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GERMANY AMENDS IMPLEMENTING ACT TO THE HAGUE EVIDENCE CONVENTION, NO LONGER FORBIDDING PRE-TRIAL DISCOVERY OF DOCUMENTS

To Our Clients and Friends:

It is a well-recognized principle of international law that judicial power ends at the respective state's border. Consequently, courts need to request judicial assistance if they wish to obtain evidence outside of their jurisdiction. Previously, German courts receiving a request for pre-trial discovery from a common-law jurisdiction would not execute this request – regardless of its content or origin. Due to a recent amendment to Germany's Implementing Act to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Hague Evidence Convention")[1], this situation may change in the future, thus, allowing for pre-trial discovery if certain conditions are met. Nevertheless, due to detailed prerequisites needed to execute a request, Germany is still taking a rather hesitant approach towards pre-trial discovery compared to other jurisdictions.

Status quo ante

In Germany, questions of judicial assistance for courts located outside of the European Union and regarding the taking of evidence are governed by the Hague Evidence Convention.[2] The Convention entered into force on October 7, 1972. Designed as a "bridge between common and civil law"[3], it established standardized procedures for handling Letters of Request to collect evidence abroad. As of today, 64 countries have become a contracting party to the Convention, including the US, the UK, China, the Russian Federation and a majority of European states.[4]

The Convention covers all types of taking evidence, including pre-trial discovery of documents. Nevertheless, due to concerns about invasive requests from common-law jurisdictions, the Hague Conference on Private International Law decided to allow Contracting States to declare a reservation regarding pre-trial discovery (Article 23).[5] So far, 28 countries have asserted an absolute, non-particularized reservation, while 19 states have declared that they would only execute a request within the meaning of Article 23 if it fulfilled certain requirements.[6]

When Germany joined the Hague Evidence Convention in 1977, it also decided to make use of Article 23, opting for a general, non-particularized reservation. In the following, it adopted the Implementing Act to the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters ("Implementing Act"). Section 14 of the Implementing Act provided that requests for mutual assistance relating to proceedings under

Article 23 of the Convention shall not be executed.[7] Consequently, any requests concerning pre-trial discovery would not be carried out in Germany[8] – until now.

The new German rule

On January 19, 2022, the Federal Ministry of Justice submitted a draft amending the Implementing Act. The bill was passed by the Bundestag and the Bundesrat and will enter into force on July 1, 2022.[9] It includes a revision of Section 14 of the Implementing Act, converting the previous absolute reservation under Article 23 of the Hague Evidence Convention to a qualified, particularized one. The new Section 14 of the Implementing Act will provide that courts shall execute requests for mutual assistance on pre-trial discovery of documents if the following five requirements 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 involved in the proceedings,

4. the request does not violate essential principles of German law, and,

5. in case the documents to be produced contain personal data, the requirements for transfer to a third country pursuant to Chapter V of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data, on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) ("GDPR") are met.[10]

With the amendment, Germany follows a recommendation of the Special Commission of the Hague Conference on Private International Law that has been reviewing the Evidence Convention and its application.[11] The Commission stated that the purpose of Article 23, namely "to ensure that a request for the production of documents [is] sufficiently substantiated so as to avoid requests whereby one party merely seeks to find out what documents may generally be in the possession of the other party to the proceeding"[12], could easily be achieved with a particularized declaration similar to the one submitted by the UK.[13] Germany had already tried to introduce an almost identical version of the new Section 14 in 2017 but withdrew the amendment from the bill at the last minute. At the time, the Judicial Affairs Committee doubted the benefit of the proposed rule and justified the withdrawal by arguing that the taking of evidence aimed at stating which documents were in one's possession ("Ausforschungsbeweis") was inadmissible[14] – even though such requests were (also) excluded in the 2017 draft and the German Federal Constitutional Court had explicitly stated in 2007 that pre-trial discovery *per se* was constitutional and did not violate fundamental principles of German law.[15] The unsatisfactory state of limbo since then has now been rectified by the modification.

Still, the recent amendment shows that Germany is taking a rather critical approach towards pre-trial discovery, defining more detailed and extensive requirements than the UK or other jurisdictions. Nevertheless, looking closely at the new provision, only one requirement may lead to blatant restrictions

of document production. While the first two conditions reflect the basic rationale of the UK declaration to prevent unreasonable 'fishing expeditions', the fourth and fifth prerequisite are merely declaratory. Article 12 lit. b of the Evidence Convention already provides that a court may refuse execution of a request if it would prejudice the state's sovereignty or security, thus containing an *ordre public*-reservation. Furthermore, German courts may also refer to potential violations of German local law to turn down a request pursuant to Article 11 of the Convention. Similarly, compliance with the GDPR as prescribed in Section 14 No. 5 of the Implementing Act is required within the EU in any case, thus creating no additional obstacles.[16]

The most significant limitation to pre-trial discovery requests, however, is the exclusion of third parties not involved in the proceedings (No. 3). No other Contracting State has issued a similar declaration. German civil procedure law does not recognize such a restriction either: In domestic proceedings, third parties can be obliged to produce documents pursuant to Section 142 of the German Code of Civil Procedure.[17] As a result, the Implementing Act's new provision ultimately contradicts the German legislator's intention to eliminate fundamental differences in obtaining evidence in domestic and international cases.[18]

Implications for future proceedings

The recent amendment will enable German courts to execute pre-trial discovery requests from foreign courts. Currently, Australia, Barbados, India, Syria, Seychelles, Singapore, South Africa, Sri Lanka, the UK and the US utilize this type of evidence taking and are Contracting States to the Evidence Convention.[19] Among these, requests from the US and the UK most likely have the greatest practical relevance.[20]

It remains to be seen whether Germany's change in direction will have a significant impact on future transnational litigation. In the past, instead of referring to the Hague Evidence Convention, foreign courts often applied their own procedure law extraterritorially to fulfill pre-trial discovery requests in Germany.[21] It is unlikely that the recent amendment will put a halt to this practice. As it happens, the previous draft to the Implementing Act from 2017 had expressed the hope that an amendment would lead US courts to preferentially refer to the Hague Convention because they could count on an effective and fast execution of their requests. Whether this will actually happen is debatable – and quite possibly, somewhat naïve. Be that as it may, the new German Implementing Act offers foreign courts and parties an additional route to deal with pre-trial discovery request in Germany – and ultimately furthers the Hague Convention's initial objective to strengthen the often shaky bridge between civil and common law.

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[1] Gesetz zur Ausführung des Haager Übereinkommens vom 15. November 1965 über die Zustellung gerichtlicher und außergerichtlicher Schriftstücke im Ausland in Zivil- oder Handelssachen und des Haager Übereinkommens vom 18. März 1970 über die Beweisaufnahme im Ausland in Zivil- oder Handelssachen [AusfG HZÜ/HBÜ] [Implementing Act to the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

and to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters], Dec. 22, 1977, BGBl. I at 3105, last amended Jan. 11, 2017, BGBl. I at 1607, see https://www.justiz.nrw.de/Bibliothek/ir_online_db/ir_htm/65_70_ausfuehrungsgesetz.htm.

[2] Evidence requests from one EU member state court to another are governed by the European Evidence Regulation (EU) 2020/1783, see https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020R1783.

[3] See Hague Conference on Private International Law, Conclusions and Recommendations adopted by the Special Commission on the Practical Operation of the Hague Apostille, Evidence and Service Conventions (28 October to 4 November 2003), p. 7, available at https://www.hcch.net/en/publications-and-studies/details4/?pid=3121&dtid=2.

[4] For an up-to-date status report on the Convention, see https://www.hcch.net/en/instruments/conventions/status-table/?cid=82.

[5] Article 23 Hague Evidence Convention: A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries, see https://assets.hcch.net/docs/dfed98c0-6749-42d2-a9be-3d41597734f1.pdf.

[6] See Regierungsentwurf [Cabinet Draft], Bundestag Drucksachen [BT] 20/1110, p. 34, available at https://dserver.bundestag.de/btd/20/011/2001110.pdf.

[7] § 14 AusfG HZÜ/HBÜ: (1) Rechtshilfeersuchen, die ein Verfahren nach Artikel 23 des Übereinkommens zum Gegenstand haben, werden nicht erledigt [free translation: Requests for mutual assistance concerning proceedings under Article 23 of the Convention shall not be executed.].

[8] See Oberlandesgericht Frankfurt [Higher Regional Court Frankfurt], Order dated May 16, 2013 – 20 VA 4/13, BeckRS 2013, 12264.

[9] See Gesetzesbeschluss [Law Decree], Bundesrat Drucksachen [BR] 225/22, Article 23, available at https://www.bundesrat.de/SharedDocs/drucksachen/2022/0201-0300/225-22.pdf?__blob=publicationFile&v=1.

[10] § 14 AusfG HZÜ/HBÜ-E: Rechtshilfeersuchen, die ein Verfahren nach Artikel 23 des Übereinkommens zum Gegenstand haben, werden nur erledigt, wenn 1. die vorzulegenden Dokumente im Einzelnen genau bezeichnet sind, 2. die vorzulegenden Dokumente für das jeweilige Verfahren und dessen Ausgang von unmittelbarer und eindeutig zu erkennender Bedeutung sind, 3. die vorzulegenden Dokumente sich im Besitz einer an dem Verfahren beteiligten Partei befinden, 4. das Herausgabeverlangen nicht gegen wesentliche Grundsätze des deutschen Rechts verstößt und, 5. soweit personenbezogene Daten in den vorzulegenden Dokumenten enthalten sind, die Voraussetzungen für die Übermittlung in ein Drittland nach Kapitel V der Verordnung (EU) 2016/679 des Europäischen Parlaments und des Rates vom 27. April 2016 zum Schutz natürlicher Personen bei der Verarbeitung personenbezogener Daten, zum freien Datenverkehr und zur Aufhebung der Richtlinie 95/46/EG

(Datenschutz-Grundverordnung) (ABl. L 119 vom 4.5.2016, S. 1; L 314 vom 22.11.2016, S. 2; L 127 vom 23.5.2018, S. 2; L 74 vom 4.3.2021, S. 35) erfüllt sind [no official translation available].

[11] See Hague Conference on Private International Law, Conclusions and Recommendations of the Special Commission on the Practical Operation of the Hague Apostille, Service, Taking of Evidence and Access to Justice Conventions (2 to 12 February 2009), p. 9, available at https://www.hcch.net/en/publications-and-studies/details4/?pid=4694&dtid=2.

[12] *Id*. at 7.

[13] "In accordance with Article 23 Her Majesty's Government declare that the United Kingdom will not execute Letters of Request issued for the purpose of obtaining pretrial discovery of documents. Her Majesty's Government further declare that Her Majesty's Government understand 'Letters of Request issued for the purpose of obtaining pre-trial discovery of documents' for the purposes of the foregoing Declaration as including any Letter of Request which requires a person: a. to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or b. to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in his possession, custody or power.", see https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=564&disp=resd.

[14] See Regierungsentwurf [Cabinet Draft], Bundestag Drucksachen [BT] 18/11637, p. 4.

[15] See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Order dated January 24, 2007 - 2 BvR 1133/04, BeckRS 2009, 71201, para. 15; a few years later, the court affirmed the decision and further stated that submitting to pre-trial discovery would not prevent recognition of the decision in Germany, see Order dated November 3, 2015 - 2 BvR 2019/09, BeckRS 2015, 55670, para. 43.

[16] For an overview of the GDPR, see https://www.gibsondunn.com/the-general-data-protection-regulation-a-primer-for-u-s-based-organizations-that-handle-eu-personal-data/.

[17] § 142 Code of Civil Procedure [ZPO]: (1) The court may direct one of the parties or a third party to produce records or documents, as well as any other material, that are in its possession and to which one of the parties has made reference. […] (2) Third parties shall not be under obligation to produce such material unless this can be reasonably expected of them, or to the extent they are entitled to refuse to testify pursuant to sections 383 to 385 [official translation]; the Max Planck Institute for Procedural Law and the Max Planck Institute for Private International Law have criticized the new version of the Implementing Act for this exact reason, see https://www.mpipriv.de/1496224/20222903-gemeinsame-stellungnahmen-zweier-max-planck-institute-fuer-das-bmj.

[18] See Regierungsentwurf [Cabinet Draft], Bundestag Drucksachen [BT] 20/1110, p. 34.

[19] *Id*. at 22.

[20] Post-Brexit, the European Evidence Regulation no longer applies to judicial assistance requests. Instead, these issues are now governed by the Hague Evidence Convention. Disclosure pursuant to Part 31 of the UK Civil Procedure Rules qualifies as pre-trial discovery within the meaning of Article 23 of the Evidence Convention.

[21] Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct., 482 U.S. 519, 533, 539 (1987), holding that the Evidence Convention serves only as an optional supplement to the Federal Rules of Civil Procedure which provide ample means to obtaining evidence if the parties are subject to the court's jurisdiction.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these issues. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Transnational Litigation practice group, or the following authors:

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