

Preservation of evidence in times of COVID-19 (under German law)

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Companies are having to devote considerable attention to the coronavirus crisis at the present time. However, in view of the current turbulence affecting business, it is equally important to be aware of any legal disputes that may lie ahead. Success in future litigation could depend crucially on preserving the necessary evidence now. Waiting too long or getting stuck in proceedings that have been paused due to the pandemic could mean that the evidence is unavailable later. In such situations, the German Code of Civil Procedure (ZPO) provides for independent evidentiary proceedings.

Why prompt preservation of evidence is so important during the COVID-19 pandemic

Whether you are a claimant or a defendant, if you want to convince a court of your arguments, you must be able to prove facts – even after months or years. This situation is currently becoming more acute as court proceedings are delayed due to the COVID-19 pandemic. In contrast to this long-term outlook for litigation, the economic environment is now extremely fast moving, turbulent and hectic. Consequently, there is a risk that evidence will be lost or its use will be made more difficult.

Take the following example:

A company decides to manufacture protective clothing for a period of three months at the beginning of the coronavirus crisis. It does not have any prior experience in this area. As if the current situation was not difficult enough, the company then starts to receive more and more complaints from customers that the protective clothing is defective. Considerable financial and health damage has been caused. There are threats of legal action.

However, the three months will soon be over and the company plans to return to its original operations – leaving no trace of its protective clothing business.

In such cases, it is time to take advantage of the independent evidentiary proceedings governed by sec. 485 ff. ZPO. As summary proceedings, they enable both parties to preserve expert, witness or visual evidence in a timely manner. They are separate from the main proceedings and can be initiated even before an action has been filed.

The risk of losing evidence is particularly clear from the above example: if the company switches back to its "old" business, an assessment of any faults in the production process for the protective clothing will no longer be possible. Expert evidence obtained even after a few months will come too late because gathering such material is only worthwhile during the short period in which the protective clothing is produced.

In times of the COVID-19 pandemic, this example can be applied to many areas: companies are being forced to temporarily switch to alternative business models and find interim solutions. Where disputes arise during such times, independent evidentiary proceedings are an effective way of securing and optimizing your own position.

Independent evidentiary proceedings increase the chances of settling disputes out of court

Independent evidentiary proceedings have a further advantage: they often lead to disputes being settled or resolved early on without the need for long and costly main proceedings. Most civil proceedings are decided on the facts of the case, and the decisive factual questions are almost always assessed differently by the parties. If the independent evidentiary proceedings clarify these contentious issues, it will be possible to predict the outcome of a lengthy process in terms of its decisive points. Under these circumstances, the parties will be more willing to submit to the findings of the independent evidentiary proceedings and to refrain from taking legal action or to reach a settlement.

The obstacles to independent evidentiary proceedings are low

Another key benefit of independent evidentiary proceedings is their speed. The obstacles in terms of the content of an application are surmountable. Often the objective of independent evidentiary proceedings is to obtain an expert opinion. This requires an application that concisely presents the facts and sets out the reasons

- why there is a risk of evidence being lost or of its use being made more difficult (sec. 485 para. 1 ZPO or
- why the applicant has a legal interest in the establishment of e.g. the condition of an object or the cause of damage to property or of a defect in quality (sec. 485 para. 2 ZPO).

As the court decides on the application by order, an oral hearing is unnecessary. Particularly in urgent cases – as in the above example – a decision as to whether evidence will be taken on the questions applied for is usually made without the involvement of the respondent. The interests of the respondent – for example in preventing the taking of evidence – can only be expressed to the court in a protective letter. According to the electronic register of protective letters, the submission of protective letters is also possible in the case of independent evidentiary proceedings.

Alternatives to independent evidentiary proceedings

In addition to the possibility of obtaining an expert opinion in independent evidentiary proceedings, there is also the option of commissioning a private expert opinion. It is important to consider the advantages and disadvantages of this: on the one hand, the private expert can be chosen freely. On the other, a private expert opinion is deemed only to be a submission by a

party. Furthermore, a private expert has no authority to enter the business premises of the opposing party.

During the COVID-19 pandemic, companies should be all the more aware of the need to internally preserve and document evidence and should demand this from their employees. In these fast-moving times, many issues are only discussed orally and internal documentation is neglected. Having the foresight to ensure that decisions and processes are recorded and transparently archived will put you in the best possible position to deal with any legal disputes in the future and thus give you a decisive advantage over your opponents.

Conclusion

Thinking about preserving evidence now for potential legal proceedings could be the difference between winning and losing a case. This strategic advantage has an even greater effect during a crisis, because crises often lead to an increase in legal disputes. It is always worth considering independent evidentiary proceedings – even in the post-coronavirus era.

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