The Hague Convention on the Taking of Evidence

Concerning 1:
We have no information on recent decisions by German higher courts which specifically deal with issues relating to the Hague Convention on the Taking of Evidence.

Concerning 2:
For internal purposes, data provided by the *Länder* on the extent of the mutual legal assistance are compiled annually in an overview (service of process, mutual assistance and other requests). Since is not possible to conduct a precise statistical analysis without investing more than a reasonable degree of effort, the overview only contains a rough outline. I have attached the current overview as Annex 2.

Concerning 3:

A considerable problem in international relations still exists in the consequences of the aerospace decision. Consequently, situations have arisen which involve the repeated taking of evidence on the basis of U.S. law, whereby in our view the Convention would have been applicable (a) and b)). Besides this, problems involving costs (c)) and in the carrying out of requests in Germany (d)) have arisen.

a) Pre-trial discovery of documents

Consideration should be given, for one, to the issuance of documents found in Germany in the context of pre-trial discovery of documents, which are requested extraterritorially directly pursuant to U.S. law. Discovery of this kind not only circumvents the German Reservation on Article 23 of the Convention, it also leads to extraordinarily high costs for the companies concerned and to concerns regarding data protection.

b) Hearing of witness outside the provisions of the Convention

Secondly, the hearing of witnesses in Germany by U.S. attorneys pursuant to U.S. civil procedural law should be mentioned.

The taking of evidence in Germany for a U.S. civil proceeding and the preliminary discovery phase must, in our view, be conducted via international law channels; these offer sufficient possibilities. For one, a consular hearing can be conducted pursuant to the German-American exchange of diplomatic memoranda. Furthermore, the witness can be heard via avenues provided under mutual legal assistance. A request for mutual legal assistance for the hearing by a German court can be conveyed to the competent German Central Authority (Article 3 and 4 of the Convention). Finally, pursuant to Article 17 of the Convention, the commissioner of a U.S. court may hear a witness if the authorisation of the competent German Central Authority has been obtained beforehand. The commissioner may also be a U.S. attorney. The declaration on Article 17 submitted by the Federal Republic of Germany upon entry of the instrument of ratification reads as follows (Federal Gazette 1979 II p. 780):

> "A commissioner of the requesting court may only take evidence pursuant to Article 17 of the Convention, if the Central Authority of the Land, in which the taking of evidence is to be conducted, has given its consent. Such consent can include conditions. The local court, in whose district official business is to be conducted as a result of a request for mutual legal assistance, is authorised to supervise the preparation and conducting of the taking of evidence. Pursuant to Article 19 second sentence of the Convention, a member of such court may participate in such taking of evidence."

If a U.S. hearing is conducted without the knowledge of German judicial authorities, this constitutes a violation of German jurisdictional competency. This applies regardless of whether the witness concerned voluntarily took part in the hearing.

c) Costs incurred through the taking of evidence in the USA

In one particular case, a German court requested the conducting of the taking of evidence in the USA. This was carried out by an attorney who acted as commissioner. The extraordinarily high costs were not presented to the German agency in advance. If it or the parties had had prior knowledge of the expected costs, the taking of evidence

would possibly have been omitted. Here, it is requested that any high costs which would be incurred due to the taking of evidence in the requested State be provided in advance.

d) Supplying of technical aids

Requests sent to Germany often entail the desire of U.S. courts and lawyers to apply their national procedural law without modification (e.g. cross-examination by U.S. attorneys, drafting of a word transcript by a special stenographer, additional electronic recording of the hearing (video or audio), request made to those performing the hearing to verify all statements through the presentation of documents, language of the hearing English, taking of oaths pursuant to U.S. law).

However, this has organisational limitations. The taking of evidence can certainly be performed by special means, but the preparation of the appropriate – often complicated – technical and actual aids is subject to limitations on availability. If the indication is then given that e.g. a special court stenographer and electronic recording – provided the consent of all those concerned has been given – can in fact be used, but that the requesting U.S. side and not the requested German side is obligated to provide such aids, the request is frequently no longer followed up on by the U.S. side. Better co-ordination in advance is recommended.

Concerning 4:
The application of the Convention is considered by Germany to be mandatory and exclusive. There is no new legislation on this.

Concerning 5:
Pursuant to the reservation on Article 23 of the Convention, Germany does not act on any requests for mutual assistance which involve the production of documents within the context of a pre-trial discovery of documents. In such cases, requests are sent back to the requesting agency uncompleted with reference to the reservation.

Concerning 6:
In practice, a limitation of the reservation under Article 23 of the Convention would not be advisable. Experience has shown that requests for pre-trial discovery may also not be

completed if such requests are honoured under certain conditions (in particular, sufficient discovery of the documents requested) in the requested State. A pre-trial discovery of documents involves specifically a discovery which causes problems to even the most minimal restrictions. What is ordinarily expected is a performance – unacceptable to Germany – pursuant to U.S. procedural law. Therefore, in practice, there has been only a limited application of the Convention in proceedings being conducted in the USA.

Concerning 7:
A private arbitration court is not considered a “court authority” within the meaning of Article 1(1) of the Convention. It must have recourse to a domestic court, which handles the issuance of a request for mutual legal assistance. In this regard, Germany shares the opinion of the Permanent Bureau.

Concerning 8:
The performance time depends on the requested court treatment. The most frequently requested hearing of parties and witnesses by German courts takes an average four months, plus mail delivery time. The provision of documents can also be made within this time or even sooner. In contrast, however, the appointment of experts and the preparation of expert opinions takes much more time, in individual cases – depending on the availability of the expert and the degree of difficulty of the work – over twelve months. However, this is not considerably longer than in domestic proceedings.

Concerning 9:
Representatives of a requesting court of another Contracting State may be present for the completion of a request for mutual legal assistance by the local court if the Central Authority of a *Land* in which the request is to be completed has given prior consent thereto (cf. also section 10 of the German Act Implementing the Convention).

Concerning 10:
German Central Authorities do not accept any requests which have only been sent electronically.

Concerning 11:

German Central Authorities do not send any requests electronically. However, informal notifications – e.g. enquiries as to the status of the request – can also be completed electronically.

Concerning 12:
In the use of modern telecommunications, a distinction must be made between a request and the performance thereof.

We do not see any benefit in the electronic transmission of requests. This may be worthy of consideration for service of process, since this occurs en masse and is dependant upon a swift transmission, but these considerations usually do not apply to requests for mutual assistance. These requests comprise a comparably small quantity of the whole of judicial co-operation, are often quite voluminous, but are under less time constraints than service of process. Delivery by mail – if needed as a rush delivery by private courier – seems sufficient.

Above all, a swift transmission by no means guarantees swift processing/completion. If the requested authority is not equipped with the necessary personnel, hardware and expertise, then this – and not the transmission – is the main reason for extensive processing. What is typical in these instances is that enquiries as to the status of the request – also submitted via fax or email – are not answered for months, and in some cases not at all.

The implementation of technical aids is however conceivable particularly in the completion of requests for hearings. As it is however, under the existing Convention, the use of video and telephone conferences is possible, since German civil procedural law provides for this option and alternatively such technical methods require the taking of evidence in a special form. Due to high costs and limited technical provisions however, use must be limited to special circumstances. In view of existing possibilities, no need is seen for critical action to be taken here either.