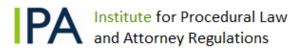




Law of Evidence in Germany –

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)



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

Basic Principle:

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



The court decides ultimately whether a fact needs to be proved or not <u>and</u> 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).



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



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 Appeal1. 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 Appeal2. 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 Appeal3. 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 Appeal3. Binding Statement of facts

≻ Exeption:

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