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German

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Taking evidence by videoconference

Germany

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?

The taking of evidence by videoconference is permitted in German civil proceedings under the first sentence of Section 128a(2) of the Code of Civil Procedure (ZPO *Zivilprozessordnung*) where the parties so agree. The examination must be transmitted simultaneously in video and audio form to the place in which a witness or expert is located during the examination and to the courtroom. Where parties, legal representatives or advisors have been authorised to be in another place, the examination must also be simultaneously transmitted in video and audio form to that place. For video examinations by a German court on the basis of an incoming request in accordance with Regulation (EC) No 1206/2001 ('active' judicial assistance), Section 128a of the ZPO may have to be applied with some modifications, because the court taking evidence is not the same as the court hearing the proceedings, which is interested in the direct impression given. Where the requesting court asks to take evidence directly under Article 17 of the Regulation ('passive' judicial assistance), in principle all requests for the direct taking of evidence using communications technology must be granted, and the taking of evidence over and above Section 128a of the ZPO is also possible. Requests may be refused only for the reasons listed in Article 17(5). However, the central body may lay down conditions for the direct taking of evidence in accordance with German law.

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 can be examined by videoconference (first sentence of Section 128a(2) ZPO).

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 videoconferencing technology (Section 128a(2) ZPO). The taking of other evidence (documents and visual inspection) by videoconference is not specifically permitted.

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

The law does not specify in what place the person to be examined must be. However, under German civil procedure law the place from where transmission to the courtroom is carried out must be in Germany.

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

The first sentence of Section 128a(3) ZPO does not provide for the recording of videoconference hearings. However, a recording may be made of evidence taking in the course of judicial assistance with the direct taking of evidence under Article 17 of the Regulation.

6 In what language should the hearing be conducted: (a) where requests are made under Articles 10 to 12; and (b) where there is direct taking of evidence under Article 17?

a) For requests under Articles 10 to 12, the hearing must be in German. Where the proceedings involve persons who do not have a command of German, an interpreter must be used. The services of an interpreter may be dispensed with where all the persons involved have a command of the foreign language concerned.

b) In the case of judicial assistance with the direct taking of evidence, the requesting court determines the language of examination. However, the authorisation under Article 17(4) can be used by the central body to lay down conditions for the direct taking of evidence such as the language of the hearing or examination.

7 If interpreters are required, who is responsible for providing them under both types of hearing and where should they be located?

In the case of 'active' judicial assistance, the German court providing the assistance is responsible for conducting proceedings and taking evidence. An interpreter must be used for the taking of evidence by German courts even when only one of the persons involved does not have a command of German. Whether the person has the required knowledge of German must be checked by the court whether or not the parties so request. The court is free to choose the interpreter. In the case of the 'passive' taking of evidence under Article 17, whether interpreters are required and which interpreters are selected is decided by the requesting court. Under Article 17(4) the central body may grant authorisation under certain conditions: it may for example require that interpreters be used. As part of those conditions, the central body may also order that the evidence be taken in German.

8 What procedure applies to the arrangements for the hearing and to notify the person to be examined about the time and place? How much time should be allowed when arranging the date of the hearing to enable the person to receive sufficient notification?

In the case of active judicial assistance, witnesses and experts are summoned informally by the administrative office of the requested court unless the requested court decides that formal service is to be made. Where the court orders the examination to be conducted by videoconference, the persons whose testimony is to be transmitted must be summoned to appear at the premises from where the transmission is to take place. The summons must specify the parties, the subject of the examination, the date of the examination and the consequences of failure to appear. The summons must include precise details of the location and time of the examination. No specific period of advance notice is laid down.

Where evidence is to be taken directly by the requesting court under Article 17 of the Regulation, the person to be examined must be informed about the time and place of the examination by the requesting court. Time and place generally depend on the situation in the German courts (where the system is located and when it can be used). The time and place of the examination are therefore closely linked to authorisation from the central body. In principle, there is no fixed deadline; however the fact that international deliveries by post take longer should be taken into consideration.

There is no provision for a special procedure relating to planning the actual videoconference. In practice, the central body routinely nominates a contact person at the court where the videoconference is to take place. This person is then able to answer any practical questions.

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. These costs cannot be charged to those involved in civil proceedings. Telecommunications fees are also incurred. The requested court may request reimbursement of the telecommunications fees under Article 10(4) in conjunction with Article 18(2) of the 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 64(2) of the Regulation on Judicial Assistance in Civil Cases (ZRHO *Rechtshilfeordnung für Zivilsachen*) the requesting court must inform the person to be examined that the examination is being conducted on a voluntary basis.

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

Where there are doubts as to the identity of the person to be examined the court is required to verify this at any stage of the proceedings.

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 Article 17?

Where a German court is requested to take evidence for the requesting court by videoconference, this, and therefore also the taking of oaths, is done in accordance with the procedural rules of the requesting court. Since the cooperation of the person providing the information in the direct taking of evidence and therefore their cooperation in the taking of an oath is in any case voluntary (and the person must be formally so advised), it is not possible for the requested State to lay down further requirements for the taking of oaths. However, the central body must in any event ensure compliance with any prohibition from giving testimony or being examined which the person providing the information is not entitled to waive (under German law). 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.

Whether it is possible to take an oath and what information is needed from the requesting court is determined by the relevant central body. In deciding on authorisation, the central body must ensure that any prohibition from giving testimony imposed on the person providing the information is not circumvented. For that reason, the central body may for example ascertain the circumstances in which the person providing the information is supposed to have acquired it. For example, German law makes the testimony of German public servants subject to the prior approval of the authority for which they work.

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 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 the evidence-taking procedure is conducted and implemented by the relevant *Land's* judicial administration. The procedures may therefore vary considerably between *Länder*. In practice, the procedural rules are drawn up by the Higher Regional Court in whose jurisdiction the requested court is located.

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

Requests for the taking of evidence received from abroad and communications in accordance with Regulation (EC) No 1206/2001 must be in German or be accompanied by a translation into German (Section 1075 ZPO).

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