Taking of evidence

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1 The burden of proof

1.1 What are the rules concerning the burden of proof?

In principle, each party is required to list all the factual claims justifying their application (burden of allegation – *Behauptungslast*) and to provide the appropriate evidence (Sections 226(1) and 239(1) of the Austrian Code of Civil Procedure (*Zivilprozessordnung*). If the facts of the case remain unclear (a *non liquet* situation), the court must nevertheless reach a decision. In such cases, the rules on the burden of proof come into play. Each party carries a burden of proof to ensure that all the conditions of the rules favourable to it are met. Under normal circumstances, the claimant must assert all the facts in support of their claim and the defendant must assert all the facts which justify their objections. The claimant also bears the burden of proving that the procedural requirements are met.

1.2 Are there rules which exempt certain facts from the burden of proof? In which cases? Is it possible to produce evidence in order to prove that a specific legal presumption is not valid?

Facts which are material to the judgment must be proved, unless they are exempt from the burden of proof. There is no need to prove facts which have been conceded (Sections 266 and 267 of the Code of Civil Procedure), obvious facts (Section 269) or legally presumed facts (Section 270).

A conceded fact is one which a party accepts to be a correct claim by the opposing party. The court is in principle required to accept a conceded fact as correct and to reach its decision without further examination.

A fact is obvious if it is common knowledge (i.e. known or reliably perceptible at any time to a large number of people) or known to the court (known to the trial court on the basis of its own official findings or clearly apparent from the files).

The court is required *ex officio* to take account of obvious facts in its ruling; they need not be claimed or proved.

A legal presumption results directly from the law and has the effect of reversing the burden of proof. The opposing party of the party benefiting from such a presumption must provide evidence to the contrary. It must prove that, despite there being a basis for a legal presumption, the presumed facts or legal situation do not exist.

1.3 To what extent must the court be convinced of a fact in order to base its judgment on the existence of that fact?

The purpose of court proceedings is to convince the judge of a fact. Generally speaking, a ‘substantial likelihood’ must be assumed and ‘absolute certainty’ is not required in order to convince the judge.

Degrees of the standard of proof are established by statutory or case law, resulting in it being raised from ‘significant likelihood’ to ‘likelihood bordering on certainty’ or reduced to ‘overwhelming likelihood’. In the latter case, satisfactory proof or a certificate is sufficient as a standard of proof under Section 274 of the Code of Civil Procedure. Prima facie evidence also leads to a reduction of the standard of proof and plays a role in overcoming difficulties in providing evidence in damages actions. If there is a typical course of events for which life experience suggests a specific causal link or fault, these conditions are deemed to be proved on the basis of their being prima facie even in individual cases.

2 The taking of evidence

2.1 Does the taking of evidence always require the application by a party, or can the judge in certain cases also take evidence on his/her own initiative?

Evidence may be taken by the court on its own motion or following the application of a party. In proceedings of a purely investigative nature (where the court is required to establish the decisive facts of the case on its own motion), there is no need for an application by the parties. In standard proceedings under the Austrian Code of Civil Procedure, judges are able on their own motion to take any evidence expected to clarify material facts (Section 183 of the Code of Civil Procedure). The judge may instruct the parties to produce documents, require an on-site inspection to be carried out or order scrutiny in the form of expert opinions or an examination of the parties. However, documentary evidence may be presented only if at least one of the parties has referred to it; documentary evidence must not be admitted or witnesses heard if this is opposed by both parties. In all other cases, evidence is taken on an application to obtain evidence by one of the parties.

2.2 If the application by a party concerning the taking of evidence is approved, what steps follow?

In principle, evidence is taken in the oral proceedings. During the ‘preparatory’ meeting (Section 258 of the Code of Civil Procedure), a trial schedule is drawn up jointly by the court and the parties and/or their representatives which also contains a schedule for the taking of evidence. Where necessary, however, a further discussion concerning the progress of the proceedings may take place at any time. Once evidence has been taken, the outcome is discussed with the parties (Section 278 of the Code of Civil Procedure). Evidence must in principle be taken directly by the judge, who will decide on the matter. In those cases expressly covered by law, evidence may also be taken during the mutual legal assistance procedure. The parties must be summoned for the taking of evidence and have various participatory rights, such as the right to put questions to witnesses and experts. Evidence is always taken on the court’s own motion, in principle even if, despite being called, the parties are not present.

2.3 In which cases can the court reject an application by a party to obtain evidence?

An application by a party to obtain evidence must be rejected if the court considers it to be irrelevant (Section 275(1) of the Code of Civil Procedure) or if it is submitted with the intention of delaying proceedings (Sections 178(2), 179 and 275(2) of the Code of Civil Procedure). It is also possible to set a time limit for taking evidence that is likely to delay the proceedings (Section 279(1) of the Code of Civil Procedure). Once this has expired, the application to take evidence may be rejected. It may also be rejected if it is unnecessary because the court has already been convinced or the fact does not need to be proved or the taking of evidence is prohibited. Where the taking of evidence gives rise to costs (e.g. expert evidence), an advance payment must be obtained from the applicant party. If this is not paid within the deadline set, the evidence may only be given at a later date if this will not cause a delay in the proceedings.

2.4 What different means of proof are there?

The Austrian Code of Civil Procedure provides for five ‘classical’ means of proof: documents (Sections 292 to 319), witness testimony (Sections 320 to 350), expert evidence (Sections 351 to 367), on-site inspection (Sections 368 to 370) and hearing the parties (Sections 371 to 383). In principle, any source of information may be admitted in evidence and will be classified as one of the above means of proof according to the form it takes.

2.5 What are the methods of obtaining evidence from witnesses and do these differ from the means employed to obtain evidence from expert witnesses? What are the rules in relation to the submission of written evidence and expert reports/opinions?

Witnesses are heard individually in the absence of witnesses to be heard subsequently. This prevents them from influencing each other's testimony. If the testimony of witnesses is contradictory, they may be examined concurrently. Examination of witnesses begins with general questioning to establish if they are disqualified from testifying for any reason, have the right to remain silent or whether there are any factors preventing them from taking oath. Once a witness has been cautioned to tell the truth and advised of the consequences under criminal law of giving false testimony, the examination proper begins with the witness being asked to provide their personal identification data. The witness is then questioned on the case itself. The parties may take part in the witness examination and, with the agreement of the court, put questions to witnesses. The judge may reject inappropriate questions. Witnesses must in principle be examined directly before the trial court. Under certain conditions, however, it is possible to examine witnesses by way of mutual legal assistance (Section 328 of the Code of Civil Procedure).

Expert witnesses are deemed to 'assist' the court. While witnesses gives testimony concerning facts, expert witnesses provide knowledge which the judge cannot possess. Expert evidence must in principle be taken directly before the trial court. An expert witness may also be called on the judge's own motion, without restriction. Expert witnesses must submit their findings and a report. Expert witnesses must deliver an oral report during the oral hearing. Written reports must be explained by expert witnesses during the oral hearing if this is requested by one of the parties. The findings and the report must be substantiated. Private reports are not considered to be expert reports within the meaning of the Code of Civil Procedure. They have the status of a private document.

Austrian law does not allow proceedings to be conducted entirely in writing. However, since the means of proof are not in any way limited, the possibility exists of witnesses giving their testimony in writing. Written witness statements are, however, treated as documentary evidence and are subject to independent assessment by the court. If the court deems it necessary, the witness must appear before the court, unless both parties object to the examination of that witness.

2.6 Are certain methods of proof stronger than others?

The principle of the 'free assessment of evidence' applies (Section 272 of the Code of Civil Procedure). The assessment of evidence is the examination of the results of the evidence by the judge. In carrying out this assessment, judges are not bound by any statutory rules regarding the evidence but must judge in accordance with their personal conviction whether or not the evidence is sufficient. There is no hierarchy applicable to means of proof. Written evidence is deemed to be documentary evidence unless it is an expert report. Public documents issued in Austria are presumed to be authentic, i.e. it is assumed that they are indeed attributable to the issuer indicated. They also establish full proof of the correctness of the contents. As long as they are signed, private documents are also fully accepted as evidence that the statements they contain were made by the person who signed them. Their accuracy is always subject to the free assessment of evidence.

2.7 In order to prove certain facts, are certain methods of proof obligatory?

The Austrian Code of Civil Procedure does not require particular types of evidence to be considered in specific cases. The amount of the claim has no bearing on the choice of means of proof.

2.8 Are witnesses obliged by law to testify?

Witnesses are obliged to appear in court, to give testimony and, if asked, to take an oath. If a duly summoned witness fails to attend an oral hearing without sufficient reason, the court must first impose an administrative fine and, if they fail to attend a second time, order that they be brought to the hearing by force. If a witness refuses to testify without giving any reason or gives an unjustified reason for not testifying, they may be forced to testify. False testimony by a witness before the court will result in criminal proceedings.

2.9 In which cases can they refuse to give evidence?

Where there are grounds for refusing to give evidence (Section 321 of the Code of Civil Procedure), the witness is entitled to refuse to answer a question or individual questions. There is no complete right to refuse to give evidence. Such grounds are scandal or the risk of criminal prosecution for the witness or a person close to them, a direct financial disadvantage for the same people, state-recognised obligations to remain silent, the obligation of lawyers, a statutory representative body or a professional association capable of entering into collective agreements to remain silent about labour and social security matters, the potential disclosure of artistic or business secrets and the use of a voting right which has been declared secret by law. The court must advise witnesses of these grounds before they are examined. Witnesses who wish to exercise their right to remain silent must state their reasons.

2.10 Can a person who refuses to testify be sanctioned or forced to give evidence?

The court must decide whether the refusal by a witness to give evidence is lawful. Witnesses who refuse to testify without giving any reason or who give reasons which the court considers unjustified may be forced to testify (Section 354 of the Enforcement Code – *Exekutionsordnung*). This may be done by means of fines or, to a limited extent, imprisonment. Such a witness is also liable vis-à-vis the parties for any damage caused as a result of an unjustified refusal to give evidence.

2.11 Are there persons from whom evidence cannot be obtained?

Evidence cannot be obtained from persons who were or are unable to witness the facts to be proved or to communicate what they have witnessed. They are considered to have an 'absolute' physical inability to testify (Section 320, point (1), of the Code of Civil Procedure). In the case of minors or mentally ill persons, the court must decide on a case-by-case basis whether they are unable to give evidence. If the person to be heard is a minor, the court may, following an application or *ex officio*, waive all or part of its examination if the examination would jeopardise the well-being of the minor, taking into account their mental maturity, the subject of the examination and their relationship to the litigants (Section 289b(1) of the Code of Civil Procedure). This also applies in non-contentious proceedings (Section 35 of the Non-contentious Proceedings Act (*Außerstreitgesetz*)). There are also three cases of 'relative' incapacity to testify (Section 320, points (2) to (4), of the Code of Civil Procedure): religious professionals in respect of information given to them during confession or otherwise covered by confidentiality arising from their position, state officials in respect of confidential information in connection with their office (unless an exemption is made), and mediators in respect of information entrusted to or otherwise obtained by them during the course of mediation.

2.12 What is the role of the judge and the parties in the hearing of a witness? Under what conditions can a witness be heard via videoconferencing or other technical means?

The court must ask witnesses appropriate questions about the facts to be proved by their testimony and about the circumstances under which they obtained their knowledge. The parties may participate in the examination of witnesses and, with the agreement of the court, ask them questions to clarify or complete their testimony. The judge may reject inappropriate questions. Witness testimonies must be records of their essential content or, if necessary, they must be recorded verbatim. Video and audio recorders and the data stored on them are generally deemed to be objects of inspection. Evidence through inspection is the result of the direct sensory perception of characteristics or conditions of things by the court. However, on the principle that evidence should be taken directly, such evidence is only admissible where direct evidence (e.g. a witness) is not available. The examination of witnesses using video technology is possible in principle and should be used in lieu of examination when executing requests for mutual legal assistance for reasons of economy of process. All courts have been equipped with video-conferencing facilities since 2011.

If the subject matter of the civil proceedings is related to criminal proceedings, the examination of parties who are the victims in these criminal proceedings within the meaning of Section 65, point (1)(a), of the Code of Criminal Procedure (*Strafprozessordnung*) shall, at their request, limit the participation of the

parties to the proceedings and their representatives in the examination in such a way as to allow them to follow the examination using technical equipment for the transmission of speech and images and to exercise their right to ask questions without being present at the interview. If the victim is an underage minor, a suitable expert must carry out the questioning related to the criminal proceedings (Section 289a(1) of the Code of Criminal Procedure). The court may, upon request, examine a person in the manner described in paragraph 1 if, in the light of the evidence in question or personal involvement, the person to be heard cannot be reasonably expected to make a statement in the presence of the parties to the proceedings and their representatives (Section 289a(2) of the Code of Civil Procedure). The court may, upon request or *ex officio*, have the examination conducted in the manner described in Section 289a(1) of the Code of Civil Procedure, and, if necessary, by a suitable expert even if the well-being of the minor would not be jeopardised by the examination itself, but conducting the examination in the presence of the parties or their representatives would affect their well-being, taking into account their mental maturity, the subject of the examination and their relationship to the litigants (Section 289b(2) of the Code of Civil Procedure). Sections 289a and 289b of the Code of Civil Procedure also apply in non-contentious proceedings (Section 35 of the Non-contentious Proceedings Act).

3 The evaluation of the evidence

3.1 Where evidence has not been obtained legally by a party, are there restrictions placed on the court in reaching its judgment?

If a party infringes a contractual obligation, a provision of private law or the accepted principles of morality in order to obtain evidence, the court may admit and assess the evidence, but the party concerned will nevertheless be liable to pay compensation. If, in order to obtain evidence, the party infringes a provision of criminal law protecting the core basic rights and freedoms laid down by the Constitution (e.g. physical injury, kidnapping, or coercion of a witness to give testimony), the evidence so obtained is inadmissible and must not be accepted by the court. If there is doubt as to whether a criminal act has been committed, the court may suspend civil proceedings until a final judgment has been given in the criminal proceedings. If the criminal act committed to obtain evidence does not infringe the core basic rights and freedoms laid down by the Constitution, the party in question is deemed criminally liable, but the evidence is not inadmissible. Only evidence obtained illegally which has adversely affected the court's duty to establish the truth and thus undermines the guarantee that the court will deliver a true and accurate judgment is inadmissible.

3.2 As a party to the case, will my own statement count as evidence?

The examination of the parties also constitutes evidence. Like witnesses, the parties also have a duty to attend, give testimony and take an oath. However, parties cannot be forced to appear or testify in court. Any unjustified failure by a party to attend the proceedings or to testify in court must be judged by the court with due regard for all the circumstances. Only in paternity or divorce proceedings is it possible to use force to ensure that the parties appear before the court. Failure by a party to tell the truth (unlike with witnesses) is not a criminal offence unless a false statement is given under oath. The examination of the parties may be ordered by judges on their own motion.

4 Has this Member State in accordance with Article 2(1) of the Taking of Evidence Regulation specified other authorities that are competent to take evidence for the purposes of judicial proceedings in civil or commercial matters under the Regulation? If so, what proceedings are they competent to take evidence in? Can they only request taking of evidence or also assist in the taking of evidence on the basis of a request from another Member State? See also notification under Article 2(1) of the Taking of Evidence Regulation.

Under Austrian national law, no authorities other than courts are currently competent to take evidence across borders under Article 2(1) of the Regulation.

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