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Taking evidence by videoconference

 Germany

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1 Is it possible for evidence to be taken by videoconference either with the participation of a court in the requesting Member State or directly by a court of that Member State? If yes, what are the relevant national procedures or laws that apply?

If, at the request of another Member State, a German court conducts an examination pursuant to Articles 12 et seq. of the Taking of Evidence Regulation, German national law will apply. In accordance with Section 284(2) of the Code of Civil Procedure [*Zivilprozessordnung*], such an examination may be conducted by means of a videoconference. Pursuant to Article 14 of the Taking of Evidence Regulation, the court of the other Member State may join the German court's taking of evidence as an observer, provided that this is compatible with the law of the Member State of the foreign court. Furthermore, the foreign court may request to actively participate in the taking of evidence by the German court, for example by posing supplementary questions (Article 14(3), first sentence, second alternative, of the Taking of Evidence Regulation). The German court will then decide, in accordance with German law, whether to grant consent to the active participation of the foreign court in the taking of evidence (Articles 14(4) and 12(2) of the Taking of Evidence Regulation).

However, under Articles 19 and 20 of the Taking of Evidence Regulation, a court of another Member State may also directly conduct the taking of evidence in Germany by means of a cross-border videoconference. Within 30 days of receiving the request for the direct taking of evidence, the central body or the competent authority of the requested Member State must inform the requesting court, using a form, as to whether the request has been accepted and, if necessary, must inform the requesting court of the conditions under which the direct taking of evidence is to be carried out in accordance with the law of its Member State (Article 19(4) of the Taking of Evidence Regulation). The requesting court must conduct the direct taking of evidence in accordance with the law of its Member State (Article 19(8) of the Taking of Evidence Regulation).

If, pursuant to Articles 12 et seq. of the Taking of Evidence Regulation, a German court conducts an examination at the request of another Member State, the provision governing the examination of witnesses by audio-visual transmission in first-instance proceedings before the regional courts can be found in Section 284(2) of the Code of Civil Procedure. This also applies to the local courts, by virtue of the referral provision set out in Section 495(1) of the Code of Civil Procedure. Under this provision, in appropriate cases and provided that sufficient capacities are available, the court may, upon request or of its own motion, permit or order the taking of evidence by means of videoconferencing technology (Section 284(2), first sentence, of the Code of Civil Procedure). The right to submit a request is open to the parties to the proceedings, witnesses and experts (Section 284(2), second sentence, of the Code of Civil Procedure). The refusal of a request is not subject to appeal. Both the respective addressee of the order and the parties to the proceedings may lodge an objection to a court order within a period of two weeks (Section 284(2), third and fourth sentences, read in conjunction with Section 128a(2), second sentence, 128a(4), first and second sentences, and 128a(7) of the Code of Civil Procedure). The order must indicate this. An objection must be lodged within a period of two weeks; it does not need to be substantiated. If the objection is lodged within the deadline, the court must lift the order in respect of all parties to the proceedings and witnesses in respect of whom an order has been issued (Section 128(4), first sentence, of

the Code of Civil Procedure). In such cases, the presiding judge must permit those parties to the proceedings that have not lodged an objection to participate by audio-visual transmission (Section 128(4), second sentence, of the Code of Civil Procedure).

Pursuant to Section 30(5) of the Act on proceedings in family matters and in matters of non-contentious jurisdiction [*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit*], in appropriate cases and provided that sufficient capacities are available, the court may, upon request or of its own motion, permit the examination of witnesses or experts by audio-visual transmission in proceedings in family matters and in matters of non-contentious jurisdiction. The right to submit a request is open to the parties, witnesses and experts. The court is not authorised to order a video examination. Decisions to permit or refuse examination by audio-visual transmission are not subject to appeal.

2 Are there any restrictions on the type of person who can be examined by videoconference – for example, is it only witnesses or can others such as experts or parties also be examined in this way?

Witnesses, experts and parties may all be examined by videoconference.

3 What restrictions, if any, are there on the type of evidence that can be obtained by videoconference?

Under German civil procedure law, evidence may be taken by examining witnesses, experts and parties via videoconference technology. Visual inspection by means of video evidence is also permitted. Only evidence by documents is not permitted to be taken by videoconference (Section 284(2), first and fifth sentences, of the Code of Civil Procedure).

4 Are there any restrictions on where the person should be examined by videoconference – i.e. does it have to be in a court?

No specific requirements are imposed in respect of the locations of the persons to be examined. In principle, this may be any location. However, the court may order parties, witnesses and experts who are to be examined to attend a court site specified by the court during the video examination (Section 284(3) of the Code of Civil Procedure). If the court exercises this power, the person to be examined is not free to be at a location of their own choosing during the video examination and must instead be present in a court building, which does not necessarily have to be the court of the proceedings. If the examination takes place in a court building, it can be ensured that, during the examination, no third parties exert influence on the person to be examined or attempt to influence their manner of giving evidence.

5 Is it permitted to record videoconference hearings and, if so, is the facility available?

Section 284(2), third sentence, read in conjunction with Section 128a(6), first sentence, of the Code of Civil Procedure, lays down an explicit prohibition on the recording of video examinations by parties to the proceedings and third parties. This prohibition also applies to the taking of evidence in accordance with the Taking of Evidence Regulation. On the other hand, the court is permitted to record the video examination, solely for the purposes of provisional documentation (Section 284(2), third sentence, read in conjunction with Section 128a(6), third sentence, of the Code of Civil Procedure).

6 In what language should the hearing be conducted: (a) where requests are made under Articles 12 to 14 of the Taking of Evidence Regulation; and (b) where there is direct taking of evidence under Articles 19 to 21 of the

Taking of Evidence Regulation?

a) As a rule, a German requested court will conduct the examination in the German language (see Section 184, first sentence, of the Constitution of Courts Act [*Gerichtsverfassungsgesetz*]: 'The language of the court is German.'). If proceedings involve persons who do not have a command of the German language, interpreters must be engaged (Section 185(1), first sentence, of the Constitution of Courts Act). The services of interpreters may be dispensed with where all the persons involved have a command of the foreign language concerned.

b) If a foreign court conducts the direct taking of evidence pursuant to Articles 19 and 20 of the Taking of Evidence Regulation, it depends on whether the competent German central body or competent authority that approves the direct taking of evidence in Germany lays down as a condition for the direct taking of evidence in accordance with Article 19(4) of the Taking of Evidence Regulation that the examination must be conducted in German or interpreted into the German language. Such a condition is common in practice.

7 If interpreters are required, who is responsible for providing them and where should they be located (a) where requests are made under Articles 12 to 14 of the Taking of Evidence Regulation; and (b) where there is direct taking of evidence under Articles 19 to 21 of the Taking of Evidence Regulation?

In the taking of evidence pursuant to Articles 12 to 14 of the Taking of Evidence Regulation, the requested court must, in principle, provide for interpretation. According to the wording of Form A of the Taking of Evidence Regulation, this is likely to apply even in cases where interpretation is only required because the requesting foreign court wishes to observe the taking of evidence. However, the courts involved are also permitted to reach agreement on different arrangements. If a German court appoints an interpreter, the interpreter will be regularly located in Germany.

In the direct taking of evidence pursuant to Articles 19 to 20 of the Taking of Evidence Regulation, the requesting court is responsible, in principle, for providing interpreting. However, when applying for the direct taking of evidence, assistance in finding a suitable interpreter may be requested (Article 20(2), second subparagraph, of the Taking of Evidence Regulation).

8 What procedure applies to the arrangements for the hearing and to notify the person to be examined about the time and place (a) where requests are made under Articles 12 to 14 of the Taking of Evidence Regulation; and (b) where there is direct taking of evidence under Articles 19 to 21 of the Taking of Evidence Regulation? For both options, how much time should be allowed when arranging the date of the hearing to enable the person to receive sufficient notification?

If a German court is to conduct an examination in Germany under German law (Article 12(2) of the Taking of Evidence Regulation) at the request of a foreign court pursuant to Articles 12 to 14 of the Taking of Evidence Regulation, it will, as a rule, formally summon the person to be examined. Witnesses' summons must specify the parties to the legal dispute, the subject matter of the examination, the date and place of the examination and the consequences of non-appearance (Section 377(2) of the Code of Civil Procedure). Pursuant to Section 377(2)(4) of the Code of Civil Procedure, in the case of Section 284(2) of the same Code, the summons must include the instruction to ensure audio-visual transmission for the giving of testimony. No specific period of advance notice is laid down. In connection with summons for experts, Section 402 of the Code of Civil Procedure makes reference to Section 377 of the same Code. For examinations of parties, a summons is issued pursuant to Section 450(1), second and third sentences, of the Code of Civil Procedure.

In connection with the direct taking of evidence pursuant to Articles 19 and 20 of the Taking of Evidence

Regulation, the requesting court will inform the person to be examined of the time and place of the examination in accordance with the law of that court's State (Article 19(8) of the Taking of Evidence Regulation). Because this form of taking evidence is only possible with the voluntary cooperation of the person concerned (Article 19(2) of the Taking of Evidence Regulation), such persons may not be threatened with coercive measures or consequences for non-appearance. As a rule, the summons from the requesting court is also not formally served on the persons concerned. The time and place at which the examination of the persons concerned take place often depends on whether the competent central body or competent authority lays down conditions when granting approval for the taking of evidence, and if so on what they are. In principle, there is no fixed deadline; however the fact that international deliveries by post take longer should be taken into consideration.

9 What costs apply to the use of videoconferencing and how should they be paid?

The use of videoconferencing technology entails the cost of purchasing, maintaining and operating the facilities. Requested courts may claim reimbursement of costs for the use of videoconferencing technology, and the same applies to related interpreting costs (Article 22(2), read in conjunction with Article 12(4), of the Taking of Evidence Regulation).

10 What requirements, if any, are there for ensuring that the person examined directly by the requesting court has been informed that the performance shall take place on a voluntary basis?

Under Section 63(7) of the Regulation on judicial assistance in civil cases [*Rechtshilfeordnung für Zivilsachen*], the German requesting court must inform the person to be examined that the examination is being conducted on a voluntary basis. When granting approval for foreign requests, German bodies generally inform the foreign requesting court that the examination is only possible on a voluntary basis and that this must be indicated in the summons issued by the requesting court. In cases where no German court is involved in the examination, the witness to be examined is also contacted by the German authority granting approval and informed about the requirement that participation be voluntary.

11 What procedure exists for verifying the identity of the person to be examined?

If there are doubts about the identity of the person to be examined, the court may, at any stage of the proceedings, take measures of organisation of procedure to verify this. The person to be examined may be asked questions about their identity during the examination and may be required to present identification documents for verification. If it is not possible to verify the identity of the person to be examined, who is located at the other location, it may be necessary to suspend or terminate the video examination.

12 What requirements for taking oaths apply and what information is needed from the requesting court when an oath is required during direct taking of evidence under Articles 19 to 21 of the Taking of Evidence Regulation?

If a German court is requested by a foreign court to take evidence, the taking of evidence generally takes place in accordance with German procedural law (Article 12(2) of the Taking of Evidence Regulation). In principle, the same applies to the taking of oaths. However, the German court will also take into account the rights to refuse to take an oath under the law of the requesting State communicated to it in the request (Form A, point 11).

In the direct taking of evidence, the cooperation of the person providing information is voluntary. The same applies to the person providing information's cooperation in the taking of an oath, and they must be informed of this.

German civil procedure law provides for the possibility of swearing in witnesses, experts and parties in the

context of the taking of evidence.

A witness may be sworn in pursuant to Section 391 of the Code of Civil Procedure if the court considers it appropriate in view of the importance of the testimony or to elicit truthful testimony. The parties may waive swearing-in, however. The swearing-in takes place after a person is examined; several witnesses may be sworn in simultaneously (Section 392, first and second sentences, of the Code of Civil Procedure). The content of the oath provision is governed by Section 392, third sentence, of the Code of Civil Procedure and must be explained to the witness before the oath is taken. Under Section 393 of the Code of Civil Procedure, certain persons cannot be sworn in. These include minors who have not yet reached the age of 16 and persons who, due to mental impairments, are unable to understand the significance of the oath.

Experts are sworn in pursuant to Section 410 of the Code of Civil Procedure either before or after submitting their expert report. The oath provides assurance that the expert report is submitted impartially and to the best of the expert's knowledge and belief. Experts who have already been publicly appointed and sworn in are not required to take the oath again and may instead rely on their existing swearing-in.

Pursuant to Section 452 of the Code of Civil Procedure, the court may require a party to swear to the veracity of their testimony if the unsworn testimony is insufficient to establish the truth or falsehood of the fact to be proven. If both parties have been examined regarding the same fact, only one party may be sworn in. The oath wording corresponds to that used for witnesses. The opposing party may waive the swearing-in. Section 453(1) of the Code of Civil Procedure requires the court to freely assess the party's testimony in accordance with Section 286 of the same Code. If the party refuses to give testimony or to take the oath, what is laid down in Section 446 of the Code of Civil Procedure applies *mutatis mutandis*. This provision states that, in such cases, the court must decide, based on its free conviction and taking into account the entirety of the circumstances, in particular the reasons given for refusal, whether it considers the alleged fact to be proven.

The provisions of Sections 478 to 484 of the Code of Civil Procedure apply to the administration of oaths in general. They state that the oath must be taken personally. Before taking the oath, the person in question must be informed about the significance of the oath and the option to choose between a religious or non-religious oath wording. The content of the oath wording is set out in Section 481(1) to (3) of the Code of Civil Procedure.

Persons with speech or hearing impairments may take the oath by repeating, writing down, or with the assistance of a communication assistant (Section 483(1), first sentence, of the Code of Civil Procedure). Anyone who refuses to take an oath for reasons of faith or conscience may make a solemn affirmation, which is legally equivalent to the oath (Section 484(1) of the Code of Civil Procedure).

Regardless of whether the examinations are conducted under oath, German authorities must also ensure, when granting foreign requests pursuant to Article 19 of the Taking of Evidence Regulation, the observance of prohibitions on testimony or examination (under German law) that are not subject to the discretion of the person giving evidence. Examples of this are the bans on examining German public servants without the prior approval of the authority for which they work, or examining doctors without their being released from their duty of confidentiality.

13 What arrangements are there for ensuring that there is a contact person at the place of the videoconference with whom the requesting court can liaise and a person who is available on the day of the hearing to operate the videoconferencing facilities and deal with any technical problems?

The German judicial system is organised federally and is the responsibility of the relevant *Land's* judicial administration. This means that there are no standard rules on this issue at national level and that evidence-taking is conducted and implemented by the relevant *Land's* judicial administration.

14 What, if any, additional information is required from the requesting

court?

For the conducting of an examination by the requested court, it is helpful if the requesting court not only describes the facts to which the taking of evidence is to relate but also submits a list of questions to the requested court. In requests for the direct taking of evidence where a German court is to provide practical assistance, the necessary information must be set out in Form N.

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