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Confidential Information in Civil Proceedings - Safeguarded Secrets or Unleashed Truths?

Can contractual or statutory confidentiality obligations prevent reliance on confidential documents or witness testimony?

Under Austrian civil procedure law, the parties have a wide range of obligations to cooperate and may even be compelled to disclose certain evidence - all while civil proceedings are generally open to the public. This may, of course, interfere with a company's interest to keep its operations and confidential information secret. In this field of tension, this article addresses the conditions under which the provision of documents and witness testimony can be refused in Austrian civil proceedings and how companies can best protect their confidential information in this context.

1. Basics of the Taking of Evidence

Austrian civil proceedings generally follow a reduced inquisitorial approach: While the judge is the head of the proceedings and can take evidence *ex officio*, the parties have a general duty to advance the proceedings, to tell the truth (i.e., only submit factually correct and complete assertions), and to **cooperate**. This may even lead to a party not bearing the burden of proof still being **obliged to disclose (detrimental) evidence**. The judge then proceeds to evaluate all evidence presented according to its own **free conviction** (i.e., is not bound by rigid rules of evidence).

As a general rule, **each party** has to **assert** and **prove facts** that are legally **relevant** to (and support) its respective claim or objection. Irrespective of this **general rule on the burden of proof**, parties often tend to provide evidence on their own initiative even though they have no burden of proof with regard to the facts in question in order to influence the court's view on the facts in their favour.

To that end, the Austrian Code of Civil Procedure ("**ZPO**") recognizes five different categories of evidence: **Documents** (Section 292 et seq), **witnesses** (Section 320 et seq), **interrogation** of the **parties** (Section 371 et seq), **expert opinions** (Section 351 et seq) and **visual inspection** (of sites or objects; Section 368 et seq). For reasons of length, this article will focus on documentary and witness evidence.

However, the judge's free evaluation of evidence and a possible *non-liquet* situation (where the judge considers him- or herself unable to determine certain facts on the basis of the evidence presented) can be (at least partially) mitigated by **contractual provisions that modify certain rules of evidence**. For example, the parties may agree which of them has to prove certain material facts and who will be at a disadvantage if the evidence is not provided.

In addition, certain material legal issues or the determination of facts and factual elements can also be reserved for a **decision by an expert arbitrator** in an expert opinion. This allows certain factual questions in a legal dispute to be settled out of court in a binding manner by a neutral person (who may, for instance in highly technical cases, be potentially better suited to do so than the judge).

2. Protection of Confidential Information

Secrets worthy of protection are conceivable in a wide variety of areas within the sphere of activity of a company (e.g., information about manufacturing processes, customer lists, pricing information, pending acquisitions). Some of this information can qualify as a **trade secret** if it is

- a) not generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
- b) has commercial value; and
- c) has been subject to reasonable steps to keep it secret.

If trade secrets would be disclosed, the taking of evidence can generally be refused by the concerned party (as discussed under point 3. below in more detail).

For confidential information that does not qualify as a trade secret, there are other protection mechanisms:

On the one hand, Austrian law provides for statutory confidentiality obligations for certain persons and institutions, such as **lawyers** about matters entrusted to them and facts made known to them in their professional capacity (coined under the term "legal privilege"). An Austrian particularity is its **banking secrecy**, which requires banks to keep confidential all client information obtained in connection with their banking activities (Section 38 Austrian Banking Act ["*BWG*"]). Such statutory confidentiality obligations are also recognized in civil proceedings and the respective professionals typically have a right to refuse testimony. There is furthermore a general **duty of loyalty to the employer** under Austrian labor law, which generally applies even after the termination of the employment relationship. Such duty of loyalty includes maintaining secrecy regarding any not commonly known facts that the employer has a legitimate secrecy interest in.

On the other hand, companies themselves try to protect their confidential information by way of contractual confidentiality obligations (such as NDAs). However, the effectiveness of such confidentiality agreements may be limited in court proceedings (as discussed below in more detail). Where trade secrets are not the subject matter of the conflict, but much rather only affected by or related to the proceedings, general rules apply:

3. Right to Refuse to Testify or Submit Documents

As a general rule, if requested, every person physically and mentally capable, is obliged to testify as a **witness** about their perceptions of (past) facts and conditions in civil proceedings. In some cases, however, potential witnesses can invoke rights to **refuse to testify** with regard to individual bits of information, but not the testimony in general. Therefore, a witness still has to appear in court and may only refuse to answer specific questions (the fact that the witness refuses to answer questions addressed to him for reasons of secrecy (accepted by law) may not be considered in the evaluation of evidence).

Reasons for Refusal of Testimony

a) Disgrace or the Risk of Criminal Prosecution

Testimony may be refused if answering the questions would disgrace the witness or their close relatives or put them at risk of **criminal prosecution**. This provision is intended to prevent the witness from conflicts of interest and the associated conflicts of conscience. The risk of criminal prosecution presupposes that there is reasonable suspicion of a criminal offense, whereby it is not necessary that prosecution or conviction is probable or certain.

b) Imminent Financial Disadvantage

Witnesses may refuse to testify if their testimony would cause them an immediate financial disadvantage. This damage must be directly imminent as a result of the testimony. For example, the threat of a **claim being granted** as a result of a truthful witness testimony does **not justify a refusal** to testify because the disadvantage arises from the judgment and the underlying laws, not from the witness statement itself.

Austrian legal doctrine does not consider a **contractual penalty** resulting from a breach of a (private) **confidentiality agreement** (such as an NDA) as sufficient to refuse testifying as a witness. Hence, employees or parties bound by a (penalized) contractual confidentiality obligation may still be compelled to testify if called as a witness and no other reason to refuse testimony applies (concerning trade secrets, see section c) below).

As a side note, a contractual penalty for the violation of a confidentiality obligation can also be difficult to assert in court in the event of a judicial defeat in the original case since judges have a **right of moderation** in the event of disproportionate contractual penalties. A minimum limit for the judicial moderation is the actual damage incurred, whereby such damage cannot be the financial consequence of a negative judgment and it could be difficult to prove actual damage caused by the breach of the contractual obligation.

c) Statutory Confidentiality Obligations

If witnesses are subject to statutory confidentiality obligations (**lawyers**, banks, insurances, doctors etc.) and have not been validly released from this confidentiality obligation, they must refuse to give evidence and are therefore not permitted to testify. The refused release from the obligation to maintain secrecy may not be subjected to the court's evaluation of the evidence (i.e. the judge must **not** draw adverse inferences).

Conversely, a person who has been validly released from their duty of confidentiality is generally **obliged** to testify, as in this case there is no longer any reason to protect the interests of the person concerned, but rather it is in the obvious interest of the person to testify. However, in the case of lawyers, Austrian case law assumes that, despite being released, they are obliged to assess (on their own), whether a statement is **contrary to the interests of the client** (and if so, potentially decide to still refuse testimony).

d) Trade Secrets

Witnesses **may** – but do not have to – refuse to testify if the statement would disclose a trade secret (see point 2. for a definition of “trade secret”). However, it always has to be examined on a case-by-case basis whether a piece of information can actually be considered a trade secret (e.g. there would be no interest in secrecy for circumstances that are no longer economically relevant, like calculation bases or sales trends from the past, insofar as no conclusions can be drawn for the present).

If a forthcoming witness statement were to potentially infringe trade secrets, obtaining a preliminary injunction on the basis of special legislation may be conceivable.

Regardless of whether trade secrets are concerned or not, the Austrian Supreme Court has continuously held that employees are **not bound by contractual confidentiality obligations** when it comes to testifying about potential criminal acts or violations of law committed by their employers. Quite the contrary, recent whistleblowing-legislation (on EU and national level) has encouraged and strengthened the rights of employees to do so.

e) Documents as Evidence

In general, the parties must submit documents if

- (i) the **party** itself has **referred to the document** for the purpose of providing evidence in the proceedings,
- (ii) they are **obligated** to do so by **substantive law**, or
- (iii) regarding **documents concerning both parties** (this is the case for documents being established in the interest of a person or recording mutual legal relationships or negotiations on a legal transaction therein, e.g. a contract of sale).

Austrian courts may draw an adverse inference from the refusal to submit a certain document, i.e., this may have a negative impact on the court's assessment of the facts and the evidence presented.

However, a party may rightfully refuse to submit certain documents (without adverse inference), if the submission of the document would violate (i) a **duty of confidentiality** recognized by law, or (ii) a **trade secret** (of the party obliged to submit the document or of a third party).

For trade secrets, the same principles as described above for the refusal of witness testimony apply. In addition, unlike the grounds for refusing to testify, there is a (broad) right to refuse to submit documents for "equally important" reasons, which amounts to a **weighing of interests** in the specific case. Whether the breach of a confidentiality agreement would constitute such an "equally important" reason has – as far as can be seen – not yet been decided by case law.

The reason for refusal must be asserted at the hearing in the proceedings and, if the court has doubts, must also be certified.

4. Unlawfully Obtained Evidence

(Witness) Statements made without a mandatory prior instruction by the judge of the right to refuse testimony are, in principle, illegally obtained evidence. However, such statements **still have to be considered** by the court and do not constitute grounds for nullity or a procedural error.

The same applies to a violation of aforementioned rights of refusal, because according to Austrian law, only "too little" but not "too much" evidence can constitute a procedural defect. That is, as judges should **not blindly ignore evidence made known to them** and since the law refers to errors that are likely to prevent an exhaustive examination of the dispute.

Thus, well-known principles under common law (as for instance the "**fruit of the poisonous tree**"-doctrine) that do not allow the use of illegally obtained evidence in court proceedings, are generally **not recognized under Austrian civil procedural law**. However, if a refusal is found to be lawful, the court has to issue a separate decision (upon a party's request), which can be challenged on appeal.

In line with this, a **preliminary injunction** with the aim of preventing the disclosure or (subsequent) use of unlawfully obtained evidence (in proceedings) is not admissible under Austrian procedural law, because this would interfere with the judge's right to freely assess (even illegally obtained) evidence.

5. Request to Exclude the Presence of Public

To protect confidential information that shall be disclosed in civil proceedings, Austrian law provides for the possibility to exclude the presence of public from (part of the) court hearings pursuant to two provisions:

- a) Section 172 ZPO is applied (by analogy) by Austrian courts to secure trade secrets within civil proceedings. The Austrian Supreme Court holds that the following prerequisites need to be fulfilled:
 - i) there are facts and knowledge of economical and commercial relevance at hand (*wirtschaftliche und kaufmännische Relevanz*),
 - ii) these facts are related to the respective business, and
 - iii) a legitimate legal interest (*berechtigtes Interesse*) exists that the information which is only available to a limited number of individuals (*geschlossener Personenkreis*) does not become publicly available.
- b) Section 26 h Unfair Competition Act ("*UWG*") implements the EU-Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (Directive (EU) 2016/943). This provision protects trade secrets and can also be invoked in civil proceedings not related to an act of unfair competition.

6. Summary & Conclusion

As a general rule, witnesses have to testify and documents need to be submitted in Austrian civil proceedings unless there is one of the reasons stipulated by law present that allow its refusal. Once witness statements are made or documents are submitted, these will be considered by the court, even if they were provided in violation of laws (e.g., without prior instruction of the right to refuse testimony). It is therefore advisable to **obtain legal support beforehand in order to inform witnesses in detail about their rights to refuse to testify** and how to assert such rights in the proceedings.

Witnesses who are subject to **statutory confidentiality obligations** have to refuse to testify or submit documents unless they have been effectively released from their confidentiality obligation. In contrast, **contractual confidentiality obligations** do not automatically lead to a right to refuse testimony. In the event of an imminent disclosure of trade secrets, however, there is a right to refuse testimony or submit documents. Otherwise, a witness generally has to testify despite an existing confidentiality agreement (any agreed contractual penalty may potentially not be enforceable or at least be moderated by Austrian courts).

With all this in mind, **practitioners** should consider (at least) the following aspects to best **protect the parties' confidential information** in civil proceedings:

- **Avoid** even mere **referencing** of disadvantageous documents in legal proceedings.
- Incorporate specific **burden of proof rules** into contracts, where appropriate.
- Entrust confidential information to **professionals bound by statutory confidentiality obligations for processing & storage** (e.g., lawyers are protected by privilege and exempt from disclosure of documents or witness testimony).
- Agree to an **expert arbitrator opinion** to mitigate risks associated with judges' discretionary evidence evaluation on **complex factual issues**.

- Advise the parties that the conclusion of NDAs and other confidentiality agreements (including contractual penalties) may serve as a deterrent, but may not constitute valid grounds to refuse witness testimony or the production of documents.

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