



German Civil Procedure and Discovery

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GERMAN CIVIL PROCEDURE AND DISCOVERY

In Germany, the taking of evidence in civil proceedings is governed by sections 355 through 494 of the Code of Civil Procedure.¹ As can be seen from this body of rules, discovery is not a feature of German procedural law. Moreover, Germany does not have a law on evidence that is comparable to American law.

German procedural law differs quite significantly from the procedural laws found in common law countries such as the United States. Among the main differences is the absence of a jury in German civil proceedings. Moreover, the German trial is not based on the adversary system. Instead, it is the function of the court to find the truth, and the German judge plays a more active role than his American counterpart.²

Evidential rules on matters such as cross examination or hearsay do not exist in Germany because there is no jury that needs to be protected from misleading evidence. Instead, the judge or the bench of judges evaluates the evidence freely, without any fixed rules.

The judge also interrogates the witnesses. As a rule, this is carried out in a trial hearing. However, if witnesses need to be examined in another location, the interrogation is carried out by the judge in the place where the witness is located. The parties or their attorneys do not have the right to cross examine the witness. They merely may pose direct questions to the witness to the extent that the judge permits.

The taking of depositions in preparation for a trial is not necessary in Germany, because the German civil proceeding does not culminate in a continuous trial session in which all the evidence is presented and a verdict is returned. Instead, the German proceeding may consist of several trial hearings which may be spread out over a considerable period of time. If the need for the presentation of additional evidence arises at any time before the proceeding is terminated, the judge merely sets another date for an additional hearing.

For all these reasons, the taking of depositions is not customary in German civil proceedings. In fact, the taking of depositions in Germany by foreign attorneys may constitute the criminal offense of impersonating a public official.³ If an American attorney wishes to take pre-trial depositions from a witness or party on German soil, one of the mechanisms other than discovery that are foreseen in the Hague Convention on the Taking of Evidence Abroad should be employed.⁴ Germany has ratified the Convention subject to the reservation that American-style pre-trial discovery will not be permitted in Germany.⁵

¹ Zivilprozessordnung, repromulgated September 12, 1950, *Bundesgesetzblatt* [BGBl., official law gazette of the Federal Republic of Germany) p. 533, as amended. An English translation of §§ 355-494, as contained in S. Goren, *The Code of Civil Procedure Rules of the Federal Republic of Germany* (Littleton, 1990) is included as *Appendix I*.

² A description of the German principles of civil procedure, as contained in E. Cohn, 2 *Manual of German Law* 172-180 (Dobbs Ferry, 1971) is included as *Appendix II*.

³ Strafgesetzbuch, repromulgated January 2, 1975, BGBl. I, p. 1, as amended, §132.

⁴ Convention on the taking of evidence abroad in civil or commercial matters, done at The Hague, March 18, 1970, 23 UST 2555; TIAS 7444.

⁵ Ausführungsgesetz, December 22, 1977, BGBl. I, p. 3105, § 14.

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