

## Recent Developments in International Civil Procedure: Document Discovery and the Recognition of Foreign Court Decisions in Germany

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The recent full implementation of two Hague Conventions in Germany and the European Union aims to ensure effective legal protection in disputes that have cross-border implications.

In a reversal of a decades-long caveat, the German legislature amended its civil procedure laws this year to allow letters of request by foreign courts to demand discovery of documents, a concept that is a central characteristic of the procedural law of countries with a common law background. Competent authorities in Germany are therefore now required to comply with such requests.

Moreover, the European Union (“EU”) recently acceded to the Hague Convention of 2 July 1919 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. As a result, Member States like Germany will now be required to recognize and enforce judgments of courts from selected countries outside the EU which are also subject to the Convention. At the same time, the accession also ensures that judgments of a court from an EU Member State can be effectively enforced in those countries.

This Alert Memorandum provides an overview of these two developments and discusses their practical implications.

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## Germany's Revised Stance on the Discovery of Documents

The discovery of documents is an indispensable procedural tool in common law jurisdictions. Yet Germany has traditionally not provided for a similar instrument in its rules of civil procedure.

A recently enacted amendment<sup>1</sup> to the German Law on the Execution of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (“HSC”) and the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters (“HEC”) (“HSC/HEC Implementing Act”)<sup>2</sup> now requires courts in Germany to comply with letters of request filed by foreign courts that seek common law-style discovery of documents (“letters of request”). Prior to this, a legal caveat had been in place excluding such requests from the scope of possible requests that foreign courts could successfully submit to courts in Germany.

While the German legislative materials frequently use the term “pre-trial discovery”, the term used in the HEC ultimately refers to any form of document production outside of an oral court hearing.<sup>3</sup> Therefore, to ensure that the discovery process discussed in this Alert Memorandum is not misunderstood as being limited only to documents disclosed in the pre-trial phase of a proceeding, the instrument will simply be referred to as “discovery”.

Under the new law, a foreign court can now submit a letter of request to a German court in order to obtain certain documents located in Germany. The new framework will ensure a good probability of success for such requests by foreign courts (including requests that would not have been processed under the previous statutory regime). This amendment will primarily affect letters of request filed by courts from the United States; however, Germany's change of stance on this topic may

also have been incentivized by Brexit and its negative impact on the efficiency of judicial cooperation between Germany and the United Kingdom.<sup>4</sup>

### Objective and Limits

The amendment will enable German courts to provide effective legal assistance in foreign proceedings. At the same time, it will help to reduce the number of requests for production of documents governed by foreign law – requests that were regularly filed in the past – thus “bypassing” the caveat that was in place in Germany. As such, the amendment will help make judicial proceedings more efficient, as compliance with requests based on foreign procedural law is particularly complex and may therefore present a strain on judicial resources.

The amendment imposes various restrictions on the scope and use of document discovery – a concept that is alien to the German legal system – thereby ensuring that fundamental principles of German civil procedural law are not undermined during the process of discovery.<sup>5</sup>

To this end, such letters of request must meet certain strict conditions. For example, a request will not be complied with if it simply refers to an entire collection of documents. Instead, a request must specify which documents are actually required and for what reason.<sup>6</sup>

### Requirements

Pursuant to Section 14 of the HSC/HEC Implementing Act, a letter of request aimed at the discovery of documents must only be complied with, if:

1. the requested documents are properly specified;
2. the requested documents are of direct and clearly identifiable importance for the respective proceedings and their outcome;
3. the requested documents are in the possession of a party involved in the proceedings;

<sup>1</sup> BGBl. 2022 I p. 959 (961).

<sup>2</sup> See [Cleary Gottlieb Alert Memorandum of June 27, 2022](#), p. 4 f.

<sup>3</sup> Legislative Reasoning, BT-Drs. 20/11 10, p. 34.

<sup>4</sup> Legislative Reasoning, BT-Drs. 20/11 10, p. 34.

<sup>5</sup> Legislative Reasoning, BT-Drs. 20/11 10, p. 22 and 34 et seq.

<sup>6</sup> Legislative Reasoning, BT-Drs. 20/11 10, p. 20 and 34 et seq.

4. the production of the requested documents does not violate fundamental principles of German law (*i.e.*, public policy exception, including the principle of fair trial); and
5. insofar as personal data are contained in the documents to be submitted, the requirements under Chapter V of the General Data Protection Regulation (“GDPR”) for the transfer of data to a third country are met (this is the case in particular if an adequacy decision within the meaning of Article 45 GDPR has been issued, as is the case, for example, for the United Kingdom and Switzerland).<sup>7</sup>

If the above conditions are met, the requested German court must comply with the request. Notably, unlike in cases where a foreign court seeks discovery under U.S. procedural law (28 U.S.C. § 1782<sup>8</sup>), Section 14 of the HSC/HEC Implementing Act does not provide the requested court with discretion as to whether it will comply with the request or not – in other words: if the requirements are met, the request has to be complied with.

Surrender of the requested documents may only be refused in certain cases, for example on the grounds of privilege or the duty to refuse to give evidence under Article 11 HEC. Such duty or privilege may originate from either the legal system of the country of origin or from the legal system of the country in which the desired documents are located. Thus, for example, compliance may be refused on the grounds of attorney-client privilege. Also, information might be privileged based on a person being a close relative of one of the parties or because it contains business secrets (Section 384 of the German Code of Civil Procedure).

### Impact and Outlook

Germany’s revised stance on the discovery of documents is of great significance to foreign courts submit-

ting letters of request and to those who might be required to produce documents in compliance with such requests.

Applicants must craft their request carefully so as not to exceed the limits of Section 14 of the HSC/HEC Implementing Act and thereby risk rejection of the application. This requires, above all, a precise indication of the documents to be produced. If all conditions are met, a request under Section 14 can be a highly effective and useful tool: In civil procedure, unless the opposing party voluntarily provides certain documents, it is often difficult for the litigant to prove the facts necessary to substantiate their claim, especially in cross-border litigation. This can sometimes prevent litigants from initiating proceedings in the first place out of concern for the costs associated with dismissal. Under the new framework, it should be more straightforward for litigants to substantiate their claim. For example, a litigant in the United States or the United Kingdom may petition the court adjudicating the case to file a letter of request with a German court in order to obtain documents located in Germany.

For those in possession of documents that might be subject to discovery, on the other hand, it is important to anticipate a potential obligation to produce a large number of documents. Under the new legal framework, it will be difficult to allege grounds for refusal.

### The Recognition of Foreign Court Decisions under the Hague Convention of 2 July 2019

In another significant development in international civil procedure, the EU recently acceded<sup>9</sup> to the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters<sup>10</sup> (“Hague Judgments Convention”). This Convention creates a uniform legal framework for the recognition and enforcement of foreign court decisions among the contracting states.<sup>11</sup>

<sup>7</sup> Section 14 of the HSC/HEC Implementing Act.

<sup>8</sup> See [Cleary Gottlieb Alert Memorandum, June 27, 2022](#), p. 4.

<sup>9</sup> Decision (EU) 2022/1206 of the Council of the European Union of 12 July 2022, OJL 187/1.

<sup>10</sup> <https://assets.hcch.net/docs/806e290e-bbd8-413d-b15e-8e3e1bf1496d.pdf>.

<sup>11</sup> HCCH, [Outline of the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters](#), p. 1.

The Hague Judgments Convention is relevant both to litigants who have obtained a judgment from a court in a country that is not an EU member state and to litigants who have obtained a judgment in the EU and who wish to secure recognition and enforcement of that judgment in non-EU countries.

### Previous Legal Framework in the EU

Among Member States of the EU, the Brussels Ia Regulation<sup>12</sup> provides for mutual recognition and enforcement of court decisions. By way of the Lugano Convention,<sup>13</sup> comprehensive recognition also takes place among EU Member States and Switzerland, Norway and Iceland.

The recognition and enforcement of court decisions from other non-EU countries, on the other hand, have so far proven more complicated. Absent a bilateral or multilateral agreement, recognition and enforcement have so far largely been governed by the applicable national rules (in Germany: Section 328 and Section 722 et seq. of the German Code of Civil Procedure, respectively) as interpreted by a court in the country in which recognition is sought. After Brexit and the end of the transition period, this has also been the case for the United Kingdom, to which both the Brussels Ia Regulation and the Lugano Convention no longer apply.<sup>14</sup>

By establishing a single standard among the ratifying countries, the Hague Judgments Convention aims to improve legal certainty and uniformity in international legal relations.

### The Hague Convention of 2 July 2019

As a basic rule, the Hague Judgments Convention provides that a decision rendered by a court in one contracting state will be recognized and enforced in another

contracting state (Article 4(1) Hague Judgments Convention).

The Convention only applies between states that have ratified or acceded to it. With the recent accession of Ukraine and the EU<sup>15</sup> – which has the legal status to accede to the Convention as a “regional economic integration organization” (Article 26 Hague Judgments Convention) and thus binds all Member States (except Denmark) to the Convention – a one-year transition period has been triggered. At the end of the transition period, the Convention will enter into force. Between Member States of the EU and Ukraine, the agreement will thus enter into force on September 1, 2023. As of this date, it will therefore also have direct effect in Germany.<sup>16</sup> To date, no other country has ratified the agreement (status as of December 12, 2022). In addition to those previously mentioned, five other countries have joined the Convention (the U.S., Costa Rica, Israel, Russia and Uruguay), but none of these countries have yet ratified it.

### Scope and Limitations

The Hague Judgments Convention applies to decisions in civil and commercial matters unless they are explicitly excluded from its scope of application. Areas that are exempt from the Convention include, among others, family and inheritance law, insolvency law and competition law matters as well as those concerning intellectual property. The Hague Judgments Convention also does not apply to arbitral awards (Article 2(3) Hague Judgments Convention), recognition and enforcement of which in Germany are instead essentially governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (with enforcement after a declaration of enforceability being governed by national procedural law under

<sup>12</sup> Regulation (EU) No. 1215/2012, Brussels Ia Regulation.

<sup>13</sup> Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 21 December 2007, OJL 339/3.

<sup>14</sup> On the contemplated but ultimately rejected accession of the United Kingdom to the Lugano Convention see European Commission, [Communication to the European Parliament and the Council, May 4, 2021, COM\(2021\) 222 final](#).

<sup>15</sup> European Commission, Daily News August 29, 2022, [https://ec.europa.eu/commission/presscorner/detail/en/mex\\_22\\_5224](https://ec.europa.eu/commission/presscorner/detail/en/mex_22_5224).

<sup>16</sup> The law implementing the provisions of the Convention in Germany was promulgated in the Federal Law Gazette on November 11, 2022, BGBl. 2022 I p. 1982.

Section 704 et seqq. of the German Code of Civil Procedure).<sup>17</sup>

Each contracting state may exclude certain areas of law from the scope of the Convention (Art. 18(1) Hague Judgments Convention). For example, the EU has declared a reservation for disputes concerning non-residential rent or the lease of immovable property.<sup>18</sup>

### **Prerequisites for Recognition and Enforcement**

The Hague Judgments Convention applies to all judicial decisions on the merits, *i.e.*, to judgments as well as to decrees and orders, in such civil and commercial matters whose substance falls within the scope of the Convention. It does not, however, apply to measures of interim relief (“interim measures of protection”, Art. 3 Par. 1 b) Hague Judgments Convention).

Notably, the Hague Judgments Convention also governs the enforceability of settlements recognized by a court of a contracting state or concluded before such a court if they are enforceable in the country of origin in the same way as other court decisions. This lays the groundwork for highly efficient judicial cooperation even if a proceeding has been settled by agreement between the parties.

Within the scope of the Convention, recognition and enforcement of a decision may not be refused based on the substance of the decision. Rather, the core prerequisite for recognition and enforcement is that the judgment is valid and enforceable in the country of origin.

Aside from this, the court deciding on the recognition merely evaluates whether the decision meets one of 13 possible procedural circumstances justifying recognition. These circumstances overwhelmingly relate to the question of whether the court issuing the decision had jurisdiction over the case. Accordingly, a decision may be recognized if, for example, the natural or legal person against whom it is to apply had their habitual residence in the country of origin at the time the decision was rendered (in the case of a legal person, that is the case if it was incorporated in the country of origin

or has its registered office or central administration or place of business there), or if the decision concerns a contractual obligation and was rendered by a court in the country in which that obligation had to be performed.

Besides being governed by the Convention, decisions may also still be recognized pursuant to the provisions of national law. Therefore, the Hague Judgments Convention does not limit the possibilities of recognition but rather expands those provided under the previous legal framework.

From a procedural standpoint, recognition and enforcement of a foreign judgment rendered in a contracting state require the submission of certain documents, in particular a complete and certified copy of the decision and, if the decision was not rendered in an official language of the country in which recognition is sought, a certified translation.

In addition to these documents, the party seeking recognition may present a declaration by the court of origin on the validity and enforceability of the judgment under the law of the country of origin. The Hague Conference provides a template for this,<sup>19</sup> offering a straightforward means of examining whether the conditions for recognition and enforcement have been met.

If these requirements have been fulfilled, recognition and enforcement can only be refused in exceptional cases, *e.g.*, if the decision is inconsistent with a decision given by a court of the country in which recognition is sought in a dispute between the same parties. Another practically significant restriction is a proviso regarding public policy, which allows an application for recognition or enforcement to be refused if it would be manifestly contrary to the public policy of the requested country (*i.e.*, if recognition or enforcement would contravene essential principles or fundamental values of the legal system in the requested country, in particular the right to a fair trial or other fundamental legal principles).

<sup>17</sup> BGBl. 1961 II p. 122.

<sup>18</sup> Article 4 of Decision (EU) 2022/1206 of the Council of the European Union of 12 July 2022, OJ L 187/3.

<sup>19</sup> [Explanatory Report](#) on the Hague Convention, p. 37 et seqq.

If all conditions for recognition and enforcement are met, the decision will then be enforced pursuant to the laws of the country in which recognition and enforcement are sought (Art. 13 Par. 1 Hague Judgments Convention).

### **Impact and Outlook**

The accession of the EU and Ukraine was an important first step and could prompt other countries to follow suit. It lays the foundation for court decisions obtained in the EU to be recognized and enforced in non-EU countries on the basis of transparent and uniform rules. At the same time, it provides legal certainty with regard to decisions rendered by courts in non-EU countries, as these decisions can now be recognized and enforced in line with the uniform standard provided for by the Hague Judgments Convention.

Absent a uniform standard such as the one implemented by the Hague Judgments Convention, there is often a risk that a judgment may not be recognized in another country and that plaintiffs have to pursue another lawsuit in that country in order to enforce their rights. The Hague Judgments Convention ensures that once a judgment is obtained, it can be recognized in multiple jurisdictions and serve as the basis for enforcement.

However, the Hague Judgments Convention will only succeed at becoming a “*gamechanger*”<sup>20</sup> if it is ratified by a significant number of countries. In this regard, it will be particularly interesting to follow developments in the United States, where the position on ratification still seems unclear, and in the United Kingdom, which has so far not indicated its intent to accede to the Convention.

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<sup>20</sup> <https://www.hcch.net/en/news-archive/details/?vare-vent=683>.