WILLKIE FARR & GALLAGHER LLP

German Law Series

Introduction to German Civil Procedure 3: How Evidence in a German Civil Litigation Works

April 11, 2023

AUTHORS
Matthias Schrader, Dr. Johannes Schmidt, Svenja Wachtel, Dr. Harry Nettlau, Fabian Peitzmeier, Dr. Marc Dietrich

This series of short and to-the-point chapters is intended for international legal practitioners who have a nexus to Germany without being fully trained in German law. It is meant to provide a general overview of the structures, functioning, and general principles of German civil procedure. A new chapter will be published monthly.[1] The previous chapter can be found here.

In this chapter of our series, we will guide you through the principles of how evidence is presented by the parties and assessed by the court in a German civil litigation. Before we dive into the substance of German evidence rules, it helps to bear in mind three fundamental principles:

- German courts decide most commercial disputes solely on the basis of the written pleadings; that is, without hearing witnesses or otherwise formally taking evidence. Only if the court thinks that evidence offered by a party in its written submissions is decisive to the outcome of the case will the court deal with that evidence.
- The entire litigation—including the evidence that the parties present—is heard and decided by a professional judge or a bench of professional judges. There is no jury to impress and no rules trying to shield the jury from weak evidence, e.g., hearsay.
- There is no discovery. In German civil litigation, a party itself generally must bring forward the evidence that it needs to prove its claim or defense. There are some exceptions to this rule, but as a general principle, a party should not expect to obtain helpful evidence from its opponent.

[1] Prior chapters will not be updated. There are exceptions to and deviations from many of the rules and practices discussed in this chapter that are not individually flagged.

A. Each Party Is Responsible For Collecting and Submitting the Evidence to Prove its Case

In German civil litigation, a plaintiff is responsible for gathering the facts supporting its case and for asserting them in its pleadings. Likewise, the defendant is responsible for presenting the facts on which it bases its defenses. The civil courts will deal with the pleadings and offers of evidence brought before them—but they will not themselves investigate the facts where a party's pleading fails to cover a legally relevant fact.

The courts typically go through the following sequence of considerations in order to identify whether evidence needs to be taken in a given case:

- In a first step, the court analyzes whether the facts as stated by the plaintiff would justify plaintiff's claim if they were true. If the plaintiff's submission, when accepted as true, is not sufficient to get the plaintiff the legal relief that the plaintiff seeks, the court will reject the plaintiff's action without taking evidence.

- If the plaintiff's pleading is good on a stand-alone basis, the court analyzes, in a second step, which of the facts that the plaintiff has presented are disputed by the defendant. If the parties agree on certain facts, the court will accept them as true and not take evidence. Using the example of a post-M&A dispute, there will hardly ever be evidence-taking on the timing and structure of the transaction and payments made by the purchaser, because these items are usually well documented and remain undisputed among the parties to a later litigation. However, the interpretation of the words of the transaction documents and what each side understood to be "the deal" is oftentimes heavily contested and relevant to the court's decision; thus, the court examines evidence in this regard, in particular witnesses and e-mails. It is not infrequent that the parties agree on the entirety of the relevant facts but have different views on the legal analysis.

- Not all disputed facts require proof. Facts that are known to the court and facts that are publicly known are presumed to be true and no evidence is required.

- Once the court has filtered out the decisive facts that are in dispute, it will check whether the plaintiff has offered evidence for each of these disputed facts for which the plaintiff bears the burden of proof. The plaintiff is typically required to prove disputed facts that establish the claim (e.g., a breach of contractual obligations by the defendant). The defendant typically bears the burden of proving facts underlying its defenses (e.g., statute of limitations).

  Example: In a real estate case the purchaser alleges that the purchased real estate was not as agreed (for which the purchaser bears the burden of proof). However, the purchaser does not offer any evidence for its allegation. If the defendant disputes that fact, the court will not take evidence on the disputed allegation—irrespective of how many witnesses the defendant offers for its statement that the real estate was in perfect condition. The court does not need to hear these witnesses, because it may discard plaintiff's statement already for the reason that it was disputed and not supported by any proof on the part of the plaintiff. Only if the plaintiff, on its part, had offered evidence of the defect, e.g., testimony by an architect who analyzed the property, would defendant's counter-evidence come into play.

- If the party bearing the burden of proof has not proffered any evidence for a disputed fact, or, after taking evidence, the court does not reach sufficient clarity on the disputed fact one way or the other, the court will decide the respective issue against the party that bears the burden of proof.

B. There Are Mechanisms to Help a Party that Cannot Proffer the Required Evidence

There is no discovery or disclosure in German civil litigation. That is not a defect of the German procedural rules but rather part and parcel of the German legal system. German statutory law and case law provide for a number of other mechanisms to address the situation in which a party does not have (and cannot get) the evidence that it needs because that evidence is with the other party. These mechanisms were created to avoid hardship. In regular cases, the general rule prevails that a party must prove its case with the evidence at its disposal, and it will lose the litigation if it fails to do so.

- Presumptions: In certain situations, German substantive law provides for a statutory presumption. For example, if the plaintiff can prove that there was a breach of contract by the defendant, the court will presume that the defendant breached the contract with fault, which is a requirement for most damages claims. The plaintiff does not have to separately prove fault on the part of the defendant. Rather, the defendant must prove that it acted without fault to avoid liability. There are several presumption rules addressing specific situations, the "breach triggers fault" presumption being among the most important ones.

- Evidence based on first impression (prima facie): Certain typical situations are subject to evidence based on first impression (so-called prima facie evidence). For example, if the plaintiff can prove that his car was rear-ended by the car driven by the defendant, then the plaintiff has automatically also established prima facie evidence that the defendant acted with fault. That is so because rear-end collisions are typically the result of a failure of the driver of the following car to observe safe following distance. It is then for the defendant to state and prove that he had driven safely and that the occurrence of the accident was due to some other reason not caused by him (e.g., defendant was pushed into the plaintiff by a heavy truck with defective breaks).

- Secondary burden of proof: It happens quite frequently that a plaintiff needs to prove facts to win its case but is unable to do so for lack (without the plaintiff's fault) of the required information. At the same time, the opposing party possesses such information and can reasonably be expected to disclose it. In practice, this occurs frequently when the plaintiff needs to state facts about the defendant's internal organization, e.g., that defendant's internal accounting system was poorly managed, that defendant did not properly conduct certain medical analysis that led to plaintiff's being treated poorly, etc. In these situations, the plaintiff is expected to state with as much detail and precision as can reasonably be expected of the plaintiff what the plaintiff's views of the facts are and why. If the plaintiff does so to the court's satisfaction, the burden of presentation shifts to the defendant possessing the information. If the defendant fails to disclose the information without a legitimate reason, the facts as stated by the plaintiff are deemed admitted.

- Disclosure orders: A German court may order a party to the litigation or a third party to disclose documents. However, these disclosure orders are very rare in practice, narrow in scope, and subject to strict requirements. The requesting party must specify the requested document in detail. A court will reject unspecific requests (e.g., a general request for "any and all documents that relate to . . ."), or other requests that it believes are made as part of a fishing expedition. Even if the request is sufficiently specific, the court has discretion on whether to order the disclosure. In its decision, the court considers the interests of all persons involved, including whether the document may contain trade secrets.

In addition, German substantive law provides for claims for disclosure of information in certain areas of law. These disclosure claims are relevant, in particular, to antitrust follow-on claims and claims for infringement of intellectual property (patents, trademarks, and copyrights).

C. Free Evaluation of Evidence by the Judge(s)

In German civil litigation, the judge (or judges, if the matter is subject to a panel decision) is solely responsible for deciding all factual and legal issues of the case.

The judge takes the evidence, not the parties. The judge usually does so in the court room. Under exceptional circumstances, the judge can appoint another judge at a different location to take evidence, e.g., examine a witness who is unable to attend the court hearing.

Pursuant to the governing concept of free evaluation of evidence by the judge (*Prinzip der freien richterlichen Beweiswürdigung*), the judge has the sole authority to decide which evidence is suitable to prove facts relevant to the outcome of the case. Moreover, the judge has broad discretion regarding how much weight to attribute to each piece of evidence. Accordingly, a judge is free to consider hearsay as part of the evidence, but may attribute little weight to it. Essentially, parties are free to offer any evidence, including hearsay, and the judge is free to assess it.

The court may exclude evidence if the evidence was unlawfully obtained, e.g., in violation of the constitutional privacy and personal rights (*allgemeines Persönlichkeitsrecht*). Typical cases of unlawfully obtained evidence are unauthorized audio or video recordings. In contrast to other legal systems, however, there is no fruit-of-the-poisonous-tree doctrine in German civil procedure. If illegal evidence leads to other facts or evidence that can be obtained legally, that further evidence will generally be admissible.

D. No Legal Privilege Under German Law

German law does not provide for legal privilege in civil litigation that is comparable to Anglo-Saxon concepts of legal privilege. Because there is no discovery and disclosure, parties to a German civil litigation typically do not have access to internal documents of the other party. Therefore, the issue of potentially accessing correspondence with in-house or external legal advisors does not arise to the same extent as in other legal systems. The need to protect this communication has thus historically arisen only in the context of witness testimony. German attorneys (including in-house counsel) are bound to secrecy about information they have obtained in the course of their professional work. Consequently, they can and must refuse to testify concerning such information. Likewise, they can and must refuse to provide documents that contain client-related information. If attorney-client communication comes to light by way of other means, any party is free to use it. The client as the “owner of the secret” has sole control over the privileged information and can waive the lawyer’s duty of secrecy at any time.

E. Types of Evidence

The German rules of civil procedure recognize five types of formal evidence: documentary evidence, inspection of objects, witness testimony, expert witness testimony/reports, and party examination. In interim relief proceedings, the parties may additionally rely on affidavits (i.e., a written witness statement given under penalty of criminal liability) to demonstrate the relevant facts (we will address the details of interim relief proceedings in a future chapter of this series).

1. Documentary Evidence

In their pleadings, parties usually refer to documents and submit copies of them to the court as evidence. The court usually takes formal documentary evidence (i.e., look at the original document during the evidentiary hearing) only if the opposing party alleges forgery or otherwise disputes the authenticity of the documents. In the vast majority of cases, the court works with the copies attached to the written submissions and does not ask for originals.

Official documents (i.e., documents issued by public authorities, courts or notaries) serve as proof that a person or the authority made a statement as recorded in the document. In certain cases, they may also be proof of the facts stated in the document, e.g., an official certificate of service as proof that a document was served. Private documents (i.e., those created and signed without the involvement of public authorities, such as contracts, invoices, etc.) are of lesser evidentiary value. A signed contract, for example, proves that the parties entered into it and made the statements contained in the contract, but it is not evidence that the parties' declarations are actually true. Therefore, a dispute over whether the document's content is actually true may have to be resolved by means of other evidence.

2. Inspection of Objects

A party can introduce movable or immovable objects as evidence to be inspected by the judge. This method of taking evidence is frequently used in disputes relating to construction projects or real estate. The judge, the parties and, if applicable, an expert may inspect the construction/property on-site.

3. Witness Testimony

In its pleading, a party may, and usually does, designate one or more witnesses as evidence for a factual allegation. Written witness statements are not considered witness evidence and not commonly used in German civil litigation outside interim relief proceedings.

In principle, any individual—including a child—who is not a party to the proceeding can serve as a witness. Parties and their current legal representatives cannot be witnesses. If the party is a legal entity, this exclusion typically covers managing directors, members of the board of directors, general partners, and insolvency administrators.

Therefore, if the plaintiff's only witness is its managing director, it may decide to dismiss the managing director from this function in order to make that person eligible to be examined as a witness. The court may, however, take this step into account when weighing the evidence. Parties or their representatives are often questioned informally by the court.

4. Examination of a Party

Formal party examination plays a negligible role in German civil lawsuits. This is because a party cannot trigger its own examination by the court unless the opposing party consents—which it typically will not do.

A party may request that the opposing party (or its legal representative) be examined by the court, but this is also rarely done because it is risky. The opposing party is not obliged to testify, but the court may interpret a refusal to the opposing party's detriment. In practice, courts oftentimes invite at least one party representative to the oral hearing with the aim of facilitating a settlement and to further clarify the facts, if necessary. This informal questioning is technically not evidence, but since the court is free to consider all pieces of information brought before it, it is

virtually impossible to stop the court through procedural means from using what it heard during the informal questioning. It is, of course, possible to disprove the statements by a party representative as untruthful.

5. Expert Witness Report/Testimony

In German civil litigation, a distinction is made between an expert retained by a party and an expert appointed by the court.

Expert reports by a party-retained expert are not evidence, but are merely part of the party's pleading. Party expert reports may be useful in amplifying the credibility of the pleading and to possibly put pressure on the opposing party's submission to respond to the expert's findings in detail. However, they do not serve as evidence to prove facts that are in dispute between the parties.

Only reports by court-appointed experts are actual evidence. If a party seeks to prove a fact by means of a (court-appointed) expert report/testimony, it designates all factual allegations to be proven by expert evidence in its pleadings by stating, e.g., "Evidence: Court-appointed expert." The court has discretion on whether to appoint an expert and on the selection of the particular expert. However, if the court hands down a judgment without having commissioned an expert, the judgment may be subject to a (successful) appeal, if the appealing party can show that the court lacked the expertise to decide the matter without expert input. Therefore, courts typically appoint experts in high-stakes disputes that turn on technical issues, such as company valuations, stock price analysis, and accounting practices, etc.

Prior to appointing an expert, the court may hear the parties on a proposed expert candidate or ask them for recommendations. However, it can also appoint the expert without having done so. If the parties agree on a specific person as an expert, the court is bound by such agreement and must appoint this expert. Either party may reject the selected expert if it can show that the expert appears to lack independence and/or impartiality.

***

Stay tuned for the next chapter, forthcoming in mid-May 2023. In the meantime, your Willkie Global Litigation & Arbitration Team is happy to provide you with further information and advice on these issues.