

Legal Evidence in Germany – Procedural Rules of Evidence

Excerpt from the German Code of Civil Procedure (ZPO)

Source:

http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html

Section 139

Direction in substance of the course of proceedings

(1) To the extent required, the court is to discuss with the parties the circumstances and facts as well as the relationship of the parties to the dispute, both in terms of the factual aspects of the matter and of its legal ramifications, and it is to ask questions. The court is to work towards ensuring that the parties to the dispute make declarations in due time and completely, regarding all significant facts, and in particular is to ensure that the parties amend by further information those facts that they have asserted only incompletely, that they designate the evidence, and that they file the relevant petitions.

Section 144

Visual evidence taken on site; experts

(1) The court may direct that visual evidence is to be taken on site, and may also direct that experts are to prepare a report. For this purpose, it may direct that a party to the proceedings or a third party produce an object in its possession, and may set a corresponding deadline therefor. The court may also direct that a party is to tolerate a measure taken under the first sentence hereof, unless this measure concerns a residence.

(2) Third parties are not under obligation to so produce objects or to tolerate a measure unless this can be reasonably expected of them, or to

the extent they are entitled to refuse to testify pursuant to sections 383 to 385. Sections 386 to 390 shall apply mutatis mutandis.

(3) The proceedings shall be governed by the rules applying to visual evidence taken on site as ordered upon corresponding application having been made, or by those applying to the preparation of reports by experts as ordered by the court upon corresponding application having been made.

Section 314

Evidentiary value of the section addressing the facts and the merits of the case

The section of the ruling that addresses the facts and the merits of the case shall establish evidence for the submissions made by the parties in oral argument. Such evidence can be invalidated only by the record of the hearing.

Section 371

Evidence taken by visual inspection

(1) Evidence taken by visual inspection is offered by designating the object to be inspected visually and by citing the facts regarding which evidence is to be provided. If an electronic document is to serve as evidence, it shall be so offered as evidence by producing or transmitting the file.

(2) Where the party tendering evidence alleges that the object is not in its possession, additional evidence shall be offered by filing the application with the court to set a period within which the object must be procured, or to deliver an order pursuant to section 144. Sections 422 to 432 shall apply mutatis mutandis.

(3) Should a party frustrate the taking of visual evidence on site that it can reasonably be expected to tolerate, the court may deem the allegations made by the opponent regarding the nature of the object to have been proven.

Section 373

Offer to provide evidence

Evidence by hearing witnesses shall be offered by naming the witnesses and designating the facts regarding which the witnesses are to be examined.

Section 396

Examination regarding the dispute

- (1)** The witness is to be induced to tell the court in context whatever facts are known to him regarding the subject matter of his examination.
- (2)** By way of ensuring the clarity and completeness of the testimony, while also investigating the basis on which the knowledge of the witness is based, the court is to ask further questions where necessary.
- (3)** The presiding judge is to grant to each member of the court making the corresponding request the opportunity to ask questions.

Section 397

Right of the parties to ask questions

- (1)** The parties are entitled to have those questions put to the witness that they believe expedient for clearing up the matter, or for establishing the circumstances of the witness.
- (2)** The presiding judge may permit the parties to directly address questions to the witness, and is to grant this permission to their counsel upon the latter's request.
- (3)** In case of doubt, the court shall rule on whether or not a question is admissible.

Section 402

Applicability of the rules for witnesses

Unless otherwise provided for by the subsections hereinbelow, the rules in place for the evidence provided by witnesses shall apply mutatis mutandis to the evidence provided by experts.

Section 404

Selection of the expert

- (1)** The court hearing the case shall select the experts to be involved and shall determine their number. It may limit itself to appointing a single expert. It may appoint other experts to take the stead of the expert first appointed.
- (2)** Should experts have been publicly appointed for certain types of reports, other persons shall be selected only if particular circumstances so require.
- (3)** The court may ask the parties to the dispute to designate persons who are suited to be examined as experts.
- (4)** Should the parties to the dispute agree on certain persons to be appointed as experts, the court is to comply with what they have agreed; however, the court may limit the selection made by the parties to a certain number.

Section 404a

Directions by the court as regards the expert's activities

- (1)** The court is to direct the expert in terms of his activities and may issue instructions as concerns their nature and scope.
- (2)** Insofar as the special aspects of the case require, the court is to hear the expert prior to wording the question regarding which evidence is to be taken; it is to familiarise the expert with his tasks; and is to explain to the expert the task it has allocated to him should he so request.
- (3)** Where the facts of a case are at issue, the court shall determine the facts on which the expert is to base his report.
- (4)** To the extent required, the court shall determine the scope in which the expert shall be authorised to elucidate the question regarding which evidence is to be taken, and it shall also determine whether or not he may contact the parties, and at which point he is to permit them to participate in his investigations.
- (5)** Any instructions given to the expert shall be communicated to the parties. If a separate hearing is held at which the expert is familiarised with his tasks, the parties are to be allowed to attend.

Section 411

Written report

- (1)** If it is ordered that the report be submitted in writing, the court shall set a period for the expert within which he is to transmit his signed report.
- (2)** Should an expert obligated to submit the report fail to meet the deadline imposed on him, a coercive fine may be levied against him. A warning that a coercive fine may be levied must have been previously issued, with a period of grace being set in the warning. Should the deadline be missed in repeated instances, the coercive fine may be levied once again in the same manner. Section 409 (2) shall apply mutatis mutandis.
- (3)** The court may order the expert to appear before it for the purpose of explaining the written report.
- (4)** Within a reasonable period of time, the parties are to communicate to the court their objections to the report, any petitions with regard to the preparation of the report, and supplementary questions to the written report. The court may set a deadline within which they are to do so; section 296 (1) and (4) shall apply mutatis mutandis.

Section 412

New report

- (1)** The court may order the same experts or other experts to prepare a new report if it finds that the report is not to its satisfaction.
- (2)** The court may order another expert to prepare a report if, following the submission of a report by an expert, the rejection of that expert has met with success.

Section 415

Evidentiary value of public records and documents regarding declarations

- (1)** Records and documents that have been prepared, in accordance with the requirements as to form, by a public authority within the scope of its official responsibilities, or by a person or entity vested with public trust

within the sphere of business assigned to him or it (public records and documents), shall establish full proof, provided they have been executed regarding a declaration made before the public authority or the public official issuing the deed.

(2) Evidence proving that the transaction has been improperly recorded is admissible.

Section 445

Examination of the opponent; offer to provide evidence

(1) Any party that has not fully provided other evidence by way of complying with its obligation to provide evidence, or that has failed to so submit other evidence, may offer to provide evidence by filing the petition that the opponent be examined regarding the facts and circumstances to be proven.

(2) This petition is not to be complied with if it concerns facts and circumstances regarding which the court deems the contrary to have been proven.

Section 448

Ex officio examination

Even if no petition has been filed by a party, and without consideration of the onus of proof, the court may direct that a party or both of the parties be examined regarding the facts and circumstances at issue, if the results of the hearings and of the taking of evidence, if any, do not suffice to establish to the satisfaction of the court the truth or untruth of a fact or circumstance that is to be proven.

Section 529

Scope of the review by the court of appeal

(1) The court of appeal is to base its hearing and decision on:

1. The facts established by the court of first instance, unless specific indications give rise to doubts as to the court having correctly or completely established the facts relevant for its decision, and therefore mandate a new fact-finding process;
2. New facts and circumstances insofar as these may permissibly be considered.

(2) The judgment contested will only be reviewed for a defect in the proceedings that is not to be taken into account ex officio if such defect has been asserted pursuant to section 520 (3). In all other regards, the court of appeal shall not be bound to the grounds for appeal asserted.

Section 531

Means of challenge or defence that have been dismissed; new means of challenge or defence

(1) Any means of challenge or defence that were rightly dismissed in the proceedings before the court of first instance shall be ruled out.

(2) New means of challenge or defence are to be admitted only if they:

1. Concern an aspect that the court of first instance has recognisably failed to see or has held to be insignificant,
2. Were not asserted in the proceedings before the court of first instance due to a defect in the proceedings or
3. Were not asserted in the proceedings before the court of first instance, without this being due to the negligence of the party.

The court of appeal may demand that those facts be demonstrated to its satisfaction based on which the new means of challenge or defence may permissibly be brought before the court.