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Obtaining Evidence in the Federal Republic of Germany: The Impact of The Hague Evidence Convention on German-American Judicial Cooperation

I. Introduction

On April 27, 1979, the Federal Republic of Germany (hereafter "FRG") deposited its instrument of ratification to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (hereafter "the Convention").[1] Pursuant to Article 38, paragraph 2 of the Convention, it entered into force for the FRG on June 26, 1979. Since the United States is also a party to the Convention, the entry of the FRG as a party is of considerable practical significance to American attorneys and judicial authorities who seek to obtain evidence from the FRG.

The accession to the Convention by the FRG has modified the pre-existing situation regarding the taking of evidence in several noteworthy areas. First and foremost among these modifications is the effect of Chapter I of the Convention, which provides for mandatory execution of judicial assistance requests issued in compliance with the requirements of the Convention, subject only to several clearly delineated exceptions.[2] Additionally, the Convention in Chapter II attempts to standardize the procedures whereby diplomatic officers, consular agents and commissioners of one State may take evidence in the territory of another State, procedures which have been traditionally disfavored by many civil law countries (including the FRG) on the grounds that such activity infringes upon the sovereignty

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[1]The Convention, which opened for signature on June 1, 1970, is published in 23 U.S.T. 2555, T.I.A.S. No. 7444, and in VIII Martindale-Hubbell Law Directory 4628 (1982).

[2]Hague Evidence Convention, art. 12.

of the State in which the evidence-taking is performed.[3] Finally, the Convention serves to solidify the basis of German-American judicial cooperation, in that a contractual basis has been substituted for the prior reliance on reciprocity, custom, and general international law to effectuate the execution of judicial assistance requests.

It should be noted that the Convention expressly enables the Signatory States to make declarations and reservations to many of its key provisions. The purpose of this flexibility is to allow the inclusion as parties to the Convention of both civil law as well as common law countries.[4] Incident to its ratification of the Convention, the FRG has made several such declarations and reservations, which significantly affect the scope of German-American judicial cooperation, primarily with respect to the Anglo-American concept of "pre-trial discovery of documents."[5]

The goal of this article is to discuss the entry by the FRG as a party to the Convention and the declarations and reservations made pursuant to that entry in terms of their effect on obtaining evidence in the FRG. Before turning to the substance of the official German position regarding the Convention, a brief discussion of the major differences between the German and American systems for producing evidence is appropriate.

II. German Evidence Procedure

Fundamental differences exist between the American and German legal systems as far as the taking of evidence is concerned. In the United States, the procedures for discovering or producing evidence are largely carried out by the parties through their attorneys, with little or no judicial supervision in the pre-trial stage. In contrast, under the German system the judge takes a much more active role in the entire evidentiary process.

According to the provisions of the German Code of Civil Procedure (*Zivilprozessordnung* or *ZPO*), the German judge is granted expansive powers to obtain evidence.[6] Based on the allegations in the initial legal briefs submitted by the parties it is the judge who determines which witnesses are to be heard, which documents or things are to be produced, etc. The actual procuring of evidence or testimony is preceded by an "evidence order" (*Beweisbeschluss*), which is issued by the competent judge. For such an "evidence order" to issue, the judge must be convinced that the evidence to be obtained is relevant to some material allegation of the party, in the sense that it will be probative of some fact at issue in the case.[7] In order to con-

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[3] *See, e.g.*, H.L. Jones, "International Judicial Assistance: Procedural Chaos and a Program for Reform," 62 YALE L.J. 515 (1953).

[4] Memorandum of the Federal German Government, *Bundestagsdrucksache* 8/217, at 53 (1977).

[5] The text of the FRG's declarations and reservations appears in volume VIII of the 1982 edition of the Martindale-Hubbell Law Directory at 4633.

[6] *Zivilprozessordnung*, sections 136, 139 and 278.

[7] P. Schlosser, "Internationale Rechtshilfe und rechtsstaatlicher Schutz von Beweispersonen," 94 *Zeitschrift für Zivilprozess*, part 4, at 375 (October 1981).

vince the issuing judge of the relevancy of the evidence sought, the parties must therefore provide sufficient foundation for each of their allegations.[8]

The practical effect of this system is that the gathering of evidence is in all cases preceded by a judicial determination as to the relevancy and probative value of the evidence to be obtained. It is this feature of the German civil law system which departs significantly from our system of evidence-gathering. The implications of this difference with respect to German-American judicial assistance under the Convention will be discussed in greater detail in the section on pre-trial discovery, *infra*.

The issuance of the evidence order is followed by the scheduling of an "evidence hearing" (*Beweisaufnahme*). Depending on the evidentiary requirements as outlined in the evidence order, the factual investigation which occurs can be in any one of the following forms: examination or inspection of a particular site or any form of physical evidence, testimony by court-appointed expert witnesses, and testimony by either witnesses, or, in exceptional cases, of the parties themselves.[9]

The deposing of witnesses and the production of documents are the two means of obtaining evidence most commonly sought by American lawyers. It is therefore appropriate at this point to discuss briefly the format of a German deposition, or more specifically, an examination of a witness. (The production of documents under German law will be examined in the section on pre-trial discovery, *infra*).

Under German law, the examination of the witness is usually conducted by the judge.[10] The judge will normally admonish the witness to speak the truth and advise him of the possible subsequent administration of an oath. Normally, witnesses are only actually sworn in very few instances, for example, where the testimony is critical to the decision of the case, or where the court has some reason to doubt the veracity of the witness (for example, where two successive witnesses provide totally conflicting testimony regarding the same series of events).[11]

The practical effect of the oath is to render punishable false statements which are negligently made. Intentional false statements are punishable regardless of whether or not an oath is administered.

After preliminary questions concerning personalia and credibility have been asked, the witness is requested to tell all that he knows about the subject matter of the proceeding, in narrative form.[12] After the witness has given his testimony in response to this all-embracing question, the judge may pose whatever additional questions he deems necessary. In addition, the judge must allow counsel for the parties to pose questions directly to the

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[8] *Id.*

[9] *Zivilprozessordnung*, sections 355 ff.

[10] According to Section 10 of the FRG Judiciary Act (*Gerichtsverfassungsgesetz* or *GVG*), law clerks are occasionally allowed to examine witnesses under the supervision of a judge.

[11] *Zivilprozessordnung*, section 391.

[12] *Id.*, at section 396.

witness, if so requested, and may also permit the parties themselves to pose questions.[13]

The German Code of Civil Procedure does not specifically define the scope of the parties' right to pose questions. In any event it must be remembered that the entire proceeding always remains under the control of the judge, with the right of the parties to examine witnesses usually limited to specific questions, approved in advance by the judge. Still, within this overall framework, it would be conceptually possible for the German court, in executing a Letter of Request, to engage in, for example, cross-examination, since although this method of questioning is not specifically provided for in the Code of Civil Procedure, it is not totally alien to the German legal system, in that it is mentioned in the Code of Criminal Procedure.[14]

Another important procedural difference in the German system involves the way in which testimony is recorded. Normally, no verbatim transcript of the testimony will be made in a German civil proceeding. Rather, the judge usually dictates the testimony of the witness in summarized form to the clerk of the court.[15]

One final important feature of German evidence procedure is the lack of strict rules of evidence. Subject to the general framework provisions outlined in Section 286 of the Code of Civil Procedure, the German judge is allowed to consider any and all evidence according to the principle of "discretionary evaluation of evidence" (*freie Beweiswürdigung*).[16] Under this principle, the judge enjoys broad discretion in evaluating and weighing that which is presented to him as evidence. There are virtually no rules of admissibility. Rather, the judge is entitled to consider every piece of evidence, and to weigh its relevancy and probative value based upon a consideration of all the facts and circumstances of the case.

Thus, for example, while hearsay is generally admissible in Germany, it will normally not be deemed by the judge to be as convincing as direct testimony, and will correspondingly only rarely be relied upon as a basis for a judgment.

The foregoing discussion indicates that significant differences exist between American and German evidence procedure. The general absence of rules of evidence, along with the disinclination of the German court to administer oaths or transcribe verbatim testimony, together constitute a fundamental departure from our normal procedural requirements.

The admissibility in an American proceeding of evidence obtained under the German system is governed by Rule 28(b) of the Federal Rules of Civil Procedure, which provides in relevant part that "(e)vidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under

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[13] *Id.*, at section 397.

[14] *Strafprozessordnung*, section 239. *See also* Schlosser, *supra* note 7, at 387-388.

[15] *Zivilprozessordnung*, section 160.

[16] *Id.*, at 286.

oath or for any similar departure from the requirements for depositions taken within the United States under these rules."[17]

It should be noted that, although the evidence may be admissible, there are indications in the Advisory Committee's Note to Rule 28(b) that in certain cases the "value or weight" of such evidence may be affected by the method of taking or recording the testimony.[18] Therefore it will always be advisable for the American practitioner to attempt to have evidence from Germany obtained in compliance with the Federal Rules of Evidence and Civil Procedure.

The extent to which such compliance will be possible may depend on the method used to obtain the evidence. The execution of a request for judicial assistance (or "Letter of Request" pursuant to Chapter I of the Convention) generally provides for the application of the law of the requested State, in this case German law. However, Article 9 of the Convention requires the requested State to follow any special method or procedure specified by the requesting State if it is not incompatible with the internal law of the requested State or impossible of performance by reason of internal practice or procedure or by reason of practical difficulties in the requested State.[19] The extent to which German judicial authorities will comply with American procedures will be discussed in the section on the execution of Letters of Request, *infra*.

The taking of evidence by diplomatic officers, consular agents or commissioners pursuant to Chapter II of the Convention will generally enable a greater degree of compliance with American procedural requirements. The relative advantages and disadvantages of these forms of evidence-taking will be examined later in greater detail.

III. FRG Declarations and Reservations to the Hague Convention

A. *Execution of Letters of Request: Procedural Requirements*

Article 1 of the Convention provides for obtaining evidence by means of a Letter of Request transmitted by a judicial authority of a State to the "competent authority" of another State. According to the text of Article 1, judicial assistance obtained under the Convention is limited to "civil or commercial matters." Although the United States interprets the term "civil or commercial" to include any foreign proceeding that is not criminal,[20] the FRG definition of "civil or commercial" seems to be somewhat narrower. For example, it is unlikely that the FRG will honor a request for evidence

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[17]Fed. R. Civ. P. 28(b).

[18]*Id.*. at Adv. Comm. Note.

[19]Hague Evidence Convention, art. 9.

[20]Report of the United States Delegation to the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, 17 I.L.M. 1418 (1978).

to be used in an American "administrative" proceeding, or in any civil proceeding dealing with "public law."[21]

According to Article 3 of the Convention, a Letter of Request must specify the following: the authority requesting its execution and the authority requested to execute it, if known to the requesting authority; the names and addresses of the parties to the proceedings and their representatives, if any; the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto; and the evidence to be obtained or other judicial act to be performed.

In appropriate cases, the Letter may be required additionally to specify any of the following: the names and addresses of the persons to be examined; the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined; the documents or other property to be inspected; any requirement that the evidence is to be given on oath or affirmation, and any special form to be used; any special method or procedure to be followed under Article 9; or any information necessary for the application of privileges according to Article 11.

In drafting a Letter of Request, the American practitioner should note that, pursuant to Article 33 of the Convention, the FRG has made a reservation excluding the provisions of paragraph 2 of Article 4 of the Convention.[22] Whereas the Convention provides, in the absence of such a reservation, that each Contracting State shall accept Letters of Request in either English or French, the FRG reservation provides that "Letters of Request to be executed under Chapter I of the Convention must . . . be in the German language or be accompanied by a translation into that language."[23]

The option to make this reservation was incorporated into the text of the Convention at the request of the FRG, and reflects a desire by the FRG to avoid bearing the burden of the costs of translation with regard to both incoming and outgoing Requests. Since outgoing Requests will almost always have to be translated into a language other than German, the acceptance of incoming Requests in French or English, with the corresponding need for translation into German, would lead to a one-sided situation in which the FRG would be burdened with virtually all translation costs arising from judicial assistance transactions.[24] Therefore the FRG will not accept Letters of Request in any language except German.

Article 2 of the Convention requires each Contracting State to designate a "Central Authority" for the purpose of receiving Letters of Request and forwarding them on to the authority competent to execute them. Under the provisions of the Convention, each State is to organize its Central Authority in accordance with its own law. The FRG has designated eleven such Cen-

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[21] *Id.*, at 1419.

[22] FRG Instrument of Ratification, at 1. *See also* VIII Martindale-Hubbell Law Directory 4633 (1982).

[23] *Id.*

[24] FRG Memorandum, *supra* note 4, at 54.

tral Authorities, one in each of the ten Federal States (*Bundesländer*) and one in the city of West Berlin.[25] There is express authority for such a designation under paragraph 2 of Article 24, which allows "Federal States" to designate more than one Central Authority.

The FRG requires that Letters of Request be addressed to the Central Authority of the State in which the request is to be executed. The practical effect of this system of designation is that an American attorney or judicial officer seeking the execution of a Letter of Request in the FRG must first ascertain, by reference to the address of the witness to be examined or the geographic location of the evidence to be obtained, in which state the request will be executed, in order to determine which Central Authority is authorized to receive the request.

This decentralized system may prove somewhat confusing to those American practitioners who are unfamiliar with the regional geography of the FRG. In response to American expressions of concern over the difficulty of the German Central Authority structure, the German Federal Ministry of Justice provided the U.S. Justice Department's Office of Foreign Litigation, which serves as the U.S. Central Authority, with an unofficial directory of the FRG's "zip code" (*Postleitzahl*) system.[26] The directory delineates the various combinations of four-digit numbers which are assigned as "zip codes" to the various *Bundesländer*. At best the directory can serve only as an approximate guide, since there are certain instances where two neighboring *Bundesländer* will utilize the same first digits in their adjacent districts. Nonetheless, it is still useful in the majority of situations as an initial aid to orientation.

Upon receipt of a Letter of Request the Central Authority determines whether or not the request complies with the provisions of the Convention. If it considers the request not to be in compliance with the Convention, the Central Authority must promptly inform the authority which transmitted the request of its objections.[27]

After verifying the sufficiency of the Letter of Request, the Central Authority forwards it to the authority competent to execute it. Pursuant to Article 35 of the Convention, the FRG has declared that such competent authority shall be the local district court (*Amtsgericht*) in whose district the official act is to be performed.[28] The designation of the *Amtsgericht* as the competent authority is consistent with basic American jurisdictional concepts, in that the *Amtsgericht* is the general court of first instance in the German judiciary system, corresponding roughly to the U.S. district courts.

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[25] FRG Instrument of Ratification, at 2.

[26] Letter of November 28, 1979, from Judge Claus D. Meinhardt of the German Federal Ministry of Justice to the Director of the Justice Department's Office of Foreign Litigation.

[27] Hague Evidence Convention, art. 5.

[28] FRG Instrument of Ratification, at 2.

B. *Execution of Letters of Request: Extent of Compliance with American Procedures*

In general the use of a Letter of Request is not well suited to evidence-taking transactions between common law and civil law countries, due to the differences in evidence procedure outlined above. Evidence obtained under normal civil law procedures would probably be of only limited use in an American proceeding, notwithstanding Federal Rule of Civil Procedure 28(b). Nonetheless, the effect of two separate Convention provisions may enable a greater degree of adherence to American procedures with respect to the execution of Letters of Request by German courts.

The first of these provisions is Article 9 of the Convention, which, as previously noted, requires the requested authority to follow any special procedure specified by the requesting authority, subject to the limits of incompatibility, etc. It is the position of the FRG that, according to the legislative history and the purpose of Article 9, the provisions for declining to proceed in a specially requested way are to be construed narrowly, i.e., it must be genuinely impossible, not merely impracticable, to correspond with the requested method.[29]

The second important provision is the declaration made by the FRG pursuant to Article 8 of the Convention that "members of the requesting court" of another Contracting State may be present at the execution of a Letter of Request by the local court, provided prior authorization has been given by the Central Authority of the *Bundesland* where the request is to be executed.[30] The phrase "members of the requesting court" is understood also to include counsel for the parties, since they are considered to be officers of the court in the United States.[31]

This declaration is also of considerable importance for American practitioners, since the Federal Ministry of Justice has indicated that, where the relevant Central Authority grants permission, American counsel may not only be allowed to be present at the execution of the Letter of Request, but may actually take part in the examination of a witness to a limited extent.[32]

In this regard, an American attorney would conceivably enjoy the same rights as any ordinary German citizen, in that he might elicit responses from the witness but would not, for example, be allowed to make any "formal applications" (e.g., motions) to the court.[33] The exact extent to which an American lawyer would be allowed to participate in an evidence-taking proceeding remains unclear, and may depend on whether or not the Ger-

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[29]FRG Memorandum, *supra* note 4, at 55.

[30]FRG Instrument of Ratification, at 3.

[31]This information was provided by the German Federal Ministry of Justice in response to questions submitted by a representative of the U.S. Justice Department, dated September 20, 1979.

[32]*Id.*

[33]*Zivilprozessordnung*, section 157.

man executing authority officially characterizes the proceeding as a "hearing" (*mündliche Verhandlung*).[34]

As mentioned in the discussion of German evidence procedure *supra*, it would be theoretically possible, within the framework of German deposition practice to conduct an examination by way of cross-examination. However, due to the uncertainty as to the scope of participation by the American lawyer, the requirement that all questioning be done in German,[35] and the overall retention of control by the German judge, the availability of this method of taking testimony should not be too heavily relied upon.

At the very least, the American lawyer would be able to submit questions to the German judge so that the court could address the additional questions to the witness, in the event that any of the responses had been incomplete or ambiguous.[36]

In addition to allowing such questioning by the parties and their counsel through the presiding judge, Article 9 of the Convention would also require the German court to administer an oath to the witness at the onset of any examination, if the "requesting authority" (i.e., American counsel) has so specified.[37] Likewise, the preparation of a verbatim transcript is possible under the FRG Code of Civil Procedure.[38]

The availability of testimony which is given under oath and which is recorded verbatim is a marked improvement over the pre-Convention situation, as is the ability of American judges or lawyers to be present and to take part in the execution of a Letter of Request. Apart from the right of American participants to pose questions on the scene, it will always be possible to specify in detail the questions to be put to the witness in the actual text of the Letter of Request.[39] In addition to insuring compliance under Article 9, this method also appears to be preferable to the FRG.[40] Therefore the American practitioner should always attempt to formulate to the fullest extent possible any desired questions in the body of the Letter of Request, and correspondingly to use the limited right to participate in the actual deposition to elicit responses to questions which first become apparent as the testimony develops.

The use of a Letter of Request enjoys a distinct advantage over the use of, for example, a diplomatic or consular deposition, in that an unwilling witness may be compelled to appear, and presumably to testify as well, to the extent possible under German law. The Convention states that a Contracting State, in executing a Letter of Request, "shall apply the appropriate measures of compulsion in the instances and to the same extent as are pro-

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[34] *See* Schlosser, *supra* note 7, at 389-390.

[35] *Gerichtsverfassungsgesetz*, sections 184, 185.

[36] *Zivilprozessordnung*, section 397 (1).

[37] *Id.*, at section 393. *See also* Code of Judicial Assistance (*Rechtshilfeordnung in Zivilsachen* or *ZRHO*), section 86.

[38] *Zivilprozessordnung*, sections 160-165.

[39] Hague Evidence Convention, art. 3(f) and (i).

[40] FRG Memorandum, *supra* note 4, at 54.

vided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings."[41] In essence the German *Amtsgericht* in executing a Letter of Request must employ the same procedures to secure the attendance of a witness as it would in a German civil proceeding.

The consequences of failure to appear by a witness are governed by the FRG Code of Civil Procedure. A witness who fails to appear after being properly summoned will first be required to bear any costs which result from his failure to appear.[42] At the same time the witness will be required to pay an additional fine of up to 1000 deutsche marks (over $400.00) and, to the extent that the witness cannot or will not pay, he may be imprisoned for up to six weeks.[43]

A final note dealing with the execution of a Letter of Request is that, pursuant to the Convention, a witness may refuse to give testimony insofar as he has a privilege or duty to refuse to testify under the laws of either the State of execution or the State of origin.[44] It will therefore always be necessary to consider the possible effect of any relevant German privileges (discussed *infra*) in addition to those arising under the laws of the United States.

Under Article 12 of the Convention the execution of a Letter of Request may only be refused if such execution does not fall within the functions of the judiciary, or if the requested State considers that its sovereignty or security would be prejudiced thereby. All other Letters of Request issued in compliance with the Convention's provisions must be executed, subject to the reservations and declarations of the individual Member States. This mandatory compliance provision constitutes a dramatic improvement over the pre-Convention state of affairs, and, along with the ability to compel the appearance of witnesses, forms the major advantage which this method of evidence-taking has to offer.

The fact that German law (including German privileges) will be applicable should not be considered a great disadvantage vis-à-vis the taking of evidence through diplomatic officers, consular agents or commissioners, since the right of the witness to be accompanied by German counsel in these latter situations (discussed *infra*) will in effect insure that any relevant German privileges, etc., will likewise be observed.

Furthermore, although control of the proceeding in all cases will still be retained by the German court, the opportunity to assist in the questioning of the witness, to require an oath to be administered, and to have a verbatim transcript prepared, should insure adequate results in terms of completeness and admissibility of the evidence obtained. It would additionally

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[41] Hague Evidence Convention, art. 10.

[42] *Zivilprozessordnung*, section 380. Although not specified in the Code, this presumably refers to court costs, etc., which are necessitated by the delay.

[43] *Id.*

[44] Hague Evidence Convention, art. 11.

be possible under the German declaration to Article 8 for an American judge to monitor the evidence-taking proceeding, advising his German counterpart of relevant American privileges and rules of evidence.

The only significant disadvantage regarding the use of a Letter of Request seems to be in terms of time, since the fact that the assistance of judicial authorities of the FRG must be sought before the proceedings can commence will generally mean that this method will take longer to accomplish than any of the other available methods.

C. *Taking of Evidence by Diplomatic Officers, Consular Agents and Commissioners*

Chapter II of the Convention, which provides for the taking of evidence by diplomatic officers, consular agents and commissioners, represents a significant departure from previous attempts to standardize judicial assistance.[45] The provisions of this chapter were included in order to facilitate judicial assistance between those countries who were parties to the Hague Convention on Civil Procedure of 1954, on the one hand, and the countries of the Anglo-American, or "common law" group, on the other, since the differences between these two systems rendered the Letter of Request method less appropriate in such cases.[46]

However, since the Chapter II-type method of evidence-taking is characterized by the direct intervention by representatives of a State in the territory of another State, they necessarily involve a greater degree of infringement upon the sovereignty of the second State. Therefore, these methods of taking evidence have generally been less favorably viewed than the use of a Letter of Request under Chapter I.[47] In light of the widespread apprehension concerning these direct methods, the Convention provides in Article 33 that a Contracting State may exclude by reservation any or all of the provisions of Chapter II. The FRG has made several declarations and reservations regarding this chapter.

The only substantive provision of Chapter II to which the FRG has made no reservation is Article 15, which allows diplomatic or consular officials to take the evidence without compulsion of nationals of the State which the official represents. Thus, for example, a U.S. consul could voluntarily depose an American citizen residing in Germany, without the necessity of receiving permission from the German government.

The extent to which American diplomatic or consular officials can take the evidence of other non-Germans is outlined in paragraph 1 of Chapter 16 of the Convention, which provides in part that evidence can be taken, again without compulsion, of nationals of a third state, subject to the per-

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[45]K.H. Bockstiegel and D. Schlafen, "Die Haager Reformübereinkommen über die Zustellung und die Beweisaufnahme im Ausland," 22 *Neue Juristische Wochenschrift*, at 1076 (May 31, 1978).

[46]FRG Memorandum, *supra* note 4, at 51.

[47]Bockstiegel and Schlafen, *supra* note 45 at 1077.

mission of the competent authority designated by the state in which the official exercises his functions, and subject to any conditions imposed by such competent authority.

The FRG has designated the Central Authority of the *Bundesland* where the evidence is to be taken as the competent authority from whom permission must be obtained.[48] Such permission will not be required where the witness who is a national of a third State is also an American citizen.[49] The purpose of requiring prior permission enables the German Central Authority to make an initial determination of whether the proposed taking of evidence would violate German public policy, and also to decide if any procedural restrictions are necessary for the protection of the proposed witness.[50] This partial retention of control by the German judicial authorities justifies, in the opinion of the FRG, allowing this type of evidence-taking to take place to a greater extent than under the pre-Convention circumstances.[51]

In addition to retaining a degree of supervisory control, the FRG requires in all cases that the taking of evidence within its territory under Chapter II must proceed without compulsion. The position of the FRG is that this type of evidence-taking deviates so significantly from the normal German proceeding as to require at the present time as a minimum that only those persons who voluntarily agree to this type of proceeding may be bound by it.[52] The FRG has indicated that it will consider granting assistance in obtaining compulsory appearance of witnesses if future practice indicates that the requirement of permission and the retention of supervisory control sufficiently protect the legitimate interests of potential witnesses.[53]

The fact that the taking of evidence under Chapter II differs so dramatically from the usual German proceeding has led the FRG to declare under Article 33 that the taking of evidence by diplomatic officers or consular agents is not permissible in its territory if German nationals are involved.[54] It is the view of the FRG that this restriction is necessary for the adequate "protection of its citizens and for the safeguarding of its sovereignty, which is infringed upon to a much greater extent by the examination of German citizens than by the taking of evidence with respect to foreign citizens."[55] It is the desire of the FRG that German witnesses be primarily examined by way of a Chapter I Letter of Request.[56]

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[48]FRG Instrument of Ratification, at 3.

[49]*Id.* Since a relatively small number of U.S. nationals hold dual citizenship, this situation is not likely to arise with any great frequency.

[50]FRG Memorandum, *supra* note 4, at 57.

[51]*Id.*

[52]*Id.*

[53]*Id.*

[54]FRG Instrument of Ratification, at 1.

[55]FRG Memorandum, *supra* note 4, at 57.

[56]*Id.*

The practical effect of this reservation is that U.S. diplomatic or consular officials cannot rely on Article 16 of the Convention in obtaining the testimony of German nationals. However, the United States stands in a somewhat special relationship with the FRG as a result of a series of exchanges of Diplomatic Notes. Pursuant to these notes, U.S. diplomatic or consular officials can in fact take the testimony of German nationals, subject to various restrictions.

Before turning to the substantive provisions of these notes, a brief discussion of their history and continuing validity is appropriate. The authority under the Convention for honoring preexisting agreements between Contracting States is Article 32, which provides, in relevant part, that "the present Convention shall not derogate from conventions containing provisions on the matters covered by this Convention. . . ."[57] The 1978 Report on the Work of the Special Commission on the Operation of The Hague Evidence noted the existence of a whole network of bilateral agreements among the Convention signatories which are often more liberal than the Convention itself.[58]

The initial Exchange of Notes between the United States and the FRG took place in 1956, and was a result of negotiations which began with an inquiry by the U.S. Department of State in 1954.[59] The State Department had interpreted the then-existing German law as permitting American consular officers in the FRG to depose only American citizens, occupants of American vessels, and aliens having permanent residence in the United States. In response to an inquiry by the U.S. Embassy in Bonn, the FRG Federal Ministry of Foreign Affairs issued the 1956 Notes, which essentially waived any objections to the questioning of German or other non-American witnesses on a voluntary basis by U.S. diplomats or consuls in the FRG.[60]

The 1956 Notes were never officially published by the Department of State or by the FRG, in keeping with the official treaty practice of both States at that time regarding "minor" agreements.[61] Both States nonetheless considered the 1956 agreement to be valid, and at no time was a question raised as to that validity. However, after the FRG in 1979 ratified the Convention with legislation which precluded the subsequent conclusion of bilateral agreements at variance with the terms of the Convention, it was realized that a legal challenge could be raised regarding the continued validity of the 1956 Agreement. To clarify the situation, it was agreed to exchange notes confirming the continuation in force of the 1956 Agreement.

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[57] Hague Evidence Convention, art. 32. *See also* Article 28(g), which provides that any two Contracting States may agree to derogate from the provisions of Chapter II.

[58] 17 I.L.M. 1425, 1433 (1978).

[59] 6 WHITEMAN DIGEST OF INTERNATIONAL LAW 21.

[60] *Id.*

[61] The text of the January 13, 1956, Note is published in 6 WHITEMAN DIGEST OF INTERNATIONAL LAW at 21.

This exchange was concluded by notes dated October 17, 1979, and February 1, 1980.[62]

As a result of the notes, the United States enjoys a somewhat privileged status vis-à-vis the other signatories of the Convention with respect to diplomatic and consular depositions in the FRG. However, this privilege is qualified by the conditions attendant to the initial German Note of January 13, 1956, which have been reaffirmed by the 1979-1980 exchange.

The first and most obvious condition is that of reciprocity, which has been formally granted by the United States.[63] A second condition, which is of considerable importance to the American practitioner, is the requirement "that no compulsion of any kind will be used against the person to be questioned, either to appear or to make statements. . . ."[64] This is consistent with the FRG position with respect to consular depositions of non-Germans, which in all cases must be completely voluntary.

The FRG also requires that the request to give information not be called a "summons" and that the questioning not be called an "interrogation," and that no compulsion whatsoever be brought to bear on a person ready to provide information to make him sign protocols or other records of orally provided information.[65]

The examination of a German witness must normally take place "in the offices of American Consulates,"[66] unless the witness expressly asks to be questioned elsewhere or expressly states his agreement with such questioning.[67] Additionally, the witness has the right to be accompanied by a German attorney.[68]

The emphasis on noncompulsion as well as the other FRG conditions tends to detract from the otherwise considerable advantages which this method of evidence-taking enjoys over the use of Letters of Request. For example, it is to be anticipated that a German attorney present at the deposition will advise his client not to testify in derogation of any relevant German privilege, etc., thus in a sense superimposing to some extent the German procedural framework over our own.

Still, this method of evidence-taking retains certain advantages as compared to the use of Letters of Request. First, the taking of testimony in this manner can usually be completed more expeditiously than through a Letter of Request, as there is no need to engage the assistance of the FRG authorities. Moreover, although German procedures may to some extent influence the proceedings, the mode of questioning will still be controlled in large measure by the diplomatic or consular official on the scene, thus insuring

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[62]T.I.A.S. 9938.
[63]*Id.*
[64]FRG Note of January 13, 1956, 6 WHITEMAN, *supra* note 61, at 21.
[65]*Id.*
[66]*Id.*
[67]U.S. Note of February 1, 1980, T.I.A.S. 9938.
[68]*Id.*

that the evidence will be obtained in a manner peculiar to our way of obtaining facts.[69]

Despite these advantages, conversations with American officials at both the U.S. Embassy in Bonn and at the U.S. Consulate in Frankfurt have revealed that this method of evidence-taking is not being utilized with any frequency by American litigators. This is possibly due to the fact that, because of the relatively recent publication of the Notes, they are not yet widely known.

One final declaration by the FRG pertaining to Chapter II of the Convention deals with the taking of evidence by way of a commissioner appointed by the requesting authority. Although the use of commissioners is generally rather broadly permitted by the signatories to the Convention,[70] the FRG continues to have objections to the unrestricted use of this method. This is in part based on considerations of national sovereignty, in that a commissioner is deemed to be an agent of the foreign sovereign he represents, and in a sense carries out a "sovereign act" in the territory of the State in which he functions.[71]

Accordingly, the FRG has declared pursuant to Article 17 of the Convention that "(a) commissioner of the requesting court may not take evidence . . . . unless the Central Authority of the *Land* where the evidence is to be taken has given its permission."[72] The FRG has also reserved the right to subject such permission to conditions.[73] The exact nature of any possible conditions is neither specified in the text of the declaration nor in the FRG Enabling Legislation.

It could generally be expected that the local district court would insist that no compulsion be employed against the witness and that any relevant German privileges be observed. Under the terms of the declaration, the local district court is entitled to control the preparation and the actual taking of the evidence.[74] This further suggests that German procedures and especially privileges will be scrupulously observed.

The fact that the commissioner will be under German judicial supervision throughout the evidence-taking process justifies, in the opinion of the FRG, extending the use of this method to the examination of German citizens.[75] The FRG view is that the requirement of obtaining permission in each case, plus the possible imposition of conditions, will insure that this method of evidence-taking is used only on an exceptional basis in situations where other methods are less appropriate.[76]

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[69] 6 WHITEMAN, *supra* note 61, at 21. The authority and guidelines for the taking of testimony by consular officials abroad is set forth in 22 C.F.R. section 92.50 (1973).

[70] 17 I.L.M. at 1433.

[71] FRG Memorandum, *supra* note 4, at 57. *See also* H. Smit, *International Cooperation in Litigation: Europe*, The Hague: Martinus Nijhoff, 1965, at 202.

[72] FRG Instrument of Ratification, at 4.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

Despite the foregoing restrictions, the use of the commissioner method has the advantages of being relatively inexpensive and informal. Subject, of course, to the imposition of restrictive conditions, the evidentiary results would generally be readily admissible, since the commissioner could easily comply with the procedure and practice of the requesting court. To some extent, it was the desire of the FRG also to utilize the commissioner method which caused it to refrain from completely excluding this method of evidence-taking.[77]

IV. Pre-Trial Discovery in the FRG

The FRG has declared, pursuant to Article 23 of the Convention, that it will not "in its territory, execute Letters of Request for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries."[78] This declaration presents considerable problems to American litigators, in that it eliminates the availability of judicial assistance with respect to a very important area of our legal system.

Although it was initially believed that the FRG's hostility to this type of evidence-taking was based on a misunderstanding of the concept,[79] it now appears clear that the real reason for concern lies in the procedural differences between the two systems. Above all, the FRG is interested in protecting its citizens, including its corporate "citizens," from an information-gathering proceeding whose scope exceeds by far that which would be permissible under German law. The FRG government, in its official memorandum published incident to the ratification of the Convention, noted that pre-trial proceedings of an investigatory or "discovery" nature "are in general not provided for in continental-European law, since the danger exists that through such proceedings, economic or industrial secrets could be disclosed."[80]

The procedural safeguards offered to litigants by German courts with respect to business or trade secrets are more extensive than those available under U.S. law.[81] Additionally, as previously discussed in the section on German Evidence Procedure, the taking of evidence under the German system is in all cases preceded by a judicial determination as to the relevancy of the evidence to be obtained, with the actual evidence-taking then ordered by the court.

One German commentator has characterized this procedure as a type of "plausibility-control," which serves to protect the courts from unnecessary work and to protect litigants and third parties from unfounded intrusions

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[77] *Id. See also* Bockstiegel and Schlafen, *supra* note 45 at 1077.

[78] FRG Instrument of Ratification, at 4.

[79] 17 I.L.M. at 1421.

[80] FRG Memorandum, *supra* note 4, at 53.

[81] R. Stürner, "Rechtshilfe nach dem Haager Beweisübereinkommen für Common Law-Länder," 15/16 *Juristen-Zeitung*, at 521 (1981).

into their "spheres of privacy."[82] It is the fear of the FRG that the German judge called upon to execute a request for discovery would have no access to the U.S. court's records, and therefore have no way to verify whether or not the evidence request is sufficiently substantiated, as required by German law.[83] Indeed, since in almost all cases under U.S. law discovery is left to the litigants themselves, there will not normally be any records available with which this could be verified.

Even in those cases where the grounds for requesting a certain piece of evidence are sufficiently substantiated, there is no guaranty that the FRG would comply with the request. The extent to which a party can demand information from his opponent is much more limited under German law than under our legal system. This is especially true with respect to documentary information; under German law, while a general duty to give testimony exists, there is no general duty to produce documents.[84] The German Code of Civil Procedure does provide for the production of documents under certain limited circumstances (discussed *infra*), but such production, unlike the giving of testimony, cannot be compelled judicially.[85]

The limits of judicial assistance by the FRG with respect to U.S. requests for discovery, documentary or otherwise, were defined in two recent decisions of the Munich Higher Regional Court (*Oberlandesgericht*).[86] The two related cases dealt with an action which had been brought in the U.S. District Court for the Western District of Virginia in 1976[87] by Corning Glass Works against ITT, for alleged patent infringement. ITT counterclaimed, alleging antitrust violations.

Upon motion of ITT the District Court sent a Letter of Request to the Bavarian State Ministry of Justice, requesting the examination of witnesses and the production of documents. In the first decision, the court considered the action of the Bavarian Justice Ministry regarding the production request. The Justice Ministry had refused to execute this part of the Request, citing the FRG's reservation under Article 23 of the Convention, and ITT had requested judicial review of this decision.

ITT argued that, since the action had been pending since 1976 and that the documents to be obtained were not to be used for any pre-trial evidence proceeding, but rather for the actual purposes of the trial, the production request was not excluded by the FRG reservation.

The German court dismissed this argument, noting that the trial itself had not yet begun at the time of the request. Therefore, the American court had not yet had an opportunity to examine the nature of the evidence

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[82] *Id.* at 522.

[83] Schlosser, *supra* note 7 at 377-378.

[84] C. D. Meinhardt, "Neuere Entwicklungen im zivilrechtlichen Verkehr, Deutschland - USA," *German-American* Lawyers' Association Newsletter, at 3 (July 1980).

[85] *Id.* at 5. *See also* Stürner, *supra* note 81 at 523.

[86] OLG Munich (Bavaria), Decisions of October 31, 1980, and November 27, 1980, reported in 15/16 *Juristen-Zeitung* at 538 (1981).

[87] *Corning Glass Works v. International Telephone & Telegraph*, No. 76-0144 (D. Va. 1976).

requested, such evidence having been freely designated by the parties. The German court found this lack of advance judicial scrutiny to be unacceptable in terms of the possible prejudicial effect on the German parties involved.

In the second related case, the German court addressed the part of the U.S. Letter of Request which requested the deposition of German witnesses in connection with ITT's counterclaim. The Bavarian State Justice Ministry had agreed to comply with this part of the request, and the German witnesses petitioned for a judicial ruling as to the legality of the request, arguing, *inter alia*, that the FRG reservation excluding pre-trial discovery of documents would be circumvented by allowing German witnesses to be questioned regarding the content of documents. The German court rejected this argument and ruled that the compliance with the request for depositions was proper.

The court first dismissed the assertion by the petitioners that the information provided in the Letter of Request was not sufficiently specific in terms of Article 3 of the Convention. While conceding that the content of the Letter of Request regarding the "nature of the proceedings"[88] and the "questions to be put to the persons to be examined"[89] were lacking in the detailed particulars about the nature of the claim which would normally be required under German law, the court ruled that these deficiencies were not sufficient to justify noncompliance under Article 5 of the Convention.

The court based this result on several factors. First, the desire of the FRG to solidify the basis of German-American judicial assistance through its ratification of the Convention obligated the FRG at least to consider reasonably "pre-trial discovery." Additionally, the FRG reservation under Article 23 only applies to discovery of documents, so that the only other grounds for refusal would lie in the "incompatibility" provisions of Article 9 (discussed, *supra*).

The court additionally held that, contrary to the petitioners' assertions, the compliance with the request would neither violate the fundamental principles of German law nor German public policy. Even under German law, the examination of third parties concerning the content of documents is fundamentally permissible, regardless of whether or not the documents are themselves produced. Finally, there would be no threat to German sovereignty or security, since the depositions would be controlled by a German judge, thus insuring that limits on the scope of the examination and compliance with any relevant German privileges would be adequately observed.

In light of the foregoing decisions, the following can be said concerning the extent to which the FRG will comply with U.S. requests for pre-trial discovery: while a request for the production of documents will not normally be granted, assistance will generally be granted in obtaining the testi-

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[88]Hague Evidence Convention, art. 3 (c).

[89]*Id.* at art. 3 (f).

mony of witnesses, even where such testimony concerns the content of documents. This latter assistance will, of course, be subject to FRG privileges and procedural requirements.

Despite the present refusal by the FRG to execute requests for pre-trial discovery of documents, there exists the possibility that such requests will be more favorably considered in the future. The text of Section 14, paragraph 2, of the FRB Enabling Legislation for the Convention essentially provides that requests of this type may be executed with due consideration of the interests of the persons affected, so long as the underlying principles of German procedural law are upheld.[90] A prerequisite for such execution, however, is the promulgation of regulations by the Federal Ministry of Justice outlining the necessary conditions and procedural requirements.[91]

As of this date no such regulations have been drafted. Nevertheless, as a result of discussions with the German Federal Ministry of Justice official responsible for the drafting of any supplemental regulations, it is possible to discuss briefly what types of production requests would most likely be accepted in the future.[92]

As a starting point, the FRG could agree to execute requests for document production in those limited instances where such production would be permissible under German law. The German Code of Civil Procedure requires, for example, that a party may demand production from his opponent where the opponent has a duty to produce under substantive civil law.[93] The instances where such a duty exists are enumerated in the German Civil Code (*Bürgerliches Gesetzbuch* or *BGB*) which provides, in relevant part, that,

> . . . . a person who has a legal interest in the examination of a document in the possession of another may demand from the possessor permission to examine it, if the document is made in his interest, or if in the document a legal relationship between himself and another is recorded, or if the document contains the negotiations of any legal transaction which have been carried on between him and another person, or between one of them and a common intermediary.[94]

Additionally, a party has a duty to produce for his opponent any document to which he has made reference in any prior proceeding.[95] It must be remembered, however, that even where a duty to produce a document exists under German law, the document, its contents, and the facts to be proved by the document must be described to the fullest extent possible.[96]

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[90]Law of December 22, 1977, *Bundesgesetzblatt* 1977, Part I, 3105, at 3106.

[91]*Id.* at 3106.

[92]The following information is based on a March 22, 1982, interview with Dr. Christoph Böhmer of the German Federal Ministry of Justice's Section on International Cooperation and Litigation, which took place in Bonn, West Germany.

[93]*Zivilprozessordnung*, section 422.

[94]*Bürgerliches Gesetzbuch*, section 810. *See also* I. Forrester, S. Goren and H. Ilgen, *The German Civil Code*, Amsterdam: North-Holland Publishing Co., 1975 (from which the English translation of this section is quoted).

[95]*Zivilprozessordnung*, section 423.

[96]*Id.* at section 424.

Although the term "fullest extent" is capable of varying interpretations, it is certain that a vague, general reference to numerous documents would not be sufficient.

A second possibility which should prove acceptable to the FRG would be to execute only those American production requests where a U.S. Judge has had the opportunity to make an initial determination as to whether the discovery is proper under U.S. law as, for example, where a U.S. court examines a motion for an Order Compelling Discovery under the Federal Rules of Civil Procedure.[97] This would eliminate the grounds for part of the current FRG objection, which is, that without any supervision by a U.S. court, American litigants would abuse the right to discover documents through random, unsubstantiated requests for voluminous evidence.

In any event, the pre-trial discovery of documents, if allowed by the FRG, would always be limited by the applicability of German procedures and privileges under Articles 9 and 11 of the Convention. Furthermore, the lack of methods to compel production under the German Code of Civil Procedure could not be changed by any future regulations.[98]

The foregoing discussion is unfortunately still theoretical, since the FRG has not yet promulgated any regulations which would enable the pre-trial discovery of documents. There are indications, however, that the FRG is just as interested in further regulation of the current state of affairs as is the United States. A major reason for this is that failure to produce documents located abroad can and has led to procedural sanctions in the United States.[99]

The threat of losing in a U.S. lawsuit has led German litigants simply to produce requested documents in the United States without the involvement of the German authorities.[100] A standardization of the procedure through German regulations, allowing for selective execution of requests for the production of documents, would actually be more likely to assist than to hinder potential German litigants, since in those cases where the request was denied, the FRG authorities would be able to confirm, for example, that a legal bar to production exists, and thus would hopefully be able to convince the American court not to impose procedural sanctions.[101]

A final argument in favor of change is that the existing situation, that is the blanket refusal by the FRG to execute incoming requests for the pre-trial production of documents, prejudices American litigants in those instances where a duty to produce would also exist under German law,

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[97]Fed. R. Civ. P. 37 (a).

[98]Meinhardt, *supra* note 84 at 5. Although compulsion actually to produce a document is not available, sanctions do exist in the event of non-production. Where the party seeking production has sufficiently described the content of a document, that version of the content can be deemed to be fact by the court in the event the opponent refuses to produce. *Zivilprozessordnung*, section 427.

[99]Schlosser, *supra* note 7 at 394.

[100]Meinhardt, *supra* note 84 at 5.

[101]*Id.*

since at present even this type of request has been denied. It would not be unreasonable to request the FRG to allow an American litigant to demand production in those cases where a German litigant in a domestic German lawsuit could do so.

The competent authorities at the German Federal Ministry of Justice have agreed to re-examine the current state of affairs and to consider a more flexible approach to the issue of pre-trial discovery of documents. At this time, it is still unlikely that a request for production of documents would be granted, although a request for the deposition of witnesses concerning those documents would be permitted to the extent allowed under German law.

V. Relevant German Privileges

In any attempt to obtain the testimony of a witness in the FRG, the privileges available to that witness must be considered, regardless of which method is used. The application of German privileges in the execution of a Letter of Request under Chapter 1 of the Convention is mandated by Article 11. Likewise, the right of a German witness to be represented legally during depositions by either U.S. consular officials or commissioners indicates that German privileges will also be applicable in these situations.[102] Accordingly, a brief survey of the more important German privileges is necessary in any thorough discussion of evidence-taking in the FRG.

Section 383 of the Code of Civil Procedure (*Zivil-prozessordnung*) enumerates the instances in which a German witness in a civil proceeding may refuse to give testimony on personal grounds. It provides that the spouse of a party may refuse to testify in any action, even if the marriage no longer exists.[103] This right also extends to the betrothed of a party.

Persons who are or were related to a party by blood or marriage in direct line, related by blood up to the third degree or by marriage up to the second degree in the collateral line may also refuse to give testimony.[104] All of the above-specified persons must be informed, prior to the hearing, of their right to refuse to give evidence.[105]

Aside from these basically familial privileges, the FRG also recognizes privileges based on official or professional secrecy. Among these, for example, is the privilege of clergymen to refuse to testify as to information which may have been confided to them in the exercise of their ministerial duties.[106] Likewise, there exists a rather comprehensive journalist's privilege which entitles "persons who assist or have assisted in a professional capacity in the preparation, production or dissemination of periodic publications or radio or television broadcasts . . . ." to refuse to testify "as to the

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[102]Hague Evidence Convention, art. 20.
[103]*Zivilprozessordnung*, section 383 (1).
[104]*Id.*
[105]*Id.*
[106]*Id.*

persons of the author, sender or informant providing contributions and supporting material, and as to information they have received in connection with their activities. . . ."[107]

There is finally under this section a "catchall" privilege, which applies to "persons who by virtue of their office, profession or trade have knowledge of facts, the secrecy of which is imperative owing to their nature of by law, in respect of those facts to which the obligation of secrecy refers."[108] Although it is not specified in the Code, this section would presumably include individuals such as attorneys, physicians, and accountants, provided the requisite confidential relationship is present.

Additionally, Section 384 of the Code enumerates the instances where a witness may refuse to testify on technical (*sachliche*) grounds. Specifically, this section provides that evidence may be refused to be given (1) on questions the reply to which might cause immediate financial damage to the witness or any person with whom he has a familial relationship;[109] (2) on questions the reply to which might disgrace the witness or his relatives (as *per* Section 383) or expose them to the risk of being prosecuted for an offense or breach of regulation;[110] and (3) on questions to which the witness could not reply without disclosing an art or trade secret.[111]

Where a witness refuses to testify as to nonprivileged information, Section 390 of the Code provides for the compulsion of testimony. The sanctions are essentially the same as those utilized under Section 380 to compel the attendance of a witness, and need not be repeated here.

The finer intricacies of the various German privileges would require a more detailed analysis than is possible here. The important fact to note is that, although they reflect basically the same policy considerations on which common law privileges are based, they extend a bit further in certain areas, particularly with respect to familial relationships, and, more importantly, with respect to business and trade secrets.

VI. Conclusion

The recent addition of the Federal Republic of Germany as a party to The Hague Evidence Convention of 1970 has served to standardize and clarify the scope and extent of judicial cooperation between that State and the United States. In addition, it has supplied a firm contractual basis for that cooperation.

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[107] *Id.*

[108] *Id.* The Code further provides that the hearing of such persons mentioned in this section, if they do not refuse to testify, "shall not be directed to facts in consideration of which it becomes patent that no evidence can be given without a breach of official or professional secrecy." *Id.* at section 383 (3).

[109] *Id.* at section 384 (1).

[110] *Id.* at section 384 (2).

[111] *Id.* at section 384 (3).

The choice of which of the various evidence-taking options to use in a given situation will depend on such considerations as the amount of time available, the desirability of specific U.S. procedures, and the need for compulsion. As more cases arise under the Convention, the exact boundaries of German-American judicial assistance will become more clearly delineated.