

Germany's responses to the questionnaire on the treatment of foreign law

Germany welcomes the goal of improving information on foreign law in order to make it easier to apply. The Federal Government takes the view that the questionnaire drafted by the Permanent Bureau is a highly useful tool in order to ascertain and compare practice in the treatment of foreign law in the Member States. It therefore considers it to make sense to make the responses available to the other States in a suitable form, such as via the website of the Hague Conference.

In the German view, the questions in Parts I to III are to be answered as follows. The European Union will be submitting a statement on Part IV of the questionnaire.

Identification

Name of the Member State: **GERMANY** _____

For follow-up purposes

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Part I – General Questions

Please answer the following general questions with regard to the *European Convention of 7 June 1968 on Information on Foreign Law* (the "London Convention"), the *Inter-American Convention of 8 May 1979 on Proof of and Information on Foreign Law* (the "Montevideo Convention"), the *Convention of 22 January 1993 on Legal Assistance and Legal Relations in Civil, Family, and Criminal Matters* (the "Minsk Convention") and any bilateral treaty on proof of and / or information on foreign law ("bilateral treaty").

In this Questionnaire, the term "foreign law" encompasses both foreign internal (substantive) law and foreign private international law.

- 1) Is your State Party to:
a) The London Convention¹ YES NO

¹ This Convention is not restricted to Member States of the Council of Europe (Art. 18). See Prel. Doc. No 21 C, *supra*, note 2, for the text of that Convention.

- b) The Montevideo Convention² YES NO
 c) The Minsk Convention³ YES NO
 d) Any bilateral treaty YES NO

(Please indicate the number of bilateral treaties concluded: **1** -
Convention between the Federal Republic of Germany and the Kingdom of Morocco concerning judicial assistance and information in civil and commercial matters of 29 October 1985

2) If not, does your State intend to become in the near future a Party to:

- a) The London Convention YES NO
 b) The Montevideo Convention YES NO
 c) The Minsk Convention YES NO
 d) or conclude any bilateral treaty YES NO

3) Please indicate (if applicable) the number of requests received in 2006 and the average number of weeks taken to respond to the requests under:

- a) The London Convention No of requests: **31** No of weeks: **3**
 b) The Montevideo Convention No of requests: - No of weeks: -
 c) The Minsk Convention No of requests: - No of weeks: -
 d) Any bilateral treaty No of requests: **0** No of weeks: -

4) Please indicate (if applicable) the number of requests that emanated from the judicial authorities in your State in 2006 and the average number of weeks taken to respond to these requests under:

- a) The London Convention No of requests: **15** No of weeks: **20**
 b) The Montevideo Convention No of requests: - No of weeks: -
 c) The Minsk Convention No of requests: - No of weeks: -
 d) Any bilateral treaty No of requests: **0** No of weeks: -

² This Convention is not restricted to Member States of the Organisation of American States (Art. 13). See Prel. Doc. No 21 C, *supra*, note 2, for the text of that Convention.

³ The Minsk Convention states in Art. 15 that "[t]he central judicial authorities of the Contracting States shall provide one another upon request with information about the internal legislation in effect or which was in effect on their territories and about the practices of its application by the judicial authorities". This Convention is not restricted to Member States of the Commonwealth of Independent States (Art. 86). The text of the Minsk Convention can be found in Prel. Doc. No 27 of April 2005, "The Relationship between the Judgments Project and certain Regional Instruments in the arena of the Commonwealth of Independent States", prepared by E. Gerasimchuk for the Permanent Bureau, for the attention of the Twentieth Session of June 2005 on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Ann. II. This document is available at: < www.hcch.net >, under "Conventions", then "Convention No 37", and "Preliminary Documents".

- 5) Do you foresee an increase in the number of requests referred to in:
- a) Question No 3 (incoming requests)
 YES
 NO
- b) Question No 4 (outgoing requests)?
 YES
 NO
- 6) If so, in which areas of the law? Please specify for each of the sub-questions:
- a) -
- b) -
- 7) Please indicate, if applicable, in bullet form to what extent you are satisfied with the instruments referred to in Question No 1:

No detailed information can be provided because of the small number of cases, in particular not as regards the quality of the information. In some cases however it takes a very long time before the information is available.

The concept of the London Convention still appears to be sensible and expedient today. Also the fact that requests can be transmitted only via specific authorities nominated by the Contracting Parties (as a rule the Ministries of Justice) (Art. 5 of the Convention) does not necessarily lead to a considerable delay. In this instance, it is a matter for each contracting state to ensure that its transmitting agency rapidly passes on the requests for information submitted by its courts.

- 8) Please indicate, if applicable, in bullet form any shortcomings of these instruments:⁴

None.

Part II – Free public access to information on the content of the law

- 9) Does your State and / or Regional Economic Integration Organisation ("REIO") provide online access to its legislation⁵ through an official (governmental) website?

YES. Please specify whether this information is also provided in a non-official language and, if so, in which language(s):

Applicable federal law can be called up free of charge on the website <http://www.gesetze-im-internet.de>. The provisions are as a rule only available in German. This site however also contains an English translation of the Civil Code (*Bürgerliches Gesetzbuch*), the central codification of German civil law.

⁴ A list of Recommendations regarding day-to-day operations of the London Convention can be found in Prel. Doc. No 21 A, *supra*, note 2, Ann. 2, paras 62-63.

⁵ In force or which was in force.

Over and above this, information on German civil law is published in all official languages of the European Union on the website of the European Judicial Network in civil and commercial matters (<http://ec.europa.eu/civiljustice>).

Most German *Länder* also have portals facilitating access to their respective *Land* law.

Case-law can as a rule be accessed via the websites of the courts in question.

[] NO. Does another, non-governmental body or organisation provide this information online (please specify which organisation or body)?

10) Does your State and / or REIO respond to written or oral requests for information on the content and / or application of its law?^{6 7}

⁶ In this Part, and questions related thereafter in Part IV, the term "law" encompasses both internal (substantive) law and private international law, including relevant provisions in treaties and Conventions.

⁷ The areas could include the following subjects: the legal order in general; organisation of the courts of justice system; organisation of the administrative tribunals system; legal professions; access to justice including legal aid; jurisdiction of the courts / administrative tribunals; bringing a case to a court / an administrative tribunal; alternative dispute resolutions; procedural time limits; applicable law; service of documents; taking of evidence and modes of proof; interim measures and precautionary measures; enforcement of judgments; simplified and accelerated procedures; marriage and nullity of marriage; divorce and legal separations; parental responsibility; parent-child relationship; international child protection including child abduction and child adoption; protection of adults; maintenance (child support and other forms of family support); traffic accidents; products liability; other types of torts; consumer protection; commercial contracts; sale of goods; securities transactions; property; secured interests; inheritance; bankruptcy; choice of court agreements; or legalisation and / or certification of documents.

YES. Please specify for which areas of the law:

NO. Does another, non-governmental body or organisation provide this service (please specify which organisation or body)?

Consultation on legal matters in Germany is in principle a matter for solicitors. State agencies may as a rule not give binding legal advice in individual cases. Over and above this, for instance associations may under certain preconditions also offer legal advice to their members.

- 11) Are the services in Question No 10 available to people in other States?
 YES. Is this service offered in any non-official language and, if so, in which?

Individuals and enterprises resident in another State may avail themselves of the services of a German solicitor. The same applies in principle also to associations. The language of communication depends on the solicitor in question. The respective German embassies have lists of German-speaking solicitors for citizens from Germany. It is likely that the representations of foreign States in Germany also maintain such lists for their citizens.

NO

- 12) If yes, do people in other States have access to this service at the same costs as residents?
 YES

It is however conceivable that the costs may increase in individual cases for factual reasons (e.g. higher communication or travel expenses because of the greater distance).

NO

- 13) Do you foresee the proportion of people in other States using these services increase in the future?
 YES
 NO
Please specify:

It is not possible to provide any information on this.

Part III – Access to information on the content of foreign law at the litigation stage

- 14) Please indicate, where possible, a rough estimate of the percentage of civil and commercial law cases heard by the judicial authorities of your State in 2006 which required the application of foreign law and whether this percentage is likely to increase. If no estimate can be obtained for 2006, please refer to another year. Percentage: **5** % (year: **2006**). Likely to increase: YES NO

If the proceedings take place before German courts, the parties frequently agree to apply German law. The foreign connection hence frequently does not lead to the application of foreign law.

15) Please indicate, if possible, the most common areas of foreign law applied by or invoked before the judicial authorities of your State.

- Marriage and nullity of marriage
- Divorce and legal separations
- Parental responsibility
- Parent-child relationship
- International child protection including child abduction and child adoption
- Protection of adults
- Maintenance (child support and other forms of family support)
- Traffic accidents
- Products liability
- Other types of tort
- Consumer protection
- Commercial contracts
- Sale of goods
- Securities transactions
- Property
- Inheritance
- Bankruptcy
- Choice of court agreements
- Other, please specify:
 - law on civil status**
 - law on family names**

16) Please identify, if possible, the States whose laws are most frequently applied by or invoked before judicial authorities in your State:

France, Italy, successor states of Yugoslavia, successor states of the Soviet Union, Austria, Poland, Spain, Turkey, the United Kingdom, the United States of America

17) In your State, a judicial authority ascertains foreign law (check more than one box if applicable):⁸

- a) *ex officio* without the assistance of an expert⁹ (e.g. law firm, specialised institute,¹⁰ university, government (i.e. specialised department or embassy), etc.)
- b) *ex officio* with the assistance of an expert
- c) by submitting, *ex officio*, a request for information under a bilateral or multilateral treaty (where applicable)
- d) as the result of an (express) agreement of all parties, without the assistance of an expert

⁸ See Prel. Doc. No 21 A, *supra*, note 2, Ann. 2, paras 4-15, and Prel. Doc. No 21 B, *supra*, note 2, for a description of the status of and mechanisms to access foreign law in a sample of jurisdictions.

⁹ In this Questionnaire the term expert is used in its broadest sense; see also Questions Nos 21 to 23 for possible qualifications that may apply.

¹⁰ For example, the Swiss Institute of Comparative Law in Lausanne, the Max Planck Institute in Hamburg, the *Deutsches Notarinstitut* in Germany, the *Internationaal Juridisch Instituut* in The Hague, the CRIDON in France, or any relevant institute / office attached to a University.

- e) as the result of an (express) agreement of all parties, with the assistance of an expert chosen (appointed) by the judicial authority
- f) as the result of an (express) agreement of all parties, with the assistance of an expert chosen (appointed) by all parties
- g) by submitting, as the result of an (express) agreement of all parties, a request for information under a bilateral or multilateral treaty (where applicable)
- h) at the request of a party (without the objection of the other or another party) or all parties, without the assistance of an expert
- i) at the request of a party (without the objection of the other or another party) or all parties, with the assistance of an expert chosen (appointed) by the judicial authority
- j) at the request of a party (without the objection of the other or another party) or all parties, with the assistance of an expert chosen (appointed) by one or all parties
- k) by submitting, at the request of a party (without the objection of the other or another party) or all parties, a request for information under a bilateral or multilateral treaty (where applicable)
- l) by any other method (please specify):

18) Please rank in order of priority (1 being the highest) the sources consulted by judicial authorities in your State to ascertain the content of foreign law under any of the methods described in a), d) and h) of Question No 17:

- [2] Internet (official legislation, case-law and legal publications websites)
- [4] Internet (legislation, case-law and legal publications from private databases (as opposed to official databases))
- [3] Local or personal library (local electronic databases)
- [1] Local or personal library (printed legislation, case-law and legal publications)
- [] Other:

19) Please explain whether and, if so, how the judicial authorities in your State verify the reliability and / or authenticity of these sources and the information provided therein:

If the courts rely on official websites of the governments or generally-recognised reference material, they presume that the information provided is authentic. With non-official material, they attempt as a rule to find several sources and compare the texts in question. Where necessary, they commission an expert report.

20) Where these sources and the information provided therein are not available in a language understood by the judicial authority, please describe the mechanisms used to address this difficulty. Description:

They are as a rule translated by a translator entitled to do so.

21) Where a judicial authority ascertains foreign law with the assistance of an expert (under any of the methods described in b), e) and i) of Question No 17), does this expert need to be a qualified lawyer or jurist in accordance with the law of your State? In the case of a specialised institute, does it need to meet certain requirements?

- YES
 NO

22) Where a judicial authority ascertains foreign law with the assistance of an expert (under any of the methods described in b), e) and i) of Question No 17), does this expert need to be a qualified lawyer or jurist in accordance with the law of the State whose laws are being ascertained? In the case of a specialised institute, does it need to meet certain requirements?

- YES
 NO

23) Please specify which individuals and / or institutions may provide expertise under any of the methods described in b), e) and i) of Question No 17:

- a) Local private expert (e.g. law professor, lawyer and / or jurist in private practice)
 YES
 NO
- b) Foreign private expert (e.g. law professor, lawyer and / or jurist in private practice)
 YES
 NO
- c) Local specialised institute
 YES
 NO
- d) Foreign specialised institute
 YES
 NO
- e) Local government (including embassies abroad)
 YES
 NO
- f) Foreign government (including embassy in your State)
 YES
 NO
- g) Member of the local judicial authority
 YES
 NO
- h) Member of a foreign judicial authority
 YES
 NO
- i) Other(s):
- j) Which of the above is most often used?

Courts most frequently call on local private experts (a), local specialised institutes (c) and the German Federal Government, including its representations abroad (e).

24) Please indicate who bears the costs of the expertise provided under any of the methods described in b), e) and i) of Question No 17:

- The requesting judicial authority
 The party that raised the application of foreign law
 The party(ies) against whom costs will be awarded
 All parties
 Other:

25) Would your answers to Questions Nos 21-24 be the same for the expert referred to under f) and j) of Question No 17?

YES

NO, please explain:

If an expert report is submitted to the court that is commissioned by one party or by both parties, the court treats it as a submission by the party(ies). Since foreign law is the subject-matter of such a submission, the court is however not bound by the submission, but may carry out its own investigations, and may for instance commission an expert report.

The cost of an expert report not commissioned by the court does not count towards the court costs. Whether and to what degree the losing party must bear the costs of an expert report commissioned by one party or jointly hence depends on the individual case.

26) Please describe, if possible, the common characteristics of requests for information on foreign law submitted under any of the methods described in c), g) and k) of Question No 17: The type of question asked; who most frequently asks questions (*e.g.*, parties with too little or no resources to afford an expert); the reasons why questions are asked (*e.g.*, no material available in a language understood by the judicial authority seized of the matter); etc.

Description:

With requests for information to other States in accordance with the London Convention, the questions are in practice asked by the court. In accordance with the German Implementing Act to the London Convention, the court may also call on the parties to draft the request and subsequently approve it.

The courts avail themselves of requests for information as a method to ascertain foreign law if they themselves do not have sufficient material in German or require more precise information (*e.g.* on the interpretation and practical application of specific statutory provisions, case-law).

27) Please indicate whether judicial authorities in your State can transmit the request for information directly to a receiving agency in the State addressed under any of the methods described in c), g) and k) of Question No 17?

YES

NO, please explain:

In accordance with the German Implementing Act to the London Convention, the courts must submit requests for legal information to the respective competent German transmitting agency (as a rule the Ministry of Justice of the *Land* in which the court is situated). The transmitting agency then forwards the request to the receiving agency of the other State. This procedure above all serves the purpose of legal clarity and rapid processing in the receiving State because it is clear by the involvement of the transmitting agency that the request originates from an institution that is entitled to

lodge it. The involvement of the transmitting agency does not lead to notable delays, by contrast.

- 28) If so, can the request be transmitted by regular non-secured e-mail?
[] YES
[X] NO, please explain:

Germany presumes that a request in accordance with the London Convention is to be transmitted in writing. This emerges from the time when it was drawn up, as well as indirectly from Art. 4 para. 2 sentence 2 of the Convention. Transmission by e-mail would not speed up the procedure appreciably since transmission by post takes only a few days. Non-secured e-mails by contrast lead to problems as to their authenticity (does the request really originate from the court stated?) and of confidentiality (in practice the courts frequently enclose excerpts from the case files which must remain confidential).

Part IV – Future development of an instrument and / or mechanisms to access information on the content of foreign law

The European Union will be submitting a statement re Questions 29 to 35.