

TESTIMONY THROUGH AN INTERNATIONAL VIDEO CONFERENCE

BASIC IDEAS, RELEVANT LEGAL INSTRUMENTS AND FIRST EXPERIENCES IN EUROPE

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I. INTRODUCTION

Summoning and hearing witnesses from foreign countries very often proves to be a cumbersome business. It already takes comprehensive organizational measures to provide for the hearing of a witness who is able and willing to come to the court from abroad. It is even more complicated for the judges (and also for the prosecutors and defence lawyers) to travel and hear a witness who is unable or unwilling to come to the court of another State's territory in his home country.

For some jurisdictions it is possible to fall back upon written testimony in place of oral testimony; for others, which are dominated by the legal principles of immediacy and oral hearing, this possibility is only *ultima ratio*. Giving up the chance of hearing the witness as legally preferred evidence too quickly would certainly bring the court trouble - in particular (but not only) concerning the defence lawyers' reaction - and most probably provoke appeals. In these situations all efforts have to be taken to ensure the attendance of a witness to give evidence in person and only if it is absolutely clear that these efforts have failed and the witness is unable or unwilling to attend in person, written evidence may replace the obligation to hear the witness as the prior evidence.

Many jurisdictions have, in between, discovered the added value of hearings by video conference on a national level and amended their respective criminal procedure provisions. But what about witnesses to be summoned from abroad? On the basis of two EU Council Decisions from 23 November 1995 on the "protection of witnesses in the framework of fighting international organized crime"¹ and from 20 December 1996 on "persons collaborating with the judicial authorities in the framework of fighting international organized crime"² and most probably influenced by positive experiences in the Anglo³-American⁴ jurisdictions, which have proved an obvious gain in directness compared to the conventional forms of summoning and hearing witnesses, the EU Council has also been encouraged to make use of testimony through international video conferences.

II. LEGAL BASIS

The appearance in the court process of another Member State regarding witnesses, experts and defendants was first addressed in the European Convention on Mutual Assistance in Criminal Matters from 1959, which did not expressly provide for the receiving of evidence in another Member State by video conference. Neither did it exclude it. The 1959 Convention just did not say anything (when taking into account the technical standards of that time, this cannot be a surprise!). Time to adjust the legal provisions to the technical pre-conditions, not only in the different national legislations but also at the level of the European Union, was nevertheless ripe long before the EU-Council on 29 May 2000 adopted the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union,⁵ with reference to listening by video conference in Article 10.

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¹ OJ C 327 from 23.11.1995, page 5.

² OJ C 10 from 20.12.1996, page 1.

³ Art. 32 (1a) Criminal Justice Act 1988.

⁴ *Case Harrell vs. State of Florida*, 709 So. 2d 1364 (1998).

⁵ D. J. Dckson "Hearing by Video Conference", EJNI Meeting, Graz, Austria, 12 June 2006.

Although European Member States were very slow in ratifying the 2000 Convention, the Council did not try to force them the same way it did with Article 13 of the Convention on Joint Investigation Teams where it had considered a legally binding instrument more appropriate and adopted a special framework decision (see the author's second UNAFEI paper titled "Joint Investigation Teams").

The Council instead trusted in the Member States to manage video conferences on the basis of national legislations and was lucky with that. First experiences with video conferences in Europe could therefore occur long before the 2000 Convention entered into force on 23 August 2005.

III. CONTENT OF ARTICLE 10/CONVENTION 2000

Art. 10, paragraph 1 states that, as a necessary requirement, where it is neither "desirable nor possible for the person to be heard to appear in its⁶ territory in person", the judicial authorities of the requesting State may ask for a videoconference. (By the way, this not limited to hearings during the court or trial process but is also legally possible during the phase of investigation!) Already this first pre-condition needs clarification: how shall the issue of 'desirability and possibility' be interpreted? There may be lots of practical reasons why a witness cannot attend the requesting State and where it is therefore more desirable to take the evidence by video conference in the requested State. However, it is not implied in the text that the requesting State must have previously made all efforts to use traditional means to have the witness attend in person to give evidence; meant above all to make it easier for the court and the other participants of the trial to assess credibility and liability of a witness.

A solution to this may be found in paragraph 4 which requires that the witness is summoned to court in accordance with the national law of the requested State. In this context the witness will, if he or she fails to attend the court and give evidence, be possibly subject to arrest and criminal sanctions for that failure to attend. Additionally, paragraph 8 says that the national law of the requested State also applies if a witness refuses to testify when under an obligation to do so, or lies under oath. With his or her own national law being applicable and not the law of the requesting State with which he or she is unfamiliar, the witness will receive some protection. Additionally the witness may decline to answer any question where under the law of either the requested or the requesting state he or she may be entitled to decline to answer the question. Further protection of the witness is provided for in paragraph 5 (b), obliging the judicial authorities of both States to discuss and agree upon protection measures, if necessary.

In this context, the court has, at least in the majority of European jurisdictions, the obligation to ensure a fair trial not only from the point of view of the defendant but also from the perspective of the witness, who would therefore also enjoy the protection of Article 6 of the European Convention on Human Rights.

Paragraph 2 indicates that the requested Member State shall agree to the request for video conference of the witness's evidence unless it is excluded by national law or the absence of technical capability. This includes a presumption that the requested State will provide the mechanism for the evidence of the witness to be taken by these means (and that the position of the witness requires it to be considered). Answering a questionnaire from the European Judicial Network only this summer, 15 of the 25 Member States indicated that they are able to provide evidence by video conference within their domestic legislation, three can do so in certain circumstances and seven are unable to do so.

Paragraph 3 contains the basic requirements for a request for hearing by video conference. Concerning this very short and 'neutral' provision, critics object that, in practice, the requesting States, assuming somehow to perform the procedural act alone, often do not feel the need to elaborate a 'real' and complete demand, and also send their request at a very late stage.

On a practical level, paragraph 5 (d) requires the witness to have the assistance of an interpreter.

Paragraph 7 provides that the requesting State shall reimburse all associated costs to the requested State unless the latter one waives this requirement.

⁶ Meaning the territory of the requesting State.

Finally, paragraph 9 leaves it to the discretion of Member States to apply the provisions of Article 10, when appropriate and with the agreement of their competent authorities, to hearings by video conference involving an accused (suspected) person.

IV. PRACTICAL ISSUES

From the answers to the above mentioned questionnaire of the EJM one can conclude that legal problems with video conferences are negligible, whereas technical problems have still to be solved.

The largest practical problem is often the non-availability of technical equipment in the court closest to the place where the witness is resident. A solution can be found, however, if the witness can be persuaded that it is still preferable to travel a little distance within his home country instead of being required to travel to the foreign jurisdiction, also taking into account giving evidence in a court system of which he or she has no previous experience and of which he or she could understandably be anxious.

The question of costs should - with regard to Art. 10 paragraph 7 of the Convention 2000 - not be a problem. Nevertheless it has been stressed in the actual discussions that not all courts are well equipped with modern technology, and some of them have to hire the necessary equipment to carry out foreign requests, which leads to the question of whether these additional costs should also be borne by the requesting State.

Time differences within the European Union are another problem and certainly become more important with regard to video conferences across the world. And, although during the course of a trial a timetable of order will surely be drawn up, it is possible that the proposed timetable may become difficult to adhere to due to unforeseen issues arising during the course of the trial. In that case the video link witness's evidence cannot be taken in time, which may cause frustrations.

Another problem is that of physical evidence. The defence need to be permitted to challenge the evidence of the witness in accordance with the instructions of the accused person but also in accordance with the national law of the requesting State. This may require the defence lawyer to object to evidence sought to be led by the judge or prosecutor. Practitioners may find it strange and difficult to react as the person is on screen and not physically present in court. It may also be of importance that the witness has to identify a certain piece of evidence which has been used during the course of the alleged crime. There is a question about whether it would be appropriate or not for the witness to be shown that physical evidence by video conference or before, for instance by photograph sent prior to the hearing.

Despite all these problems it can be concluded that the authorities in the Member States, having already experienced good procedural results with the use of video hearings, welcome this new form of providing legal assistance. Contrary to the experiences with joint investigation teams, the reactions of the competent authorities in the Member States are positive and without major restrictions. The procedures are not so expensive, the requests are easy to fulfil and problems with 'traditional' requests can be avoided.

It cannot be said better than with the words of a Portuguese colleague, citing the national judges and prosecutors using this instrument being "totally in love with video conferences".

V. CONCLUSIONS

To pour some water into the sometimes excellent Portuguese wine, hearings by video conference will only be successful when they are well prepared by clear and focused discussions and agreements between the requesting and the requested States prior to the hearings. Even if the carrying out of the hearings is not time consuming, their preparations surely are. At an early stage of bilateral co-operation technical arrangements must be made, a test run would be desirable, interpreters must be engaged and any likely objections to be given by the witness need to be discussed and clarified. Also, here one should not forget the role Eurojust can play (see the author's first UNAFEI paper "Eurojust: Signpost on the Road to Security, Freedom and Justice in Europe"), above all in larger transnational (multilateral) cases where the practical aspects of the case may be discussed at a co-ordination meeting in the Eurojust premises, also with a view to making use of a video conference, in detail. This enables the requested State to approach witnesses at an

early stage, and to start to make necessary preparations of a technical nature to ensure quick and adequate arrangements for the requesting State.

Taking all this into account, Art. 10 of the 2000 Convention can be a useful instrument and a real step forward in the fight against organized cross-border crime.