to appear, he or she may be held in contempt of court, may be required to pay a money penalty, and may even be put in jail. If the witness has good reasons for his or her refusal to appear, he or she may present a motion to the court to nullify ("quash") the subpoena. If the court determines that the witness must nonetheless give evidence, the court will order the deposition to proceed.

The attorney for the party or witness who is being questioned may object to questions. Many such objections relate only to the form of the question, based on the rules of evidence that govern the presentation of evidence at trial. Such objections do not prevent the witness from answering the question, but preserve the formal evidentiary objection if the question and answer are later offered as evidence at trial. There may also be questions that the witness refuses to answer or which his or her attorney instructs him or her not to answer; in such instances, the attorney who is seeking the information must proceed before the court to seek an order requiring an answer to the question.

Depositions of Foreign Parties: Depositions are often the most uncomfortable and surprising aspect of pre-trial discovery for a non-U.S. party or witness. That is why an American attorney usually spends considerable time with his or her client preparing the witness for the deposition, carefully reviewing documents about which the witness is likely to be asked and reviewing the questions that will likely be posed.

If a foreign company is the plaintiff, courts will generally require that the plaintiff's employees give their pre-trial depositions in the United States. If the plaintiff refuses, its complaint may be dismissed. If the foreign party is the defendant, it is possible that the judge will not require travel to the U.S. for a deposition but will direct the plaintiff to conduct the deposition abroad or seek information by some means other than deposition, such as written interrogatories. Many judges, however, take the position that, where a foreign defendant conducts business on an ongoing basis in the United States, it must produce its witnesses in the U.S. for pretrial depositions or suffer the risk of a default judgment.

VI. The Hague Evidence Convention

In 1970, the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Evidence Convention") was concluded. The United States, Germany and Switzerland are members; Austria is not. The Hague Evidence Convention was intended to bridge the significant differences between the common law and civil law approaches to the taking of evidence and to allow the parties in civil suits in one country to obtain evidence located in another country. The Hague Evidence Convention deals with the taking of evidence by means of a "Letter of Request" sent by a judicial authority in the state where the litigation is pending to the Central Authority in the foreign state where assistance is sought in obtaining evidence ("receiving country"). The Central Authority in the receiving country often refers the request to a local judge in the area where the evidence is sought, and the law of the receiving country is applied in deciding the methods and procedures to be followed.

Most signatories to the Hague Evidence Convention have, however, made a reservation under Article 23 of the Convention, stating that they will not execute a Letter of Request "issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries."

In 1987, in the *Societe Nationale* case,[2] the U.S. Supreme Court held that the Hague Evidence Convention is not the exclusive means for obtaining evidence located outside the United States. Rather, the Court held that the Hague Evidence procedures are "optional,"[3] *i.e.*, not mandatory, and thus only one of several methods of seeking evidence that a court may use. But the Supreme Court cautioned that:

> American courts, in supervising pretrial proceedings, should exercise **special vigilance to protect foreign litigants** from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position. Judicial supervision of discovery should always seek to minimize its costs and inconvenience and to prevent improper uses of discovery requests. When it is necessary to seek evidence abroad, however, the district court must **supervise pretrial proceedings particularly closely** to prevent discovery abuses.[4]

2 *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522 (1987).
3 *Id.* at 538.
4 *Id.* at 546 (emphasis added).

*Anke Meier**

U.S. Discovery: The German Perspective

Due to the fundamental differences between the litigation culture in the United States of America on the one hand and the Federal Republic of Germany on the other it is not unusual that cross-border litigation that affects parties, or even non-parties, of both countries sometimes causes difficulty and turmoil. The German term *"deutsch-amerikanischer Justizkonflikt"* has been used for decades now to describe particularly prominent areas of conflict, such as the:

(i) Service of U.S. litigation papers on German individuals or entities;

(ii) Taking of evidence for U.S. proceedings on German territory, especially with regard to pre-trial discovery;

(iii) Excessive interpretation of international jurisdiction by U.S. courts; and

(iv) Enforcement of U.S. judgments against German parties.[1]

The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970 ("Hague Evidence Convention") is the leading multilateral treaty to facilitate the

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1 *See, e.g.*, Schütze, *Zum Stand des deutsch-amerikanischen Justizkonfliktes*, RIW 2004, 162, listing four areas of conflict which are particularly relevant.

cross-boarder taking of evidence. Under the procedure of the Hague Evidence Convention, a judicial authority of one contracting state may request the assistance of the competent authority of another contracting state *"to obtain evidence, or to perform some other judicial act."*[2] Pursuant to Article 9 of the Hague Evidence Convention, the judicial authority that executes the request *"shall apply its own law as to the methods and procedures to be followed"* unless the requesting authority asks that a special method or procedure be followed.

The Hague Evidence Convention entered into force in relation to Germany on 27 June 1979[3] and in relation to the U.S. on 7 October 1972.[4] It is, however, still in dispute whether the Hague Evidence Convention is the exclusive basis for the international taking of evidence in cross-boarder litigation with parties from two or more contracting states. While leading German scholars opine that it is mandatory for the judicial authority of one contracting state to apply the Hague Evidence Convention in order to obtain evidence located in another contracting state, courts in the U.S. tend to allow other direct means of obtaining evidence besides the Hague Evidence Convention, specifically the Federal Rules of Civil Procedure ("FRCP").[5] This clash obviously caused and continuous to cause frustration on the side of German parties.[6]

1. Germany's Reservation Regarding Pre-Trial Discovery of Documents

Article 23 of the Hague Evidence Convention provides that contracting states may declare reservations with regard to the pre-trial discovery of documents:

> *A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.*

Germany has made such reservation.[7] Pursuant to § 14(2) of the German Act on the Execution of the Hague Evidence Convention (*Ausführungsgesetz*, "German Execution Act") of 22 December 1977,[8] a regulation may be issued to allow for the execution of requests for the purpose of obtaining pre-trial discovery of documents unless fundamental principles of German procedural law are not opposed thereto.[9] As of today, Germany has not issued a respective regulation yet.

There is a vivid discussion whether (i) the German reservation requires that any request for pre-trial discovery of documents has to be rejected or (ii) documents can be obtained if the request is narrowly defined and limited to the production of specific documents. In support of the latter view it is argued that it is the aim of the reservation to prevent fishing expeditions. Hence, it is suggested that German authorities execute requests for the production of specifically defined documents.[10] Furthermore, in 2002 the German Code of Civil Procedure (*Zivilprozessordnung*, "ZPO") was amended with regard to the obligations of parties and non-parties to produce documents. Pursuant to the new ZPO § 142, the court can order the production of precisely defined documents in the course of the litigation procedure.[11] Hence, the argument is made that production of documents under the Hague Evidence Convention should not be more restrictive than under German domestic law.[12] German courts, however, have taken the view that such interpretation conflicts with the wording of Article 23 of the Hague Evidence Convention.[13]

Even if one allowed the execution of requests for the production of precisely specified documents it has to be expected that U.S. courts still would consider the procedure under the Hague Evidence Convention as insufficient, too complicated and tardy. The Court in *First American Corp. v. Price Waterhouse* expressly noted that the process under the Hague Evidence Convention is insufficient because it required a specification of the requested documents.[14] Hence, in practice the Hague Evidence Convention is not considered as an efficient means of obtaining pre-trial discovery of documents. The U.S. courts are likely to pursue the means of the FRCP. German parties will not have much leeway to avoid discovery requests under the FRCP. It is widely accepted that the mere fact that pre-trial discovery took place in U.S. proceedings does not exclude recognition and enforcement of a subsequent judgment in Germany.[15] In the vast majority of cases, German parties are well-advised to cooperate in the pre-trial discovery of document in order to avoid sanctions in the U.S. proceedings or negative inferences by the U.S. court when considering the evidence.

2. Taking of Depositions in Germany

According to the wording of Article 23 of the Hague Evidence Convention, its scope is limited to *"pre-trial discovery of documents."* Hence, pursuant to the prevailing opinion, Germany's reservation does not exclude pre-trial discovery in other forms than the production of documents, most notably, witness

2 Article 1 of the Hague Evidence Convention.

3 The status table of the Hague Evidence Convention is available at http://www.hcch.net/index_en.php?act=conventions.status&cid=82. Germany adopted the Hague Evidence Convention by act of 22 December 1997 (BGBl. II 1452).

4 Schütze, *supra* note 1.

5 For an overview of the discussion about the priority and exclusivity of the Hague Evidence Convention in the U.S. on the one hand and continental Europe, specifically Germany, on the other hand see Heinrich in MÜNCHNER KOMMENTAR ZUM ZIVILPROZESSRECHT, 3rd ed. 2008, vol. 2, Hague Evidence Convention, note 2.

6 Schütze, *supra* note 1, 164.

7 The German reservation with regard to Article 23 of the Hague Evidence Convention is available at http://www.hcch.net/index_en.php?act=status.comment&csid=502&disp=resdn.

8 BGBl. I, 3105.

9 Section 14 of the German Execution Act, BGBl. I, 3105.

10 See, e.g. Reufels, *Pre-trial discovery Maßnahmen in Deutschland: Neuauflage des deutsch-amerikanischen Justizkonflikts?*, RIW 1999, 667, 670.

11 For a comprehensive description of the new scetion 142 of the ZPO see KAPOOR, DIE NEUEN VORLAGEPFLICHTEN FÜR URKUNDEN UND AUGENSCHEINSGEGENSTÄNDE IN DER ZIVILPROZESSORDNUNG, 2009.

12 The German legislature, however, emphasized that the new § 142 of the ZPO does not aim at allowing any fishing expeditions as common to U.S.-style pre-trial discovery, Bundestags Drucksache 14/6036, 120.

13 Higher Regional Court (*Oberlandesgericht*, OLG) Celle, Decision of 6 July 2007, case number 16 VA 5/07, at II.2.c)(1); Higher Regional Court (OLG) Munich, Decision of 27 November 1980, case number 9 VA 3/80. The position that Germany's reservation to Article 23 of the Hague Evidence Convention prohibits the execution of any requests for pre-trial discovery of documents is further supported by the fact that contracting states may make limited reservations. For example the French reservation is not applicable if the requested documents are fully listed in the letter of request and there is a direct and clear connection between the requested documents and the matter at dispute.

14 *First American Corp. v. Price Waterhouse*, 154 F.3d 16, 23 (2d Cir. 1998).

15 The German Federal Court (*Bundesgerichtshof*, BGH) held in a decision of 4 June 1992, case no. IX ZR 149/91, that the conduct of pre-trial discovery does not constitute per se a violation of the *ordre public*, noting *"Bei Verfahrensverstößen ist nur dann von einer Verletzung des ordre public auszugehen, wenn die Entscheidung auf einem Verfahren beruht, das von den Grundprinzipien des deutschen Verfahrensrechts in einem Maße abweicht, dass es nach der deutschen Rechtsordnung nicht als in einer geordneten, rechtsstaatlichen Weise ergangen angesehen werden kann."* section A.III.4.a).

testimony.[16] Accordingly, German courts have confirmed that Germany's reservation to Article 23 of the Hague Evidence Convention does not restrict the taking of witness testimony, even if a witness is asked to testify to the content of a certain document.[17]

The Hague Evidence Convention does not set forth any details to be followed when executing the most common type of pre-trial witness testimony in U.S. litigation, the taking of depositions. Chapter II of the Hague Evidence Convention provides for the taking of evidence by diplomatic officers, consular agents and commissioners. Germany, however, has made a general reservation with respect to Chapter II. Pursuant to Section 11 of the German Execution Act, the taking of evidence through diplomatic officers or consular agents is not admissible if it relates to German nationals. It is possible to make an exception to this reservation through bilateral agreement with a contracting state. This is the case between Germany and the U.S.

Germany and the U.S. exchanged diplomatic notes verbal in 1956 which provide for the legal framework of the taking of depositions for U.S. civil/commercial litigation on German territory through U.S. diplomatic officers and consular agents until today. The Foreign Office notes dated 13 January 1956 and 8 October 1956 laid the foundation for *"the questioning of German or other non-American citizens"* by specifying the requirements under which the questioning is admissible.[18] Most importantly, no pressure may be imposed on the person to be questioned to make her appear or provide information.[19] This includes that the request to provide information is not called a *"summons"* and that no coercive measures are threatened in the event that a person does not appear or refuses to provide information.[20] Furthermore, it is emphasized that the person to be questioned has the right to be accompanied by a lawyer.[21]

During the past years, Germany and the U.S. developed the practice to allow for depositions on German territory with regard to German nationals if the German Ministry of Justice is informed and approves the deposition in advance.[22] Furthermore, it is required that the U.S. Mission to Germany is involved. In response to the vast increase of the numbers of depositions taken in Germany every year, the German Ministry of Justice nowadays, as a general rule, insists on conducting the deposition at the premises of U.S. Consulate General and that the oath is administered by a U.S. Consul.[23]

Due to the involvement of the German Ministry of Justice as well as the U.S. Consulate General parties are well-advised to plan depositions in Germany well ahead. According to the information provided by the U.S. Consulate General, space at the Consulate General is limited and an early scheduling is advisable.[24] The rather formal set-up frequently tempts parties to organize depositions on German territory without involvement of either the German or U.S. authorities.[25] The parties and lawyers involved, however, may risk criminal prosecution.[26] German scholars opine that the questioning of witnesses may constitute an unlawful assumption of public authority (*Amtsanmaßung*) pursuant to Section 132 of the German Criminal Code (*Strafgesetzbuch*).[27] It is argued that the questioning of witnesses is reserved to the police, prosecutors and courts so that depositions by lawyers violate the German sovereignty.[28] This view is not undisputed. Other scholars emphasize that depositions have the purpose of simply preparing the taking of evidence without involvement of the courts. Hence, they would not conflict with any sovereign action.[29]

3. Conclusion

The Hague Evidence Convention is the main multilateral treaty in the area of international judicial aid on the taking of evidence abroad. Unfortunately, the procedures offered by the Hague Evidence Convention too often do not match with the reality of comprehensive pre-trial discovery of documents, including e-discovery, and depositions. U.S. courts respond by avoiding the Hague Evidence Convention because it is perceived as inflexible and ineffective. With regard to depositions, the praxis of the German Ministry of Justice and the U.S. Consulate General are likewise rather formal and bureaucratic. Given the commonness of U.S.-German cross-boarder litigation it would be desirable for the parties to obtain a more suitable legal foundation for efficient pre-trial discovery in accordance with today's needs.

16 Higher Regional Court (OLG) Munich, Decision of 27 November 1980, case number 9 VA 4/80.

17 Higher Regional Court (OLG) Celle, Decision of 6 July 2007, case number 16 VA 5/07, at II.2.c)(1), referring also to the earlier decision of the Higher Regional Court (OLG) Munich, *supra* note 16.

18 Subsequently, the notes verbal of 13 January 1956 and 8 October 1956 were confirmed by the German note verbal of 17 October 1979 and the U.S. note verbal 1 February 1980. The full text of the notes verbal is cited at GEIMER/SCHÜTZE, INTERNATIONALER RECHTSVERKEHR IN ZIVIL- UND HANDELSSACHEN, 374 2a.

19 *Id.* 1.

20 *Id.* 1 (a), (b).

21 *Id.* 3.

22 The U.S. Embassy in Germany provides detailed practical information at its homepage at http://germany.usembassy.gov/acs/judicial-assistance/, including the applicable fees.

23 *See* http://germany.usembassy.gov/english-speaking-services/2008-deposition-instructions.pdf.

24 *Id.*

25 Böhmer, *Spannungen im deutsch-amerikanischen Rechtsverkehr in Zivilsachen*, NJW 1990, 3049, 3054.

26 *Id.* It is reported that German authorities have filed protests with the U.S. Embassy after obtaining knowledge of the taking of depositions on German territory without involvement of the U.S. Mission.

27 Hohmann in MÜNCHENER KOMMENTAR ZUM STRAFGESETZBUCH, 1st ed. 2005, section 132, note 18; Böhmer, *supra* note 22.

28 *Id.*

29 Reufels, *Pre-trial discovery-Maßnahmen in Deutschland*, RIW 1999, 667, 670, arguing that even if the U.S. court defines the pre-trial discovery measures there would be no violation of sovereign authority on the ground that discovery orders by the U.S. court merely specify the procedural rights of the parties.