Taking of evidence - Germany

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1 The burden of proof

1.1 What are the rules concerning the burden of proof?

The rules governing the burden of proof depend on the law relied on in the claim, i.e. the substantive law. The general principle is that each party must prove the facts in their favour. Some rules about the burden of proof are also expressly laid down in statute law.

If there is still doubt about an essential factual point after all the procedurally admissible evidence has been exhausted, a decision has to be taken about where the burden of proof lies. The party that bore the burden of proving the fact that has been left in doubt will then fail in its submissions on that point.

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?

Certain facts may be exempted from the burden of proof in one of two ways: the burden of proof may be reversed, i.e. shifted from the party on whom it would otherwise rest to the opposing party, or the burden of proof that rests on one of the parties may be relaxed..

1. Reversal of the burden of proof

The burden of proof can be reversed, and shifted from the party on whom it normally falls to the opposing party. To some extent, the statutory wording establishes a distinction between a general rule and an exception: the party invoking an exception bears the burden of proof. For example, the legislation generally assumes the good faith of a buyer under Sections 932(1), first sentence, 892 (1), first sentence, and 2366 of the Civil Code (*Bürgerliches Gesetzbuch*). The reversal of the burden of proof is of particular significance in cases involving liability under the law on defective performance (*Leistungsstörungsrecht*) where the debtor (the defendant) must prove that they are not liable for failure to comply with an obligation under Section 280(1), second sentence, of the Civil Code.

2. Relaxation of the burden of proof

a. Statutory presumptions (*gesetzliche Vermutungen*) relax the burden of proof on one of the parties, who has to plead and prove only the facts that justify the presumption (Section 292 of the Code of Civil Procedure (*Zivilprozessordnung*)). Statutory presumptions may relate to facts, an example being the presumption that a mortgage certificate has been transferred to the creditor by virtue of possession of the certificate (Section 1117(3) of the Civil Code). They may also relate to rights, an example being the presumption that the holder of a certificate of inheritance has the status of heir (Section 2365 of the Civil Code).

Statutory presumptions can, in principle, be rebutted in accordance with Section 292 of the Code of Civil Procedure unless the legislation indicates otherwise.

b. Factual presumptions (*tatsächliche Vermutungen*) are those on which prima facie evidence is based (*Anscheinbeweis,* evidence which is true ‘on the face of it’); the general approach is comparable to that involving statutory presumptions. There is prima facie evidence where a fact to be proved is a typical occurrence in the normal course of events, taking all the undisputed and established circumstances of the case into account. Prima facie evidence can be used in particular to establish causality and fault, e.g. fault where a vehicle is driven into a tree.

The opposing party can challenge the presumption on the basis of facts that cast serious doubt on whether the occurrence was indeed a typical occurrence in the ordinary course of events.

3. Case law is increasingly defining the burden of proof on the grounds of equity and a fair balancing of interests in specific areas of risk. The most significant examples are as follows:

- Product liability (Section 823(1) of the Civil Code)

The burden of proving that a product is defective, that legal rights have been infringed and that there is a causal relationship between the two falls on the claimant, whereas the manufacturer has to prove the absence of fault.

- Medical negligence

In these cases the burden of proof may be relaxed to the point where it is reversed as a result of inadequate or incorrect medical documentation (operation reports and patient files). In the case of gross medical error, all the claimant has to prove is that this is generally likely to cause the type of injury claimed. In establishing actual causality, therefore, the burden of proof on the claimant is relaxed to the point where it is shifted to the doctor.

- Duties to inform and advise

If specific contractual obligations to inform and advise are not satisfied, the party at fault has the burden of proving that the damage would have occurred even if they had complied with their obligations. There is a presumption that the injured party would have acted in accordance with the information provided.

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?

Section 286 of the Code of Civil Procedure lays down the fundamental procedural principle of the free assessment of evidence (*Fre iheit der Beweiswürdigung*). Under this principle, the court has to make its own decision about whether an alleged fact is true or false in the light of the entire content of the proceedings and the conclusions it draws from any evidence.

A preponderant or high degree of probability is not sufficient to prove a fact, but on the other hand all doubt does not have to be excluded. According to caselaw, there must be a degree of certainty which is sufficient in practice and which silences any remaining doubt, without necessarily ruling it out entirely.

There is an exception regarding the necessary degree of proof in cases where the law accepts that prima facie evidence suffices. An allegation is prima facie correct if there is a preponderant probability that it is correct. In proving prima facie correctness, the parties are not obliged to follow the strict rules of proof (witnesses, documents, inspection by the court, expert evidence or questioning of the parties). For example, a mere affidavit is also admissible (Section 294 of the Code of Civil Procedure).

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?

The principle in civil proceedings is that the issues and the relevant evidence have to be put forward by the parties. The court may not itself introduce material as a basis for its decision. This may be qualified by the court's duty to inform and advise under Section 139 of the Code of Civil Procedure.

In some cases, the court may take evidence of its own motion, contrary to the principle of party presentation, but it must do so with a view to a well-founded presentation of the case by the parties, and may not seek to investigate the facts itself.

Hence the court may, of its own motion, order inspections and expert reports (Section 144 of the Code of Civil Procedure), the presentation of documents (Section 142) and further questioning of a party (Section 448). A party may also be questioned by the court of its own motion (Section 448) where the conclusions of the hearing or of any evidence taken are not sufficient to convince the court of the truth or falsehood of a fact to be proved. There must therefore be a certain degree of initial probability for the fact to be proved.

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

The court directs the taking of evidence after a party has presented the issues on which it wishes to give evidence. This is generally done without specific formality at the hearing or by an order for evidence under Section 358 of the Code of Civil Procedure. According to Section 359 of the Code, this must specify the facts in dispute for which evidence is to be taken, must specify the evidence to be taken, giving the names of the witnesses and experts to be questioned or of the party to be questioned, and must specify the party that is relying on the evidence.

Evidence is then taken in accordance with the relevant legal provisions (Sections 355 to 484 of the Code of Civil Procedure). The principles that evidence should be taken directly (Section 355) and that the parties may attend (Section 357) have to be observed.

The first of these principles provides that the evidence must be given before the trial court, because it is this court that has to assess the evidence. An exception applies only where, in accordance with statute, responsibility for taking evidence can be transferred to one member of the trial court (Section 361 of the Code of Civil Procedure) or to another court (Section 362). Under the principle that parties may attend, the parties have a right to be present during the hearing of witnesses and also have the right to question witnesses (Section 397).

Under Section 285 of the Code of Civil Procedure, the results of the evidence are then debated in the oral proceedings. Under Section 286 of the Code, the court must establish the facts on the basis of the entire content of the proceedings, including the evidence taken; in doing so, it assesses the evidence freely.

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

An application to admit evidence can be rejected on procedural grounds, or under the rules governing evidence, if:

- the facts do not have to be proved by evidence, i.e. the facts have already been proved, or are obvious or undisputed;

- the facts are not material, i.e. cannot have any influence on the decision;
- the evidence is unsuitable for proving the fact alleged (this is rare, as evidence cannot be assessed before it is taken);
- the evidence cannot be obtained;
- the evidence is inadmissible, e.g. as a result of an unsubstantiated allegation in abuse of process or a conflicting confidentiality obligation of the witness (unless they are released from this obligation);
- the taking of evidence is at the court's discretion, e.g. in the assessment of damages in accordance with Section 287 of the Code of Civil Procedure;
- the fact was established finally in other proceedings and is binding on both parties;
- the application was not submitted in time (Section 296(1) of the Code of Civil Procedure);
- the taking of evidence is hampered by an obstacle of uncertain duration, the relevant time limit has elapsed and the proceedings would be delayed in other respects (Section 356 of the Code of Civil Procedure).

2.4 What different means of proof are there?

The five types of strict evidence are:

- Judicial inspection, Sections 371-372a of the Code of Civil Procedure

This consists of any direct, sensory inspection by the judge for evidential purposes. Contrary to the somewhat misleading term used, '*Augenschein*', 'visual examination', it may also include sensory inspection by touching, smelling, listening and tasting. Consequently, sound and video recordings and data storage media are also included.

- Witness testimony, Sections 373-401 of the Code of Civil Procedure

Witnesses can testify to past events which they themselves have observed. This means that, unlike an expert, a witness cannot be replaced.

Only a person who is not a party to the dispute may be a witness.

If the witness must have specialised knowledge in order to understand the facts, the witness is referred to as an expert witness (*sac hverständiger Zeuge,* Section 414 of the Code of Civil Procedure): an example would be the statement of an emergency doctor in the case of injuries sustained in an accident.

- Expert, Sections 402-414 of the Code of Civil Procedure

The expert (*Sachverständiger*) provides the judge with the specialised knowledge the latter needs to assess the facts. Experts do not establish the facts themselves. They are expected to give their assessment purely on the basis of the facts referred to them (*An schlusstatsachen*).

Only if specialist expert knowledge is required to establish the facts themselves can an expert be asked to give their own conclusions. An example would be a doctor's diagnosis.

A private expert report commissioned by one of the parties may be admitted as expert evidence only in exceptional cases and only with the consent of both parties.

- Documentary evidence, Sections 415-444 of the Code of Civil Procedure

Documents within the meaning of of the Code of Civil Procedure are written declarations. The law draws a distinction between the evidential value of public documents (Sections 415, 417 and 418 of the Code) and of private documents (Section 416).

- Questioning of the parties, Sections 445-455 of the Code of Civil Procedure

The questioning of parties is subsidiary to other forms of evidence and admissible only in order to present the main evidence (Section 445(2) of the Code of Civil Procedure). The parties may be questioned only with the consent of the other side or of the court.

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?

There are no differences in evidential value. Rather, all evidence has equal status, because of the principle that the court is free to assess the evidence. The only difference is the procedure for taking evidence.

Each witness must be examined individually and not in the presence of witnesses who are to be heard subsequently (Section 394 (1) of the Code of Civil Procedure). Witnesses whose testimonies conflict may be brought face to face (Section 394(2)).

Before witnesses are questioned, they are warned that they must tell the truth and that they may subsequently be required to swear an oath (Section 395(1)). Witnesses are first asked to give their personal details (Section 395(2)) and are then questioned on the subjectmatter of the case (Section 396). The court tries to ensure that their testimony remains relevant to the matter on which they are being questioned. It may also put further questions to witnesses to clarify points or to ensure their testimonies are complete.

Parties have the right to be present when witnesses are questioned and to put questions to them. Generally, the parties themselves are only allowed to submit questions to be put to witnesses, whereas legal counsel can question a witness directly (Section 397).

These rules governing the questioning of witnesses also apply to evidence provided by expert witnesses and to the questioning of the parties themselves (Sections 402 and 451).

Documentary evidence is presented by submitting the document. If the party presenting the evidence does not have the document in question, but the document is in the possession of the opposing party or a third party, the party presenting the evidence may request that the opposing party or third party be required to produce the document (Sections 421 and 428). The obligation to produce documents is a requirement of civil law and applies where the person presenting the evidence is entitled to demand that the opposing party or a third party surrender or produce a document (Section 422). There must be prima facie grounds that the obligation applies (Section 424(5), second sentence). Written expert reports or opinions are documents within the meaning of of the Code of Civil Procedure.

2.6 Are certain methods of proof stronger than others?

In principle, no. Under the principle that the court is free to assess the evidence, in accordance with Section 286 of the Code of Civil Procedure, all evidence has equal status. All the evidence gathered provides a basis for the assessment to be made by the court. Only in exceptional cases do binding rules of evidence have to be observed by judges: examples are those applying to the evidential value of the record of the proceedings under Section 165 of the Code of Civil Procedure, or of the judgment under Section 314, or of other documents under Sections 415 to 418.

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

No, the Code of Civil Procedure does not stipulate any obligatory forms of evidence to prove particular facts.

There are exceptions in certain types of proceedings. In proceedings relating to deeds and bills of exchange, evidence establishing the facts on which the claim is based may be given only in the form of documents, and evidence of all other facts only in the form of documents or by questioning the parties (Sections 592 et seq. of the Code).

2.8 Are witnesses obliged by law to testify?

All witnesses who are subject to the jurisdiction of the German courts and have been properly summoned are required to attend court hearings, to testify and to swear an oath.

A witness’s duty to testify also includes a duty to check what he or she knows on the basis of documents and to refresh his or her memory (Section 378 of the Code of Civil Procedure). Witnesses are not obliged to inquire into facts of which they are unaware.

2.9 In which cases can they refuse to give evidence?

The relevant rules in the Code of Civil Procedure provide for the right of witnesses to remain silent in view of their personal relationship with one of the parties (Section 383) and the right not to respond to particular questions on material grounds described below (Section 384).

The witness’s right to refuse to testify under Section 383 of the Code of Civil Procedure is based on a family relationship or obligation of professional trust, and is intended to avoid conflicts of interest.

It applies to betrothed persons (No 1), spouses (No 2) and parties in a civil union (No 3) for the duration of, and even after the end of, their marriage or civil union. Any person who is or was directly related to a party, either by blood or by marriage, or who is or was related as a collateral relative to the third degree, or who is or was a collateral relative by marriage to the second degree, cannot be obliged to testify either (No 3). Collateral relationship means not directly related, but descended from the same third person. The degree of blood relationship or of relationship by marriage is determined by the number of intermediary births.

Under Section 383 (1) No 4 of the Code, clerics, people who are or have been involved professionally in the preparation, production or distribution of periodicals or radio and TV programmes (No 5), and persons who, by virtue of their office, position or profession, are entrusted with information which cannot be disclosed because of its nature or by virtue of a legal provision (No 6), are not obliged to testify.

The right of witnesses to refuse to testify for professional reasons covers all information known to the persons referred to above by virtue of their particular position.

A witness's right not to testify on material grounds (*aus sachlichen Gründen*) under Section 384 of the Code of Civil Procedure is intended to protect witnesses from adverse consequences of having to testify. It gives them the right not to reply to particular questions, but they cannot refuse to testify at all, as they can under Section 383.

The right not to testify under Section 384 applies where answering the question would cause direct financial damage to the witness or a person with a family relationship listed in Section 383 of the Code (No 1), or would expose them to dishonour or the risk of criminal or administrative prosecution (No 2). Nor do witnesses have to answer questions if this would oblige them to disclose a trade or business secret (No 3).

Section 385 of the Code of Civil Procedure sets out a number of exceptions to witnesses' right not to testify under Sections 383 and 384. Of particular note is Section 385(2), which releases clerics and persons who are required not to testify under substantive law in accordance with Section 383(1) No 6 from their obligation to remain silent, and consequently restores their obligation to testify.

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

Yes. If a witness who has been properly summoned does not attend, the court will impose an administrative fine under Section 380 (1) of the Code of Civil Procedure, and if this is not paid it will impose a custodial sentence. The fine is €5 to €1 000 (Section 6(1) of the Act introducing the Criminal Code (*Einführungsgesetz zum Strafgesetzbuch*)), and the custodial sentence is one day to six weeks (Section 6(2) of the same Act). Witnesses are also required to pay the costs occasioned by their failure to attend.

A witness who fails to attend for a second time can be forcibly brought to the hearing under Section 380(2) of the Code of Civil Procedure, as well as incurring an administrative penalty. These measures will not be enforced if the witness provides an adequate explanation of his or her absence in good time. If no such explanation is received in good time, the witness will have to show that he or she was not responsible for the delay (Section 381 of the Code).

If a witness refuses to testify or to swear an oath without giving a reason, or gives a reason that has been finally declared to be irrelevant, the same measures can be taken under Section 390(1) of the Code of Civil Procedure as those applying to a witness who fails to attend without explanation. If a witness refuses to testify a second time, he or she may, on application, be detained in order to compel him or her to testify, but only for the duration of the current trial (Section 390(2) of the Code).

2.11 Are there persons from whom evidence cannot be obtained?

No, there is no general disqualification from being a witness. Any person who has the maturity to make factual observations and to understand and answer questions about them can be a witness, irrespective of their age or ability to enter into legal transactions.

There are no special rules for people who have previously been punished for deliberately making false statements or committing perjury.

A person cannot be a witness if they are directly involved in the proceedings, as a party or as the legal representative of a party. There is an exception for joint parties in relation to facts which solely concern other joint parties. In certain circumstances, an agent may be a witness if the subject-matter of the examination is outside the scope of the agency relationship. A registered representative may, for example, testify in relation to facts that are not related to their duties in proceedings to which the person they represent is a party.

The relevant time at which a person must qualify to appear as a witness is always the time at which they are to be heard.

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?

Witnesses are questioned by the judge or judges. The examination of witnesses may also be allocated to one member of the trial court. Section 375(1a) of the Code of Civil Procedure often applies here.

Each witness must be examined individually, and not in the presence of witnesses who are to be heard subsequently (Section 394 (1) of the Code of Civil Procedure). Witnesses whose testimonies conflict may be brought face to face (Section 394(2)).

Parties have the right to be present when witnesses are questioned and to put questions to them. Generally, the parties themselves are allowed only to submit questions to be put to witnesses, whereas legal counsel can question a witness directly (Section 397).

Witnesses may be heard via videoconferencing if, on application, the parties concerned give their consent (Section 128a(2)). The consent of the witness or expert is also required, as the transmission affects their personal rights.

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?

First, there may be legislation that prohibits the court from considering particular evidence: for example, a court may not consider judgments which have been removed or or which are to be removed from the Federal Central Register (Section 51 of the Act governing the Federal Central Register (*Bundeszentralregistergesetz*)).

Second, the court may be prohibited from considering evidence under the caselaw of the Federal Constitutional Court (*Bundesverf assungsgericht*) in cases where taking evidence would violate a constitutional right of the individual and, on a balance of interests, no exceptional justification exists.

Under this caselaw, for example, the court may not generally hear evidence obtained by means of secret sound recordings. The same applies to the use of mini-transmitters, directional microphones or intercoms to listen in to conversations, and to the use in evidence of illegally obtained personal records, such as diaries or intimate letters.

However, in all these cases, it may be decided on a case-by-case basis that by way of exception there are counterbalancing rights that justify the admission of illegally obtained evidence, always provided that this does not impinge on the core area of private life.

The question whether evidence must be excluded as a result of a procedural rule must be decided separately for each such rule. Deficiencies affecting the proceedings and, in particular, the way the hearing is conducted can be remedied under Section 295(1) of the Code of Civil Procedure. The examination of a particular party as a witness is, for example, a procedural deficiency that can be waived, i.e. the evidence can be used if the parties waive the rule or have not raised an objection against the error by the end of the subsequent hearing. Failure to provide information about a witness's right to refuse to give evidence may also be remedied under Section 295(1) of the Code.

Compliance with rules in the public interest cannot, however, be waived (Section 295(2)). Examples include all points to be considered by the court of its own motion, such as the requirements for the proceedings, the admissibility of an appeal, and the disqualification of people to be judges.

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

As has already been explained at 2.4, the examination of parties may under certain circumstances be admitted as evidence. The weight given to such evidence is left to the court's discretion (Section 286 of the Code of Civil Procedure).

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