THE DIGITALISATION OF EUROPEAN CIVIL PROCEDURE – LESSONS FOR THIRD STATES?

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Abstract

We examine the current state of digitalisation in EU civil procedure, with a particular focus on the taking of evidence and the conduct of proceedings by digital means. In recent years, the European Union has adopted several regulations aimed at enhancing the digitalisation of civil procedure and judicial cooperation. These regulations establish electronic communication via a decentralised IT system as the standard method of interaction between competent authorities. They also provide general rules on the legal effects of electronic documents and promote the use of videoconferencing for the taking of evidence and during hearings. However, the latter has led to some ambiguity regarding the distinction between the taking of evidence and conducting party hearings, as different regulations impose different requirements for videoconferences. We compare this new European approach with the Hague Convention on the Taking of Evidence of 1970, which is in force between Germany and Türkiye and does not contain explicit provisions on the use of modern technology. The article concludes by considering whether the more modern EU regulations could serve as a source of inspiration for interpreting the Hague Convention.

Keywords

European Civil Procedure – Taking of Evidence – Digitalisation – Electronic Communication – Use of video-links in civil procedure – eCODEX

1. INTRODUCTION

In 2023, the European Union passed the Digitalisation Regulation (DR).[1] This Regulation aims to enhance judicial cooperation and access to justice by providing for digital channels of comminication (Recital 3 DR). Already prior to this Regulation, the EU Evidence Regulation[2] and the EU Service Regulation[3] had been reformed in order to better take the possibilities of digitalisation into account (see Recitals 3 and 7 Evidence Regulation). In the following contribution, we will analyse the current state of the digitalisation of EU civil procedure, with a focus on the taking of evidence and the conduct of proceedings by digital means. We will also compare the new European approach with the Hague Convention of 1970 (on recent developments Richard & Hess, 2020),[4] which is in force between Germany and Türkiye. Although modern means of technology were not foreseen in 1970, the Special Commission on the Operation of the Evidence Convention has reiterated the technological neutrality of the Convention (HCCH, 2024, para. 3). Therefore, we will pay particular attention to the question as to whether the more recent EU Regulations may be a source of inspiration in interpreting the Hague Convention.

2. OVERVIEW OF THE PRESENT STATE OF DIGITALISATION OF EU CIVIL PROCEDURE

In recent years, the European Union has recognised the importance of digital tools for enhancing international judicial cooperation (Velicogna & Lupo, 2017, p. 183; Dourlen, 2024, p. 222). In 2020, the European Commission mandated that Member States "by default use digital channels for cross-border communication and data exchanges between competent national authorities." (EU Commission, 2020, p. 9). Prior to this, the use of modern communication technologies in cross-border civil proceedings was largely left to the discretion of the Member States.

The second-generation regulations concerning European civil procedure – e.g. the European Payment Order Regulation[5] and the European Small Claims Regulation[6] – only contained fragmented provisions on digital means. For example, Article 7(5) and (6) EU Payment Order Regulation and Article 4(1) EU Small Claims Regulation allowed electronic communication and submission of applications, if corresponding national rules existed.

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1 Regulation (EU) 2023/2844.

2 Regulation (EU) 2020/1783.

3 Regulation (EU) 2020/1784.

4 The Hague Convention on the taking of evidence of 18 March 1970, BGBl. II 1472.

5 Regulation (EC) 1896/2006.

6 Regulation (EC) 861/2007.

In 2020, the European Union initiated the recast of the Service Regulation and the Evidence Regulation. The revised text of the European Evidence Regulation replaced its previous version[7] and is applicable since 1 July 2022. The reform pursued the purpose of improving the use of modern technologies (see especially Recitals 7 ff., 13 f., 21 ff. Evidence Regulation). This seeks to avoid delays and reduce costs both for the parties to civil proceedings and for the judicial system. Firstly, the transmission of requests under Article 7 Evidence Regulation has been adapted in order to establish electronic communication as a standard practice (see section 3.1). Secondly, a new Article 8 Evidence Regulation removes legal obstacles to the admissibility of digital evidence (see section 4; on the previous Regulation, cf. Junker, 2008; Mason, 2012; Thole & Gnauck, 2012). Thirdly, the new Article 20 Evidence Regulation aims to promote the use of videoconferences (see section 5.1).

Similar adaptations were made to the EU Service Regulation. Article 5 Service Regulation, establishes electronic communication as the standard method for the transmission of documents between competent authorities. In parallel with Article 8 Evidence Regulation, Article 6 Service Regulation sets out the legal effects of documents transmitted electronically. Moreover, the means to effect a cross-border service of documents itself have been modernised. Article 19 Service Regulation now permits the electronic service of documents, provided that the modes of transmission chosen meet the requirements of the eIDAS Regulation[8] and that the addressee consented to electronic means being used.

Both Regulations designate the e-Justice Communication via Online Data Exchange (e-CODEX[9]) as the decentralised IT system that is to be used for the electronic exchange of information. E-CODEX was created by the European Union, with the aim of "improving the cross-border exchange of information in legal proceedings – involving citizens, businesses, and governments – in a safe, accessible, and sustainable way" (Velicogna, 2014, pp. 309–310). The e-CODEX Regulation operates as a platform that enables interoperability between national systems (Voß & Singer, 2024, p. 174). E-CODEX thus ensures the secure cross-border transmission of judicial documents in compliance with European data protection standards (Recitals 7 and 8 e-CODEX Regulation; EU Commission, 2020, p. 15; Velicogna & Lupo, 2017, p. 197).

Further progress has been achieved through the Digitalisation Regulation, which is applicable since 1 May 2025 (Article 26(2) DR). The Regulation takes a holistic approach to civil and commercial matters, partly by creating new rules and systems, and partly by consolidating existing provisions within a uniform framework, notably through references to e-CODEX and eIDAS (Rühl, 2023, p. 165). The Regulation seeks to establish a uniform legal framework for the

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7 Council Regulation (EC) No 1206/2001.

8 Regulation (EU) No 910/2014.

9 Regulation (EU) 2022/850.

use of electronic communication between competent authorities by creating a "secure, efficient and reliable decentralised IT system" (Article 1(1) DR). Cross-border communication between competent authorities shall be carried out via the decentralised IT system (Article 3(1) DR). Only in exceptional cases – disruption of the system, the physical or technical nature of the transmitted material, force majeure or appropriateness (Article 3(2) and (3) DR) – alternative means of communication may be used (sceptical Voß & Singer, 2024, p. 175). This system is again based on e-CODEX (Voß & Singer, 2024, p. 175; Dourlen, 2024, p. 223). However, the Digitalisation Regulation does not explicitly mandate e-CODEX as the standard system, instead maintaining a technology-neutral stance. Nonetheless, the Regulation contains multiple references to e-CODEX – for instance, Recitals 9 and 20.

Moreover, the communication between the parties to civil proceedings and the competent authorities is also largely digitalised. To this end, Article 4 DR aims to establish a "European electronic access point" that will facilitate the use of electronic means by focusing on a single point of entry (Recital 27 DR; Voß & Singer, 2024, p. 176).

In addition, Article 5(1) DR permits the cross-border use of videoconferencing for purposes other than the taking of evidence, without requiring the prior consent of the respective Member State. This is relevant for the participation of parties or their representatives in hearings. However, potential conflicts may arise with Article 20 Evidence Regulation (see section 5.1).

For the purposes of applying electronic signatures and seals, Article 7 DR largely refers to the eIDAS Regulation, as amended by Regulation (EU) 2024/118, which introduced the "European Digital Identity Wallet".

With regard to the legal effects of electronic documents, Article 8 DR extends their recognition beyond the scope of Article 6 Service Regulation and Article 8 Evidence Regulation, applying it to all instruments listed in Annex II DR. This shall further facilitate electronic cross-border communication (Recital 30 DR).

Furthermore, Article 9 DR simplifies the electronic cross-border payment of court fees through the European electronic access point. Going beyond the former Article 15a(2) EU Small Claims Regulation, which listed various payment methods such as bank transfers, Member States mustnow make sure that electronic distance payment methods are available (Article 9 DR).

The Digitalisation Regulation also contains several amendments of existing EU Regulations on cross-border civil procedure (see Annex I DR). In particular, the provisions on electronic communication between citizens and competent authorities, e.g. in Article 7(5), (6) EU Payment Order Regulation and Article 4(1) EU Small Claims Regulation, are now supplemented by the option to use the European electronic access point pursuant to Article 4 DR (Recital 29 DR; Voß & Singer, 2024, p. 176).

Recital 17 DR excludes the Evidence Regulation and the Service Regulation from the scope of the DR. Article 24 DR, however, introduces some amendments to the Service Regulation, in particular inserting a new Article 19a Service Regulation. This provision allows for the direct electronic service of documents through the European electronic access point, provided that certain conditions – such as the prior express consent of the recipient – are met.

As a result, uniform methods of electronic communication are now applicable across the entire field of EU civil procedure Regulations (Dourlen, 2024, p. 221).

3. THE TAKING OF EVIDENCE AND THE CONDUCT OF PROCEEDINGS

3.1. Legal sources and actors

While the EU can only regulate the international taking of evidence for the Member States among themselves, legal assistance in relation to third countries falls under the Hague Convention. Despite the recent recast, the revised Evidence Regulation is still modelled upon the Evidence Convention in many aspects, particularly in Articles 12–16 Evidence Regulation (more to history Knöfel, 2024a, Prel. Evidence Regulation 2001 para. 3; Stadler, 2002b, p. 1286). Thus, it remains important for interpreting the Evidence Regulation to consider the previous case law regarding the former Evidence Regulation and the Evidence Convention (see, e.g., CJEU, 2011, C-283/09 para. 66 ff.; Galič, 2017, p. 214; Lindacher, 2015, p. 236; Knöfel, 2024a, Prel. Evidence Regulation 2001 para. 8; Labonté & Rohrbeck, 2021, p. 100; Nuyts & Sepulchre, 2005, p. 80). However, it should be noted that the Evidence Regulation must be interpreted autonomously (von Hein, 2022, Art. 1 Evidence Regulation para. 1) and that even common terms in the Convention and the Regulation may be interpreted differently (Bonatti, 2004, p. 215; Trocker, 2003, p. 675). Furthermore, the jurisdiction of the Court of Justice of the European Union (CJEU) under Article 267 TFEU is limited to the interpretation of the Evidence Regulation, while only the courts of the contracting states are competent for the Evidence Convention.

3.2. Defining "Taking of evidence"

Neither the Evidence Regulation nor the Evidence Convention define the term "taking of evidence". Article 3 Evidence Convention provides some guidance by enumerating – not exclusively – the examination of persons or the inspection of documents or other property, real or personal (HCCH, 2020b, p. 29). The Convention is usually interpreted according to the lex fori of the requesting State (Geimer, 2024, para. 2441). However, in its Practical Handbook on the operation of the Evidence Regulation, the Hague Conference favours an autonomous interpretation of the term (HCCH, 2020b, p. 31; Knöfel, 2024b, para. 25).

With regard to the Evidence Regulation, the term "taking of evidence" is interpreted autonomously by the CJEU (AG Kokott, 2007, C-175/06 para. 40 ff.; Adolphsen, 2007, p. 9; Betetto, 2006, p. 138; Knöfel, 2024a, Art. 1 Evidence Regulation 2001 para. 36; Heinze, 2008, p. 481; Hess, 2021b, para. 8.38; Janal, 2015, § 15 para. 6; Ubertazzi, 2008, p. 810). In contrast to Article 1(1) Hague Convention, the performance of "some other judicial act" is not explicitly covered by the Evidence Regulation (AG Kokott, 2007, C-175/06 para. 79; Freudenthal, 2002, p. 114; Fumagalli, 2002, p. 332; Hess & Müller, 2001, p. 152; Jayme, 2002, p. 378; Jayme & Kohler, 2001, p. 503; Schlosser, 2021, Art. 1 Evidence Regulation 2001 para. 5; Schulze, 2001, p. 529; Valdhans & Sehnálek, 2015, p. 354). A core element of an autonomous understanding of the term is that a measure taken under the Evidence Regulation must aim at obtaining information that serves the judicial establishment of truth or conviction in the proceedings (Betetto, 2006, p. 138; Fucik, 2008, Art. 1 Evidence Regulation 2001 para. 7; Heinze, 2008, p. 481; Janal, 2015, § 15 para. 6; Rauscher, 2022, Art. 1 Evidence Regulation 2001 para. 3; Tsikrikas, 2012, p. 637; Schütze, 2013, § 1072 ZPO para. 5; AG Kokott, 2007, C-175/06 para. 55). In contrast, an attempt at conciliation, a settlement hearing, or merely a video hearing – without taking evidence – is not covered by the Evidence Regulation (von Hein, 2022, Art. 1 Evidence Regulation para. 8), but – as "some other judicial act" – by the Evidence Convention (Knöfel, 2024b, para. 32; § 5 Nr. 2 ZRHO). The Evidence Regulation only covers the modalities (the "how") of taking evidence abroad (Article 1(1) Evidence Regulation), while the procedural conditions under which a court may decide to take evidence abroad (the "whether") are governed by "its domestic law," (CJEU, 2012, C-170/11, para. 28; CJEU, 2013, C-332/11 para. 42). Just like the Evidence Convention (Musielak, 2002, pp. 765-767; Nagel & Gottwald, 2020, para. 9.47; Schack, 2021, para. 864; Schlosser, 2015, Art. 1 Evidence Convention para. 5; different Stadler, 2025, § 363 ZPO para. 9), the Evidence Regulation does not exclude measures aimed at obtaining or securing evidence located abroad for the subsequent use in domestic proceedings (CJEU, 2012, C-170/11, para. 30; CJEU, 2013, C-332/11 para. 45; *Masri vs. Consolidated Contractors International Co SAL & Anor*, [2008] 2 CLC 126, 139 ff. (CA Civ. Div.); final decision [2009] UKHL 43; Huber, 2021, Art. 1 Evidence Regulation 2001 para. 41; Knöfel, 2024a, Prel. Evidence Regulation 2001 para. 28; von Hein, 2012; Hess, 2021b, para. 8.39; Labonté & Rohrbeck, 2021, p. 100; Schlosser, 2021, Art. 1 Evidence Regulation 2001 para. 2). This follows from the purpose of the Regulation to facilitate the taking of evidence within the European legal area (CJEU, 2012, C-170/11, para. 29; CJEU, 2013, C-332/11 para. 44). However, the right to obtain evidence in the most efficient manner possible must be balanced with the personality rights of witnesses (von Hein, 2022, Art. 12 Evidence Regulation para. 20 ff.), the rights of the other party, e.g., to participate in the proceedings (*The Three Mile Inn Ltd. vs. Daley*, [2012] EWCA Civ 970), the rights of third parties (von Hein, 2022, Art. 19 Evidence Regulation para. 8), data protection (Article 30 Evidence Regulation) (von Hein, 2022, Art. 19 Evidence Regulation para. 1 ff.), and, last but not least, the territorial sovereignty of the state in which the evidence is located (Voß, 2022, p. 44).

3.3. Impact of human rights on the taking of evidence abroad

The impact of human rights on the international taking of evidence has to be considered as well. The European Court of Human Rights (ECtHR) has ruled in a domestic case that a child's right to know the identity of their father is, in principle, protected by Article 8 European Convention on Human Rights (ECHR) (private life) (ECtHR, 2002, 53176/99, para. 56-66). In cases concerning status, courts must act with particular care (ECtHR, 2002, 53176/99, para. 44-46). This evaluation also extends to the international taking of evidence and suggests a broad interpretation of Article 1 Evidence Regulation (von Hein, 2022, Art. 1 Evidence Regulation para. 25).

In the same vein, the CJEU has derived from Article 24 EU Charter of Fundamental Rights[10] that a Member State's court is obliged to consider the Evidence Regulation in child return proceedings under the Brussels IIa Regulation: "The court of the Member State of origin [must] use all available means under its national law, as well as those specific to cross-border judicial cooperation, which may include the means provided for in the [former Evidence Regulation]," (CJEU, 2010, C-491/10 PPU, para. 67) including conducting a videoconference (Article 10(4) Evidence Regulation 2001 = Article 12(4) Evidence Regulation 2020). This approach has been confirmed by Recital 39 Brussels IIb Regulation of 2019.[11]

Finally, the German Federal Constitutional Court (BVerfG) has stated that the right to legal protection (Article 2(1) and Article 20(3) Basic Law) of a party is violated if a court in family law matters does not exhaust all available sources of evidence to clarify the facts, in violation of Section 26 Family Court Act (FamFG) (BVerfG, 2015, 1 BvR 1321/13). To fulfil its duty to investigate, the court must also use the tools of European law (BVerfG, 2015, 1 BvR 1321/13).

In contrast, the Hague Convention on Taking of Evidence does not establish individual rights to perform certain procedural actions (Knöfel, 2024b, para. 11). However, the ECHR has to be taken into account by the European Contracting Parties to the Convention.

4. LETTERS OF REQUEST: MEANS OF TRANSMISSION

4.1. Article 7 Evidence Regulation

Article 7(1) sentence 1 Evidence Regulation mandates the electronic transmission of requests and communications via a decentralised IT system as a rule (Eichel, 2020, p. 232; Knöfel, 2021, p. 258). This aims to reduce costs and increase the speed of communication (EU Commission, 2018, p. 2). Other channels may only be used in exceptional cases (Article 7(4) Evidence Regulation; EU Commission, 2018, p. 9): first, when there is a disruption of the decentralised

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10 OJ of 07.12.2016, C 202/389.

11 Council Regulation (EU) 2019/1111.

IT system (Article 7(4) variant 1 Evidence Regulation); second, when transmission via the IT system is not possible due to the nature of the evidence, e.g. a DNA sample (Article 7(4) variant 2 Evidence Regulation); third, when other extraordinary circumstances prevent the use of the IT system (Article 7(4) variant 3 Evidence Regulation). Article 7(4) Evidence Regulation requires the use of the fastest and most suitable transmission method available. In doing so, the requirement for reliability and security shall be taken into account, meaning that the consistency of the received document with the sent document must be ensured and the information contained therein must be legible (von Hein, 2022, Art. 7 Evidence Regulation para. 10). Unlike Article 6 sentence 1 of the former version, Article 7(4) Evidence Regulation no longer explicitly requires that the requested state agrees to the chosen transmission form. However, the communication of the technical means available to the courts for receiving requests (Article 31(1)(c) Evidence Regulation), can be seen as a tacit consent in using this technical means of communication (von Hein, 2022, Art. 31 Evidence Regulation para. 2).

A decentralised IT system is defined in Article 2(2) Evidence Regulation. This solution is described as a "transmission tunnel system," to which Member States can connect their national IT platforms (Eichel, 2020, p. 229; Knöfel, 2021, p. 258). According to Article 7(1) sentence 2 Evidence Regulation, the decentralised IT system must meet the requirement of interoperability (Onţanu, 2021, p. 498 ff.; Velicogna & Lupo, 2017, p. 181 ff.).

Articles 7(2) and (3) Evidence Regulation refer to the eIDAS Regulation for details, particularly regarding the use of qualified electronic signatures. Additionally, in Germany, Sections 130a and 130b Code of Civil Procedure[12] and the Regulation on Electronic Legal Transactions (ERRV)[13] have to be considered. Article 25 Evidence Regulation empowers the Commission to adopt further implementing acts for the establishment of the decentralised IT system.

It should be noted that Article 7 Evidence Regulation will become effective at a later date than the other parts of the Regulation due to the need to establish the necessary legal and technical prerequisites (Article 35(3) Evidence Regulation; see von Hein, 2022, Art. 34 Evidence Regulation para. 1). Until then, Article 6 Evidence Regulation in its previous version continues to apply (Article 34(1) Evidence Regulation). The originally intended 24-month period for providing the necessary IT systems was criticised as being too short (Deutscher Bundesrat (2018), p. 2; BRAK, 2018, p. 4).

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12 Code of Civil Procedure as promulgated on 5 December 2005 (BGBl. 2005 I 3202, BGBl. 2006 I 431; BGBl. 2007 I 1781), last amended by Article 1 of the Act of 24 October 2024 (BGBl. I 2024 I Nr. 328).

13 Ordinance on the technical framework conditions for electronic legal transactions and on the special electronic mailbox for public authorities of 24.11.2017, BGBl. 2017 I 3803, last amended by Article 6 of Act of 05.10.2021 (BGBl. 2021 I 4607).

4.2. Evidence Convention

Active legal assistance under the Hague Convention is pursued by means of Central Authorities (Article 2 Evidence Convention). As mentioned before, the Convention is technologically neutral and does not prescribe the use of certain means of technology when transmitting a letter of request (HCCH, 2024, para. 3). The Special Commission on the practical operation of the Evidence Convention (SC) emphasises the importance of the use of modern technologies to facilitate cross-border legal assistance in taking of evidence (SC, 2024, para. 10; SC, 2003, para. 4; SC, 2009, para. 4). Information about how to and to whom submit a letter of request in the Contracting States is available via the website of the Hague Conference (HCCH, 2025).

5. LEGAL EFFECTS OF ELECTRONIC DOCUMENTS

The former Evidence Regulation did not contain provisions on whether a court could use evidence obtained through mutual legal assistance; this was solely governed by the lex fori. Article 8 Evidence Regulation now provides that the legal effect or admissibility of documents transmitted via electronic means (see above section 3) must not be denied on formal grounds. This provision shall ensure that the digitalised international transfer of documents is used more frequently (Recital 13, sentence 1 Evidence Regulation). If an alternative transmission method is chosen in accordance with Article 7(4) Evidence Regulation (see above section 3.1), Article 8 Evidence Regulation does not apply. In this case, the lex fori remains solely responsible for determining the evidentiary value of electronic documents.

From Article 8 Evidence Regulation, it may be inferred, first, that the receiving state may not reject an electronic request for this formal reason alone (Knöfel, 2021, p. 259). Second, Article 8 Evidence Regulation ensures that the requesting court must not reject documents transmitted via the decentralised IT system solely because they are in electronic form. Apart from that, the evaluation of evidence remains subject to the lex fori of the requesting court (Heinze & Prado Ojea, 2018; Kienzle, 2019; Forschner & Kienzle, 2020); this is clarified by Recital 13, sentence 2 Evidence Regulation. In Germany, Section 371a Code of Civil Procedure regulates the evidentiary value of electronic documents; for scanned public documents, Section 371b Code of Civil Procedure applies; for simple emails, Section 286 Code of Civil Procedure is applicable (Schwarz, 2024). Recital 13, sentence 3 Evidence Regulation emphasises that Article 8 Evidence Regulation leaves national law on the conversion of documents into an electronic form unaffected. For example, a German court would apply Section 371b, sentence 1 ZPO for public documents.

The Evidence Convention is lacking any kind of provision regarding the legal effects of electronic documents. However, the Practical Handbook clarifies that the term “evidence” also covers information stored in digital form (HCCH, 2020b, p. 30). The Special Commission

recommends treating requests for information in electronic form in the same way as requests for tangible documents (SC, 2009, para. 50). Although a non-binding recommendation does not have the same legal force as Article 8 Evidence Regulation, it can induce a technology-open interpretation. The contracting states decide on the admissibility and the use of electronic transmission for requests (see above 3.2). Although the use of electronic channels to transmit requests increased significantly among Contracting Parties between 2013 and 2022 from only 7.7 % allowing electronic transmission in 2013 to 55 % in 2022 (HCCH, 2024, para. 9), challenges regarding the security and data protection as well as the diversity of modes of transmission persist. To overcome the plurality of electronic transmission methods, the e-CODEX system might serve as an example.

6. DIRECT TAKING OF EVIDENCE, ESPECIALLY BY VIDEOCONFERENCING

6.1. Article 20 Evidence Regulation

The taking of evidence via videoconference was only indirectly regulated in Article 17(4) sentence 3 of the original Evidence Regulation. According to this provision, the competent authorities were to encourage the use of communication technologies (Betetto, 2006, p. 141; Schulze, 2001, p. 529). This very cautious approach led to the result that "the potential of modern communication technologies, such as videoconferencing" was "not fully utilised" in practice (Recital 21 sentence 1 Evidence Regulation). The recast of the Evidence Regulation, therefore, introduced a separate provision, Article 20 Evidence Regulation. This shall ensure "a more appropriate, more frequent, and faster use of direct evidence taking [...] via videoconference." (EU Commission, 2018, p. 9).

If the domestic court hears a witness located abroad via videoconferencing, while the court members remain in the home country, an internationally widespread view assumes that no approval from the state where the witness is located is required (Full Court of the Federal Court of Australia, Judgement of 19.08.2011, *Matthew James Joyce vs. Sunland Waterfront (BVI) Ltd.*, with approving comment Knöfel, 2011, p. 886; Berger, 2015, § 363 ZPO para. 14; Davies, 2004, p. 72; Geimer, 2024a, para. 2385a; Geimer, 2024b, Art. 17 Evidence Regulation 2001 para. 2; Geimer, 2010, p. 427; Knöfel, 2024a, Prel. Evidence Regulation 2001 para. 29; Knöfel, 2006, p. 304; Nagel & Gottwald, 2020, para. 9.38). Whether the House of Lords in the case Polanski vs. Condé Nast Publications Ltd. (House of Lords, 2005, [2005] 1 WLR 637 (HL); Hess, 2007, p. 17; Knöfel, 2006, p. 301) has adopted this view (Geimer, 2024b, Art. 17 Evidence Regulation 2001 para. 2) is highly questionable (Hess, 2007, p. 25). The German Federal Patent Court (BPatG) has considered a video hearing of a witness residing in England admissible, even without resorting to the framework of mutual legal assistance, provided that the parties and the witness agree (BPatG, 2002, 23 W (pat) 32/98). According to the prevailing view, however, this

constitutes a direct taking of evidence abroad, which falls within the scope of Articles 19, 20 Evidence Regulation (Betetto, 2006, p. 143; Fucik, 2008, Prel. Art. 1 Evidence Regulation 2001 para. 6; Galič, 2017, p. 225 f.; Huber, 2021, Art. 1 Evidence Regulation 2001 para. 46; Hess, 2021b, para. 8.59; Lafontaine, 2020, p. 542; Rauscher, 2022, Prel. § 1072 ZPO para. 10; Stadler, 2025, § 128a ZPO para. 8; Voß, 2022, p. 44 ff.; United States District Court, S.D. New York, Judgement of 21.12.2015, *Rana vs. Islam*, 2015 WL 10374195 (S.D.N.Y.)).

The German Federal Court of Justice (BGH) has assumed that the questioning of a foreign witness through videoconferencing in criminal procedure (§ 247a StPO) affects the territorial sovereignty of the state where the witness resides, meaning that approval or at least tolerance from the state of residence is required (BGH, 1999, 1 StR 286/99 with approving comment Vassilaki, 2000, p. 471; Rose, 2000, p. 76; Stadler, 2025, § 128a ZPO para. 8; Stadler, 2002a, p. 441; Schultzky, 2003, p. 314; Geimer, 2024a, para. 2385a). After the CJEU had ruled on the foreign activity of a court expert regarding Article 17 of the former Evidence Regulation, stating that compliance with the prescribed mutual legal assistance route was "not necessarily" mandatory (CJEU, 2013, C-332/11; von Hein, 2022, Art. 1 Evidence Regulation para. 20), the question arose whether more lenient standards should be applied to videoconferencing as well (Sengstschmid, 2023, para. 15.52; Janal, 2015, § 15 para. 75; sceptical Galič, 2017, p. 224 ff.).

Under the Commission's proposal for the recast of the Evidence Regulation from 2018, it would have been appropriate to differentiate whether the person making the statement voluntarily participates in a videoconference (von Hein, 2022, Prel. Evidence Regulation para. 6). This proposal would have deleted the voluntary participation requirement for direct evidence taking (EU Commission, 2018, Art. 1 No. 3 letter a; Knöfel, 2018, p. 715 f.). Thus, it would have made sense to limit the approval requirement for a videoconference to cases where the use of coercive measures would be considered. However, since the voluntary participation requirement was maintained in the recast Article 19(2) Evidence Regulation, this criterion does not provide a meaningful basis for differentiation (von Hein, 2022, Art. 19 Evidence Regulation para. 19). Instead, the explicit reference to Article 19 Evidence Regulation in Article 20(1) Evidence Regulation confirms that the legislature assumed that even a video hearing of a consenting person requires prior approval by the state of residence (Hess, 2021a, Art. 20 Evidence Regulation 2001 para. 2; Lafontaine, 2020, p. 550; Voß, 2022, p. 50; Windau, 2021, p. 181; de lege lata also Knöfel, 2021, p. 250 f.; sceptical Labonté & Rohrbeck, 2021, p. 101 f.).

In German domestic law, the recently revised Sections 284(2) and 128a Code of Civil Procedure for video hearings of parties and witnesses deliberately exclude international evidence taking as per Article 20 Evidence Regulation (Deutscher Bundestag, 2023, p. 31). This is even more the case when the court sends one of its members abroad for questioning and the hearing is transmitted to the home country via video technology; in this case, approval must still be requested according to Article 19 Evidence Regulation (Bernasconi et al., 2013, p. 44).

Article 20(1) Evidence Regulation refers solely to "examining a person". This can be a witness, but also a party or an expert (Recital 21 sentence 2 Evidence Regulation). The fact that the final Article 20(1) Evidence Regulation no longer explicitly says so is not problematic because the previous enumeration ("witness, party, or expert") merely had a clarifying meaning (sceptical Knöfel, 2021, p. 251). It is questionable whether other evidence can be taken via remote communication technologies, such as inspecting the place of an accident with a camera drone (sceptical Knöfel, 2021, p. 251). Since Article 20(1) Evidence Regulation aims to promote the more frequent use of modern technologies for evidence taking, it should be understood as a clarifying provision and not as a preclusive rule. Thus, a video inspection can therefore also be requested under the general conditions for direct evidence taking contained in Article 19 Evidence Regulation (Windau, 2021, p. 185).

The questioning of a person via videoconference further requires that this person is "present in another Member State" (Article 20(1) Evidence Regulation). For this purpose, a mere stay in that state is sufficient (von Hein, 2024, Art. 5 EGBGB para. 135). It is not required for the person to have their domicile in that state (Knöfel, 2021, p. 251). This is evident from the fact that Article 17a(1) 2018 Commission proposal originally foresaw this connection, but it was deleted during the legislative process (EU Commission, 2018, Art. 1 No 3 letter a).

The taking of evidence via videoconference depends on the requesting court possessing the necessary technological means (Article 20(1) Evidence Regulation). Since a standard laptop is sufficient, a corresponding request will rarely fail due to hardware limitations. The software with which the videoconference is technically conducted does not matter, provided that the confidentiality of the communication is maintained and the relevant data protection requirements are met (BRAK, 2018, p. 5; von Hein, 2022, Art. 30 Evidence Regulation para. 1 ff.).

Finally, the requesting court must consider whether the use of a videoconference is appropriate in the specific circumstances of the case (Article 20(1) Evidence Regulation). In light of the purpose of the Regulation – promoting the use of modern technologies (von Hein, 2022, Art. 20 Evidence Regulation para. 1) – this criterion should not be applied too restrictively. The assessment of "appropriateness" is of crucial importance for ensuring a fair trial, as indicated in Recital 21 sentence 2 Evidence Regulation. This implicitly refers to the standards of Article 47(2) Charter of Fundamental Rights and Article 6 ECHR. As the subjective formulation of Article 20(1) Evidence Regulation ("considers […] appropriate") makes clear, the requesting court has a certain margin of discretion. However, as also indicated in Recital 21 sentence 5 Evidence Regulation, a refusal may be considered if the requested evidence taking violates the public policy of the requested Member State (Article 19(7) letter c Evidence Regulation; see von Hein, 2022, Art. 19 Evidence Regulation para. 6 ff.).

The practical modalities of the videoconference should preferably be arranged by agreement (Article 20(2) sentence 2 Evidence Regulation). The videoconference does not necessarily have to take place in a courtroom, because a corresponding requirement initially contained in the 2018 Commission proposal was omitted in the final Regulation (Knöfel, 2021, p. 251; Lafontaine, 2020, p. 550). The conclusion of such an agreement does not prevent the authority of the requested Member State from unilaterally setting conditions for conducting a videoconference (Article 19(4) Evidence Regulation; von Hein, 2022, Art. 19 Evidence Regulation para. 9 ff.). This is explicitly noted in Recital 21 sentence 4 Evidence Regulation.

New issues of delimitation have arisen with the adoption of the Digitalisation Regulation. According to Article 5 DR, oral proceedings and hearings can be conducted via videoconference if a party is present in a Member State different from the state of the court, without the need for prior approval from the other state. Since Article 5 DR sets lower requirements for videoconferences than Article 20(1) Evidence Regulation, the distinction between a formal interrogation and a mere hearing is crucial. It is clear that the questioning of witnesses or experts is not covered by Article 5 DR, but is exclusively regulated by the Evidence Regulation (Bundesjustizministerium, 2024, p. 2). However, the legal situation is less settled regarding party hearings. While some regard party hearings as falling under the broad wording of the Digitalisation Regulation (Voß & Singer, 2024, p. 177), others prefer to classify them as evidence taking because they are part of the judicial fact-gathering process (Windau, 2025). As Article 5 DR applies from 1 May 2025, no judgments of national courts or the CJEU concerning the interpretation of "hearing" are available yet. Only a few Member States, in particular Germany, Malta and Portugal, had notified an earlier application pursuant to Article 17(2) DR. In Germany, cross-border video hearings can be conducted since October 1st, 2024 (Bundesjustizministerium, 2024, p. 3; Greger, 2024, § 128a ZPO para. 15.1). In this context, the German Ministry of Justice clarified that party hearings should generally be covered by Article 5 DR (Bundesjustizministerium, 2024, p. 2). Yet in certain family matters (e.g. adult protection), video hearings may not be appropriate (Article 5(1)(c) and 4 DR) under German domestic law: section 34 (4), 1st sentence Family Proceedings Act (FamFG) does not permit a videoconference if a personal hearing is required by law (e.g. Section 278 (1) FamFG; cf. BGH, 2025, XII ZB 128/24).

6.2. Evidence Convention

The Hague Conference emphasises the importance of videoconferences in the international taking of evidence because they significantly reduce time, costs, inconvenience and environmental impact (HCCH, 2024, para. 27). In 2020, the Hague Conference released a guide to good practice (HCCH, 2020a). The Convention allows videoconferencing both for carrying

out a letter of request under Chapter I and for executing a request under Chapter II. Under Chapter I, the requesting authority can, per Article 9(2), ask for a special method or procedure, e.g., attending by videoconference while the competent authority in the requested state takes testimony (indirect evidence-taking). Chapter II provides for a Contracting Party to permit evidence to be taken in its territory by diplomatic officers, consular agents, or commissioners. Evidence can be taken by videoconference in two ways: when the authority before which proceedings are pending conducts the witness examination by videoconference with the permission and assistance of an authority of the State in whose territory the witness is located, evidence is taken "directly" by videoconference (HCCH, 2020a, para. A.37). In contrast, evidence is taken „indirectly" by videoconference, when an authority of the State in whose territory the witness is located conducts the witness examination and permits the requesting court or the parties and their representatives to be "present" at the examination by videoconference (HCCH, 2020a, para. A.37).

Opinions differ as to whether the direct taking of evidence is permitted under Chapter I. In light of the wording of Article 1 of the Convention, Chapter I seems to prohibit the direct taking of evidence because it presupposes that an authority of a Contracting State transmits a request to the competent authority of another State to obtain evidence (HCCH, 2024, para. 33). However, the practice of many Contracting States shows a different approach (e.g. China (Hong Kong SAR), Greece, Poland, Portugal, Romania, Singapore, Sweden, United Kingdom). France has even codified the possibility of directly taking evidence under chapter I of the Convention by means of a decree.[14] Article 747-1 CPC permits explicitly the possibility of a direct taking of evidence by videoconference after a letter of request has been submitted to the central authority.

According to their Country Profiles, both Türkiye and Germany do not allow the direct taking of evidence under Chapter I (Federal Republic of Germany, 2017, Part V lit. b); Republic of Türkiye, 2021, Part V lit. b)). Türkiye generally allows the direct taking of evidence by diplomatic officers, consular agents or commissioners pursuant to Article 15 to 17 Evidence Convention.[15] However, Türkiye's responses to the HCCH questionnaire on videoconferences do not clarify whether the direct taking of evidence via videoconference is permitted. In Part VI of the questionnaire, which addresses videoconferences under Chapter II, Türkiye only confirmed the existence of legal obstacles to the taking of evidence by videoconference, without providing any details. The subsequent questions in this section were left unanswered (Republic of Türkiye, 2021, Part VI). Germany does not generally exclude the direct taking of evidence

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[14] Décret n° 2017-892 du 6 mai 2017 portant diverses mesures de modernisation et de simplification de la procédure civile, JORF n°0109 du 10 mai 2017.

[15] See information about Türkiye at https://www.hcch.net/de/states/authorities/details3/?aid=672 (last accessed: 21 May 2025).

pursuant to Chapter II of the Evidence Convention, but made several reservations. First, the direct taking of evidence by diplomatic officers or consular agents pursuant to Article 15 Evidence Convention is not permitted when the concerned person also has a German nationality (Section 11 Sentence 1 HZustBewÜAG). Further, the taking of evidence by diplomatic officers with regard to third-state citizens or stateless persons is only possible after permission through the central authority (Section 11 Sentence 2 HZustBewÜAG). Finally, the taking of evidence by a commissioner as foreseen in Article 17 Evidence Convention may be executed only after permission by the central authority (Section 12 HZustBewÜAG). However, when the permission is granted, the taking of evidence via videoconference is possible under certain conditions (Federal Republic of Germany, 2017, Part VI lit. d); HCCH, 2020a, para. A.). According to the Special Commission, a commissioner appointed by the State of Origin may take evidence either from the state of origin or the state of execution by videoconference (HCCH, 2020a, para. 42).

Regarding the indirect taking of evidence, both countries allow videoconferencing pursuant to Article 9(1) and (2) Hague Convention (Federal Republic of Germany, 2017, Part V lit. c); Republic of Türkiye, 2021, Part V lit. c)). Evidence may be gathered pursuant to the national rules of the requested authority or, if requested, pursuant to a special method or procedure of the requesting State, which both may include the use of videoconferences. Videoconferences will typically be used to connect the judicial personnel of the requesting state or the parties and their representatives to the procedure of taking of evidence through the competent authority in the requested state as provided by Article 8 Evidence Convention (HCCH, 2020a, para. 54). Less commonly, videoconferences might be used by the competent authority of the requested state to conduct the examination with a witness present in the same state but far away from the competent authority (HCCH, 2020a, para. 55).

Germany and Türkiye both allow the presence – as well by videoconference – of members of the judicial personnel of the requesting authority during the execution of the letter of request after permission of the central authority pursuant to Article 8 Evidence Convention (specified in Section 134(3) ZRHO in Germany), but the foreign judicial personnel is not authorised to actively participate in the proceedings (Federal Republic of Germany, 2017, Part V lit. g); Republic of Türkiye, 2021, Part V lit. g)).

7. CONCLUSIONS

The Evidence Regulation implements a uniform system for the cross-border transmission of requests and documents while the Hague Convention relies on national implementation of electronic systems and solutions and does not prescribe the use of any technical means. This may make it difficult to handle the use of modern information technology due to a lack of technical and legal interoperability of the systems in use.

In the past years, serious efforts of the Hague Conference towards uniform solutions of electronic transmission at the international level can be recognised. For this purpose, the Evidence Regulation and the established e-CODEX system might serve as an inspiration for a decentralised platform solution in the future.

With regard to a possible reduction of time and costs in international taking of evidence, the direct taking of evidence by videoconference might be the most efficient method (HCCH, 2020a, para. 46). While the Evidence Regulation provides a clear rule in Article 20 that enables Member States to take evidence directly in other Member States after their permission, the situation under the Evidence Convention is less clear. Some Contracting States allow the direct taking of evidence under Chapter I, some do not with regard to sovereignty concerns. Some even prohibit the presence of judicial personnel of the requesting state during the examination by the requested authority. This might negatively impact the fundamental rights of the parties. Hence, the Special Commission should promote the direct taking of evidence under Chapter I or at least recommend the presence of judicial personnel and the parties during the examination by videoconference.

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