TAKING OF EVIDENCE IN GERMANY IN SUPPORT OF FOREIGN ACTION

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The German Code of Civil Procedure (*Zivi1prozeßordnung*, "ZPO") distinguishes the taking of evidence from (1) nonparty witnesses (*Zeugen*) (§§ 373 - 401 ZPO); (2) parties to the suit (§§ 445 - 455 ZPO); and (3) experts (*Sachverständigen*) (§§ 402 - 414 ZPO).

1. Nonparty witnesses

Nonparty witnesses are designated by one of the parties to give testimony in support of that party's allegations that are disputed by the opposing party. German courts consider the following persons to be witnesses and not parties to the suit:

- Minors or other parties lacking capacity to conduct legal proceedings;
- Limited partners of a limited partnership (*Kommanditgesellschaft*) that is party to the action;
- General partners of a limited partnership in liquidation;
- Shareholders excluded from representation in the shareholders agreement;
- Shareholders of stock corporations (*Aktiengesellschaft*); and
- Senior executives (but not managing directors) of a limited liability company (*Gesellschaft mit beschränkter Haftung*, or "GmbH").

Witnesses can also be professionals who have been involved in certain circumstances of the case, *i.e.*, the doctor at the scene of an accident or a technician in a laboratory qualify as expert witnesses. Such "expert witnesses" (*sachverständige Zeugen*, § 414 ZPO) are designated by one of the parties and must not be confused with "experts" (*Sachverständigen*), who are appointed by the court. The court allows as evidence only the expert witness's account of observations relating to the case and not the witness's evaluation of the subject matter.

A professional specialist commissioned by a party on its own initiative to report on circumstances of the case is a witness, not an "expert." Also, a specialist who was originally appointed by the court and then successfully rejected by a party and subsequently discharged as an expert may testify only as a witness.

Witnesses who do not answer a court summons to testify or without sufficient reason refuse to testify can be sanctioned with fines, custody, and procedural costs.

2. Parties

A party to a suit is not a witness under German procedural law.

When the party is a legal entity, certain persons are treated as identical to the party and therefore disqualified as witnesses. These include:

- Members of the board of directors of a stock corporation;
- Managing directors of a company with limited liability;
- General partners of a limited partnership; and
- All partners in a commercial or private partnership.

Persons who formerly, but at the time of testimony no longer, hold these positions can be interrogated as witnesses. Some legal counsel will recommend that if a case can be facilitated by testimony of a person deemed a party *(e.g.*, a managing director) that person should be relieved of his or her position shortly before witness testimony is to be taken and afterwards reinstated. The opposing party can and should object to such an action as being surreptitious and petition the court to disallow the testimony as evidence. If the court allows the testimony as evidence, the opposing party can nominate its own counterpart, *e.g.*, a managing director, as a witness under the "equality of arms" argument (*Waffengleichheit*), which the court should allow.

Special rules not applicable to witnesses determine the party's role in clarifying facts. The German court will ask each party to state completely and truthfully its version of the facts, usually without interruption (§ 138 ZPO). Only a party to the suit can admit facts such that the admission is binding on the court and the litigants (*Geständnis*, § 288 ZPO). The admission cannot be subject to any conditions and it can be revoked only on a showing that the admission was untruthful (§ 290 ZPO).

A party to a suit risks civil liability for damages and criminal prosecution for fraud or attempted fraud if it intentionally lies or omits information on circumstances known to the party. The court is required to assure that the parties to a suit state completely all facts relevant to the case and, under questioning by the court, supplement any factual submissions (§ 141 ZPO).

German courts rarely take party testimony as evidence, although the ZPO permits party testimony to a limited degree under the following circumstances:

- When the party carrying the burden of proof has not been able to produce enough evidence to support its claim or defense, the party may petition the court to interrogate the opposing party on the issue in dispute (§ 445 ZPO);
- On petition of either party and with the consent of the other party, the party seeking to prove an issue is allowed to testify (§ 447 ZPO); and -
- If the court has not been able to decide with the requisite certainty the truth or untruth of contested factual issues, the court can order either party to testify regardless of burden of proof (§ 448 ZPO).

In all instances, the court must issue a formal evidence order (*Beweisbeschluß*, § 450 ZPO)

before a party can be requested to give testimony.

A court cannot force a party to testify by using the means of compulsion it has against witnesses. The court can conclude, however, that the party who refuses to testify has not proven contested issues of fact that might otherwise have been advantageous to its case (§§ 453, 446 ZPO).

For decades Germany's highest courts have vacillated on the question as to whether a statement made by a party during testimony taken in accordance with §§ 445 ff. ZPO can qualify as an~'~ admission that is binding on the court. In 1995, the Federal Court of Justice (*Bundesgerichtshof*, "BGH") expressly overruled its own 1952 judgment (which had overruled a 1935 judgment of the *Reichsgericht*) and held that a party statement made during formal party testimony cannot qualify as an admission. The court cannot be bound by the statement but rather, as with all evidence, must weigh the party testimony within the court's discretion according to the principle of free evaluation (§ 286 ZPO, *freie Beweiswürdigung*).

The 1995 BGH case was one of personal injury in which ultimately the defendant's liability insurance would cover plaintiffs claims if justified. German insurance policies usually contain a clause in which a defendant risks loss of coverage if it makes an admission of fault in court. Therefore, the defendant had made no admission, but the court feared that plaintiff and defendant, who in this case had a long-term business relation, might collude in the taking of party testimony to the detriment of the insurance company. To prevent this abuse of the opportunity to have party testimony taken as evidence, the statements of the defendant were held to be not an admission and not binding on the court but rather subject to the court's free evaluation.

3. Expert Evidence

Experts are understood as assistants of the judge and are appointed by the court (§ 404(l) ZPO), although the court can request that the parties recommend an expert witness (§ 404(3) ZPO). If the parties agree on an expert, the court is bound to appoint that person (§ 404(4) ZPO).

Court-appointed experts are required to examine and report on a subject matter or circumstance that the court feels it is unable to evaluate due to a lack of specialized knowledge. Unlike a witness, the expert is to assist the court in its evaluation of established facts on the basis of his or her expertise by means of analysis, subjective interpretations, deductions, conclusions, hypotheses, and opinions.

Often experts are university professors. The courts also have contacts with many organizations in various technical fields who maintain lists of forensic experts. One such organization is the Association for Technical Supervision (*Technischer Überwachungs-Verein*, "TUV") which will examine the technical safety of almost any product, from toys to motor vehicles to industrial plants.

Experts will usually express their opinions in a report presented to the court and made available to the parties. After the court and the parties have been given time to read the expert report, the expert will usually be summoned to appear in court to explain his findings and answer questions relating to the report.

4. Attorney-Client, Work-Product and Other "Privileges"

Witnesses have a right to refuse testimony that would disclose their own trade, business, or banking secrets (§ 384 no.3 ZPO) if the witness can show that he or she would suffer an unreasonable professional or business disadvantage by disclosing the information requested. A concerned third party may seek a court order preventing a witness from giving information on business or trade secrets if the witness has a statutory or contractual non-disclosure obligation towards this third person.

Generally, the concept of business privileges is extremely broad under German law and constitutionally protected as a part of the constitutional right to own property (Article 14(l) of the German Basic law (*Grundgesetz* or "GG")). Provisions in European Community law protecting free competition (e.g., Article 85 EC Treaty) are a part of German national law and have further expanded the protection of business secrets. Business secrets include technical material, tools, and methods as well as economic business secrets such as price calculations, scope of credit, financiers, participants, bank connections, and sources of information.

A witness must always give grounds for invoking a privilege (§ 386 ZPO), which the court will accept if it deems the reasons probable (*glaubhaft*). Either party may challenge the witness's privilege (§§ 386, 399 ZPO), and the court must immediately commence interlocutory proceedings to decide the privilege issue. For this procedure, the witness can be, but need not be, represented by a lawyer. The interlocutory judgment is subject to a special appeal within a short statutory period (*sofortige Beschwerde,* § 387(3) ZPO) to the next higher court.

If one of the parties has a legal right to the information that the witness possesses, that party can file either an independent complaint against the witness for disclosure of information (§ 254 ZPO) or seek an injunction (§ 940 ZPO).

However, a party to the action cannot prevent testimony from a witness that might disclose a trade, business, or banking secret of that party. For the party carrying the burden of proof, the decision to designate a witness for testimony that might involve confidential information lies within that party's discretion.

To some extent, in order to protect business secrets, the court can protect sensitive testimony by ordering a closed session and excluding the public from the hearing (§ 172 no.2 of the Judicature Act (*Gerichtsverfassunggesetz* or "GVG")).

Some legal experts recommend that the court appoint an expert to hear testimony from a witness on the business secrets of one party, depriving the other party of access to evidence containing business or trade secrets. The excluded party's lawyer would be allowed to attend the closed court session and represent the client. This suggestion is highly controversial and has been practiced only for review or examination of documents presented as evidence to avoid disclosing confidential information in documents not relevant to the hearing. For instance, in a decision from May 8, 1984, the Nuremberg Higher Regional Court (*Oberlandesgericht*) held that a court expert could examine the source code of a computer program in order to avoid disclosure of the source code to the other party. This decision was widely criticized by German legal authorities who argued that the intervention of an expert to hear testimony at the exclusion of a party violates that party's constitutional right to be present at all stages of the hearing. Furthermore, no statutory basis exists for such a procedure.

Under § 383 ZPO, certain members of commercial and business professions have a right to refuse testimony on confidential information entrusted to them due to their professional duties. These

witnesses include members of a supervisory board and board of directors of a corporation, public accountants, private detective agencies, credit detective agencies, and banks.

Also enjoying privileges under § 383 ZPO are members of the legal profession, including judges, lawyers, notaries, defense attorneys in criminal cases, translators, interpreters, tax consultants, and accountants. If a lawyer is called to give witness evidence before a court, the extent and legal grounds for an attorney-client privilege depend on whether the lawyer is admitted to the German bar. According to § 43a of the Federal Code for Attorneys (*Bundesrechtsanwalts-ordnung*, or BRAO), a lawyer admitted to the bar has the duty and privilege to protect client confidences:

> "The lawyer has a duty to observe confidentiality. This duty includes everything that is made known to him in the course of his profession. Excluded are facts known to the public or the relevance of which does not demand confidentiality."

This duty is repeated in the Professional Rules of the Federal Chamber of Lawyers (*Berufsordnung der Bundesrechtsanwaltskammer*), supported as an attorney-client privilege in § 383 ZPO, and its violation penalized in § 203 StGB.

In-house counsel not admitted to the bar are not bound by these duties, and conversely, do not enjoy an attorney-client privilege in respect of their company employers. The privileges of in-house counsel as employees depend on whether the employer is a party to the litigation. If the employer is not party to the litigation: in-house counsel can invoke a privilege to protect the employer's business or trade secrets. If the employer is party to the action: in-house counsel cannot invoke a privilege to protect the employer's business or trade secrets. For the party carrying the burden of proof, the decision to designate a witness for testimony that might involve disclosure of confidential information lies within that party's discretion. The opposing party can call the in-house counsel of its adversary to testify, although this is rare in German civil litigation.

Most in-house counsel in Germany are not admitted to the bar. For those few who are, they have no attorney-client privileges with regard to information regarding their employers. They may not represent their company in court.

5. Documentary Evidence

There is no documentary discovery in Germany. The issue of protection of privileged information "found" during discovery does not arise. The opposing party is under no general obligation to release documents in its possession to assist the other side to "discover" the facts of the case. Each party is responsible for producing the documentary evidence that will support its allegations. From this follows that all confidential communications are protected from disclosure in civil litigation.

The parties to German litigation substantiate their allegations by, inter alia, referring to documentary evidence in their written pleadings and attaching photocopies of the documents referred to. Procedures for the production of documents vary, depending on who has possession of the document: the party with the burden of proof, the opposing party, a third person, or a public authority.

Possession of the Party with the Burden of Proof

If the party with the burden of proof has the document or can obtain possession of it easily, that party presents it to the court (§ 420, 432(2) ZPO). Private documents must be produced in the original and only "authentic" private documents have evidentiary value. The opposing party must declare whether it accepts the document as authentic (§ 439(l) ZPO), and if no declaration is given, the document is regarded as acknowledged unless the intention to contest the authenticity can be inferred from other declarations of the opposing party (§ 439(3) ZPO). If the opposing party disputes authenticity, the party with the burden of proof must prove the document's authenticity (§§ 440-443 ZPO).

Public documents may be produced in original or as certified copies (§ 435 ZPO). Uncertified copies of public documents have no evidentiary value.

Possession of Opposing Party

When documentary evidence relied on is in the possession of the opposing party, the evidence is furnished by requesting the court to order the opposing party to produce the document (§§ 421 ZPO). The petition to produce must include (§ 424 ZPO):

- Description of the document;
- Particulars of the facts to be proved by the document;
- As far as possible, a complete description of the contents of the document;
- Basis for the allegation that the opposing party possesses the document;
- Description and prima-facie justification of the grounds from which the obligation to produce the document arises.

As indicated by the last requirement listed above, the opposing party is obligated to produce a document only if the party with the burden of proof is entitled to demand the surrender or production of the document. Unless the opposing party has itself referred to the document in the course of offering evidence (§ 423 ZPO), the right to demand surrender or production must be founded on private law (§ 422 ZPO). Statutory rights to demand production or surrender of documents are scattered throughout German civil and commercial substantive provisions and are based on entitlement. The most important statement of the right is found in § 810 of the German Civil Code (*Bürgerliches Gesetzbuch* or “BGB”):

> "A person who has a legal interest in the examination of a document in the possession of another may demand from the possessor permission to examine it if the document is made in his interest or if in the document a legal relationship existing between himself and another is recorded or if the document contains the negotiations of any legal transaction that have been conducted between the person interested and another person or between one of them and a common intermediary. "

Further statutory duties to release documents or accounts include:

- Obligation of an administrator of accounts to provide records of receipts and expenditures, § 259 BGB;
- Obligation to return certificate of debt upon payment, § 371 BGB;

- Obligation of assignor to furnish information and documents to assignee, § 402 BGB;
- Obligation of the mandatary to furnish information and render accounts to the mandator, § 666 BGB;
- Obligation of the mandatary to surrender to the mandator all that he receives in the course of the execution of the mandate, § 667 BGB;
- Obligation of partnership to inform partners of the affairs of the partnership and provide books and papers, § 716 BGB;
- Obligation of commercial partnership to provide books and records to partners, § 118 of the German Commercial Code (*Handelsgesetzbuch* or "HGB");
- Obligation of liquidators to provide books and documents of a dissolved partnership to partners and their heirs, § 157 HGB;
- Obligation of principal to provide commercial agent with information on concluded transactions, § 86a(2) HGB;
- Obligations based on the general rule of performance of contractual obligations in accordance with the requirements of good faith, § 242 BGB.

The opposing party is obligated to produce documents if the court is of the opinion that the fact to be established by the document is material and the request is well-founded. If the opposing party does not dispute that the document is in its possession, the court orders production of the document (§ 425 ZPO).

If the opposing party disputes that the document is in its possession, the court must examine the opposing party concerning the location of the document. If the court arrives at the conviction that the document is in the possession of the opposing party, production is ordered (§ 426 ZPO). If the opposing party fails to comply with the order to produce, a copy produced by the party offering the evidence can be considered as accurate, and if no copy of the document can be produced, the assertions of the party offering the evidence concerning the nature and contents of the document are assumed as proved (§ 427 ZPO).

Possession of Third Party

Where documents are alleged to be in the possession of a third party, the party relying on the document may request the court for a time allowance for production of the document. The court may not subpoena a third party to appear before the court and produce the document. Rather, if the third party does not voluntarily surrender the document to the party relying on the document in spite of a duty to produce on statutory grounds such as those described above, the only recourse for the party entitled to the document is to institute separate proceedings against the third party for surrender of the document.

The court having jurisdiction for the second action is determined independently of the first action, on the basis of the third party's domicile (or other relevant jurisdictional basis). The time frame of the proceedings for surrender of documents depends on the circumstances of the particular case between the party relying on the document and the third party, but the action can take a year or longer. The court of original proceedings may suspend the action until the second action is completed if it determines that its decision depends on the outcome of the second action (§ 148 ZPO).

Possession of a Public Authority

If the party with the burden of proof asserts that a document is in the possession of a public authority, the evidence is offered by a petition to the court requesting that the public authority make the document available (§ 432(l) ZPO). The court will submit this request to the public authority as a request for administrative assistance unless the party can request the document without the court's cooperation (§ 432(2) ZPO). The document must be identified exactly; the request "to produce the file" is too vague and unacceptable. If the public authority refuses to produce the document, and the party relying on the document gives credible grounds for its entitlement, the court sets a time allowance in which the party relying on the document must institute an action and enforce judgment against the public authority as described above with respect to actions against third parties (§ 432(3) ZPO).

Documentary evidence that can be requested from public authorities include evidentiary protocols, documents of service, administrative files, and court judgments. Protocols of visual inspection, as well as witness and expert testimony protocols from other proceedings, are evaluated by the court as documentary evidence.

6. Blocking Statutes

"Blocking statutes" are national laws enacted specifically to prevent disclosure of certain information for purposes of foreign litigation and reflect the State's notion of sovereignty, protecting information sensitive to national security. Blocking statutes have been enacted as a means of counteracting U.S. discovery requests and make it unlawful for citizens or residents of the enacting State to comply with such discovery requests. All blocking statutes are designed to endow the citizens and companies with the **foreign government compulsion defense** if they should become targets of U.S. discovery orders.

Germany has passed no blocking statute explicitly placing criminal sanctions on witnesses who testify before foreign judicial authorities or agencies without permission or intervention of German judicial authorities. Some German legal authorities consider the taking of witness testimony or depositions by foreign courts, commissioners, or lawyers in Germany without the intervention of German judicial authorities to be a criminal offense, namely *Amtsanmaßung*, § 132 StGB (performing acts which may be performed only by the holder of a public office). However, no German court has ever decided on this issue, and the practice of taking depositions of willing German parties and witnesses without making use of the means prescribed by national law and international conventions appears to be widespread.

Germany has, however, enacted one blocking statute that prohibits transmission of shipping trade documents to foreign authorities or agencies. This is the Ordinance Concerning the Transmission of Shipping Documents to Foreign Authorities or Agencies dated December 14, 1966 pursuant to Article I I of the Law on the Responsibilities of the Federation with regard to Shipping (*Gesetz über die Aufgaben des Bundes auf dem Gebiet der Schiffahrt*). This law was Germany's reaction to investigations undertaken by the U.S. Federal Maritime Commission in the early 1960's into alleged discriminatory and anti-competitive activities of international shipping conferences. The U.S. investigations provoked blocking legislation not only in Germany, but similar statutes were enacted in Great Britain, France, Norway, Belgium, and Sweden.

7. Secrecy laws

In contrast to blocking statutes, which seek to protect the public interest, secrecy laws seek to protect private interests. In addition to the Criminal Code, which sanctions doctors, lawyers, social workers, insurance companies, and public officials for violations of confidentiality (§ 203 StGB), the Federal Data Protection Law (*Bundesdatenschutzgesetz*) forbids any public or private agency to distribute or use collected personal data for other than the prescribed purposes. In U.S. proceedings in Texas in 1995, Volkswagen AG v. Valdez, Volkswagen ultimately succeeded in preventing discovery of its corporate telephone book, the disclosure of which was found to violate the BDSG.

No law specifically protects bank secrets. Banks are bound to respect the confidentiality of its customers as a contractual obligation, usually expressed in General Terms and Conditions, which are based on a uniform model, *Allgemeine Geschäftsbedingungen der Banken*, no.2 General Terms and Conditions for Banks.

Statutory and contractual duties to observe confidentiality are supported by privileges of witnesses to refuse testimony.

8. Procedures

Conventions and Bilateral Treaties

Germany is a Contracting State to the 1970 Hague Evidence Convention as well as to the 1954 Hague Convention on Civil Procedure. Under these conventions and under the numerous bilateral treaties to which Germany is a party, witnesses can be compelled to give evidence before German courts for use in foreign litigation.

Other Means and Absence of Convention

States not party to any international or bilateral treaty on judicial assistance with Germany can nevertheless request a German judicial authority to assist in the taking of evidence as well as request diplomatic and consular officials to conduct the taking of evidence. Decisions to grant a request for judicial assistance, procedures for transmitting these requests to the requesting State, and methods of execution of the request are based on comity and reciprocity. As far as procedures for judicial assistance have been established through practice or formalized between Germany and Non-Treaty States, these are explained in detail in the foreign country sections of the Regulation on Judicial Assistance in Civil Matters (*Rechtshilfeordnung für Zivilsachen*, "ZRHO"). If no diplomatic relations exist between Germany and the requesting State, execution of the request is not to be expected. If the State from which the request originates has consistently refused to grant reciprocal treatment to German requests, German authorities will almost certainly reject the request.

According to the ZRHO, a consular officer of the requesting Non-Treaty State must submit requests for judicial assistance to the President of the Regional Court that has personal jurisdiction over the prospective witness. If the request does not violate German sovereignty or other vital aspects of German public policy, the Regional Court (*Landgericht* or "LG") will forward the request to the Municipal Court (*Amtsgericht* or "AG"), which will conduct the examination of witnesses as described above under the 1970 Hague Evidence Convention. Testimony of witnesses who are requested to testify by a Non-Treaty State can only be voluntary.

A German court may not use any means of compulsion against a witness in executing a request for testimony from a Non-Treaty State.

Germany officially holds the position that taking witness evidence from German or third State nationals on its territory by foreign courts, commissioners, or lawyers, without the intervention or permission of the proper German authorities, to be a violation of its sovereignty, even when the witness complies voluntarily. The German government has consistently maintained this position and a few legal authorities contend that obtaining evidence in Germany without the intervention or permission of German authorities might constitute the crime of performing acts which may only be performed by the holder of a public office (*Amtsanmaßung*, § 132 StGB).

In spite of this, when faced with the alternatives of requesting judicial assistance (perceived as cumbersome) or sending witnesses at considerable expense to the foreign forum for the taking of evidence, and in view of penalties imposed by the foreign forum for non-compliance with an order for the production of evidence, German parties to foreign litigation often persuade their witnesses to participate in the taking of evidence in Germany conducted by legal counsel.

This method of taking evidence is attractive to the foreign plaintiff, but most litigants harbor a major concern that a judgment based on evidence obtained without the assistance of judicial authorities cannot be enforced in Germany. Despite Germany's official position regarding its sovereignty, most legal authorities are of the opinion that the method of obtaining evidence either in Germany or the forum State is in itself not sufficient to preclude recognition and enforcement of a judgment.

Exchange of Notes between the United States of America and the Federal Republic of Germany, 1956 and 1980

Authority for U.S. consular officers to depose willing witnesses of German or third-country nationality is derived from the Exchanges of Notes (*Verbalnoten*) which entered into force in 1956 and 1980. Where a witness for U.S. litigation is willing to testify voluntarily, a deposition may be conducted at the American Embassy in Bonn or any of the American Consulates in Germany. Although technically the consular officer is "taking the deposition," attorneys for either side may pose all questions orally or in writing.

Key points under the notes are (i) absolutely no compulsion may be brought to bear on the witness to appear or to provide testimony, e.g., the request to give information may not be called a "summons" nor may the interview be called an "interrogation"; no coercive measures may be threatened in the event that a person does not appear or refuses to provide information; (ii) no compulsion may be brought to bear on a person to sign protocols or other records of oral information; (iii) witnesses must give their express consent to be interviewed outside the consulate; and (iv) witnesses have a right to be accompanied by an attorney.

In addition, witnesses should not be asked to produce documentary evidence. According to a declaration made by Germany to the 1970 Hague Evidence Convention, Germany does not allow pretrial discovery of documents "as known in common law countries."

Since the testimony of witnesses in German court proceedings is not taken verbatim, court reporting as it is known in the United States has not developed into a regular profession in Germany. The American Consulates provide lists of names of American registered professional court reporters living in Germany who are available for taking of depositions in Germany.

9. Excursus: Taking of Evidence Abroad in Support of German Litigation

The German court may use its discretion in deciding whether to have witnesses appear before the court or to have witness testimony taken in the country of residence. German witnesses can be ordered to appear before a German court based on the court's personal jurisdiction over German citizens. In practice, it is often left to the party bearing the burden of proof to ensure that its witnesses are available to testify before a German court. A German court cannot administer any compulsion against witnesses and experts living in a foreign country who do not appear voluntarily.

Written Statements

In practice, courts allow parties to bring before the court a written statement of the witness residing in a foreign State, which is then presented to the court as documentary evidence. However, because this practice infringes the principle of immediacy, both parties to the action must agree on this method of taking evidence. The court can request the witness to answer the evidence order in writing if the court holds a written statement of a witness to be sufficient (§ 377(3) ZPO), which of course, saves time and money.

Leading authorities warn that such written statements should not have the same form or be construed as "interrogatories" prepared and ordered by the court, because the foreign State might consider this to be a violation of its sovereignty. Rather, the parties themselves should request such written statements from witnesses. Court-ordered interrogatories can be sent from the court only through German consular officials.

This procedure is addressed in § 39 ZRHO:

> **"Written Questionnaires**
>
> Often parties are confronted with substantial costs by the execution of requests for the taking of witness testimony. These can be reduced when, in accordance with § 377(3) ZPO, the court orders a written response to evidentiary questions. The German court may not, however, directly ask the potential witness for a written response, as the foreign State could interpret this as a violation of its sovereignty. The expedited procedure will primarily come into question with respect to requests for judicial assistance when the consular and diplomatic representatives of Germany can execute them within their own spheres of, responsibility."

*28 U.S.C. § 1782**

Consider the following hypothetical:

> The German company, K-GmbH, files a complaint in Germany with the LG Frankfurt against another German company, B-AG, for damages, charging B-AG with illegal price agreements. K would like to look through some documents from B-USA-Ltd., the American subsidiary of B-AG, in the hopes of finding some facts with which it could support its complaint against the German parent company. Although K has no certain evidence to indicate that the subsidiary has been involved in any wrong-doing, K would also like to investigate B-USA's

> correspondence with Z-Corp., another American company. Some of this correspondence is to be found at the head office of Z in Boston, Massachusetts. K would also like to take testimony from the managing directors of both B-USA and Z-Corp."

Can K have testimony taken from the managing directors of B-USA and Z?

A German court cannot order the taking of such testimony for a plaintiff hoping to find additional facts to substantiate its claim or curious about correspondence between two companies not party to the suit. Although the Hague Evidence Convention does not forbid such a request (see Articles 9(l) and 12 Hague Evidence Convention), German procedural law, which requires a formal evidence order from a German judicial body to invoke the Convention procedures, precludes the use of the Convention in this case.

However, the German party might be able to make use of Title 28 of the United States Code (U.S.C.) § 1782 and upon private application, without the collaboration of the German courts, request the American court having jurisdiction over the two companies to take the required testimony.

Similar to the discussion above on the prospects of recognition and enforcement in Germany of a foreign judgment based on U.S.-style discovery, the parties who rely on evidence gathered in the United States in accordance with 28 U.S.C. § 1728 run the risk that such testimony or documentary evidence will not be allowed as evidence in the German proceedings. The German court could find such evidence to be contrary to the procedural principle of immediacy as well as exceeding the limits of the obligations of the parties to cooperate in the clarification of relevant facts. Although it could be expected that a German court would exclude evidence produced through US-discovery methods, German courts do have a broader tolerance than, e.g., American courts, for admitting evidence produced through forbidden methods, as ultimately the judge alone decides the weight given to evidence produced, thus excluding the need for rigid evidence admissibility rules. No German court has decided on these issues, and it remains for innovative individuals to collect the evidence in accordance with 28 U.S.C. § 1728 and provoke a test case to the delight of German litigators.

*** 28 U.S.C. § 1782:**

Assistance to foreign and international tribunals and to litigants before such tribunals

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of this appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international

tribunal before any person and in any manner acceptable to him.

List of Abbreviations

AG *Amtsgericht*; Municipal Court, Local Court; the lowest German court of record. Civil jurisdiction for matters not exceeding DM 3,000, landlord and tenant cases, maintenance claims, enforcement of judgments, bankruptcy proceedings, probate, guardianship, registration;

BGB *Bürgerliches Gesetzbuch*; German Civil Code;

BGH *Bundesgerichtshof*; Federal Court of Justice. The BGH is the highest court of the Federal Republic of Germany in civil and criminal matters; it sits in panels designated "Senate" (civil and criminal);

BRAO *Bundesrechtsanwaltsordnung*; Federal Regulations for Attorneys;

GG *Grundgesetz für die Bundesrepublik Deutschland* vom 23.05.1949; Basic Law of the #Federal Republic of Germany, the German constitution;

GVG *Gerichtsverfassunggesetz*; German Judicature Act;

HGB *Handelsgesetzbuch vom 10.05.1897*; German Commercial Code;

LG *Landgericht*; Regional Court; first-instance jurisdiction includes all civil litigation, apart from those matters assigned to the Municipal Courts; appellate jurisdiction against Municipal Court judgments; adjudicates in panels or "chambers." Appeals from first-instance Landgericht judgments lie with the Oberlandesgericht (Higher Regional Court);

OLG *Oberlandesgericht*; Higher Regional Court; civil jurisdiction includes appeal of Landgericht judgments as well as Amtsgericht judgments in certain family law matters; in criminal matters, primarily appeals from Landgericht judgments, but court of first instance for crimes against state security;

StGB *Strafgesetzbuch*; German Criminal Code;

ZPO *Zivilprozeßordnung*; German Code of Civil Procedure;

ZRHO *Rechtshilfeordnung in Zivilsachen*; German Regulation on Judicial Assistance in Civil Matters.