

Germany Lifted Its Foreign Discovery Ban, But Hurdles Persist

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Until June 30, any foreign court outside the European Union that requested pretrial discovery in Germany under the 1970 Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters would have hit a dead end.

Germany had opted out of its judicial assistance duties, with the German Implementing Act to the Evidence Convention simply stating that such requests would not be executed.

As of July 1, however, the Implementing Act has been amended, and judicial assistance with this type of evidence taking is allowed if certain conditions are met.[1]

Still, foreign courts will not receive a free pass because the new rule imposes rather strict requirements on requests for pretrial discovery of documents and will likely meet persistent skepticism in the judiciary.

Pretrial Discovery and the Hague Evidence Convention

Pretrial discovery under the Hague Evidence Convention has always been subject to heated debates. The Evidence Convention establishes standardized procedures to handle letters of requests directed at collecting evidence in foreign jurisdictions. When the Hague Conference on Private International Law was negotiating the content of the Hague Evidence Convention in 1967-68, several states expressed concerns about excessive and invasive discovery requests from common-law jurisdictions.

As a compromise, the convention that entered into force in 1970 allowed in Article 23 that 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 pretrial discovery of documents as known in Common Law countries."

Today, out of the 64 contracting states, 27 have asserted an absolute, nonparticularized reservation, while 20 have declared that they would only execute a request within the meaning of Article 23 if it fulfilled certain requirements.[2]



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Old and New Legal Framework in Germany

Previously, Germany was among the first group, forbidding pretrial discovery entirely. Legislation stated that requests for judicial assistance relating to proceedings under Article 23 of the Hague Evidence Convention would not be executed.[3]

The first attempt to change the law failed in 2017. The second attempt at reform, however, proved to be more successful: On July 1, a bill to amend the Implementing Act entered into force.

The new Section 14 of the Implementing Act to the Hague Evidence Convention provides that courts shall execute requests for mutual assistance on pretrial 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 2016/679 of the European Parliament and of the Council of April 27, 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, are met.

Prerequisites for Pretrial Discovery Requests

At first sight, the new German rule presents a significant change because document production prior to proceedings is no longer outright banned.

A closer look, however, reveals that Germany remains rather hesitant toward pretrial discovery, placing strict limitations on the admissibility of these requests. The legal situation under the new rule resembles the situation under the national civil procedure rules where, in practice, requests for the production of documents play no substantial role.

The first two conditions, calling for a detailed description of the requested documents and some significance for the proceedings, aim at avoiding so-called fishing expeditions, an objective reflected in several implementing laws and reservations of contracting states.[4]

The most significant restriction of the new provision is that third parties not involved in the proceedings may not be subject to pretrial discovery requests. Germany is the only contracting state that has placed such a severe limitation on the scope of judicial assistance.

The decision to include this restriction is even more surprising given that third parties may be obliged to produce documents under Section 142 of Germany's Code of Civil Procedure.[5] There is no apparent

reason for treating national and international cases as so fundamentally different.

Finally, the fourth and fifth prerequisites for discovery requests are mainly declaratory. Articles 11 and 12(b) of the Hague Evidence Convention already prevent the execution of requests that violate local law or a state's sovereignty. Similarly, EU law requires compliance with the General Data Protection Regulation in any case, leaving the fifth condition with no additional scope of application.

Implications for Transnational Proceedings

The practical implications of the recent amendment cannot be fully anticipated at this point.

Currently, Australia, Barbados, India, Syria, Seychelles, Singapore, South Africa, Sri Lanka, the U.K. and the U.S. use some form of pretrial discovery and are contracting states to the Evidence Convention.[6] Consequently, any court in these jurisdictions would need to approach the central authority located in their home state to forward a pretrial discovery request to the central authorities in each federal state in Germany.

Whether courts and parties will actually decide to take this route remains to be seen. It is possible that the administrative detour will be perceived as a hurdle.

Furthermore, U.S. courts in particular managed to circumvent the previous restrictions of German law by applying their own procedural law extraterritorially, mainly by extending what they perceive as being still in control of a party even if this party is domiciled abroad.[7]

In any case, extensive discovery requests from U.S. courts will not be executed due to the restrictions in Section 14 of the updated Implementing Act. Consequently, the recent amendment may not lead to an increased use of the Hague Evidence Convention in cases from the U.S.

The new German legal framework offers foreign courts and parties an additional route to deal with pretrial discovery request in Germany. Ultimately, it may also further the Hague Convention's initial objective of further international cooperation.

Nevertheless, parties seeking pretrial discovery should keep in mind the strict requirements that their requests need to fulfill to be executed by German courts. As previously mentioned, the corresponding provision of the national civil procedure rules in Section 142 of the Code of Civil Procedure for all practical purposes lives only in the shadows and not the courtroom, because the German judiciary does not like to be bothered with requests for the production of documents.

One should not expect that the new rules concerning the Hague Evidence Convention would change this rather conservative mindset.

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[1] 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 Jun. 24, 2022, BGBl. I at 959, available at https://www.gesetze-im-internet.de/haag_bkag/Haag%C3%9CbkAG.pdf?_sm_au_=iHVR3w3QvDnjJ3trFcVTvKQkcK8MG.

[2] See Regierungsentwurf [Cabinet Draft], Bundestag Drucksachen [BT] 20/1110, p. 34, available at https://dserver.bundestag.de/btd/20/011/2001110.pdf?_sm_au_=iHVR3w3QvDnjJ3trFcVTvKQkcK8MG.

[3] §14 AusfG HZÜ/HBÜ (old version): (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.].

[4] For example, see the reservation by the U.K., www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=564&disp=resd.

[5] §142 Code of Civil Procedure [ZPO].

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

[7] *Société Nationale Industrielle Aerospatiale v. U.S. Dist. Ct.*, 482 U.S. 522, 533, 539 (1987).