure orders against foreign parties under their own civil procedure rules.

The US Supreme Court decided in 1987 in *Aérospatiale*[2] that Hague Evidence Convention procedures are not mandatory in the US but rather optional. Since *Aérospatiale*, US courts have considered various factors, including a comity analysis, in determining whether it is appropriate in a particular case to allow discovery to proceed under the Hague Evidence Convention rather than the US civil procedure rules. More often than not, US courts have found that the US interest in allowing discovery outweighs the concerns of any countervailing foreign country. UK courts, backed by the European Court of Justice,[3] similarly took the position that the EU Evidence Regulation[4] did not limit the options of the UK courts to obtain disclosure from parties to UK litigation.[5]

According to US and UK judges, even the possibility of criminal prosecutions imposed by other jurisdictions for producing information for use in US or UK litigation does not necessarily override the court's ability to order disclosure.[6]

The unfortunate result of that practice is that German parties to a proceeding brought in a common law court can often find themselves stuck between a rock and a hard place. On the one hand, the common law court that issues a request for pre-trial discovery may order sanctions (up to a disbarment from the proceedings) or other penalties to be imposed on a party that refuses to comply with the pre-trial discovery request. On the other hand, a German company has to assess whether complying with a pre-trial discovery request is in line with its obligations under German law. German law does not generally prevent a company from complying with a foreign pre-trial discovery request. However, a German party needs to make sure that it does not breach its confidentiality obligations under German law or the provisions of the EU's General Data Protection Regulation ("GDPR"). Many of the German law concerns related to discovery orders by common law courts could be alleviated by a German court order mandating disclosure of documents. However, such an order by a German court was not obtainable through legal assistance in the past.

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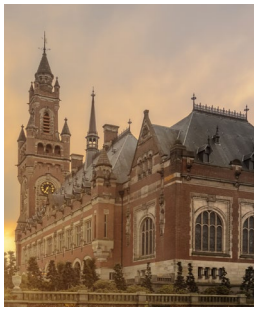
2 Aérospatiale (Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa, 482 U.S. 522 (1987)).

3 In two cases from the Netherlands and Belgium, the European Court of Justice ruled that courts who want to take evidence in another Member State still have the option to take evidence in accordance with the law of their Member State and do not have to rely on the EU Evidence Regulation, see ECJ, Judgment of 6 September 2012 – Case C-170/11 (Lippens and Others) and Judgment of 21 February 2013 – Case C-332/11 (ProRail).

4 As of 1 July 2022, Regulation (EU) 2020/1783 of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters replaced the former Council Regulation (EC) No 1206/2001 of 28 May 2001. From the end of the Brexit transition period Council Regulation (EC) No 1206/2001 and its successor Regulation (EU) 2020/1783 are no longer applicable between the UK and the EU member states. The Hague Evidence Convention has instead become applicable between the UK and those EU member states that are part of the convention: The Law Society „Taking of evidence after Brexit", available at https://www.lawsociety.org.uk/topics/brexit/taking-of-evidence-after-brexit.

5 Secretary of State for Health v Servier Laboratories Ltd and National Grid Electricity Transmission Plc v ABB Limited [2013] EWCA Civ 1234.

6 Denise E. Backhouse and Philip M. Berkowitz, The Hague Evidence Convention's rarely used private commissioner provision may be a viable option for cross-border discovery, in: The New York Law Journal, February 01, 2019 edition. See also, for example, Strauss v. Credit Lyonnais, S.A., 249 F.R.D. 429, 400 (E.D.N.Y. 2008), Catalano v B.M.W. of North America, 2016 WL 3406125 (S.D.N.Y. June 16, 2016) and Laydon v Mizuho Bank, 183 F. Supp. 3d 409 (S.D.N.Y. April 29, 2016). See also Bank Mellat v HM Treasury [2019] EWCA Civ 449, Taylor v Stoutt [2011] EWHC 324 (Ch) and Secretary of State for Health v Servier Laboratories Ltd and National Grid Electricity Transmission Plc v ABB Limited [2013] EWCA Civ 1234.



Germany will accept certain letters of request concerning pre-trial discovery as of 1 July 2022

As of 1 July 2022, Germany now allows foreign courts of countries who are signatories to the Hague Evidence Convention to ask German courts for legal assistance in pre-trial discovery proceedings, provided that their letter of request satisfies certain requirements.

Under the new wording of Section 14 of the Implementing Act German courts shall execute requests for pre-trial discovery of documents under the Hague Evidence Convention if the following prerequisites are met:

1. the documents to be produced are specified in detail;
2. the documents to be produced are of direct and clearly identifiable importance for the proceedings in question and their outcome;
3. the documents to be produced are in the possession of a party to the proceedings;
4. the request does not violate fundamental principles of German law; and
5. if the documents contain personal data, the requirements of the GDPR must be met.

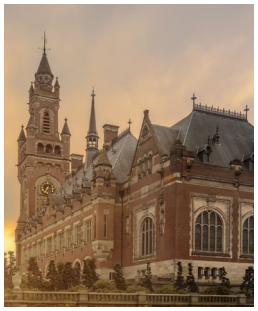
These requirements seek to safeguard the rights of German litigants, by ensuring that they are not subject to an overly broad request for the production of an entire collection of documents. If the Hague Evidence Convention is used in the way it is intended by the German legislature, it will create more legal certainty for German parties.

It remains to be seen whether foreign courts will make use of the new option to obtain evidence

Whether things will change in practice now that there is a new mechanism for obtaining pre-trial discovery in Germany remains to be seen. It depends to a large extent on how German courts will interpret Section 14 of the Implementing Act and whether or not common law courts will refine their pre-trial discovery requests in order to comply with the specific requirements of the German restrictions under the Hague Evidence Convention.

On the German side, the practical usefulness of the amended Section 14 of the Implementing Act in assisting US or UK style discovery or disclosure mainly hinges on the interpretation of prerequisites no. 1 and 2:

- It will be decisive whether the requirement of specifying the documents to be produced in detail will be interpreted narrowly to mean that each document needs to be individually identified, or whether it is sufficient to identify a specific group of documents. The German wording of the legislation suggests that documents might need to be identified individually to fulfil this requirement. Such an interpretation would be at odds with discovery practice, which does not impose a particularly high burden on an applicant with regard to the specification of documents to be disclosed. However, the legislative intent is also relevant here, and the purpose behind the amendment of the Implementing Act is to open up a possibility for common law courts to use the Hague Evidence Convention for pre-trial discovery, and to encourage them to do so. In order to give effect to that legislative intent, the German courts might be inclined to consider a broader discovery classification.



- Whether the requested documents are of direct and identifiable importance to the proceedings is also a question of discretion for the court. A US or UK definition of what is relevant or important is likely to be broader than that of a more restrictive German court definition, and it may be harder to convince a German court that a document is relevant or important than it would be to convince a common law court. Again, given that the German legislature intended to encourage the use of legal assistance in German courts, it may be that the courts will give a broader interpretation of relevance than they would otherwise have done.

On the common law side, courts take into account comity considerations when making discovery orders. Therefore, they can be expected to be more amenable to use of the Hague Evidence Convention now that there is a mechanism in place to allow for legal assistance for discovery requests in the first place. It remains to be seen whether or not common law courts will refine their pre-trial discovery requests in order to comply with the specific requirements of the German restrictions under the Hague Evidence Convention.

It may well be that foreign courts, at least in the near future, will continue to apply their own procedural law, instead of using the Hague Evidence Convention. However, if letters of request under the Hague Evidence Convention are executed quickly and efficiently, this could become the more common option of choice when dealing with pre-trial discovery requests in Germany. For German parties to a proceeding in a common law court, it would be advantageous to ensure the court is aware of this new possibility for legal assistance. It could prove a valuable tool in evading the catch-22 that they may encounter when faced with a US or UK discovery order.

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