

Law of Evidence in Germany –

Procedural rules of Evidence

I. Basic Questions

1. Who states the facts?
2. Which facts need to be proven?
3. What kind of legal evidences are admissible?
4. Who is ordering the taking of evidence?

1. Who states the facts?

Main Principle:

- The parties state the facts:
They produce the factual basis of the decision
- The court does **not** conduct own investigations
 - No principle of official investigation
 - Principle of Party Presentation

1. Who states the facts?

But: Influence of the duty of the court to draw the attention of the parties to certain facts (*Section 139 ZPO*)

- Court has to secure that the parties:
- State all relevant facts
 - Respond to the facts of the other party
 - Present their means of proof

2. Which facts need to be proven?

- **Not all** facts require proof
- Facts only need to be proven, if they are:
 - Stated by the parties
 - Relevant for the Judgment
 - (Explicitly) denied by the opposing party, (*Section 138 subpar. 3 ZPO*)

3. What kind of legal evidences are admissible?

Admissible evidences (legal evidences) are:

- visual evidence taken on site (*Section 371 ZPO*)
- documentary proof (*Section 415 et seq. ZPO*)
- witness testimony (*Section 373 ZPO*)
- expert testimony (*Section 402, 373 ZPO*)
- party testimony (*Section 445 et seq. ZPO*)

4. Who is ordering the taking of evidence?

The court decides ultimately whether a fact needs to be proved or not and orders the taking of evidence.

Basic Principle:

Parties have to present their **legal evidence** and the **subject at issue** to the court.

4. Who is ordering the taking of evidence?

The court decides ultimately whether a fact needs to be proved or not and orders the taking of evidence.

But Party can stop the procedure of taking of evidence:

No taking of evidence without advance payment for the expenses through the party who offers the evidence, (*Section 17 GKG*).

4. Who is ordering the taking of evidence?

Exception:

Court can decide to seek evidence from **legal evidences** which are **not presented by the parties**

- Records and documents (*Section 144 ZPO*)
- Visual evidence taken on site (*Section 144 ZPO*)
- Expert testimony (*Section 144 ZPO*)
- Party testimony (*Section 448 ZPO*)

➤ **Not** possible in regards to witness testimony

4. Who is ordering the taking of evidence?

Parties can not stop the ex officio process of taking evidence by not paying the expenses

§ 17 GKG do not apply in this situation

§ 21 GKG ensure the interests of the parties if the court decision had been wrong

II. Taking of Evidence – 1. Visual evidence taken on site

- Proof by visual evidence taken on site: (*Section 371 – 372 a ZPO*)
- **Direct** perception of the condition of persons, objects or electronic documents by the judge with all of his senses
 - The perception can arise from: **Seeing, hearing, tasting or feeling** a certain person/object.

II. Taking of Evidence – 2. Documentary Proof

- Documentary Proof: (*Section 415 – 444 ZPO*)
 - **Direct** perception of the declarations the documentary contains by the judge

II: Taking of Evidence –

2. Documentary Proof

- The definition of the term document is stricter under the civil law than it is under criminal law:
 - **A document is defined as:**
A written recording in verbal form, which by any means incorporates information.
 - Accordingly: photographs, drawings or tape recordings are not considered as documents, but as visual evidences taken on site.

II. Taking of Evidence – 3. Expert Testimony

- The court selects the experts and appoints them (*Section 404 (1) ZPO*)
 - Except: Parties do **agree** on a certain person to be appointed as expert (*Section 404 (4) ZPO*)

II. Taking of Evidence – 3. Expert Testimony

- The court directs the activities of the expert (*Section 404 a ZPO*)
 - The court has to **introduce** the expert to **his task** and **explain** it to him
 - The court shall further determine:
 - **the facts** on which the expert should base his report
 - **the scope** of the experts elucidation
 - if the expert can **contact the parties**
 - **The participation of the parties** in the investigations of the expert

II. Taking of Evidence – 3. Expert Testimony

- Evaluating the expert report:
 - The parties can **object** to the report and can **ask questions** concerning the report (*Section 411 (4) ZPO*)
 - The court can order the expert **to explain the report** before the court (*Section 411 (3) ZPO*)
 - The court can **order a new report**, if it is not satisfied with the existing report (*Section 412 (1) ZPO*)

II. Taking of Evidence – 4. Witnesses

- Carrying out the questioning of witnesses by the court: (*Section 396, 397 ZPO*)
 - Firstly, the witness has to **tell the court** the facts known to him
 - Secondly, the **court can ask questions** to clarify the perceptions of the witness
 - Thirdly, **the parties** are entitled to **interrogate** the witness

III. Evidence – Court of Appeal

1. German ZPO Reform 2002

- Original role:
 - Reassessing the complete facts of a case (trial court)
 - controversy as defined by the claims will be argued anew

- Role after the reformation of the ZPO:
 - Detecting mistakes and correcting them
 - appeals court is to proceed on the fact findings of the previous instance

III. Evidence – Court of Appeal

2. Basic Principle:

Scope of the review

(Section 529 (1) No. 1 ZPO)

- hearing and decision **are based on the facts** established by the court of the first instance
- In general: Court of appeal is **bound** by this fact-finding

III. Evidence – Court of Appeal

3. Binding Statement of facts

- Statement of facts
 - establishes evidence for the submissions made by the parties in the former proceeding (*Section 314 sentence 1 ZPO*)
 - Only the **Record of the hearing** can invalidate such an evidence (*Section 314 sentence 2 ZPO*)

III. Evidence – Court of Appeal

3. Binding Statement of facts

➤ Exemption:

The court of appeals has doubts as to whether the first-instance court has

- Completely
- Correctly

established the facts relevant for the decision-making.

III. Evidence – Court of Appeal

4. New Evidences

- Consideration of new evidences (*Section 531 ZPO*) only if they:
 - Concern a fact which the court below has **failed to see** or considered **insignificant**
 - Were not asserted because of a **procedural error**
 - Remain unconsidered, **without** this being due to **the negligence** of the party