

## CASE TRANSLATION: GERMANY

CASE CITATION:  
12 U 34/07

NAME AND LEVEL OF COURT:  
Court of Appeal Berlin (Kammergericht  
Berlin)

DATE OF DECISION: 30 August 2007

Court of Appeal Berlin (Kammergericht Berlin)  
Judgement of 30.08.2007, Reference 12 U 34/07  
Relevant legal norms: § 2 No. 3 German Signature Act  
(Signaturgesetz – SigG); § 371a I, § 580 No. 7b German  
Code of Civil Procedure (Zivilprozeßordnung – ZPO)

### Leading record

Private electronic documents pursuant to § 371a I ZPO  
can only be an ‘instrument’ within the meaning of § 580  
No. 7b ZPO, if signed with a qualified electronic  
signature (§ 2 No. 3 SigG).

### Decision

The action for retrial of the case is rejected as  
inadmissible.

The defendant has to bear the cost of the restitution  
procedure.

The value in litigation for the restitution procedure is  
determined at 2.890,24 EUR.

### Reasons

The action for retrial of the case is inadmissible and  
therefore unsuccessful.

1. The admissibility of an action for retrial of the case  
requires the presentation of an instrument in  
accordance with the conditions set out in § 580  
No. 7b ZPO. This instrument corresponds to the  
notion of an instrument as set out in § 415 ZPO: It  
is necessary to provide a written statement as a  
minimum requirement of an action for the retrial of  
a case. The presentation of an evidence of  
inspection is not sufficient (see Federal Court of  
Justice (Bundesgerichtshof – BGH), NJW 1976,  
294; (Court of Appeal Berlin (Kammergericht  
Berlin), NJW-RR 1997, 123; Zöller/Greger,  
Commentary to the German Code of Civil  
Procedure (Zivilprozeßordnung – ZPO), 26th  
edition 2007, § 580 ZPO, Para. 16; Musielak,  
Commentary to the ZPO, 5th edition 2007, § 580  
ZPO, Para. 16). After the adoption of § 371a  
Subsection 1 and 2 ZPO, that provide for the  
respective application of the probative value of  
instruments to certain documents and so  
ultimately increased the reach of the documentary  
evidence, the application of this provision also

appears to be possible in the context of § 580 No.  
7b ZPO, although the production of evidence has  
to be presented according to the rules of the  
evidence of inspection.

2. Ultimately, the matter of an expanded  
interpretation of § 580 No. 7b ZPO, does not need  
to be decided on this point.

The printouts of 8 February 2007 produced from  
the data base of Volkswagen AG, do not represent  
electronic documents within the meaning of §  
371a I ZPO, which have the same probative value  
as instruments.

Only such private electronic documents provided  
with a qualified electronic signature may be  
considered as a private electronic document  
pursuant to § 371a I ZPO, having a probative value  
equivalent to the probative value of private  
instruments. Qualified electronic signatures are  
advanced electronic signatures pursuant to § 2 No.  
3 SigG relying on a valid qualified signature  
certificate at the time of creation and have to be  
created with a safe signature creation device (see  
in detail Musielak/Huber, Commentary to the ZPO,  
5th edition 2007, § 371a ZPO, Para. 3 with further  
references.).

Upon the Senate’s indication that it was neither  
stated nor evident that the file, upon which the  
submitted printout was based, was electronically  
signed in this way, the defendant and the claimant  
of the action for retrial of the case expressly  
acknowledges in its submissions dated 6 June  
2007 that the file was not signed. For this reason  
only a free evaluation of evidence as with evidence  
of inspection comes into consideration; this  
cannot justify an action for a retrial of the case.

The Senate does not share the defendant’s  
argument brought forward in the defendant’s  
submissions dated 9 July 2007 that the defendant  
can not accept that the action for a retrial of the  
case is unsuccessful alone due to pure  
coincidence because the new § 371a ZPO was not  
valid. The action for a retrial of the case is

unsuccessful because the prerequisites of the prevailing § 371a ZPO are not met. The defendant may only base the claim on § 371a ZPO and therefore can not proceed against the claimant in the selected kind of procedure. Therefore the defendant's submissions in denying the kilometres travelled are not relevant.

3. The defendant's alternative request to refer the case to the District Court (Landgericht) as an action raising an objection to the judgement claim is inadmissible because the law does not provide for such a referral. In particular it is not a case of the application of § 281 ZPO, because it is not a question of the local or material incompetence of the court, but the missing admissibility of the selected procedure.
4. The court order as to costs is based on §§ 91 I; 97 I ZPO.

### Case Note

§ 580 No. 7b German Code of Civil Procedure (Zivilprozeßordnung – ZPO) provides that 'die Restitutionsklage (stattfindet), wenn die Partei (...) eine andere Urkunde auffindet oder zu benutzen in den Stand gesetzt wird, die eine ihr günstigere Entscheidung herbeigeführt haben würde;' 'an action for the retrial of the case takes place if a party discovers an instrument or if a party is placed in a position to use an instrument, which would have lead to a more favourable decision for this party'.

Traditionally, an instrument that is cited as documentary evidence has to be presented to the court as an evidence of inspection. But since the new § 371 a ZPO provides for the application of the rules on documentary evidence to electronic documents by analogy, it ought to be discussed as to whether electronic documents could be presented within the range of application of § 580 No. 7b ZPO.

§ 371 a I ZPO provides that '(1) Auf private elektronische Dokumente, die mit einer qualifizierten elektronischen Signatur versehen sind, finden die Vorschriften über die Beweiskraft privater Urkunden entsprechende Anwendung. Der Anschein der Echtheit einer in elektronischer Form vorliegenden Erklärung, der sich auf Grund der Prüfung nach dem Signaturgesetz ergibt, kann nur durch Tatsachen erschüttert werden, die ernstliche Zweifel daran begründen, dass die Erklärung vom Signaturschlüssel-Inhaber abgegeben worden ist.' '(1) Rules regarding the probative value of documentary evidence apply accordingly to private electronic documents signed with a qualified electronic signature. The appearance of authenticity of a document

presented in electronic form that results from the verification of the signature according to the German Signature Act (Signaturgesetz – SigG) may only be challenged by facts giving reason for serious doubts that the document was not issued by the owner of the signature key.'

The court raises the question that if § 580 No. 7b ZPO should be construed in a way that an action for retrial of the case is also admissible if an electronic document signed with a qualified electronic signature (instead of an instrument that § 580 No. 7b ZPO originally meant) is presented to the court. This would be an extensive construction of § 580 No. 7b ZPO in view of the newer § 371a ZPO. The court leaves this question expressly open because in the present case the electronic documents were not signed with a qualified electronic signature in accordance with the provisions of § 2 No. 3 SigG. The defendant admitted there was no qualified electronic signature.

The extensive construction of § 580 No. 7b ZPO – as indicated by the court – appears to be appropriate. § 371a ZPO enlarges the application range of documentary evidence. Therefore, and given that the German legislator inserted § 371a ZPO to provide for the equivalence of electronic documentary evidence with documentary evidence, a document signed with a qualified electronic signature pursuant to the German Signature Act should be treated like the 'classical' instrument and allow an action for retrial of the case.

**Translation by Dr Martin Eßer and Stephen Mason,  
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