

CLIENT ALERT

# All You Need to Know About Deposing Witnesses in Germany

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## AUTHORS

**Matthias Schrader | Dr. Johannes Schmidt | Svenja Wachtel | Dr. Marc Dietrich | Fabian Peitzmeier**

Much has been written about deposing witnesses located in Germany for U.S. court proceedings. The concepts of party-driven discovery, in general, and pre-trial depositions, in particular, are alien to the German legal system. Unsurprisingly, the German and U.S. rules and practices on the (pre-trial) taking of evidence in cross-border situations do not match and, indeed, in many ways collide.

Our U.S. litigators have observed a surge in remote depositions taken by video since the beginning of the pandemic. We expect that this practice will not disappear in the future and instead remain a standard tool going forward. It would appear that remote depositions would obliterate a number of practical obstacles to long-distance cross-border depositions. However, as confirmed in a recent string of decisions rendered by German authorities, anyone seeking to depose a witness in Germany for a U.S. proceeding should be aware of several legal and practical challenges – irrespective of whether the deposition is taken in person or remotely by video.

Cross-border depositions that we have handled for our clients can be categorized broadly into three scenarios:

- Scenario 1: The voluntary and consensual deposition: neither the witness nor the opposing party has concerns.
- Scenario 2: The voluntary but contentious deposition: the witness is prepared to testify, but the opposing party objects (as a result of genuine legal concerns or for tactical reasons).
- Scenario 3: The involuntary deposition: the witness is not prepared to testify voluntarily.

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Below, we will address each scenario, point out the typical challenges and offer suggestions on how to navigate the issues.

## 1. Scenario 1: The Voluntary and Consensual Deposition

If the witness is willing to testify and the parties are in agreement about the procedure, they enjoy the greatest freedom in making the deposition work in their preferred and least cumbersome fashion, including by way of a remote deposition of a witness located in Germany. In practice, in these situations, parties increasingly choose to forgo the strict procedure prescribed for the taking of evidence abroad set forth in the Hague Convention of March 18, 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the “**Hague Convention**”). The Hague Convention establishes a formalized process for ensuring that witness testimony for use in one member state can be obtained in another member state. Germany and the United States are both signatories of the Hague Convention.

Traditionally, U.S. courts do not insist that parties observe the procedure set forth in the Hague Convention in a cross-border setting. The U.S. Supreme Court has confirmed, in its 1987 *Aerospatiale* decision, that the Hague Convention provides optional procedures for obtaining evidence abroad. Accordingly, U.S. courts will accept evidence discovered under the applicable U.S. procedural rules, in particular if obtained under party agreement. By design, depositions in the pretrial-discovery phase are to be conducted by the parties without interference by the court unless a contentious issue between the parties requires the court to intervene.<sup>1</sup> The U.S. court will not take part in the deposition or question the witness. Obtaining witness testimony in an “informal” deposition in a private setting, i.e., without involving German courts, is thus a viable option from the U.S. perspective.

However, parties contemplating to circumvent the Hague Convention should also consider the German perspective.

### a. “Informal” Depositions in Germany: Are They Legal?

From the German perspective, the issue of whether privately conducted “informal” depositions in Germany are legal – or, to the contrary, amount to as much as a criminal offense – is not settled. The German government, in communications to U.S. authorities and courts in the 1980s and 1990s, expressed the view that taking depositions in Germany outside of the framework of the Hague Convention violates Germany’s sovereignty. This view is not uncontested in Germany. Some German scholars point out that there is no clear rule in public international law to the effect that privately conducted depositions or questioning of witnesses constitutes violations of a country’s sovereignty.

Even if a private, informal deposition in Germany for a U.S. proceeding were to violate German sovereignty, there are no immediate consequences attached to such a violation. Germany has not adopted a blocking statute prohibiting depositions for use in the United States (or any other country). A few authors have raised the question whether taking a

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<sup>1</sup> Fed. R. Civ. P. 28(b) governs the taking of depositions in a foreign country.

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deposition might constitute a criminal offense under German criminal statutes (fraudulent exercise of public office, which is punishable with a monetary fine or imprisonment of up to two years). The overwhelming view, however, is that the mere questioning of a witness on a voluntary basis in a private setting is not an exercise of public office and, thus, does not violate any criminal statute. We are not aware that any criminal investigations were ever initiated against participants in a deposition in Germany for use in a U.S. proceeding.

When deciding whether to conduct private depositions in Germany, the parties should also consider whether the judgment needs to be enforced in Germany. A German court might find that a U.S. judgment that is based on evidence obtained through a private, informal deposition in Germany was obtained by breaching Germany's sovereignty and refuse recognition and enforcement in Germany.

### **b. Administration of an Oath**

In a U.S. deposition, witnesses usually testify under oath. The oath is administered by the court reporter present at the deposition. In Germany, administering an oath is considered an official act that only certain public servants may administer, in particular judges and notaries. Some commentators suggest that the administration of an oath by a court reporter to a deponent in Germany constitutes the crime of fraudulent exercise of a public office. While this question is not yet fully settled, persons – irrespective of their physical location – who are not authorized to do so under German law should best refrain from administering an oath to a person located in Germany, including by video.

The easiest solution to avoid this issue is to stipulate that the witness may testify without taking an oath.

If such a stipulation is not possible, parties may ask a German notary to administer the oath. Pursuant to Sec. 22 of the Federal Code of Notaries, notaries shall be responsible for the administration of oaths if an oath is necessary under the law of a foreign state. In practice, the notary will administer an oath that the witness swears to tell the truth during the specified deposition. The notary then will record this oath in a public document to be signed by the witness. The notary should best be contacted a few days ahead of the deposition so that he can prepare the paperwork. Unless required by the applicable procedural rules in the United States, the notary does not need to be present during the deposition.

Parties should be aware that German notaries are generally limited to practicing within the area in which they maintain their office, which reflects the jurisdictional limits of the competent Local Court (*Amtsgericht*). Also, notary fees may be an issue. German notaries are required by law to charge statutory fees. The fees are based on the value of the matter. In a litigation setting, a notary may equate the value of the matter with the amount in dispute. In multi-million dollar litigations, the administration of the oath thus may carry a surprisingly large bill. If the value of the matter cannot be reasonably assessed, the notary will usually apply the statutory default value, which leads to negligible fees. Since there is little to no precedent, this issue of notary fees should be discussed beforehand among the parties and with the notary.

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### 2. Scenario 2: The Voluntary but Contentious Deposition

If the witness is willing to testify, but the opposing party does not agree to the private, “informal” deposition discussed in the previous section, there are three established routes:

- a deposition by a consular officer in the U.S. Consulate General in Frankfurt;
- a deposition by court-appointed commissioner pursuant to Art. 17 of the Hague Convention; or
- a deposition by a German judge via judicial assistance pursuant to Arts. 9 and 10 of the Hague Convention, which will be discussed in more detail below in section 3.

#### a. Deposition by a Consular Officer in the U.S. Consulate General in Frankfurt

Pursuant to Arts. 15 and 16 of the Hague Convention and diplomatic notes exchanged between Germany and the United States, a deposition may also be carried out by a diplomatic or consular officer of either country who is stationed in the other country. The deponent may be a U.S. or non-U.S. citizen resident in Germany (including German nationals). The testimony must be provided voluntarily, without coercion or threat of future sanctions. If these requirements are fulfilled, Germany will not regard the questioning of a witness as a breach of its sovereignty.

According to the U.S. Diplomatic Mission in Germany,<sup>2</sup> depositions may be taken on notice or by issuance of a commission by a U.S. court to a consular officer. Depositions may only be taken at the U.S. Consulate General in Frankfurt am Main. Counsel to the requesting party will contact the U.S. consulate to arrange for the deposition. The required documents need to be provided to the consular section of the respective embassy or consulate at least six weeks prior to the deposition. The U.S. Embassy in Berlin will notify the German Ministry of Justice.

The mode of questioning will be controlled by the consular officer attending the deposition; it is not governed by German procedural law. Therefore, a U.S.-style deposition under oath is possible when pursuing the consular route. The oath may be administered only by a U.S. consular officer. The parties to the dispute will be required to bring their own court reporter and translator, if necessary.

#### b. Deposition by a Court-Appointed Commissioner

Pursuant to Art. 17 of the Hague Convention, depositions in Germany may also be conducted by a commissioner appointed by the competent German authority. In practice, the U.S. court issues a letter of request to the German Central

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<sup>2</sup> Further information can be found on the website of the U.S. Embassy & Consulates in Germany [here](#) and the U.S. Department of State – Bureau of Consular Affairs [here](#).

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Authority for the state in which the deponent is situated requesting that the German authority appoint a commissioner.<sup>3</sup> The German Central Authority will then decide if and under which conditions a deposition may be conducted. Parties should keep in mind that this process will likely take between one and two months.

Recently, the Higher Regional Court Düsseldorf, the Ministry of Justice of Rhineland-Palatinate and the Higher Regional Court of Munich, each acting as Central Authority for its respective state, specified the conditions under which a remote deposition via video conference by a commissioner would be possible in Germany.

The Central Authorities all stressed that the commissioner must be a neutral person who is independent of the parties to ensure that the process of taking the evidence is conducted in a neutral, non-adversarial manner. The parties and their representatives were allowed to attend the depositions. The Central Authorities further required that a judge of the Local Court (*Amtsgericht*) be granted the opportunity to attend the deposition or to dial into it if the deposition were taken by video. To this end, the German Central Authorities asked that the parties commission a German translator and that they liaise with the German Local Court judge ahead of the deposition.

The Central Authorities allowed that the witnesses testify under oath, and that the testimony be recorded in writing by a court reporter. The Central Authorities did, however, prohibit any audio or video recording of the deposition. They further expressly prohibited any cross-examination or exploratory questions outside the scope of the specified topics. According to the Central Authorities, such questioning is contrary to German law and may not be authorized. The commissioner conducting the deposition may allow the parties to ask questions within these boundaries.

Conducting a fully-fledged U.S.-style deposition in Germany within this framework is impossible. Indeed, some U.S. courts considered the taking of witness testimony under those restrictions unfair to the deposing party and refused to issue a request to the German Central Authority, finding the means provided under the Hague Convention insufficient.<sup>4</sup> Still, the U.S. Supreme Court has instructed federal courts to employ a case-by-case analysis to determine whether the Hague Convention is an appropriate tool for gathering evidence in a given proceeding.<sup>5</sup>

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<sup>3</sup> Each state in Germany has its own Central Authority. The list of all Central Authorities of the respective states can be found [here](#).

<sup>4</sup> See e.g., *Fraunhofer-Gesellschaft Zur Förderung der Angewandten Forschung E.V. v. Sirius XM Radio Inc.*, 2021 U.S. Dist. LEXIS 42648, \*6-7 (D. Del. March 8, 2021) (denying Plaintiff's amended Application for the Issuance of a Letter of Request for International Judicial Assistance in the Appointment of Commissioners Pursuant to the Hague Convention and finding that "[t]o the extent that depositions under the Hague Convention are not of the same scope as they would be in the U.S., courts have required the depositions go forward in the U.S. or in accordance with U.S. procedures in lieu of pursuing the depositions under the Hague Convention.") (citing similar cases); *Work v. Bier*, 106 F.R.D. 45, 56-57 (D.D.C. May 2, 1985) (stating that depositions occurring at the Embassy in Germany must be "of the same scope as if they were occurring here in the United States" and, to the extent that was not possible, defendants would be required to appear in the U.S. for deposition).

<sup>5</sup> See *Fraunhofer* 2021 U.S. Dist. LEXIS 42648 at \*4; see also, *In re Urethane Antitrust Litig.*, 267 F.R.D. 361, 367 (D. Kan. 2010) (granting Plaintiffs' motion for the issuance of letters of request and granting Defendants' request to include additional special procedural requests, even though the "court believes it is probably futile to ask the German courts to permit the parties to cross-examine the witnesses.")

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### 3. Scenario 3: The Involuntary Deposition

If the witness is not willing to testify voluntarily, the parties to the U.S. proceedings will be required to take the route of judicial assistance via Arts. 9 and 10 of the Hague Convention. Art. 10 of the Hague Convention requires the requested authority to apply the same measures of compulsion as it would have in domestic proceedings. In practice, this results in the witness being questioned by a German judge in a German courtroom in line with German rules of civil procedure, with the opportunity for the parties to also pose questions.

In practice, the parties will primarily pursue this route if the deponent is not subject to the control of either party and possesses valuable information that is relevant to the case. If a deponent is subject to party control but resists a deposition, the controlling party may be sanctioned by the U.S. court for not making the witness available.

Under the Hague Convention, a formal letter of request must be sent from the U.S. court to the German Central Authority requesting a German court to question the witness. This formal request should follow the criteria specified in Arts. 1, 3, and 4 of the Hague Convention, including that the request must be made in German or accompanied by a German translation. The Central Authority must approve the request and will then instruct the competent German Local Court that will ultimately carry out the deposition. In our experience it is advisable to include a summary of the relevant facts of the case, the topics to be covered with the witness and also a comprehensive list of specific questions that the German judge should pose. This avoids leaving it up to the German judge to identify the questions that the judge finds relevant to the case, a determination that the judge may make under the influence of his German law training and experience. The Central Authorities may impose certain restrictions and conditions on the conduct of the questioning.

Subject to any restrictions and conditions imposed by the Central Authorities, the Local Court judge tasked with conducting the deposition has some discretion on how to conduct the questioning, in particular with respect to the extent the judge will allow questioning by attorneys and the type of questions (e.g., open-ended vs. leading). It is likely that the German judge will conduct the primary questioning of the witness in a manner similar to German civil procedure, which is a relevancy-driven-to-the-point approach. Follow-up questions by the parties will be permitted but parties should not expect to be allowed to conduct U.S.-style cross-examination.

The German court will provide only a non-verbatim transcript of the witness's testimony summarizing the testimony in the judge's words. However, the Central Authority or the judge will likely allow a verbatim transcript if the parties arranged for a court reporter. Similarly, the parties are typically free to bring a translator. As German trials may not be videotaped, German courts and authorities have generally adopted the stance that video-recording a deposition for U.S. proceedings is not permissible. However, there are also precedents allowing the questioning to be audio recorded.

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If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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**Matthias Schrader**

+ 49 69 7930 2244

mschrader@willkie.com

**Dr. Johannes Schmidt**

+49 69 7930 2245

jschmidt@willkie.com

**Svenja Wachtel**

+49 69 7930 2275

swachel@willkie.com

**Dr. Marc Dietrich**

+49 69 7930 2128

mdietrich@willkie.com

**Fabian Peitzmeier**

+49 69 7930 2255

fpeitzmeier@willkie.com

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