Categorization of means of evidence

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1. Introduction

Talking about the "European dimension of taking evidence in civil procedure" the question arises which is the **European dimension** of taking evidence in civil procedure when it comes to the categorization of means of evidence. Is there such a European Dimension to begin with? Actually, some European Regulations and Directives refer in some way to evidence and have to be assessed thereon.

2. The European dimension of the categorization of means of evidence

The following products of European legislation have to be included in the analysis:

- the Regulations on taking of evidence,
- the small claims procedure and
- the European order for payment procedure
- as well as the enforcement directive.

2.1. Regulation 1206/2001 on taking of evidence

The Regulation No 1206/2001 of course encompasses the most rules on evidence of all the procedural EU-Regulations. However, it does not contain a list of possible means of evidence. In various articles there are references to specific means of evidence: for example

- documents (Art 4 para 1 lit f; 12.3.1. of Form A)
- inspection (Art 4 para 1 lit f; 12.3.2. of Form A)
- witnesses (12.2. of Form A)
- experts (Art 17 para 3)

However, detailed rules on the categorization of means of evidence are missing. The main purpose of the Regulation was to improve, simplify and accelerate the cooperation between courts in the taking of evidence. This does not necessary imply a harmonization of the possible means of evidence. So the European legislator obviously decided to leave the categorization of such means **to national laws**.

2.2. Regulation 861/2007 on Small Claims Procedure

It is not surprising that the Small Claims Procedure encompasses rules on evidence because it constitutes the first "real" European civil procedure. According to Art 9 of the Regulation the court or tribunal shall determine the means of taking evidence and the extent of the evidence necessary for its judgment under the rules applicable to the admissibility of evidence. The court or tribunal may admit the taking of evidence through **written statements of witnesses, experts or parties**. The court or tribunal may take expert evidence or oral testimony only if it is **necessary** for giving the judgment. In making its decision, the court or tribunal shall take costs into account. Generally, the court or tribunal shall use **the simplest and least burdensome method of taking evidence**.

Summed up the Small Claims Procedure contains restraints and supplements on the subject of evidence in order to guarantee fast proceedings. A list of possible means of evidence **cannot be derived**.

2.3. Regulation 1896/2006 on European order for payment procedure

An application for a European order for payment shall be made using standard form A as set out in Annex I. The application shall state a **description of evidence** supporting the claim (Art 7 para 2 lit e). According to recital 14 of the regulation the application form should "*include as exhaustive a list as possible of types of evidence that are usually produced in support of pecuniary claims*". Hence, the Standard Form A contains one section on evidence with the following list of means of evidence:

- written evidence
- oral evidence
- expert evidence
- inspection of an object or site
- other (please specify)

The means of evidence purported by the applicant shall place the defendant in a position to make a well-informed choice either to oppose the claim or to leave it uncontested. If a statement of opposition is entered within the 30 days of service of the order on the defendant, the proceedings shall continue before the competent courts of the Member State of origin in accordance with the rules of ordinary civil procedure. Hence, the applicable **national law** determines which means of evidence are permissible.

2.4. Enforcement Directive

The Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union ("Enforcement Directive") contains a **definition of ev**idence (Art 2 nr 13). It stipulates that "*evidence means all types of means of proof admissible before the national court seized, in particular documents and all other objects containing information, irrespective of the medium on which the information is stored*". The Directive specifically refers to **documents** and **objects** without giving an exhaustive list of possible means of evidence.

2.5. Interim conclusion

In conclusion, various articles in European Regulations or Directives refer to means of evidence. However, an exhaustive list or a definition of such means **cannot be found**; for such rules of evidence one has to look into **national law**.

3. The Austrian Code of Civil Procedure

Instead of giving an overview about all procedural laws of the Member States to derive a European dimension therefrom, in the following the **Austrian dimension** of the categorization of means of evidence shall be presented. The Austrian Code of Civil Procedure is a typical example of codification of procedural law in Central Europe which – itself strongly influenced by the German Code of Civil Procedure – has influenced for its part a lot of Codes in this region (for instance the Slovenian one).

3.1. The classics

The Austrian Code of Civil Procedure expressly enumerates **five types of evidence**:

- production of documents (sec 292 et seqq),
- examination of witnesses (sec 320 et seqq),
- expert evidence (sec 351 et seqq),
- inspection by the judge (sec 368 et seqq) and
- the examination of the parties (sec 371 et seqq).

These means of evidence are referred to as "classical means of evidence". At the time the Austrian CCP was enacted, namely in the late 19th century, those means of evidence were commonly used and there was no need to develop rules for other means. Even in the middle of the 20th century the Austrian Supreme Court ruled that this list has to be considered as exhaustive (OGH 04.01.1950, 1 Ob 129/48 = SZ 23/1).

3.2. "New means of evidence"

Nowadays, the list is not deemed to be exhaustive, but only to contain the most important examples. As long as the rules of the Code of Civil Procedure are obeyed, **all means can be used** for the taking of evidence. This is now stated explicitely by sec 31 para 1 Austrian Non-Contentious Proceedings Act (*Außerstreitgesetz*) of 2003 which is the most recent codification of procedural law in Austria.

So-called **"new means of evidence"** are therefore generally admissible. This includes

- requests to other government authorities,
- examination of informed representatives,
- the use of visual or audio media,
- electronic documents,
- internet publications,
- demoscopic surveys,
- the procurement and utilization of records,
- electronic record of an interrogation, etc.

Especially electronic documents are a big issue when it comes to the categorization of means of evidence.

4. Problems with the categorization

Now two examples shall be addressed where the categorization of means of evidence may be an issue and at least in Austria, they are.

4.1. Example 1: Signed painting

In many cases painters sign their paintings – probably their lawyer told them to do so in order to secure the authenticity. The question then arises what the **legal consequences of such a signature** are. A painting will most likely be just an object to inspect in a civil law proceeding. Does that change when the painting is signed? Does a painting become a document after the painter has signed it?

Before giving an answer to this question there should be explained at least one reason why this distinction may be important. Sec 369 of the Austrian CCP on the inspection of objects by the judge refers to the rules for production of documents. However, said section does not include any reference to sec 308 which stipulates that under certain conditions a third party may be obliged to produce a document. Consequently, there is no possibility for a court to order that a third party has to bring forward any objects other than documents.

Moreover, the provisions on documents contain specific rules regarding the authenticity of a private document. If one party proves the authenticity of a signature, this generally also provides full proof of the authenticity of the whole document (sec 294 Austrian CCP).

Generally, documents under the Austrian CCP need to express **thoughts by the means of common or agreed upon written characters**. Documents as 'paper with writing on it' are the emanation of thoughts by means of writing. Accordingly, paintings or pictures are only deemed to be documents, if they contain any written record. In most cases, pictures and paintings only depict the appearance of persons or objects. A picture of a signed contract may also be a document. A picture of the signatories is not, regardless of whether the photographer signed the picture afterwards. Therefore, **the rules on inspections** are applicable to signed paintings.

In a trial where the authenticity of a painting is disputed, sec 294 Austrian CCP generally does **not apply to the painting**. From a legal view it is therefore not sufficient to proof just the authenticity of the signature. However, a general assumption – which is also the basis for the mentioned provision – may be applied. In most cases the person who signed something also created it. Sec 294 Austrian CCP can be applied *per analogiam*. Therefore, regarding the issue of authenticity the difference between documents and inspections are of minor importance. The difference may however become of relevance if the painting shall be produced by a third party.

4.2. Example 2: Private Expert

There is a lively discussion about private experts in recent Austrian literature. An expert according to the Austrian CCP is always appointed by the court. The expert is not a witness, but considered more an **assistant to the court**. An expert appointed by one of the parties is not an expert in the sense of the Austrian CCP.

There are important **differences between a court appointed expert and a party appointed expert**:

- Private experts are sometimes deemed to render an expert opinion only in favor of the party which pays the fee and is therefore it is doubted whether they are able to be neutral.
- The other party is not involved in the development of the expert opinion.
- Private experts do not have investigative powers.

However, private experts are important means of evidence. Nonetheless, there are no specific rules in Austrian law dealing with private experts. Hence, the question arises what to do with a private expert.

According to persistent Austrian case law a private expert opinion is a **private document** which expresses the personal view of its writer. The court may evaluate the private expert opinion. However, if there are discrepancies between the opinions of the expert appointed by the court and the one appointed by a party, according to persistent case law the court is not obliged to investigate any further. It may follow the opinion of the court appointed expert and ignore the private expert opinion.

During civil proceedings the parties may **ask** a court appointed expert **questions** in order to clarify the opinion. Sometimes it would be very useful if a private expert could also be asked questions, especially by the court appointed expert, and *vice versa*. However, the Austrian CCP does not provide for such examination. Due to the differences between court appointed and private experts the rules on court appointed experts **cannot** be applied *per analogiam*.

One may consider summoning a private expert as **expert witness**. According to Austrian law witnesses are persons who do not take part in the proceeding on either side and can give evidence about past **facts which were observed by them**. Private experts can testify as witnesses if they have made findings that are relevant for the proceeding. But in this situation their testimony is limited to factual observations; they are not allowed to testify as to their opinion or conclusion, the latter falling into the exclusive prerogative of the court-appointed expert. The private expert does not have investigative powers, which limits the possibility of a testimony on his observations. The opinion and conclusions of the private expert may be solely seen as **assertions or arguments of the party**.

As long as the Austrian CCP does not provide for specific rules on this issue, one has to fall back on **general principles**. In this context the categorization of means of evidence shall not be followed too strictly. Especially in the case of private experts it limits the flexibility of the evidence procedure. In the fact finding process of the Austrian CCP the main principle is – like in all Member States – the **free evaluation of the evidence**, there are no fixed rules as to which evidence overrules another or what kinds or how much evidence is needed to come to the conclusion that the alleged facts are true in the Austrian system. Why should a judge not be able to evaluate a private expert opinion, be it a written opinion or an oral testimony? However, in order to get there one has to detach the private expert from the general categorization of means of evidence and apply appropriate legal provisions. The judge should be given **discretion to deal with private experts** in a way that he may summon the expert,

ask questions and even confront the court appointed expert with the findings of the private expert and *vice versa*. The limited rules on specific means of evidence in Austria do not provide for such a solution. Consequently, these restrictions have to be overcome by an amendment of the Austrian CCP.

5. Conclusion

There are two major points to sum up:

- First, there is no clear cut categorization of means of evidence under European Law, at least not yet. Therefore, one has to refer to the various national laws on evidence.
- Second, the categorization of means of evidence may on the one side help those who apply the law whereas on the other side it may limit possible evidence. Considering the example of private experts under Austrian law, a strict categorization of means of evidence is outdated.