

10th Annual IAP-Conference Copenhagen

Workshop hearing foreign witnesses

Statement by Dr. Robert Wallner, Prosecutor General of Liechtenstein

Mr. Chairman

Dear Colleagues

First of all I would like to thank Barry Hancock for the invitation to speak at this workshop. I can only assume that my name came to his mind because I have spoken at other conferences about Liechtenstein's experience with mutual legal assistance, and he thought that I might have something useful to say about the subject which is to be discussed at this workshop.

I was very late in preparing my presentation. This had the advantage that I was able to look through the speeches of other speakers who had been more diligent than I, and had published them on the conference website.

This showed me that many aspects about hearing witnesses in general like witness protection, witness anonymity, witness immunity, adequate witness care, and others are being covered in an expert way by other speakers. Whether a witness is local or foreign does not make a big difference in these important questions. Because of this fact and also because time is limited I will concentrate on a few practical questions in connection with hearing foreign witnesses.

Last week I mentioned to my daughter that I was to speak at this conference about hearing foreign witnesses. Her answer was: „Have you googled it ?“ After she explained to me what she meant I did google „foreign witnesses“ in

English and in German, and amazingly I got some results. One ¹was an article in the Times of India of Monday August 1st of this year which reported about a ruling of the Delhi High Court on the question of hearing foreign witnesses through a video conference. In a high profile fraud case the Turkish defendant had challenged a Court order asking him to bear the expenses of video conference to examine certain foreign witnesses in his defense. The Delhi High Court ruled, that the government shall foot the bills for video conference testimony. The second² result was an article about a judgment of the German Supreme Federal Court of 15th September 1999 (1 Str 286/99). In this case a defendant had been jailed for trafficking cocaine. A witness, who lived in New York, had failed to appear in front of the German Court. The defense had wanted to hear this witness in order to prove that the defendant had not bought cocaine from him. The Court of First Instance had considered the witness unreachable while the Supreme Federal Court stated that the German Code of Criminal Procedure allowed the hearing of the witness by video conference in order to overcome such obstacles with foreign witnesses. Therefore a witness was considered to be reachable if there was a chance to hear him by video conference especially if the law of the requested state allowed this. Interestingly the German Federal Court also mentioned the disadvantages of this procedure like the greater difficulty to get an impression of the witness.

In my presentation I want to discuss some issues arising with

1. the summoning a foreign witness to the domestic court,
2. hearing a foreign witness through mutual legal assistance and with a more recent form of obtaining a witness statement namely through
3. Video conferencing.

¹ <http://timesofindia.indiatimes.com/articleshow/1187031.cms>

² <http://www.finanztip.de/recht/sonstiges/so105.htm>

4. At the end I will give you some figures about foreign requests to Liechtenstein asking for witness interviews.

1. Despite the efforts of organizations like the IAP, UNODC, Eurojust, the Judicial Network and others, the border of a jurisdiction is still a major obstacle in an investigation in general and when it comes to summoning and questioning a witness in particular. If the witness lives on the other side of that border you have no power to make him appear in front of your court. Before sending off a MLA-request to the country of residence of the witness you should consider attempting to summon the witness to your country. Especially if personal appearance of the witness is essential for formal procedural reasons or if the case is very important and high profile or it is impossible to get proper assistance from the country of residence this should be attempted. Sometimes the witness - especially if he or she is the victim of the crime - might have indicated his/her willingness to travel or the witness does not live very far away or is an official of the requested country. In these cases chances to get the witness to agree to travel are high. In Liechtenstein we have made the experience that it is very helpful to contact the witness beforehand and explain what is expected from him, explain the proceedings and assist in organizing transport and accommodation. If the witness is an official his office or organization might have an interest in assisting your investigation/trial; for instance because you are attempting to forfeit criminal funds and are willing to share the forfeited money if successful. Formal summons must be sent by a letter of request to the country of residence of the witness. Countries will consider it a breach of sovereignty if a summons is sent directly, unless a bilateral or multilateral treaty provides otherwise³. In both cases it is normally prohibited to subject the witness to any form of punishment or any measure of restraint should he fail to appear in the requesting state unless

³ for instance article 52 Para 1 of the Convention Implementing Schengen

he subsequently voluntarily enters the territory of the requesting state and is again duly summoned ⁴.

2. If you are not successful through this channel you will have to send a formal request to the country of residence. The legal basis for the request might be a bilateral treaty or one of the UN treaties ⁵, another multilateral treaty like the Council of Europe Treaty on Mutual Legal Assistance in Criminal Matters ⁶ with its additional protocols or within the European Union the Convention Implementing Schengen and the Convention on Mutual Legal Assistance between the member states of 2000 and the 2001 protocol to this convention, just to mention a few. If you have neither of these don't give up. Many countries like Liechtenstein will provide assistance based on their domestic law if you can grant mutuality.

It is not always easy to obtain the statement of the witness in the right form. Legal and cultural traditions are very different and often at a clash here. While sometimes an informal statement taken by a police officer will suffice in one country a formal sworn or unsworn hearing in front of a judge is required by another. We have executed a request asking for the witness to be heard in front of the defendant, who was in jail in the requesting state and had to be transferred to Liechtenstein for the hearing, and his lawyer. The whole hearing had to be recorded on video

⁴ This principle is for instance stated in article 8 of the European Convention on Mutual Assistance in Criminal Matters or article 52 Para 3 of the Convention Implementing Schengen.

⁵ www.un.org

- Single United Nations Convention on Narcotic Drugs 1961
- Convention on Psychotropic Substances 1971
- Additional Protocol to the Single Convention 1972
- Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988
- Convention against Transnational Organised Crime 2000
- Corruption Convention 2003

⁶ www.coe.int

- Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime 1990
- Convention on Cybercrime 2001

in order to be admissible in front of the jury in the requesting state. This was a very costly operation for the requesting state and a lot of work for the judge executing the request in Liechtenstein. Both defendants were later convicted of wire fraud and money laundering. What is possible or not depends a lot on the domestic law of the requested country since multilateral and bilateral treaties often use the phrase that “the widest assistance possible should be granted according to the law of the requested state” ⁷.

Quite common is the request, that officers of the requesting state be allowed to travel and take part in the hearing of the witness. This can be particularly useful in complex cases. Pursuant to article 59 of the Liechtenstein Law and Mutual Legal Assistance in Criminal Matters ⁸ the government can allow the presence of foreign judges, prosecutors and parties involved in the foreign proceeding including their legal counsels if their presence is necessary for the proper execution of the request.

⁷ Art 1 Para 1 and Art 3 Para 1 European Convention on Mutual Legal Assistance in Criminal Matters: “.....undertake to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance.....”
“The requested Party shall execute in the manner provided for by its law.....”

Art 13 Para 1 Palermo Convention: “A State Party that has received a request shall, to the greatest extent possible within its domestic legal system....”

Art 46 Para 2: “Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party.....”

⁸ Art. 59 Liechtenstein Law on Legal Assistance in Criminal Matters:

“Admission of Foreign Organs and Parties Involved in the Proceedings to Carry Out Actions of Legal Assistance

1) Foreign organs are not allowed to make investigations or carry out procedural actions on the territory of the Principality of Liechtenstein under this law. However, the competent foreign judge, public prosecutor and other persons involved as well as their legal representatives are to be granted permission to be present and take part in legal assistance actions if this seems necessary for the appropriate handling of the request for legal assistance. The official actions of foreign organs necessary for this, except in the case of border-crossing observations, are subject to approval by the Ministry of Justice.”

3. In some cases - for evidential or procedural reasons - the hearing of a foreign witness by video conferencing can be necessary. A video conference is a virtual meeting in which two or more people who are separated can communicate via audio and video in real time with the possibility to exchange all data (audio, video, text) digitalized. Many legal assistance laws allow the deposition of a witness statement through video conferencing. The practical conduct of such a hearing is costly and tedious. First of all it is difficult to organize such a meeting if you have to bring together a number of people on two continents with two different time zones and also make sure that all the technical assistance really functions. It is also not cheap. We recently paid a private provider of such services a basic fee of 250.-- Swiss Francs plus 218.-- Swiss Francs per hour for hiring the conference room and for having six phone lines open. However these costs are very low in comparison to the traveling costs of one or more people from one continent to another.
4. In 2004 Liechtenstein received 282 foreign requests for mutual legal assistance in criminal matters. The requests came from the following countries:

Year	2004	2003	2002
Switzerland	123	116	133
Germany	57	46	51
Austria	46	40	39
United States of America	13	4	9
Italy	7	12	16
Poland	7	9	-
France	5	8	7
Czech Republic	5	6	5
United Kingdom	4	-	8
Russia	3	4	4
Finland	3	-	-
Netherlands	-	-	5
Ukraine	-	4	-
others	9	17	22
Total	282	270	304

67 of these requests wanted one or more witnesses to be interviewed. In 16 of these 67 cases it was additionally requested, that foreign officials could be present at the hearing. In 2003 we received 270 requests, 73 demanded interviews of witnesses, 12 additionally the presence of foreign officials. In 2002 out of 304 requests 88 requested the hearing of witnesses and five the presence of foreign officials.

The German Supreme Court Judge Armin Nack said the following: „The human being is insofar as he acts as a witness biologically a misconception“. Experts think that at least half of all witness statements in front of a court are

unreliable, either blatant lies or errors. If this is true maybe we should sometimes reconsider our decision to hear a foreign witness.

Vaduz, am 25.08.2005 RW/buan