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# **Intensities of Immediacy and the Taking of Evidence Abroad**

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# 1. General aspects

- When taking evidence abroad
  - **Principle of immediacy** versus **procedural economy**
    - How far shall the principle of immediacy be weakened in favor of an efficient and fast procedure?
  - More than the two extremes „**immediacy**“ and „**no immediacy**“
    - Several steps in-between

# 1. General aspects

- When taking evidence abroad
  - **Numerous possibilities**
    - The taking of evidence abroad **by the national court** (passive legal assistance)
    - The taking of evidence abroad **by a foreign court** with **active participation** of the national court's representative (so-called "**dialogic taking of evidence**")
    - The taking of evidence abroad **by a foreign court** in the **(passive) presence** of the national court's representative
    - The taking of evidence abroad **without the presence** of a national judge (classic active legal assistance)
    - The examination of witnesses via **videoconference** or **teleconference** (cf. Art 17 para 4 of the Regulation)
    - The **using of the protocol** of a previous proceeding abroad (according to § 281a ZPO)

# 2.1. Taking of evidence by requesting court

- European Law: Art 17 of the Regulation
  - **Requirements**
    - The request contains the **necessary information** and falls within the **scope of the Regulation** (Art 17 para 5 of the Regulation)
    - The direct taking of evidence can be performed on a **voluntary basis** without the need for coercive measures (Art 17 para 2 of the Regulation)
    - The direct taking of evidence is **not contrary to fundamental principles of law** in that Member State
  - **Particularities**
    - **Requesting court** directly takes evidence abroad
    - **Procedural law of the requesting Member State** is applicable
    - Generally the **language of the requesting Member State** is used

## 2.1. Taking of evidence by requesting court

- Austrian Law: § 291a ZPO
  - **Requirements**
    - Conditions for the **active legal assistance** abroad are met
    - **Application** of a party
    - The court may **take the evidence itself** or **participate** at the taking of evidence **if**
      - this is **admissible** with regard to international treaties (nr 1),
      - it is **reasonable** regarding the **travel effort** as well as the **factual circumstances** in the country in question (nr 1),
      - **extraordinary circumstances** require the factual presence of the court's representative (nr 2)
      - the parties pay an **advance on costs** (nr 3).

## 2.2. Taking of evidence by requested court

- European Law: Art 10-16 of the Regulation
  - **Applicable law**
    - Generally the **law of the requested Member State** (Art 10 para 2 of the Regulation)
    - But if possible, the requested court complies with the request for a special procedure (Art 10 para 3 of the Regulation)
  - Possibility for **coercive measures** (Art 13 of the Regulation)
  - **Participation**
    - **Parties and their representatives** (Art 11 of the Regulation)
    - **Court representatives** (eg. judge, expert)
      - (Passive) **presence** (Art 12 para 1 of the Regulation)
      - (Active) **participation** (Art 12 para 3 and 4 of the Regulation)

## 2.2. Taking of evidence by requested court

- Austrian Law: § 291a ZPO
  - **Requirements**
    - Conditions for the **active legal assistance** abroad are met
    - **Application** of a party
    - The court may **participate** at the taking of evidence only **if**
      - this is **admissible** with regard to international treaties (nr 1),
      - it is **reasonable** regarding the **travel effort** as well as the **factual circumstances** in the country in question (nr 1),
      - **extraordinary circumstances** require the factual presence of the court's representative (nr 2)
      - the parties pay an **advance on costs** (nr 3).

## 2.3. Videoconference and other means of communication technology

- European Law:
  - Requesting court **may ask** the requested court to use communications technology at the performance of the taking of evidence, in particular by using **videoconference and teleconference** (Art 10 para 4 of the Regulation)
  - The central body or the competent authority of the requested Member State **shall encourage the use of communications technology** such as videoconferences and teleconferences (Art 17 para 4 subpara 3 of the Regulation)



## 2.3. Videoconference and other means of communication technology

- Austrian Law: § 277 ZPO
  - Court (in accordance with the existing technical facilities) **has to use videoconference technologies** instead of requesting a judge to carry out an examination, except if
    - examination by a requested judge is more appropriate for reasons of procedural economy
    - or necessary for other reasons
  - That means that active legal assistance shall generally be **substituted** by videoconferences
  - Explicit declaration of **immediacy**

## 2.4. Protocols or expert opinions from previous proceedings

- Austrian Law: § 281a ZPO
  - Protocols or written expert opinions **from previous proceedings** (that includes proceedings **abroad**) may be used in a civil procedure instead of taking that evidence again, if
    1. the parties **participated** in that proceeding and
      - a) none of the parties explicitly applies for the contrary or
      - b) that means of evidence is not available any more
    2. the parties that **did not participate** in that proceeding explicitly agree

# 3. Conclusion

- Several options for the taking of evidence abroad that show **different levels of immediacy**
- **Ranking** of immediacy?
  1. The taking of evidence abroad **by the national court**
  2. The taking of evidence abroad **by a foreign court** with **active participation** of the national representative or in the **(passive) presence** of the national representative
  3. The examination of witnesses via **videoconference** or **teleconference** (cf. Art 17 para 4 of the Regulation)
  4. The taking of evidence abroad **without the presence** of a national representative
  5. The **using of the protocol** or an expert opinion from a previous proceeding abroad (according to § 281a ZPO)

# 3. Conclusion

- **Ranking** of usage in Austrian Civil Procedure
  1. The use of **videoconference technologies** -> except for cases where the examination by a requested judge is more appropriate for reasons of procedural economy or necessary for other reasons (§ 277 ZPO)
  2. The taking of evidence **by the requested judge alone** -> unless **extraordinary circumstances** require the factual presence of the court's representative and such a participation is **reasonable** (§ 291a ZPO)
  3. On an equal level: The **direct taking of evidence by the requesting judge** as well as the taking of evidence by the requested judge **with the participation or presence of a national court's representative**

Optional: The usage of **protocols taken in previous proceedings**
- Strong influence of the **procedural economy**



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**Thank you very much for your  
attention!**