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Evidence in Civil Law - Germany

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CHRISTIAN WOLF & NICOLA ZEIBIG

ABSTRACT The fundamental principles in civil procedure do not only serve as guiding principles for civil procedure in general, but are especially relevant in the taking of evidence process. The German Code of Civil Procedure lays down various rules in its part on the taking of evidence, which aim to specify the scope of the fundamental procedural principles as well as their limitations. This reports purposes to depict the taking of evidence process under German law by illustrating its interaction with said principles.

KEYWORDS: • German civil procedure • fundamental principles • taking of evidence

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Foreword

The law of evidence is one of the most important cornerstones of the civil procedure law of each country. In a very simple sense it is a cornerstone, because in most civil actions the parties do not only dispute over questions of law but also over the contested facts of the case. Even more in a normal civil process the questions of law will be much less contested and in doubt, than the questions of fact. One would not go too far saying that nearly in each process the law of evidence plays an important role.

In a more sophisticated sense, the law of evidence is a very important cornerstone of the civil procedure law for two reasons. The first reason is the interference between the substantive law and the law of evidence. Substantive law answers normally what must be proofed and the law of evidence answers the question how this can be done. Substantive law and the law of taking evidence influence each other. To give one example: Is it sufficient that a certain cause possibly created the alleged damage or must the judge be totally confident that the certain cause and nothing else has created the damage? If only the plausibility is sufficient, tort law can protect other legal values (for example the environment) as if certainty is necessary.

The second reason is the attitude of the society towards the state and the individual. Maybe more than in other fields of the civil procedure law, the law of evidence gives us an answer to the question whether we see the civil procedure more as an instrument to protect individual rights or to enforce the law. Do we strengthen the capacity of the individual to protect his or her right or do we bank on the judge and the state? Is the civil procedure law more written through the glasses of the parties or through the glasses of the state and in the interest of the judges?

Europe has a western society with common roots, we share the same problems in the law of taking evidence. But not only in small details we may have differences regarding the attitude and solutions of the same problems. The project of taking evidence in Europe is a single opportunity to learn from each other and to narrow our views and understanding. We are very grateful to be given the unique opportunity to be a part of this project. Our special thanks go to Vesna Rijavec and Bettina Nunner-Krautgasser for inviting us to contribute to this project. Furthermore we would like to thank Katja Drnovšek for her tremendous support.

Christian Wolf and Nicola Zeibig

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Part I

1 Fundamental Principles of Civil Procedure

1.1 Preliminary Remark: The General Understanding of Procedural Principles in German Law

The German law does not know any written principles like the overriding principles in Part 1 of the English CPR or Art. 1 to 24 French code de procedure. In scholarly writing procedural principles have been developed.[2] The purpose of these principles is to make the main structure of civil procedure rule understandable and transparent.[3] The principles are developed by reading and interpreting the civil procedure rules. So, on the one hand the principles derive from the rules, but on the other hand the principles – once found in the rules – influence our interpretation of the rules. The courts also use these principles in their argumentation.[4] However, the courts are not bound by the principles; they are only bound by the written rules. For example: The court is not allowed to grant the claimant more than it asked for, § 308 para. 1 ZPO[5]. While this rule is an expression of the principle of free disposition of the parties ("Dispositionsgrundsatz"), not the principle itself governs the judge's decision. Instead the judge applies the rule.

There is one notable exemption: Insofar as the principles are taken directly from the German Constitution ("Grundgesetz[6]") the court has to follow the principles. For example the right to be heard is a fundamental procedural right ("Justizgrundrecht"), established in Art. 103 para. 1 GG. But we also find numerous specific rules, which safeguard the right to be heard. For example: § 278 para. 3 ZPO orders that the results obtained in the taking of evidence must be discussed with the parties.

In Germany we know different branches of the judicial authority. In total, we distinguish between five branches and we subdivide one branch in three sub-branches. In detail: the ordinary jurisdiction, subdivided in civil courts, the criminal courts and the family court; the administrative courts; the social courts; the labor courts and the fiscal courts. Each branch has its own procedural rules and the rules partially build up on two

[2] Röhl/ Röhl, Allgemeine Rechtslehre, 3. ed., 2008, pp. 505 f.
[3] Braun, Lehrbuch des Zivilprozeßrechts, 1. ed., 2014, p 70.
[4] BGHZ 139, pp. 305 ff.; BGH, NJW-RR 2012, pp. 263 f.
[5] Zivilprozessordnung (ZPO): German Code of Civil Procedure.
[6] Grundgesetz (GG): German Constitution.

main different procedural principles. To illustrate the understanding of the principles in German civil procedure they will be discussed in antithetic pairs: first, the **principle of free disposition** ("Dispositionsgrundsatz") of the parties in contrast **to the principle of ex officio proceedings** ("Offizialmaxime"), second, **the principle of party presentation** ("Beibringungsgrundsatz" or "Verhandlungsgrundsatz") in contrast to **the inquisitorial system** ("Untersuchungsgrundsatz").

The German civil procedure puts the principle of free disposition ("Dispositionsgrundsatz") in a more or less strict sense into practice. The principle of free disposition in its basic understanding means that the claimant determines whether a procedure takes place, against whom the proceeding is going to be initiated and, finally, the subject of the litigation ("Streitgegenstand"). In contrast, the principle of ex officio proceedings ("Offizialmaxime") means that the proceedings takes place ex officio, the subject of the litigation is also determined ex officio and at last the question how the proceedings end is determined ex officio as well.

The principle of free disposition ("Dispositionsgrundsatz") and the principle of party presentation ("Beibringungsgrundsatz" or "Verhandlungsgrundsatz") are closely connected. Roughly speaking, the principle of free disposition ("Dispositionsgrundsatz") deals with the subject of the proceeding in general and the principle of party presentation ("Beibringungsgrundsatz") with the submission of the facts of the case. Of course the facts are necessary to construct the subject of the case, but the subject of the case can be understood as the frame and the facts built the details of the picture. A procedural action starts with the filing of a statement of claim ("Klageantrag"), § 253 ZPO.[7] A statement of claim could be for example that the claimant has a legal right against the defendant ("Anspruch") to return a certain picture to claimant. A legal right means primarily nothing else than the alleged statement that respondent has to return the picture. The statement of claim does not include the legal foundation of the claim ("Anspruchsgrundlage"). The picture may have to be returned to claimant because claimant has lent the picture to defendant or the sales contract between claimant and defendant is null and void. To decide the case the judge must know all relevant facts why the sales contract might be null and void or why the time of the gratuitous loan expired. The principle of party presentation ("Beibringungsgrundsatz") deals with the question who is responsible for the submission of all the relevant facts, which are necessary to subsume the facts under the relevant legal foundation of the claim ("Anspruchsgrundlage"). In principle, in civil procedure the parties are responsible for submitting the facts to the court.

The contradicting principle is the inquisitorial system. In an inquisitorial system the judge must explore the facts which are necessary for the decision. The inquisitorial system is used in criminal proceedings (§§ 155, 244 para. 2 StPO[8]), in administrative proceedings (§ 86 para. 1 VwGO[9]) in the social court proceedings (§ 103 SGG[10]) and in

[7] Jauernig/ Hess, Zivilprozessrecht, 30. ed., 2011, § 25 Rz. 1.
[8] Strafprozessordnung (StPO): Code of Criminal Procedure.
[9] Verwaltungsgerichtsordnung (VwGO): Code of Adminitrative Court Procedure.
[10] Sozialgerichtsgesetz (SGG): Social Court Act.

fiscal court proceedings (§ 76 para. 1 FGO[11]).[12] The same goes for proceedings in non-contentious matters ("freiwillige Gerichtsbarkeit") and specific types of procedure in family court proceedings ("Familiengerichtsverfahren"), § 26 FamFG[13], §§ 113, 127 FamFG.[14] Furthermore in labour court proceedings both principles apply. We distinguish in labour court proceedings to different types of proceedings. The first type is called proceeding leading to a judgment ("Urteilsverfahren"), § 2 ArbGG. This proceeding deals, for example, with a dispute between the parties of a collective wage agreement or a dismissal protecting claim ("Kündigungsschutzklage"). In this type of proceeding the principle of party presentation ("Beibringungsgrundsatz") is applicable.[15] The second type of proceeding is the decision by an order ("Beschlussverfahren"). This type of proceeding is applicable, for example, to disputes concerning the Works Constitution Act, § 2a ArbGG[16]. In the procedure resulting in an order ("Beschlussverfahren") the inquisitorial system is applicable, § 83 para. 1 ArbGG.[17]

For a broader understanding of the principle of party presentation ("Beibringungsgrundsatz") one first has to distinguish the law finding issue from the fact finding issue. Under German law the law finding issue is solely the task of the judiciary: Iura novit curia. The law does not explicitly stipulate the principle in a written norm, but according to the leading opinion this principle can be derived from § 293 ZPO. § 293 ZPO states that "The laws applicable in another state, customary laws, and statutes must be proven only insofar as the court is not aware of them."[18] As an argumentum e contrario one takes from that norm that in all other circumstances the court must know the law.[19] This does not mean that the parties are not entitled to instruct the court about their legal judgment. It is quite common for the parties to inform the court of their legal opinion on the case in their written submissions.[20] What is key is that the court is not bound by the legal opinion pleaded by the parties. The court does not even have to inform the parties how it has found its legal belief.[21] It is free to

[11] Finanzgerichtsordnung (FGO): Code of Procedure of Fiscal Courts.
[12] Braun, Lehrbuch des Zivilprozeßrechts, 1. ed., 2014, p. 89.
[13] Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (FamFG): Act on Proceedings in Family Cases and in Matters of non-contentious litigation.
[14] Ulrici in Münchener Kommentar zum FamFG, 2. ed., 2013, § 26 Rz. 2.
[15] Koch in Erfurter Kommentar zum Arbeitsrecht, 15. ed., 2015, § 46 Rz. 5; BAG, NZA 1993, p. 1036.
[16] Arbeitsgerichtsgesetz (ArbGG): Works Constitution Act.
[17] Koch in Erfurter Kommentar zum Arbeitsrecht, 15. ed., 2015, § 83 Rz. 1.
[18] § 293 para. 1 ZPO translated into English.
[19] Prütting in Münchener Kommentar zur ZPO, 4. ed., 2013, § 293, Rz. 2; Braun, Lehrbuch des Zivilprozeßrechts, 1. ed., 2014, p. 88.
[20] Jauernig/ Hess, Zivilprozessrecht, 30. ed., 2011, § 25 Rz. 4.
[21] Prütting in Münchener Kommentar zur ZPO, 4. ed., 2013, § 293 ZPO Rz. 4.

discuss legal questions with the parties, but has no duty to do so.[22] In other words, with regard to the law finding task the judge is a loner.[23]

As § 293 ZPO directly says foreign law is treated as facts. This means that foreign law is subject of evidence. Normally expert evidence is taken in cases where foreign law is applicable. As foreign law is treated as facts foreign law cannot be subject of appeal on points of law ("Revision").[24]

Generally speaking in contrast to the law finding process the fact finding process is governed by the principle of party presentation ("Beibringungsgrundsatz").[25] But a closer look leads to several differentiations.

Firstly, the separation of the law finding process from the fact finding process is a legal imagination. There is – from a theoretic standpoint – a non-divisible interdependency between fact and law finding.[26] The selection of the relevant facts is made in regard to the applicable rules of law. But on the other hand the facts determine which rules are applicable: 'Until one knows which rules are applicable, one cannot know which facts are material. Until one knows the facts, one cannot know which rules are applicable.'[27] In the civil procedure literature this interdependency is usually ignored. The literature refers to the legal paroemia: 'da mihi factum dabo tibi ius'.[28] In contrast to this, the legal theory literature sees and discusses this problem.[29] But their scholars keep their consideration separate from the discussion of procedural institutes. Consequently, the problem whether we have to modify the principle of party presentation ("Beibringungsgrundsatz") is not widely deliberated.[30] Despite this contradiction the principle of party presentation ("Beibringungsgrundsatz") is upheld in procedural literature without scrutinizing. In the clear light of the day, the principle of party presentation ("Beibringungsgrundsatz") has been modified in many circumstances. The judge has more responsibility for the fact selection process than the principle of party presentation ("Beibringungsgrundsatz") may suggest.

Firstly, the judge has the duty to direct the parties in substance in the course of proceedings, § 139 ZPO. The judge is obligated to discuss all the relevant factual aspects of the matter and its legal ramifications with the parties according to § 139 para. 1 ZPO. The underlying idea of this paragraph is to establish trustful communication

[22] Jauernig/ Hess, Zivilprozessrecht, 30. ed., 2011, § 25 Rz. 4; dissenting opinion: Wolf, Anwaltsblatt, 2010, p. 725 ff.
[23] Cf. Michelmann, Harvard Law Review, 100 (1986) pp. 4, 76 f.
[24] BGH, NJW 2013, p. 3656.
[25] Lüke, Zivilprozessrecht, 10. ed., 2011, Rz. 14.
[26] Maxeiner, Failures of American Civil Justice in International Perspective, 2011, p. 90.
[27] Maxeiner, Failures of American Civil Justice in International Perspective, 2011, p. 90
[28] For example: Schellhamer, Die Arbeitsmethode des Zivilrichters, 2013, Rz. 22.
[29] Engisch, Logische Studien zur Gesetzesanwendung, 2. ed., 1960, p. 85; Bydlinski, Juristische Methodenlehre und Rechtsbegriff, 2. ed., 1991, p. 419.
[30] Compare: Paulus, Zivilprozessrecht, 4. ed., 2010, Rz. 319 ff.

between the court and the parties.[31] § 139 para. 2 ZPO makes clear that the court can only base its decision on an aspect that the parties have not – for the court recognizably – overlooked. If so the court must give the party a corresponding notice of this fact and give the opportunity to address this matter. The same is necessary for any aspect that the court assesses differently than both parties do.

To elaborate the boundaries of § 139 ZPO is not easy and still an ongoing discussion in Germany. From a constitutional view the fundamental right to be heard does not cover the right to a legal discussion and deliberation of the law.[32] So, § 139 ZPO may entitle the parties to more legal and factual advice through the court than the right to be heard grants the parties.[33] § 139 ZPO should avert unexpected und surprising court decisions.[34] Due to that the courts have to inform the parties if the judge applies a different basis for the claim in the judgment than the parties deemed applicable.[35] For example, the basis of a damage claim can be tort law or contract law. If the parties introduce the facts of the case under the assumption that the basis of the claim is tort law, the court has to inform the parties if the court thinks that the claim is only founded under tort law.

One of the most debated topics concerning the provision of § 139 ZPO is whether it is in the same way applicable if the parties are represented by lawyers.[36] Furthermore, it is controversially discussed whether the judge has to give any advice in regard to procedural defences ("Einreden"). German Law distinguishes to forms of objections. The first form becomes legally effective if the substantive requirements of the objections is fulfilled ("Einwendung"). The other form needs an additional declaration of the person entitled to raise the objection ("Einrede"). If all the elements of the objection are fulfilled, the judge has to advise the party entitled to it to clarify and complete the facts necessary for the objection. Nevertheless, the judge does not have the right to demand the person entitled to an objection to raise it in the proceedings. Particularly with regard to the statute of limitation ("Verjährung") the judge would be biased if they asked the respondent to request the dismissal of the claim due to an objection based on the statute of limitation.[37]

Generally speaking the inherent limitation within § 139 ZPO is the judge's impartiality[38] since the independence and neutrality of the bench is a constitutional fundamental right, Art. 97 para. 1 GG.

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[31] Von Selle in Vorwerk/ Wolf (eds.), Beck'scher Online-Kommentar ZPO, 15. ed., 2015, § 139 Rz. 3 ff.
[32] Von Selle in Vorwerk/ Wolf (eds.), Beck'scher Online-Kommentar ZPO, 15. ed., 2015, § 139, Rz. 5.1.
[33] Wagner in Münchener Kommentar zur ZPO, 4. ed., 2013, § 139 Rz. 39.
[34] Stadler in Musielak/ Voit, Kommentar zur ZPO, 12. ed., 2015, § 139 Rz. 18.
[35] Wagner in Münchener Kommentar zur ZPO, 4. ed., 2013, § 139, Rz. 33.
[36] Wagner in Münchener Kommentar zur ZPO, 4. ed., 2013, § 139 Rz 3.
[37] BGH, NJW 2004, p. 164.
[38] Stadler in Musielak/ Voit, Kommentar zur ZPO, 12. ed, 2015, § 139 Rz. 5.

A deeper understanding of the function of § 139 ZPO is only possible if one accepts the interdependence between law and facts. To substantiate the factual and the legal basis of a claim it is necessary to go back and forth between the facts and the legal foundation of the claim ("Anspruchsgrundlage"). In this sense, the legal proceedings are a dialog between the parties and the court to elaborate the factual and legal basis of the decision. This does not mean, however, that the court has to investigate the case. The basis and the starting point of the dialog between the court and the parties is still the written pleadings of the parties.

Secondly, besides § 139 ZPO, the judge has the right to order a party to appear in person in front of the court to give additional information about the facts and circumstances of the case, § 141 ZPO. In preparation for the oral hearing the court may also ask the parties for amendments of their preparatory written submissions or additional information, § 273 para. 2 no. 1 ZPO.

Thirdly, the civil procedural rules obligate the court to observe certain issues on the court's own motion ("von Amts wegen"). The law itself does not define the expression "on the court's own motion" ("von Amts wegen"). Common opinion is that the "court's own motion" does not mean the same as the inquisitorial principle ("Untersuchungsgrundsatz").[39] "The court's own motion" ("von Amts wegen") lies between the inquisitorial system ("Untersuchungsgrundatz") on the one side and the principle of party presentation ("Beibringungsgrundsatz") on the other side.[40] Starting point is still the facts that have been submitted by the parties. The court does not have any obligation to investigate the facts without any hint in the file. The obligations of the court to evaluate the facts begin where the submitted facts create suspicion.[41] The court has to inform the parties about its concerns regarding any items it takes into account on its own motion, § 139 para. 3 ZPO. In this case the court is not bound by the effect of § 138 para. 3 ZPO. Therefore, also non-disputed facts cannot be judged as having been acknowledged.[42] In general, if the written pleadings do not raise any doubts the court can assume that the points, which the court has to prove on its own motion, are fulfilled.[43]

If the court's concerns have not been lifted by the parties of the proceeding the court has to take evidence. According to the majority opinion in taking the evidence the court is not limited to the concept of strict proof ("Strengbeweis"), but may adopt the concept of informal proof.[44]

[39] Bendtsen in Saenger, Kommentar zur Zivilprozessordnung, 6. ed., 2015, § 56 Rz 2; Leipold in Stein/ Jonas, Kommentar zur Zivilprozessordnung, 22. ed., 2005, Vor § 128 Rz. 163.
[40] Jauernig/ Hess, Zivilprozessrecht, 30. ed., 2011, § 26 Rz. 63.
[41] BGH, NJW 2011, p. 778.
[42] Jauernig/ Hess, Zivilprozessrecht, 30. ed., 2011, § 26 Rz. 64.
[43] BGH, NJW 1983, p. 997.
[44] Bendtsen in Saenger, Kommentar zur Zivilprozessordnung, 6. ed., 2015, § 56 Rz. 5

In the case that the proof fails, the court has to decide based on the objective rule of burden of proof.[45] The German system differentiates between the subjective burden of proof ("subjektive Beweislast"), the objective burden of proof ("objektive Beweislast") and the burden of making sufficient assertions ("Behauptungslast"). The latter answers the questions, which party has to introduce the relevant facts in the court proceeding, and is based on the principle of party presentation ("Beibringungsgrundsatz").[46] The principle of party presentation ("Beibringungsgrundsatz") deals with the question whether the court or the parties have to introduce the alleged facts in the proceeding. The burden of making sufficient assertions gives the answer to the question whether the claimant or the respondent has to introduce the alleged facts in their written pleading.[47] The subjective burden of proof ("subjektive Beweislast") is in close connection with the principle of party presentation. Both need as a precondition the principle of party presentation ("Beibringungsgrundsatz").[48] The subjective burden of proof ("subjektive Beweislast") determines which side must offer evidence for the alleged facts.[49] The court is not allowed to take evidence if it was offered by the party who does not bear the burden of proof.[50] Of course the party who is not charged with the burden of proof can offer evidence. Such evidence is called "evidence in rebuttal" ("Gegenbeweis"). However, the court does not have to order the evidence in rebuttal if the party who has the burden of proof did not offer evidence to prove the facts which support its claim.[51] In the situation that the taking of evidence does not lead to a clear result the court has nevertheless to decide the case. Hence, in such a non-liquet situation the court has to rule according to the objective burden of proof ("objektive Beweislast") and decide against the party who bears the objective burden of proof.[52]

These three rules act together and are applicable in certain stages of the proceeding. At the beginning of the proceedings claimant has to submit in its written pleading all the alleged and relevant facts, which are necessary to subsume the facts under the relevant legal foundation of the claim ("Anspruchsgrundlage"). If claimant fails to do so – and after an advice of the court, § 138 ZPO – the court has to dismiss the case. In the next step the court has to review whether the alleged and relevant facts have been contested by the respondent. If the facts are indeed in dispute between the parties, the court has to determine if the party, who bears the burden of proof, has offered any evidence, §§ 373, 403, 420 421, 428, 432, 445 ZPO ("offer of evidence" – "Beweisantritt"). If the alleged facts are backed by the offered evidence the court must take said evidence. More problematic is the situation if the alleged facts are not backed by an offer of evidence ("Beweisantritt"). The decisive rules governing the taking of evidence are §§ 355 to 484 ZPO. Beside these rules the legislator has regulated the taking of evidence in §§ 141 to 144 ZPO in different ways. Except for the witness evidence the court can take all other

[45] Foerste in Musielak/ Voit, Kommentar zur ZPO, 12. ed., 2015, § 286 Rz. 32.
[46] Koch, Mitwirkungsverantwortung im Zivilprozess, 2013, p. 35.
[47] Koch, Mitwirkungsverantwortung im Zivilprozess, 2013, p. 36.
[48] Prütting in Münchener Kommentar zur ZPO, 4. ed., 2013, § 286 Rz. 99.
[49] Prütting in Münchener Kommentar zur ZPO, 4. ed., 2013, § 286 Rz. 98.
[50] Prütting in Münchener Kommentar zur ZPO, 4. ed., 2013, § 286 Rz. 98.
[51] Rosenberg/ Schwab/ Gottwald, Zivilprozessrecht, 17. ed., § 115 Rz. 7.
[52] Koch, Mitwirkungsverantwortung im Zivilprozess, 2013, p. 35.

means of evidence (documentary evidence, expert evidence and evidence by visual inspection) without an offer of evidence by one of the parties.

In German scholarly literature it is questioned whether these provisions contradict the principle of party presentation ("Beibringungsgrundsatz").[53] Generally, there are two different interpretations offered to solve this (alleged) contradiction. The first one regards documentary evidence (§ 142 ZPO), evidence by inspection (§ 144 para. 1 first alternative ZPO) and the order that a party has to appear in person (§ 141 ZPO) as an instruments for the court to clarify and better understand the intentions of the parties' written pleadings.[54] The second interpretation assumes that these provisions establish a second line of evidence taking. The prevailing opinion is that these paragraphs serve both aims. On the one hand, the provisions provide the judge with the necessary instruments to get a better understanding of the case. On the other hand, in case of disputed facts they also serve as an instrument for evidence taking.[55] This view is supported by § 428 ZPO which refers to § 142 ZPO and makes clear that evidence can also be offered through the mechanism of § 142 ZPO. Under that rule the court may direct one of the parties or a third party to produce records or documents, that are in its possession and to which one of the parties has made reference, § 142 ZPO. However, the limitations of this rule are not clear. The BGH[56] has ruled that the court is only allowed to use § 142 ZPO for the purpose of the acquisition of information. § 142 ZPO can only be used, if one of the parties has introduced concrete facts in its written pleading, which can be proven with the requested document.[57]

Beside these provisions the court has to prove all facts related to the sufficiency of the claim on its own motion. § 56 ZPO instructs the court only to act on its own motion in terms of the capacity to be a party to court proceedings ("Parteifähigkeit"), the capacity to sue and be sued ("Prozessfähigkeit"), the legitimization of a legal representative ("Legitimation des gesetzlichen Vertreters") and the required authorization to pursue legal proceedings ("Prozessführungsbefugnis"). Despite the wording of § 56 ZPO it is nearly uncontested that the court may act on its own motion regarding all facts which must be proven regarding the sufficiency of the claim.[58] Moreover, the court is also entitled to clarify the requirements of legal remedies on its own motion, §§ 522, 552, 572, 577, 589 ZPO. In addition, the courts may on its own motion decide to use an expert to estimate the figures of the compensation sum for damages, § 287 ZPO.

In summary, the German civil procedural law is built upon the principle of party presentation even though the principle in a strict sense cannot be found in black letter law. Instead one can see that the law dilutes this principle in some ways. Since it is

[53] Braun, Lehrbuch des Zivilprozeßrechts, 1. ed., 2014, p. 751 ff.
[54] Damrau, p. 143 ff.; Gruber/ Kießling, ZZP 116 (2003), pp. 305 ff.; Braun, Lehrbuch des Zivilprozeßrechts, 1. ed., 2014, p. 754 f.
[55] Von Selle in Vorwerk/ Wolf (eds.), Beck'scher Online-Kommentar ZPO, 15. ed., 2015, § 142 Rz. 1; BGH, NJW 2007, p. 155.
[56] Bundesgerichtshof (BGH): German Federal Court of Justice.
[57] BGH, NJW 2007, pp. 2989 ff.
[58] Leipold in Stein/ Jonas, Kommentar zur Zivilprozessordnung, 22. ed., 2005, Vor § 128 Rz. 164.

mainly in the court's discretion, it decides how far it will dilute the principle of party presentation. The court's judgement can only be questioned in this respect at a higher instance if the court has ignored the possibility of acting on his own motion.[59]

In addition to these principles, which are decisive to distinguish between civil procedure and criminal procedure, the German procedural system knows a few principles, which are common in every branch of law.

There is the right to be heard. The German Federal Constitutional Court[60] calls this right the procedural predominant right ("prozessuales Urrecht").[61] The right to be heard shall ensure that a party is not only an object of the proceeding but a subject of the proceeding. A violation of the right to be heard entitles the party to different legal remedies. First of all, the party, whose right to be heard has been violated, can raise a constitutional complaint to the German Federal Constitutional Court, Art. 93 para. 1 no. 4a GG. Precondition for such a complaint is that all ordinary recourse to the courts is exhausted. One of the ordinary recourses in the sense of § 90 para. 2 BVerfGG[62] is the remedy according § 321a ZPO.[63] If no appellate remedy or any other legal remedy is available against the decision, which violates the right of a fair legal hearing, the court has to continue the proceedings to give that party the possibility to be heard. A violation of the right to a fair legal hearing can also be brought forward in appeal proceedings on points of fact ("Berufung") and in appeal proceedings on points of law ("Revision"). If the court of appeal has not admitted the appeal on points of law ("Revisionszulassung"), the party can file a complaint against that decision in the form of a complaint against the denial of leave to appeal ("Nichtzulassungsbeschwerde"). In the circumstances, in which the BGH would normally grant the appeal proceedings on points of law, the provision of § 544 para. 7 ZPO enables the BGH to refer the legal dispute back to the court of appeal for it to once again hear the case and to rule on it. As a consequence, the BGH will not have an oral hearing of the case and can handle the case in a simpler way. The condition for that is that the court of appeal has violated the right to be heard. Using § 544 para. 7 ZPO is a much easier way for the BGH to handle an appeal on points of law. Therefore, the BGH has developed a different understanding of the right to be heard in the sense of § 544 para. 7 ZPO and assigned it a broader understanding than usual. Especially if the court of appeal has not taken into account a relevant offer of proof ("Beweisangebot") the right to be heard in the meaning of § 544 para. 7 ZPO is violated.[64]

The German Code of Civil Procedure does not explicitly define the right of an effective and fair legal hearing in general, but in regard to the taking of evidence it gives some guidance. The parties are permitted to attend the taking of evidence, § 357 para. 1 ZPO.

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[59] BGH, NJW 2007, pp. 2989 ff.
[60] Bundesverfassungsgericht (BVerfG): German Federal Constitutional Court.
[61] BVerfGE 6, pp. 12 f.; BVerfGE 55, pp. 1 f.
[62] Bundesverfassungsgerichtsgesetz (BVerfGG): Federal Constitutional Court Act.
[63] Utermark in Vorwerk/ Wolf (eds.), Beck'scher Online-Kommentar ZPO, 15. ed., 2015, § 321a Rz. 38.
[64] BGH, NJW-RR 2010, pp. 1217f.

For a better understanding of this rule one has to take into account that the German Code of Civil Procedure differentiates between the oral hearing and the process of evidence taking.[65] The differentiation dates back to the common procedure law ("Gemeines Prozessrecht"). There the process was split in two parts. The first part was the allegation stage ("Behauptungsverfahren"). The second part was the taking of evidence stage ("Beweisverfahren").[66] The allegation stage ("Behauptungsverfahren") ended with the "Beweisinterlokut" which is closely connected with the eventual maxim ("Eventualmaxime"). The name "eventual maxim" leads back to the circumstance that the lawyers in the first stage brought forward every possible fact ("in eventu"). Otherwise the party would have been precluded. The Beweisinterlokut froze the subject matter of the litigation. The German Code of Civil Procedure abolished the eventual maxim and the "Beweisinterlokut", but in principle the differentiation between the taking of evidence and the oral hearing remained.

Also, the order for evidence to be taken ("Beweisbeschluss") dates back to the time of the "Beweisinterlokut".[67] The purpose of the order for evidence is to clarify for all involved parties why the evidence is taken.[68] The order for evidence must be based on a certain understanding of the legal evaluation of the case. The taking of evidence is only necessary as far as the alleged facts are relevant and contested. In contrast to the "Beweisinterlokut", the court is not bound by the legal opinion, which underlies the order for evidence to be taken, in regard for the judgment.[69] The order for evidence to be taken can be modified or cancelled by the court in charge of the judgment. § 360 ZPO regulates the modification of the order for evidence to be taken. The unspoken principle of § 360 ZPO is that the court is free to modify an order for evidence to be taken after an oral hearing.[70] § 360 ZPO stipulates certain conditions which must be fulfilled to modify the order for evidence to be taken if the court wants to do so without an additional oral hearing. In its second sentence the provision allows the court to modify the order for evidence to be taken upon a corresponding application by a party or on its own motion insofar as the opponent agrees to such a modification.[71] Without the consent of the parties the court can on its own motion exchange the witness or the expert and modify the subject of the order of taken evidence.[72] Without consent does not mean without protecting the right to be heard. In the cold light of the day the scope of § 360 ZPO is very narrow. Only the delegated judge (§ 361 ZPO) and the requested judge (§ 362) are limited by § 360 ZPO. § 360 ZPO does not hinder the court, which renders the judgment, not to perform the order for evidence to be taken. Also § 358a ZPO allows the court to take evidence previously to the oral hearing. It is unclear whether § 358a ZPO means previous to the first oral hearing or previous to any oral

[65] Braun, Lehrbuch des Zivilprozeßrechts, 1. ed., 2014, p. 151.
[66] Bach in Vorwerk/ Wolf (eds.), Beck'scher Online-Kommentar ZPO, 15. ed., 2015, § 358 Rz. 1.
[67] Bach in Vorwerk/ Wolf (eds.), Beck'scher Online-Kommentar ZPO, 15. ed., 2015, § 358 Rz. 1.
[68] Bach in Vorwerk/ Wolf (eds.), Beck'scher Online-Kommentar ZPO, 15. ed., 2015, § 358 Rz 1.
[69] Bach in Vorwerk/ Wolf (eds.), Beck'scher Online-Kommentar ZPO, 15. ed., 2015, § 360 Rz. 2.
[70] Stadler in Musielak/ Voit, Kommentar zur ZPO, 12. ed., 2015, § 360 Rz. 3.
[71] Stadler in Musielak/ Voit, Kommentar zur ZPO, 12. ed., 2015, § 360 Rz. 4.
[72] Stadler in Musielak/ Voit, Kommentar zur ZPO, 12. ed., 2015, § 360 Rz. 4 f.

hearing.[73] Following the latter opinion, § 358a ZPO substitutes de facto § 360 ZPO.[74] But even if § 358a ZPO is only applicable before the first oral hearing, the court can render a new order for evidence to be taken in accordance with § 128 para. 4 ZPO. This provision entitles the court to render a decision without a hearing if the decision is not a judgment and there is no other contradicting regulation.[75]

The principle of the publicity of the trial (§ 169 GVG[76] – "Gerichtsöffentlichkeit") is only applicable for the oral hearing.[77] Regularly evidence is taken in the oral hearings. § 279 para. 2 ZPO states that the taking of evidence shall immediately follow the hearing in which the dispute as such is dealt with.[78] This means that the evidence is generally taken during the oral hearing, but in certain circumstances evidence is taken outside of the main oral hearing. This happens if the evidence is taken by a delegated judge charged with a task, § 361 ZPO, or by a requested judge, § 362 ZPO. A delegated judge is a member of the court, which is hearing the case; a requested judge is a judge of another court. Furthermore, the judicial inspection can take place outside of the oral hearing if the object of the visual inspection cannot be brought to the courtroom. The same applies if an expert has to undertake an inspection. Especially for such a situation § 357 ZPO stipulates the right for the parties to attend. § 357 ZPO creates a right for the parties, not an obligation. The evidence may be taken without the presence of the parties, § 367 ZPO. In such a case there is no room for a default judgment.[79] A default judgment can only be rendered, if the court has ordered the continuation of the oral hearing directly after the taking of evidence, § 370 para. 1 ZPO.

In regard to the different means of evidence, the German Code of Civil Procedure provides different solutions for safeguarding the right to be heard:

Regularly, the parties are entitled to attend the examination of witnesses. In a proceeding, where party representation is mandatory, the party can execute its procedural right to question the witness (§ 397 ZPO) only together with its lawyer.[80] Also an expert engaged by a party has the right to attend the witness testimony. The right to be heard (Art. 103 para. 1 GG) justifies that the party is instructed and advised by an expert during the examination of the witness.[81] In a very specific situation the court can order that a party has to leave the courtroom. According to § 177 GVG the judge can order that a party has to vacate the court room if this is necessary to uphold the public order due to the party's behavior.[82] The nature of the right to be heard

[73] Stadler in Musielak/ Voit, Kommentar zur ZPO, 12. ed., 2015, § 358a Rz. 2.
[74] Bach in Vorwerk/ Wolf (eds.), Beck'scher Online-Kommentar ZPO, 15. ed., 2015, § 360 Rz. 3.
[75] Bach in Vorwerk/ Wolf (eds.), Beck'scher Online-Kommentar ZPO, 15. ed., 2015, § 360 Rz. 3.
[76] Gerichtsverfassungsgesetz (GVG): Courts Constitution Act.
[77] Zimmermann in Münchener Kommentar zur ZPO, 4. ed., 2013, § 169 GVG Rz 11.
[78] Braun, Lehrbuch des Zivilprozeßrechts, 1. ed., 2014, p. 151.
[79] Stadler in Musielak/ Voit, Kommentar zur ZPO, 12. ed., 2015, § 367 ZPO, Rz. 5.
[80] Heinrich in Münchener Kommentar zur ZPO, 4. ed., 2013, § 357 Rz. 9; Bach in Vorwerk/ Wolf (eds.), Beck'scher Online-Kommentar ZPO, 15. ed., 2015, § 357 Rz 7.
[81] OLG München, NJW-RR, 1988, pp. 1534 f.; Heinrich in Münchener Kommentar zur ZPO, 4. ed., 2013, § 357 Rz. 6.
[82] Heinrich in Münchener Kommentar zur ZPO, 4. ed., 2013, § 357 Rz. 6.

according to Art. 103 para. 1 GG requires that the party must be allowed to return to the court room immediately once further danger for the public order in by its presence is expected.[83]

In criminal procedure the provision of § 257 StPO[84] allows the removal of the defendant from the court room if it is to be feared that a witness will not tell the truth when examined in the presence of the defendant. Since a comparable regulation cannot be found in the German Code of Civil Procedure the provision of § 257 StPO is used in analogy in civil procedure. Nonetheless, the court has to give the party the opportunity to ask additional questions after the witness testimony. Therefore, the party must be informed of the content of the witness testimony.[85]

§ 377 para. 3 ZPO contains also an exemption from the right to attend the witness testimony. In accordance with § 377 para. 3 ZPO the court can instruct the witness to answer its questions in writing. This is only possible if the witness is able to express itself in writing and the credibility of the witness is not in question. Furthermore, it must be expected that it will be unnecessary to ask the witness additional questions.[86]

§ 174 GVG allows to close the courtroom for the public if this is necessary to avoid a breach of peace. If the public has been excluded on the grounds of endangerment of state security, the court may obligate the persons present to observe secrecy in respect of facts of which they became aware of in the course of the hearing (§ 174 para. 3 GVG). In such a case it is disputed whether the lawyer is entitled to inform the party he represents about the court hearing if the party is absent.[87] The same question arises if the court is closed for the public to protect a trade secret.[88]

Both constellations deal with the question whether the lawyer is entitled to inform the party about the oral hearing if the party did not attend the court hearing, but had the right to attend the oral hearing.

In German terminology an in-camera-proceeding means, that the relevant information is only distributed between the court and one party. In other words, the opponent party will not have access to this information. Under very specific circumstances the German law allows such an in-camera-proceeding namely in the Code of Administrative Court Procedure. In its § 99 VwGO the law regulates a review process if the government refuses the submission, transmission or information concerning documents or files on grounds that the interests of the Federation would be impaired. Similar provisions can be found in the Federal Constitutional Court Act, § 26 para. 2 BVerfGG; in the Social

[83] Bach in Vorwerk/ Wolf (eds.), Beck'scher Online-Kommentar ZPO, 15. ed., 2015, § 357 Rz. 7.
[84] Strafprozessordung (StPO): German Code of Criminal Procedure.
[85] Heinrich in Münchener Kommentar zur ZPO, 4. ed., 2013, § 357 Rz. 9.
[86] Scheuch in Vorwerk/ Wolf (eds.), Beck'scher Online-Kommentar ZPO, 15. ed., 2015, § 377 Rz. 13.
[87] Zimmermann in Münchener Kommentar zur ZPO, 4. ed., 2013, § 174 GVG Rz. 14.
[88] Heinrich in Münchener Kommentar zur ZPO, 4. ed., 2013, § 357 Rz 7.

Court Act, § 119 SGG and Code of Procedure for Fiscal Courts[89], § 86 FGO. The German Code of Civil Procedure does not know an in-camera-proceeding and only a few scholars[90] demand an in-camera-proceeding for civil proceedings.[91]

1.2 Principle of Free Disposition of the Parties and Officiality Principle

The German law recognizes the principle of free disposition of the parties as well as the officiality principle even though the principles are not expressly mentioned by these names in the law itself.

The principle of free disposition of the parties derives from the principle of party autonomy. The German Code of Civil Procedure is based on the self-determination of the individual regarding the enforcement of its individual legal positions.[92] The principle entitles the parties to initiate civil proceedings by filing a motion (*iudex ne procedat ex officio*), to determine the subject-matter of the dispute, to submit applications during the proceedings and also to end the proceedings by admitting or waiving the claim or by settling the dispute.[93]

The opposing officiality principle generally applies in criminal jurisdiction and not in proceedings before civil courts. Only in proceedings regarding claims, which are not at the disposal of the parties, the principle of free disposition is by way of exception superseded by the principle of officiality. The German law knows such exceptions in matrimonial matters and certain matters of family procedure according to the Act on Proceedings in Family Cases and in Matters of non-contentious litigation.[94]

As part of the principle of free disposition, the parties define the scope of authority of the court. For this purpose the ne ultra petita principle is part of German civil procedure (§ 308 para. 1 ZPO) and ensures that the matter in dispute is confined according to the parties submission. The court would violate said principle by granting higher or different remedies than the claimant has asked for.[95] The court may however – without exceeding its scope of authority – fall short of the claimant's request.[96] As stated above the courts may generally not act on its own motion in civil proceedings. As a consequence it is the parties' obligation to provide the facts the court needs to decide the case.[97]

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[89] Finanzgerichtsordnung (FGO): Code of Procedure for Fiscal Courts.
[90] E.g. Wagner, JZ 2007, pp. 706 ff.
[91] Götz, Der Schutz von Betriebs- und Geschäftsgeheimnissen im Zivilverfahren, 2014, pp. 403 ff.; Heinrich in Münchener Kommentar zur ZPO, 4. ed., 2013, § 357 Rz. 9.
[92] Rauscher in Münchener Kommentar zur ZPO, 4. ed., 2013, Einl. Rz. 209.
[93] Musielak in Musielak/ Voit, Kommentar zur ZPO, 12. ed., 2015, Einl. Rz. 35.
[94] Musielak in Musielak/ Voit, Kommentar zur ZPO, 12. ed., 2015, Einl. Rz 36.
[95] Jauernig/ Hess, Zivilprozessrecht, 30. ed., 2011, § 24 Rz. 8.
[96] Lüke, Zivilprozessrecht, 10. ed., 2011, Rz. 8.
[97] Jauernig/ Hess, Zivilprozessrecht, 30. ed., 2011, § 25 Rz. 13.

The German Code of Civil Procedure does not strictly follow the eventual maxim. It nevertheless contains provisions that will allow the court under certain circumstances to exclude a party with arguments, which would otherwise delay the proceedings. Regulations dealing with preclusion are e.g. § 282 and 296 ZPO. The parties are supposed to expedite the proceedings by putting forward their facts, evidence and defense immediately, § 282 para. 1 ZPO. As a general rule these can be submitted until the closing of the oral proceeding (in the first instance), § 296 a ZPO.[98]

If a party does not introduce a fact, evidence and defense in time (§ 282 ZPO) the court according to its own independent conviction can reject the fact, evidence or defense if it was not introduced earlier due to gross negligence and admitting it would considerably delay the proceedings, § 296 para. 2 ZPO. Similarly, the court can reject any of the above mentioned submission if it was not submitted within a stipulated period, § 296 para. 1 ZPO.[99]

Facts that are not in dispute between the parties do not need to be supported by evidence, § 138 para. 3 ZPO and § 288 para. 1 ZPO. Insofar, the court is bound by the parties' submissions. Evidence is only needed to support those facts that the parties are in dispute about. Thus, the court can only verify the truth of a fact within the limits set by the parties.[100]

1.3 The Adversarial and Inquisitorial Principles

The German law recognizes both the adversarial as well as inquisitorial principle. The law itself does not expressly mention these principles by name. The German Code of Civil Procedure is in general based on the adversarial principle.[101] The inquisitorial principle on the other hand is the guiding principle in criminal[102] and administrative proceedings[103].

According to the adversarial principle in German civil procedure the parties bear the burden to present the necessary facts and evidence. The court may only base its decision on such material that the parties introduced into the proceedings.[104] The court has to treat fact that are conceded or not in dispute between the parties as true. They do not require proof, § 138 para. 3 ZPO and § 288 para. 1 ZPO. For those facts that remain disputed between the parties the parties are obliged to offer evidence, §§ 371, 373, 403, 420 ff., 445, 447 ZPO.[105]

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[98] Jauernig/ Hess, Zivilprozessrecht, 30. ed., 2011, § 28 Rz. 9.
[99] Schilken, Zivilprozessrecht, 7. ed., 2014, Rz. 386 f.
[100] Jauernig/ Hess, Zivilprozessrecht, 30. ed., 2011, § 25 Rz. 14.
[101] BVerfGE 67, p. 42; BGHZ 161, p. 143.
[102] Fischer in Karlsruher Kommentar zur Strafprozessordnung, 7. ed., 2013, Einl. Rz. 12 ff.
[103] Cf. § 86 VwGO, § 76 FGO, § 103 SGG.
[104] Jauernig/ Hess, Zivilprozessrecht, 30. ed., 2011, § 25 Rz. 8 ff.
[105] Förschler/ Steinle, Der Zivilprozess, 7. ed., 2009, Rz. 738.

There are certain situations in which the German Code of Civil Procedure modifies the adversarial principle to ensure a fair trial. The court may under certain circumstances order the evidence to be taken on its own motion, e.g. §§ 144 para. 1, 142, 143, 273 para. 2, 448 ZPO. Another modification of the adversarial principle concerns the application of the law. The court is free in the application of the law in the sense that it may base its decision on an aspect of law that has not been introduced or has been deemed insignificant by one or both of the parties, provided the court has given the parties the opportunity to address the matter before its decision, § 139 para. 2 ZPO.

Regarding the role of a judge the German Code of Civil Procedure acknowledges both concepts: the substantive and the procedural guidance of proceedings. According to § 136 ZPO the procedural guidance resides with the judge. In addition, the judge also exercises a substantive guidance of the proceedings, § 139 ZPO. The judge has a duty of care of the parties as well as a co-responsibility to ensure a fair trial. The adversarial principle is modified insofar as the judge is obliged to assist the parties by discussing factual and legal aspects of the dispute even if such conversation between the parties and the court raises issues that have not been introduced by the parties before, § 139 para. 1 ZPO. Ultimately, it is the parties' responsibility to decide whether to follow a judicial notice or not. Thus, the judge's duty of care is an instrument that safeguards the right to be heard.[106]

1.4 Hearing of Both Parties Principle (audiatur et alter pars) – Contradictory Principle

The right to be heard and to a fair trial is a fundamental right and forms part of the German constitution, Art. 103 para. 1 GG, and is, thus, applicable to legal proceedings in all branches of law. The provision aims to ensure that each individual is not a mere object in the proceedings, but has the possibility to actively participate in the proceedings and, thus, influence the court's decision.[107] Consequently, the right to be heard is generally considered to be a fundamental procedural principle.[108] The right to be heard is implemented in the German Code of Civil Procedure in various provisions, e.g. §§ 99 para. 3, 118 para. 1, 136 para. 3, 139, 225 para. 2 ZPO.

Mainly three rights of a party in legal proceedings can be derived from the principle: firstly, the parties' right to express themselves freely in the proceeding, secondly, the right to be informed properly by the court about the factual and legal basis of the proceeding and, thirdly, the court's obligation to take the parties' statements into consideration when deciding the case.[109]

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[106] Stadtler in Musielak/ Voit, Kommentar zur ZPO, 12. ed., 2015, § 139 Rz. 1.
[107] BVerfGE 89, pp. 28 ff.
[108] Radtke/ Hagemeier in Epping/ Hillgruber (eds.), Beck'scher Online-Kommentar GG, Art. 103 Rz. 1.
[109] Radtke/ Hagemeier in Epping/ Hillgruber (eds.), Beck'scher Online-Kommentar GG, Art. 103 Rz. 7.

While the principle requires that the parties need to have the possibility to be heard in the legal proceedings, it does not stipulate that they actually need to make use of their right. In case of a default judgment (§§ 330 ff. ZPO), for example, the right to be heard is not violated if the absent party had the opportunity to appear before the court and to express its opinion, but nevertheless failed to appear.

The right to be heard does not only require that the parties must have had the opportunity to state their opinion on the case and their submissions respectively, but also that each party must have had sufficient opportunity to submit evidence and express their view on the result of the taking of evidence. In order to be able to comment on the result of the taking of evidence it is mandatory that the parties have the right to be present during the taking of evidence, § 357 ZPO.[110]

There are different means for a party if the right to be heard was violated.[111] If the right to be heard was violated because a party did not comply with a time limit and the failure was inevitable, the party may file for a restoration of the status quo ante ("Wiedereinsetzung in den vorherigen Stand"), § 233 ZPO. Equally, in case of a default judgment the party may file a protest ("Einspruch"), § 338 ZPO, if the failure to appear at the hearing was unavoidable. Additionally, in its § 579 para. 1 no. 4 the German Code of Civil Procedure stipulates an action for an annulment in cases of misrepresentation before the court as special case of a violation of the right to be heard.[112]

1.5 Principle of Orality – Right to Oral Stage of Procedure and Principle of Written Form

The principle of orality is part of German civil procedure. It is statutorily regulated in § 128 ZPO which states that the court is supposed to decide based on the parties' arguments that have been presented orally.[113] The German Code of Civil Procedure deviates from the principle of orality in certain situation where the public interest in an accelerated process prevails over the advantages of oral proceedings. While according to some provisions the parties can choose whether they would prefer written over oral proceedings, e.g. § 128 para. 2 ZPO, other provisions dealing with exceptions to the principle of orality are mandatory and require the proceedings to be in written form, e.g. §§ 251 a, 307 para. 2, 331 para. 3, 331 a ZPO. Apart from these explicitly regulated exceptions any violation of the principle of orality constitutes a procedural violation.[114] Accordingly, the German Code of Civil Procedure is based on a mixture of the oral and the written form.

[110] Cf. Preliminary remarks, para. 25.
[111] Cf. Preliminary remarks, para. 25.
[112] BVerfG, NJW 1998, p. 745.
[113] BGH, NJW 1999, p. 1339.
[114] Schilken, Zivilprozessrecht, 7. ed., 2014, Rz. 361.

1.6 Principle of Directness

The principle of directness is part of German civil procedure. It requires an oral hearing and the direct taking of evidence before the court. The court may not make use of any judicial intermediaries, but needs to conduct the proceedings itself and decide on the basis of its own impression gained during the oral hearings. Thus, the principle of directness is closely connected to the principle of orality.[115]

The directness regarding the taking of evidence is statutorily regulated in § 355 ZPO. As a general rule only a judge, who has gained a personal impression of the witnesses as well as other means of evidence, can consider the evidence justly and adjudicate accordingly. Hence, courts of appeal have to hear a witness themselves if they judge the witness' credibility differently than the court of the first instance. Hearing a witness in front of another court by way of judicial assistance or by just one member of the court is only admissible if it can be assumed that an appropriate consideration of the evidence is possible despite the missing direct impression, § 375 para. 1 ZPO and § 527 para. 3 s. 2 ZPO.[116]

Directness in the sense that always the 'closest' piece of evidence must be offered is not regulated in the German Code of Civil Procedure. The possibly lower value of such evidence may be regarded by the court when evaluating the evidence.[117]

The taking of evidence by only one member of the court or another court by way of judicial assistance is only admissible in the situations expressly outlined in the law. The German Code of Civil Procedure regulates exceptions from the principle of directness for all means of evidence if it is to be assumed from the outset that the court hearing the case will be able to properly evaluate the results obtained in taking the evidence, without having gained a direct impression, §§ 361 para. 1, 372 para. 2, 375 para. 1, 1 a ZPO and §§ 362, 372 para. 2 ZPO, 157 GVG. If in accordance with § 348 para. 1 ZPO or § 348 a para. 1 ZPO a judge is responsible for sitting on a matter alone, he or she represents the court and is responsible for the taking of evidence alone. Equally, if the court of appeal has transferred the legal dispute to one of its members to take the decision, the judge will conduct the proceeding including the taking of evidence alone, § 526 ZPO. The judge of the appellate court sitting alone in preparatory proceedings on the other hand, is limited in the taking of evidence, § 527 para. 2 ZPO.[118] In general, appeals can be based on points of fact and law. The courts of appeal cannot consider new evidence that could have been introduced by the parties during the first instance. New submissions must be taken into account only to the extent that they were not considered in the first instance due to a faulty conduct of proceedings by the court or otherwise through no fault of the party, §§ 529 para. 2 no. 2, 531 para. 2 ZPO.[119]

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[115] Rauscher in Münchener Kommentar zur ZPO, 4. ed., 2013, Einl. Rz. 368 f.
[116] Rauscher in Münchener Kommentar zur ZPO, 4. ed., 2013, Einl. Rz. 370.
[117] Rauscher in Münchener Kommentar zur ZPO, 4. ed., 2013, Einl. Rz. 371.
[118] Rauscher in Münchener Kommentar zur ZPO, 4. ed., 2013, Einl. Rz. 374 f.
[119] Ball in Musielak/ Voit, Kommentar zur ZPO, 12. ed., 2015, Vorb. zu § 511 Rz. 8.

A violation of the principle of directness constitutes a procedural irregularity and leads to the inadmissibility of the obtained result of the evidence.[120]

1.7 Principle of Public Hearing

The principle of public hearing is regulated in § 169 s. 1 GVG. According to the principle, hearings including the announcement of the decision generally have to be accessible to everyone, not only the parties. The principle aims to strengthen judicial independence as well as public control of the judicial power. While the principle ensure access to the courtroom, it does not constitute a right for audio or video transmission, § 169 s. 2 GVG.[121]

Due to the personal nature of certain types of proceedings, such as family matters and non-contentious matters, are excluded from the principle of a public hearing, § 170 para. 1 GVG. In these cases the court can admit the public with the consent of the participants.

Furthermore, the court can exclude the public from the courtroom to protect the participants' personality rights, §§ 171 b ff. GVG. Similarly, the law regulates that the public can be excluded from the hearing or from a part thereof if admitting the public would endanger the public order or public morals (§ 172 no. 1 GVG), endanger the life, limb or liberty of a participant (§ 172 no. 1 a GVG), reveal important business secrets (§ 172 no. 2 GVG), reveal a private secret the unauthorized disclosure of which carries a penalty (§ 172 no. 3 GVG) or a person under the age of eighteen is examined (§ 172 no. 4 GVG).[122]

1.8 Principle of Pre-trial Discovery

While the German civil procedure knows a taking of evidence procedure that may take place prior to the trial, it is not quite comparable to the pre-trial-discovery we know from Anglo-American jurisdictions.

In its §§ 485 ff. ZPO the German Code of Civil Procedure stipulates the specifics for such "independent evidentiary proceedings" ("Selbständiges Beweisverfahren").

The normative purpose of these provisions is to avoid lawsuits where the parties are in dispute about the facts of the case rather than the legal issues. In such cases an expert report might resolve the dispute by giving the parties the basis for a settlement, § 492 para. 3 ZPO. Furthermore, independent evidentiary proceedings ("Selbständiges Beweisverfahren") enhance accelerated proceedings since a party may at a later stage during the court hearing refer to facts or circumstances, which have been previously held in an independent evidentiary proceeding, and the court hearing the case will not take evidence on such facts and circumstances again since independent evidentiary

[120] Rauscher in Münchener Kommentar zur ZPO, 4. ed., 2013, Einl. Rz. 376.
[121] Rauscher in Münchener Kommentar zur ZPO, 4. ed., 2013, Einl. Rz. 378.
[122] Musielak/ Voit, Grundkurs ZPO, 12. ed., 2014, Rz. 109.

proceedings are equivalent to the taking of evidence before the court, § 492 ZPO.[123] Contrary to the Anglo-American pre-trial discovery, independent evidentiary proceedings under German civil procedure do not aim to enable the parties to collect evidence, which they might later found their claim on. In order to respect the allocation of the burden of making sufficient assertions ("Behauptungslast") and the burden of proof ("Beweislast") the German Code of Civil Procedure tries to prevent the so-called "fishing expeditions" by allowing the taking of evidence prior to the main proceedings only when certain criteria are fulfilled.

The taking of evidence in independent evidentiary proceedings ("Selbständiges Beweisverfahren") is only allowed in certain circumstances and typically limited to certain means of evidence: visual inspection, witness testimony and oral or written expert opinion. The purpose of the provisions regarding independent evidentiary proceedings does not allow to extend this procedure to party examination.[124]

§ 485 para. 1 ZPO stipulates that a party may file a petition to take evidence in the form of the mentioned means of evidence in the course of litigation or outside of the proceedings if the opponent consents to it or there is a concern that the evidence might be lost or that it will become difficult to use it. § 485 para. 2 ZPO allows the taking of evidence in the form of a written expert report if the party requesting it has a legitimate interest. Such interest is assumed if the expert report serves to avoid a legal dispute.

In contrast to the Anglo-American pre-trial discovery, the independent evidentiary proceeding does not apply to documents. While the German Code of Civil Procedure contains a provision regarding the production of documents in § 142 ZPO it is unclear whether documents can be part of independent evidentiary proceedings. This question has not yet been clarified by a high-court decision.[125] One might argue that the absence of a reference to § 142 ZPO within the regulations on independent evidentiary proceedings indicates that the production of documents should not be part of such proceedings.[126]

1.9 Other General Principles

There is a principle of concentration of the proceedings, which aims to achieve fast and affordable proceedings. Whether this principle should have the same status in German civil procedure as the aforementioned general principles is disputed. It is undisputed that the German Code of Civil Procedure contains provisions, which promote the goal of accelerated proceedings.[127] According to the principle of concentration the court should purpose to close the proceedings after one comprehensively prepared main hearing, § 272 para. 1 ZPO. Similarly, the parties' duty to promote accelerated

[123] Huber in Musielak/ Voit, Kommentar zur ZPO, 12. ed., 2015, § 485 Rz. 2.
[124] Pukall in Saenger, Kommentar zur Zivilprozessordnung, 6. ed., 2015, Einl. Rz. 62.
[125] BGH, NJW 2013, pp. 2687 f.; KG, NJW 2014, pp. 85 f.
[126] Willer, Das selbstständige Beweisverfahren und die Grenzen richterlicher Vorlageanordnungen, NJW 2014, pp. 22 ff.
[127] Musielak in Musielak/ Voit, Kommentar zur ZPO, 12. ed., 2015, Einl. Rz. 52.

proceedings and to introduce their pleas in law timely, § 282 ZPO, serve the principle of concentration.[128]

2 General Principles of Evidence Taking

2.1 Free Assessment of Evidence

The principle of free assessment of evidence ("Freie Beweiswürdigung") is a general principle in any statutory procedural law in Germany.[129] It is the central principle regarding the provisions on evidence within the German Code of Civil Procedure and can be found in its § 286 para. 1 ZPO. The principle states that the judge at the end of the oral hearing needs to evaluate the results obtained by the taken evidence according to his own independent conviction and decide if he considers the facts put forward by the parties to be true. This is an entirely internal process. The provision intentionally relies on the subjective criterion of free assessment of evidence rather than any objective criteria. The judge is merely obliged to consider rules of logic, empirical principles and natural law[130], which limit his freedom in assessing the evidence. For a fact to be deemed true, the court does not have to be certain of it. While 'certainty' does not leave room for any, even minor, doubts the wording of the provision points in another direction. According to § 286 para. 1 s. 1 ZPO for a fact to be established as true the court must *deem* it to be so. It is considered to be sufficient if the court is *convinced* that the fact is true after assessing the evidence.[131]

If the court, after a duly conducted taking of evidence process, cannot reach the conviction that the fact in question has been established (*non liquet*), it still needs to take a decision on the merits. Refraining from doing so would constitute a violation of the right to have justice administered ("Justizgewährungsanspruch"), Art. 19 para. 4 GG[132]. Consequently, in these *non liquet*-situations the court will decide according to the burden of proof and decide against the party who had the burden of proof and failed to produce sufficient evidence.[133]

As stated above the court may only base its decision on such material that the parties introduced into the proceedings.[134] If a certain fact is disputed between the parties, the party who bears the burden of proof needs to offer evidence to support the disputed fact. Only after all the taking of evidence is concluded the court may freely assess the

[128] Saenger in Saenger, Kommentar zur Zivilprozessordnung, 6. ed., 2015, Einl. Rz. 62.
[129] E.g. § 261 German Code of Criminal Procedure (StPO), § 108 para. 1 German Code of Administrative Court Procedure (VwGO), §§ 46 para. 2, 84 p. 1 German Labour Court Law (ArbGG), § 30 German Federal Constitutional Court Act (BVerfGG).
[130] Prütting in Münchener Kommentar zur ZPO, 4. ed., 2013, § 286 Rz. 14.
[131] Prütting in Münchener Kommentar zur ZPO, 4. ed., 2013, § 286 Rz. 18.
[132] Grundgesetz (GG): Basic Law for the Federal Republic of Germany.
[133] Rosenberg/ Schwab/ Gottwald, Zivilprozessrecht, 17. ed., 2009, § 115 Rz. 1 f.; Saenger in Saenger, Kommentar zur Zivilprozessordnung, 6. ed., 2015, § 286 Rz. 34.
[134] Jauernig/ Hess, Zivilprozessrecht, 30. ed., 2011, § 25 Rz. 8 ff.

evidence according to the principle of free assessment of evidence. The principle does not extend to the taking of evidence itself.[135]

The scope of the principle is broader than the phrase "free assessment of evidence" implies. The reference point for the assessment is not only the result of the taking of evidence but the oral hearing or hearings in its entirety. The court is supposed to base its decision on all information that it has gained during the proceedings within the legal framework of the German Code of Civil Procedure. The court needs to set out its conviction relating to its assessment of evidence in the reasoning of the decision, § 286 para. 1 s. 2 ZPO. This obligation to state the court's reasons for the judicial decision creates a necessary correlate to the broad principle of free assessment of evidence.[136]

While the judge is hardly limited in his assessment of the evidence there are certain exception from the principle, § 286 para. 2 ZPO. The judge is only bound by rules for the assessment of evidence where the law explicitly provides for such rules, § 286 para. 2 ZPO. Such rules are the exception to the aforementioned general principle. The German Code of Civil Procedure stipulates rules for the assessment of evidence in the context of the protocol of the oral hearing (§ 165 ZPO), the lawyer's confirmation of receipt (§§ 174, 195 para. 2 ZPO), the evidence of service abroad (§ 183 para. 2 ZPO), factual findings of a judgment (§ 314 ZPO) and the evidentiary value of public or private records and documents (§§ 415 to 418, 435, 438 para. 2 ZPO).[137]

The German law acknowledges that certain claims would almost always be dismissed due to a lack of evidence even though the claim might be substantially justified. In those exceptional cases the law reduces the standard of proof to a prima-facie evidence. In that context it would be sufficient for the party who has the burden of proof to establish the facts and raise the presumption that the fact is true unless it is disproven by the other party. This lower standard of proof is common in cases in the field of medical liability regarding the responsibility of the liable party or causality of its action.

Further exceptions with a lower standard of proof can be found in the German Code of Civil Procedure. Such an exception exists for the standard of proof for interim injunctions, §§ 920, 294 ZPO. The provisions require that the claim and the grounds for the interim measure must be demonstrated to the satisfaction of the court, § 920 ZPO. In general a fact shall be deemed 'demonstrated to the satisfaction of the court' ("Glaubhaftmachung") if the fact is in all probability true, § 294 ZPO. In addition to the other means of evidence[138] the provision of § 294 ZPO allows the party to prove the facts by an affirmation in lieu of oath.[139] In assessing whether that standard is met the court is free in the sense of § 286 ZPO.[140]

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[135] Greger in Zöller, Kommentar zur ZPO, 28. ed., 2010, § 286 Rz. 12.
[136] Prütting in Münchener Kommentar zur ZPO, 4. ed., 2013, § 286 Rz. 3.
[137] Lüke, Zivilprozessrecht, 10. ed., 2011, Rz. 268.
[138] Experts, inspection, party testimony, documents and witnesses; see Part I, 3.4, para. 93.
[139] Bacher in Vorwerk/ Wolf (eds.),Beck'scher Online-Kommentar zur ZPO, 15. Ed., 2015, § 294 Rz. 3 ff.
[140] BGH NJW-RR, 2007, p. 776.

Likewise, a lower standard of proof applies in connection with the determination of damages, § 287 ZPO. To facilitate the court's decision on the amount of the claim the court shall rule on this issue at its discretion and conviction based on its evaluation of all circumstances. The provision deviates from the general rule that the parties have to introduce the evidence and empowers the court take evidence on its own motion.[141]

Contracts in which the parties agree on a lower evidentiary standard are not compatible with the mandatory principle of free assessment of evidence.[142] While the parties cannot validly deviate from the free assessment of evidence, they can contractually limit the admissible means of proof as well as decide on a different allocation of the burden of proof.[143]

Consequently, the principle of free assessment of evidence is hardly limited by any rules for the assessment of evidence. It serves as the foundation for the principle of equality of all means of evidence.[144]

2.2 Relevance of Material Truth

The adversarial principle as a fundamental principle of German civil procedure contrasts with the goal to achieve material truth in civil proceedings. The aim of civil proceedings is to end a specific legal dispute by a judicial decision within the scope of the parties' wishes.[145]

The law simultaneously contains provisions which aim for a fair trial in the sense that the court does not consciously need to disregard the material truth. These provisions are necessary to balance the adversarial principle and the correctness of the judicial decision. The central provision that intends to guarantee a correct fact finding process is § 138 ZPO.

According to this provision the parties are supposed to make their declarations as to the facts and circumstances fully and completely and are obligated to tell the truth.

The parties' obligation to tell the truth prohibits the parties from intentionally introducing facts as truth against their better judgment. A party must not make assertions if it knows that the assertions are untrue. A party is equally not allowed to dispute allegations made by the other party if it knows those allegations to be true. It does not constitute a violation of the obligation to tell the truth if the party introduces

[141] Foerste in Musielak/ Voit, Kommentar zur ZPO, 12. ed., 2015, § 287 Rz. 1.
[142] Leipold in Stein/ Jonas, Kommentar zur ZPO, 28. ed., 2010, § 286 Rz. 8; Rosenberg/ Schwab/ Gottwald, Zivilprozessrecht, 17. ed., 2009, § 113 Rz 9.
[143] Prütting in Münchener Kommentar zur ZPO, 4. ed., 2013, § 286 Rz. 166.
[144] Prütting in Münchener Kommentar zur ZPO, 4. ed., 2013, § 286 Rz. 1 f.
[145] Braun, Lehrbuch des Zivilprozeßrechts, 1. ed., 2014, p. 99 f.

facts which it is uncertain about or disputes facts introduced by the opposing party if it considers those facts to be possibly true.[146]

Not every evidence that could be obtained, is legally permissible. In certain situations the court is forbidden to consider for its decision the result of evidence that has already been taken. There are generally two kinds of prohibitions regarding the taking of evidence.[147]

Firstly, some methods of collecting evidence are prohibited either in certain situations or in general. In proceedings in which solely documentary evidence is submitted, proceedings on claims arising from a bill of exchange and proceedings on claims asserted concerning the payment of a cheque other means of evidence than documentary evidence or proof through examination of the opponent are not admissible, §§ 595 para. 2, 605 para. 1, 605 a ZPO. Equally, the evidence of witnesses can be prohibited if the person who could serve as a witness is bound by professional secrecy (e.g. doctors, priest etc.) or if the witness may refuse to testify on personal grounds (§ 383 ZPO).[148] Also unknown in German civil proceedings is obtaining evidence in a discovery process. There is no general procedural obligation of a party or a third person to provide the opposing party with information or documents which are not in the possession of that party.[149]

Secondly, the court is under certain circumstances forbidden to make use of already taken evidence. The obtainment of the evidence can be illegal due to various reasons: the witness might not have been instructed on his right to refuse testimony or one of the parties might have obtained a tape recording illegally because it was recorded without the recorded persons consent. The law itself is silent on the question if such illegally obtained evidence can be introduced into the proceedings. There are different approaches in scholarly writing to solve this question. While some scholars deem the illegal way of obtaining the evidence of no concern with regard to its use in civil proceedings[150], courts will most likely refrain from basing their decision on unlawfully obtained evidence if the obtainment of evidence was accompanied by a violation constitutionally protected rights.[151]

These limitation and prohibitions naturally limit the possibility to establish material truth.

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[146] Wagner in Münchener Kommentar zur ZPO, 4. ed., 2013, § 138 Rz. 2.
[147] Prütting in Münchener Kommentar zur ZPO, 4. ed., 2013, § 284 Rz. 63.
[148] Saenger in Saenger, Kommentar zur ZPO, 6. ed., 2015, § 284 Rz. 31.
[149] BGH, NJW 2000, pp. 1108 f.; BGH, NJW 1997, pp. 128 f.; BGH, NJW 1990, p. 3151.
[150] Werner, Verwertung rechtswidrig erlangter Beweismittel, NJW 1988, pp. 993 ff.
[151] Prütting in Münchener Kommentar zur ZPO, 4. ed., 2013, § 284 Rz. 64.

2.3 Other General Principles Regarding Evidence Taking

There are mainly two other principle regarding the taking of evidence. Both principles constitute general principles of German civil procedure.[152]

The principle of directness is specifically relevant regarding the taking of evidence.[153] It is statutorily regulated in § 355 ZPO. It stipulates that the evidence shall be taken before the court that is hearing the case to ensure that the adjudicator who ultimately decides on the matter has the possibility to gain a personal impression of the evidence.[154]

The principle of concentration aims to achieve fast and affordable proceedings.[155] Several provision within the German Code of Civil Procedure are based on this rationale. The law imposes obligations on the court to conduct the proceedings efficiently. Generally, the legal dispute shall be dealt with and terminated in one main hearing, § 272 para. 1 ZPO. It is the court's duty to comprehensively prepare for that hearing and ensure that all the means of evidence the parties relied on in their written submissions are present at the hearing, § 273 ZPO. The parties at the same time have to introduce their pleas in law timely, § 282 ZPO. If they fail to do so the court may refuse to accept their submissions including means of evidence, § 296 ZPO.[156]

3 Evidence in General

3.1 Evidentiary Value of Means of Evidence

The German Code of Civil procedure stipulates that the court is free in its assessment of evidence ("Freie Beweiswürdigung"), § 286 ZPO.[157] By basing the assessment of evidence on this principle the provision simultaneously stipulates that all means of evidence have the same evidential value given that the taken evidence has been conducted properly and the evidence is admissible.[158]

3.2 Formal Rule of Evidence under German Civil Procedure

The judge is hardly limited in its assessment of the evidence.[159] There are certain rules for the assessment of evidence where the law explicitly provides such regulations, § 286 para. 2 ZPO. These are exceptions to the aforementioned general principle of free assessment of evidence. The German Code of Civil Procedure regulates the assessment of evidence in the context of the protocol of the oral hearing (§ 165 ZPO), the lawyer's

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[152] Cf. Part I, 1.5 and 1.8.
[153] Cf. Part I, 1.8, para. 67.
[154] Rauscher in Münchener Kommentar zur ZPO, 4. ed., 2013, Einl. Rz. 370.
[155] Cf. Part I, 1.8, para. 67.
[156] Saenger in Saenger, Kommentar zur Zivilprozessordnung, 6. ed., 2015, Einl. Rz. 62.
[157] Cf. Part I, 2.1, para. 68.
[158] Prütting in Münchener Kommentar zur ZPO, 4. ed., 2013, § 286 Rz. 1; Ahrens in Wieczorek/Schütze, Kommentar zur ZPO, vol. 4, 4. ed., 2013, § 286 Rz. 28.
[159] Cf. Part I, 2.1, para. 72.

confirmation of receipt (§§ 174, 195 para. 2 ZPO), the evidence of service abroad (§ 183 para. 2 ZPO), factual findings of a judgment (§ 314 ZPO) and the evidentiary value of public or private records and documents (§§ 415 to 418, 435, 438 para. 2 ZPO).[160] Mandatory rules of evidence need to be statutorily regulated and may not simply be established by case law.[161]

3.3 Minimum Standard of Proof

As stated above the German Code of Civil Procedure sets out the principle of free assessment of evidence in § 286 para 1 ZPO.[162] Under this principle the court has discretion to decide in the light of the entire content of the proceedings if it considers a fact to be true or false. For a fact to be established as true the court must *deem* it to be so. The court needs to be *convinced* that the fact is true after assessing the evidence. An overwhelming or high degree of probability is not sufficient to prove a fact. At the same time it is not necessary that all doubt have to be excluded.[163] The German Federal Supreme Court has stated in several decisions that '*all there has to be is a feasible degree of certainty in normal day-to-day life which allows some element of doubt without completely excluding it*'.[164]

3.4 Means of Proof

The German Code of Civil Procedure knows two different ways to take evidence: strict taking of evidence ("Strengbeweisverfahren") and informal taking of evidence ("Freibeweisverfahren").

The law lists five means of proof for the strict taking of evidence: expert testimony (§§ 402 – 414 ZPO), visual inspection (§§ 371 – 372a ZPO), examination of the opponent (§§ 445 – 455 ZPO), documents (§§415 – 444 ZPO) and witness testimony (§§373 – 401 ZPO). The strict taking of evidence method generally applies to facts that are disputed between the parties and, consequently, need to be proved. The law provides these numerous provision regarding the taking of evidence for these means of proof and, thereby, intends to safeguard the principles of directness and party publicity throughout the taking of evidence process.[165]

The informal taking of evidence is not tied to certain means of evidence and it does not depend on one party to provide the evidence. The minimum standard of proof always requires the court's conviction of a fact to be true[166] irrespective of the way the evidence

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[160] Lüke, Zivilprozessrecht, 10. ed., 2011, Rz. 268.
[161] Ahrens, Der Beweis im Zivilprozess, 1. ed., 2015, chapter 15 Rz. 34.
[162] Cf. Part I, 2.1, para. 68.
[163] Ahrens, Der Beweis im Zivilprozess, 1. ed., 2015, chapter 15 Rz. 44 f.
[164] BGH, NJW 1970, pp. 946 ff.; BGH, NJW 1989, pp. 2948 ff.; BGH, NJW 2003, pp. 1116 ff.; BGH, NJW 2006, pp. 3416 ff.; BGH, NJW 2008, pp. 1381 ff.; BGH, NJW 2008, p. 2846.
[165] Ahrens, Der Beweis im Zivilprozess, 1. ed., 2015, chapter 3 Rz. 23.
[166] Cf. Part I, 3.3, para. 91.

was taken.[167] The informal taking of evidence permits the court to consider other means of proof, such as obtaining information over the phone. The law expressly allows the informal taking of evidence by way of exception for information procured from government bodies (§§ 273 para. 2 and 358 a para. 2 ZPO) and if the parties consented to it (§ 284 s. 2 ZPO).[168]

Additionally, courts have decided that to prove certain requirements of a claim or in certain types of proceedings the evidence can be taken informally. In this sense, it has been established by case law that evidence may be taken informally for facts which the court has to consider on its own motion, such as the admissibility of a claim or an appeal.[169] This jurisprudence is commonly rejected by scholars.[170] Equally, in proceedings that do not require an oral hearing, legal aid proceedings and proceedings concerning a claim under 600 Euros (§ 495 a ZPO) the evidence may be taken informally.[171]

As mentioned above the law lists five means of proof for the strict taking of evidence.

The provisions regarding *expert testimony* can be found in §§ 402 to 414 ZPO. While experts provide the court with the specialist knowledge that it does not possess in order to assess the facts, they usually do not establish the facts themselves. Experts are typically required to give a judgment on the basis of established facts. Seldom, an expert is required to establish the facts and to give his conclusions, e.g. a doctor's diagnosis. A private expert report obtained by one of the parties may be admitted as expert evidence with the consent of both parties.[172]

The law sets out provisions concerning the *visual inspection* in §§ 371 to 372 a of the ZPO. The visual inspection is understood to be a physical inspection of the evidence by the judge. It is understood to allow beyond the wording of § 371 ZPO any perception of the senses by the court and, thus, to include touching, smelling, listening and tasting.[173]

Provisions regarding *documents* as evidence can be found in §§ 415 to 444 ZPO. The law distinguishes public and private documents. They differ in terms of their evidentiary value.[174] Public documents are 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

[167] BGH, NJW 1997, pp. 3319 f.; BGH, NJW-RR 2002, p. 1070; Saenger in Saenger, Kommentar zur Zivilprozessordnung, 6. ed., 2015, § 284 Rz. 22.
[168] Foerste in Musielak/ Voit, Kommentar zur ZPO, 11 ed., 2014, § 284 Rz. 5.
[169] BGH, NJW 1951, pp. 441 ff.; BGH, NJW 1987, pp. 2875 ff.; BGH, NJW 1992, pp. 627 ff.; BGH, NJW 1997, pp. 3319 ff.
[170] Ahrens in Wieczorek/ Schütze, Kommentar zur ZPO, vol. 4, 4. ed., 2013, § 284 Rz.48; Laumen in Prütting/ Gehrlein, 6. ed., 2014, § 284 Rz. 21; Greger in Zöller, Kommentar zur ZPO, 28. ed., 2010, Vor § 284 Rn. 7.
[171] Prütting in Münchener Kommentar zur ZPO, 4. ed., 2013, § 284 Rz 30 ff.
[172] Musielak/ Voit, Grundkurs ZPO, 12. ed., 2014, Rz. 437 f.
[173] Bach in Beck'scher Online-Kommentar zur ZPO, 15. ed., 2015, § 371 Rz. 1 f.
[174] Cf. Part I, 5.3, para. 144.

sphere of business assigned to him or it.[175] Private documents are private records and documents that are issued by a private party.[176]

Witness testimony is admissible evidence according to §§ 373 to 401 ZPO. Witness evidence is commonly used in practice.[177] In general, any person who can testify on facts by his or her own perception can be a witness.[178] Witnesses are supposed to testify on events only according to their own perception and not to express their own opinion or draw conclusions.[179]

The German Code of Civil Procedure provides for *party testimony* by way of an examination of the opponent as a means of evidence, §§ 445 to 455 ZPO. In general, the law distinguishes between a party's statement ("Parteianhörung") in the proceedings (§ 141 ZPO) and party testimony ("Parteivernehmung", §§ 445 – 455 ZPO). To ask a party for its statement constitutes part of the court's obligation to discuss with the parties the circumstances and facts of the case in order to direct the substance of the course of proceedings, § 139 ZPO. The parties' statements in that context serve to collect all the facts necessary to decide the case. A party testimony on the other hand serves a different purpose: It is a means of evidence which a party relies on to convince the court that a certain disputed fact is true or untrue. Every party, that has legal capacity, or otherwise its legal representative (§ 455 para. 1 ZPO) can be ordered to testify. Persons, who are legally incompetent or do not possess procedural capacity, generally can be heard as witnesses.[180] The law stipulates that party testimony is a subsidiary means of evidence which should only be considered if the party who bears the burden of proof on a certain issue did not fully provide other evidence or has failed to submit other evidence in total, § 445 para. 1 ZPO. Thereby, the German Code of Civil Procedure takes into account that the party testifying is compelled to tell the truth (§ 446 ZPO), but in doing so might harm its own position.[181] The court may also order the party testimony of the party who bears the burden of proof regarding certain facts if this party has requested to testify and the other party has consented to such testimony, § 447 ZPO.

Finally, the court on its own motion may order a party to testify if the results of the hearing and of the taking of evidence do not suffice to establish the truth or untruth of a fact to the satisfaction of the court, § 448 ZPO. In order to respect the subsidiary nature of party testimony the court shall only order a party to testify if it considers it likely that the disputed fact can be established to be true or untrue by means of party testimony. In practice the courts often order a party to testify in cases where the success of the claim depends on the court's assessment of a one-to-one conversation. Typically, the difficulty in such scenario derives from the procedural position the participants of the conversation hold. The conversational partners in these cases are usually an employee

[175] Foerschler/ Steinle, Der Zivilprozess, 7. ed., 2010, Rz. 860.
[176] Foerschler/ Steinle, Der Zivilprozess, 7. ed., 2010, Rz. 868.
[177] Musielak/ Voit, Grundkurs ZPO, 12. ed., 2014, Rz. 429.
[178] Jauernig/ Hess, Zivilprozessrecht, 30. ed., 2011, § 53 Rz. 1.
[179] BGH, NJW 2007, pp. 2122 ff.
[180] Schreiber in Münchener Kommentar zur ZPO, 4. ed., 2012, § 445 Rz. 4.
[181] Schreiber in Münchener Kommentar zur ZPO, 4. ed., 2012, § 445 Rz. 6.

of one party and the other party itself. In this situation the party whose employee was involved could call the employee as a witness in the proceedings. The other party would – given that no other means of evidence is available – fall short on its burden of proof.[182] The German Federal Supreme Court considers this result to violate the 'equality of arms' principle, the right to be heard and the right to a fair trial. Consequently, the Court deems it necessary to order the party to testify on the court's own motion according to § 448 ZPO or to hear the party's statement regarding the conversation in question according to § 141 ZPO.[183]

Both, a party's statement before the court and party testimony, require an order by the court. While the order to take evidence by party testimony needs to fulfill all requirements set out by § 359 ZPO, which deals with the content of orders for evidence to be taken, the order that a party shall appear in person in order to elaborate on facts and circumstances of the case in the sense of § 141 ZPO can be issued by the court on its own motion. If the party, that was ordered to appear in person, fails to comply with said order, the court may impose a fine, § 141 para. 3 s. 1 ZPO. The court's authority only extends to the parties' physical appearance. The party may nevertheless remain silent and cannot be forced to do otherwise. The party has to strategically decide whether it will comment on the facts of the case since the court deduces from a party's silence on certain issues that these issues are not in dispute between the parties, § 138 para. 3 ZPO. Additionally, the court can take the parties' silence into consideration during the assessment of evidence since it needs to contemplate the entire content of the hearings and the results obtained by evidence being taken during the assessment of evidence[184], § 286 para. 1 ZPO.

If the court orders a party to testify and the party chooses to comment on the substance it is obliged to tell the truth. This obligation to tell the truth constitutes a significant difference between a party's statement and a party testimony. In their submissions the parties may state facts even if they are unsure regarding the truth or untruth of said fact. They are only forbidden to knowingly state what they know to be false. In a testimony a party is not only obliged to tell the truth, but also to voice if it has any doubts regarding the facts it testifies about. In contrast to a witness testifying, a party may refuse to testify under oath.[185]

3.5 Rules of Evidence for Rights Arising out of a Cheque or Bill of Exchange

As mentioned before, the German Code of Civil Procedure seldom stipulates obligatory forms of evidence. Such exception exists for claims arising out of a cheque or bill of exchange. In such proceedings the claim may only be supported by documentary evidence or examination of the opponent, §§ 595 para. 2, 602, 605 para. 1, 605 a ZPO.[186] The fact that the right out of the cheque or bill of exchange arises without a

[182] Braun, Lehrbuch des Zivilprozeßrechts, 1. ed., 2014, pp. 814 ff.
[183] BGH, NJW-RR 2006, pp. 61 ff.
[184] Cf. Part I, 2.1, para. 68.
[185] Braun, Lehrbuch des Zivilprozeßrechts, 1. ed., 2014, p. 818.
[186] Cf. Part I, 2.2.

formal protest in the sense of § 44 WG[187] may not only be proven by the document itself, but also by an examination of the opponent.[188]

3.6 Evidentiary Value of Various Types of Evidence in One Proceeding

The court is free in its assessment of the evidence ("Freie Beweiswürdigung") and, thus, can also decide freely which evidentiary value it will assign to a certain evidence and the relation between the means of proof that were taken. The judge will assign a certain value to a piece of evidence according to its logical persuasiveness.

While the judge is hardly limited in its assessment of the evidence, there are certain exception from the principle (§ 286 para. 2 ZPO) which the judge is bound by. Such rules that form an exception to the aforementioned general principle of free assessment of evidence are explicitly mentioned in the law. The German Code of Civil Procedure stipulates rules for the assessment of evidence in the context of the protocol of the oral hearing (§ 165 ZPO), the lawyer's confirmation of receipt (§§ 174, 195 para. 2 ZPO), the evidence of service abroad (§ 183 para. 2 ZPO), factual findings of a judgment (§ 314 ZPO) and the evidentiary value of public or private records and documents (§§ 415 to 418, 435, 438 para. 2 ZPO).[189]

As mentioned before there is only one piece of evidence that is considered to be subsidiary: party testimony. A party testimony is admissible only if the party who bears the burden of proof on the fact to be proven did not fully provide other evidence or has failed to submit other evidence in total, § 445 para. 1 ZPO.[190]

The German Code of Civil Procedure by way of exception stipulates that documentary evidence or examination of the opponent are the obligatory forms of evidence in claims arising from a deed, a bill of exchange or a cheque, §§ 595 para. 2, 602, 605 para. 1, 605 a ZPO.[191]

3.7 Parties' Duty to Produce and Deliver Evidence

As part of the principle of party presentation the party bearing the burden of proof ("Beweislast") needs to state the facts that support its claim ("Behauptungslast") and has to submit the corresponding evidence in due time, § 282 ZPO.[192]

Nevertheless, the court may order the taking of evidence regarding documents (§ 142 para. 1 ZPO), visuals inspections and expert reports (§ 144 para. 1 ZPO) as well as party testimony (§ 448 ZPO) on its own motion according to its best judgement. This

[187] Wechselgesetz (WG): Bills of Exchange Act.
[188] Braun in Münchener Kommentar zur ZPO, 4. ed., 2012, § 605 Rz. 2.
[189] Lüke, Zivilprozessrecht, 10. ed., 2011, Rz. 268; Cf. Part I, 2.1, para. 72; ,5 para. 144 ff.
[190] Schreiber in Münchener Kommentar zur ZPO, 4. ed., 2012, § 445 Rz. 6.
[191] Cf. Part I, 2.2, para. 83.
[192] Musielak/ Voit, Grundkurs ZPO, 12. ed., 2014, Rz. 401 f.

possibility does not exist for the evidence by witness testimony.[193] Provided that the court does not order the taking of evidence on its own motion, the party, who bears the burden of proof, has to offer evidence by an application to the court to issue an order for evidence to be taken. The court will then decide if it will follow that application and issue a formal order for evidence to be taken (§§ 358, 358 a ZPO) or if it will reject the party's application. The court is free initiate the taking of evidence process by the aforementioned formal order for evidence to be taken or by an informal directive in the oral hearing.

3.8 Third Person's Duty to Produce and Deliver Evidence

There a certain procedural scenarios, in which a third party is obliged to deliver evidence.

If the third person is a witness, there is an obligation to appear (§ 380 ZPO), provide personal information (§ 395 para. 2 ZPO), testify on the facts (§ 396 ZPO) and to – if necessary – declare under oath (§ 391 ZPO).[194] A witness may only refuse to testify on personal grounds or for factual reasons if the law allows such refusal, §§ 383 and 384 ZPO. If the third person refuses to testify without compelling reasons, the court can impose a coercive fine or coercive detention, § 390 para. 1 s. 2 ZPO. Additionally, the costs resulting from such refusal shall be imposed on the witness, § 390 para. 1 s. 1 ZPO. Should the witness repeatedly refuse to testify the detention of the witness shall be ordered upon a corresponding application being made in order to extract a testimony from the witness, § 390 para. 2 ZPO.

The court may order a third person to submit documents or visual evidence for an inspection, §§ 142 para. 2, 144 para. 2 ZPO, unless the obligation to submit the document is unreasonable or the third person has a right to refuse to testify. In assessing whether it is unreasonable for the third person to submit a document or visual evidence, the court will typically take into consideration personal factors, such as age, health condition and protection of privacy, and factual circumstances, such as effort, cost and time. If the third person refuses to submit documents or visual evidence without providing any ground for such refusal it has to bear the above mentioned consequences stipulated in § 390 para. 1 ZPO: coercive fine, coercive detention and costs resulting from the refusal.[195]

If the third person is appointed as an expert, that person is obligated to comply with that appointment and submit an expert report of the type required, § 407 ZPO. Regarding expert's right to refuse to submit a report, § 408 ZPO serves the purpose of clarification. § 402 refers to the provisions regarding witness testimony in general. Thus, it also refers to the provisions in §§ 383 and 384 ZPO, which allow an expert to refuse to testify on the personal grounds or for factual reasons.[196] In the event that the expert fails to appear

[193] Ahrens, Der Beweis im Zivilprozess, 1. ed., 2015, chapter 12 Rz. 7.
[194] Damrau in Münchener Kommentar zur ZPO, 4. ed., 2012, § 373 Rz. 24 f.
[195] Wagner in Münchener Kommentar zur ZPO, 4. ed., 2012, § 144 Rz. 14.
[196] Zimmermann in Münchener Kommentar zur ZPO, 4. ed., 2012, § 408 Rz. 1.

or refuses to submit a report without valid reasons, the costs entailed by this conduct shall be imposed on the expert. In addition, the court may order a coercive fine against the expert, § 409 ZPO.

3.9 Evidentiary Value of Judicial and Administrative Decisions as Evidence

Judicial decisions and document from court files can be introduced as documentary evidence. This applies for criminal court files. Nevertheless, he court in civil proceedings may not rely on such results and findings without evaluating them itself and is not bound by them. Judicial decisions will, however, have a great significance for the proceedings before the civil court since the judge will most likely follow them unless there are compelling reasons not to do so.[197]

Even though it is possible to introduce a witness statement from previous proceedings by documentary evidence any party may insist on an oral witness statement in front of the court. The court will generally assign lesser evidentiary value to the document containing the witness testimony than the testimony itself. With regard to expert reports, a written report in the current proceedings may be forgone if another expert report can be used, that has been obtained by the court or the public prosecution office in other court proceedings, § 411 a ZPO.[198]

4 General Rule on the Burden of Proof[199]

4.1 Doctrine Behind the Burden of Proof Rules under German Civil Procedure

There is a general rule on the burden of proof in German civil procedure that each party shall have the burden of proving the facts it relied on to support its claim or defense.[200] In the situation that the taking of evidence does not lead to a clear result the court has nevertheless to decide the case. Hence, in such a non-liquet situation the court has to rule according to the objective burden of proof ("objektive Beweislast") and decide against the party who bears the objective burden of proof.[201]

4.2 Standard of Proof under German Civil Procedure

The judge is generally free in its assessment of evidence ("Freie Beweiswürdigung"), § 286 ZPO. According to § 286 para. 1 s. 1 ZPO for a fact to be established as true, the court must *deem* it to be so. It is considered to be sufficient if the court is *convinced* that the fact is true after assessing the evidence.[202]

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[197] Foerste in Musielak/ Voit, Kommentar zur ZPO, 11 ed., 2014, § 286 Rz. 9.
[198] Foerste in Musielak/ Voit, Kommentar zur ZPO, 11 ed., 2014, § 286 Rz. 5.
[199] Cf. Part I, Preliminary remarks, para. 19.
[200] BGH, NJW 1991, pp. 1052 f.; BGH, NJW 2005, pp. 2395 f.; Rosenberg, Zivilprozeßrecht, 8. ed., 1960, p. 555.
[201] Cf. Part I, Preliminary Remarks, para. 19.
[202] Cf. Part I, 2.1, para. 68.

4.3 Exemptions of the Burden of Proof

In general the parties' conduct decide whether a certain fact needs to be proven. There are some scenarios in which a party's behavior makes the necessity of proof redundant.

Facts alleged by one party do not require any substantiation by evidence if they are admitted by the opponent, § 288 ZPO. Such an admissions requires a declaration, which can also be made impliedly.[203] The mere silence with regard to the allegations made by the opposing party is, however, not sufficient.[204] The party's will to admit certain facts must become clear.[205] An admitted fact – like an undisputed fact (§ 138 para. 3 ZPO) – does not need any further evidence. The court is bound by the admission even if it has already taken evidence and the result of the taking of evidence contradicts the admission.[206]

Equally, facts, which are not in dispute between the parties, do not have to be substantiated by evidence, § 138 para. 3 ZPO. The court is also bound by this conduct of the parties.

The law stipulates another exemption for facts that are evident. In § 291 ZPO it says that facts, that are common knowledge with the court, need not be substantiated by evidence. The court may take such evident facts into consideration without an assertion by one of the parties. The court hast to give the parties the opportunity to express their view with regard to such facts. Otherwise the parties' right to be heard would be violated.[207] Facts are evident or common knowledge if they are known to a vast number of people or if they can easily be found out or if they are known to the court through its official activities.[208]

Furthermore, legally presumed facts do not need to be proven. § 292 ZPO clarifies that in case the law itself contains a presumption as to a certain fact being given it is admissible to prove the opposite unless the law explicitly provides otherwise. This rule causes a shift in the burden of making sufficient assertions as well as the burden of proof.[209]

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[203] BGH, NJW 2002, pp. 1276 f.; BGH, NJW 2000, pp. 276 f.
[204] BGH, NJW 1999, pp. 579 f.
[205] BVerfG, NJW 2001, p. 1565; BGH, NJW-RR 1996, p. 1044.
[206] Bacher in Vorwerk/ Wolf (eds.), Beck'scher Online-Kommentar zur ZPO, 15. ed., 2015, § 288 Rz 6.
[207] BVerfG, NJW 1960, p. 31; Rosenberg/ Schwab/ Gottwald, Zivilprozessrecht, 17. ed., § 112 Rz. 25.
[208] Rosenberg/ Schwab/ Gottwald, Zivilprozessrecht, 17. ed., § 112 Rz. 26 and 28.
[209] Bacher in Vorwerk/ Wolf (eds.),Beck'scher Online-Kommentar zur ZPO, 15. Ed., 2015, § 292 Rz. 1.

4.4 Regulations Regarding the Duty to Contest Specified Facts and Evidence

In German civil procedure the parties are under an obligation to make declarations as to facts and to tell the truth, § 138 para. 1 ZPO. Along with this obligation the parties are requested by law to react in substance to the facts alleged by the opponent, § 138 para. 2 ZPO.

The burden to react to facts by the opponent results from the principle of party presentation and the obligation to tell the truth. Each party has to comment on the factual allegations made by the other party[210] if said party's allegations were substantiated. This does not mean, however, that a party has to explain or add to the opposing party's allegations on the facts. A party has satisfied its obligation to substantiate its submissions by facts if the submitted facts that support the requested legal consequence.[211]

While § 138 para. 2 ZPO stipulates that the opposing party has to react to such substantiated submissions, the exact scope of that obligation is not regulated. There is no general obligation to substantially contest the fact by putting contradicting facts forward ("substantiiertes Bestreiten"). The mere statement that a certain fact is in dispute ("einfaches Bestreiten") can be sufficient. As a general rule the party who contest facts, which the other party relies on, should do so in as much detail as the other party stated the facts in the first place.[212]

4.5 Collection of Evidence *ex officio*

The doctrine of *iura novit curia* is recognized under German law. While the law does not explicitly state this doctrine to apply in German civil procedure, according to the leading opinion in can be derived from § 293 ZPO. This provisions deals with the application of foreign law and stipulates that foreign law – in contrast to German law – needs to be proven and, thus, is a matter of evidence.[213]

4.6 The court's Obligation to Direct the Course of the Proceedings

According to § 139 para. 1 ZPO the court is required 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 to ask questions. The court is to work towards ensuring that the parties to the dispute make declarations timely and completely regarding all significant facts. In particular, the court shall 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.

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[210] BGH, NJW 2010, p. 1357.
[211] Bacher in Vorwerk/ Wolf (eds.), Beck'scher Online-Kommentar zur ZPO, 15. Ed., 2015, § 253 Rz. 22.
[212] Wöstmann in Saenger, Kommentar zur Zivilprozessordnung, 6. ed., 2015, § 138 Rz. 4.
[213] Cf. Part I, Preliminary Remarks, para. 7.

The court is not only empowered, but obliged to discuss the factual and legal matter of the dispute, § 139 para. 2 ZPO. Accordingly, the court can only rely its decisions on matters that the parties did not clearly overlook, unless the court has discussed these aspects with the parties before the judgment, § 139 para. 2 ZPO.

Normally, the court provides such information during the oral hearings, but it is also possible for the court to inform the parties in a notification in the form of an order, a written notification or in a phone call.[214]

As mentioned above the court has an obligation to direct the course of the proceedings in substance, § 139 ZPO. Correspondingly, the court can inform the parties that their applications for evidence to be taken are incomplete or imprecise. Also permitted is a notification by the court that the piece of evidence offered by a party is inadequate or that the party failed to offer any evidence. In proceedings, in which the parties must be represented by counsel, the court is only obligated to give notice to a party if it is obvious that the party's failure to offer (sufficient) evidence is due to an error in its assessment of the legal or factual situation of the case or if it is obvious that the party omitted to hand in an application for evidence to be taken by mistake.[215] If the taking of evidence leads to the result that the party, who had the burden of proof, failed to prove the disputed fact there is no obligation for the court to ask said party to deliver additional evidence.[216]

The court's notification in the sense of § 139 para. 1 ZPO is to be given as soon as possible, § 139 para. 4 ZPO. For the parties the general rule applies that they are supposed to put forward their facts, evidence and defense immediately, § 282 para. 1 ZPO. In order to avoid preclusions the parties can generally submit these until the closing of the oral proceedings, § 296 a ZPO. If a party fails to do so the court can simply not consider such facts or evidence, § 296 para. 1 and 2 ZPO.[217] Accordingly, the court will decide with regard to the burden of proof.

4.7 Possibility to Collect Evidence on the Court's Initiative

In certain matters the procedure will follow an inquisitorial approach. In such proceedings the court may collect evidence on its own motion.[218]

The German Code of Civil Procedure deviates from the general principle of party presentation ("Beibringungsgrundsatz") with regard to certain means of evidence, namely expert report (§ 144 ZPO), documents (§§ 142-143 ZPO), visual inspection (§ 144 ZPO) and party testimony (§ 448 ZPO), and allows the court to take evidence on its own motion.

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[214] Wagner in Münchener Kommentar ZPO, 4. ed., 2013, § 139 Rz. 56.
[215] Smid in Wieczorek/ Schütze, Kommentar zur ZPO, vol.3, 4. ed., 2013, § 139 Rz. 128.
[216] Smid in Wieczorek/ Schütze, Kommentar zur ZPO, vol.3, 4. ed., 2013, § 139 Rz. 135.
[217] Cf. Part I, 1.1, para. 40.
[218] Cf. Part I, Preliminary remarks, para. 6.

4.8 Additional Submission of Evidence

Generally, the parties can introduce facts, evidence and defenses until the closing of the oral proceedings. New evidence may be considered unless it was not introduced earlier due to gross negligence and admitting it would considerably delay the proceedings, § 296 para. 2 ZPO.[219]

4.9 Order to Produce Evidence Addressed to a Third Party

A party, who has the burden of proof, but is not in possession of the means of evidence that would support the facts vital for its claim can ask the court to issue an order to a third person given that the requirements for such an order are met. Consequently, the court may order a third person to submit documents or visual evidence for an inspection unless the obligation to submit the evidence is unreasonable or the third person has a right to refuse to testify.[220]

5 Written Evidence

The German Code of Civil Procedure lists documents as one of the five means of proof[221] in in §§ 415 to 444 ZPO.

In German civil procedure a document is understood to be an embodiment of thought in a written form.[222] Consequently, thoughts, which are not embodied in a written form, are not documents, but objects that can serve for a (visual) inspection. Typically, video recording, tape recording, vinyl records, photographs, license plates etc. are objects which can be introduced in the proceedings for an inspection.[223] Evidence by an inspection includes beyond the wording of the provision, which literally only refers to a visual experience, also fact-finding by any form of sensory perception, such as acoustic, tactile and sensory experiences.[224] While this is a disputed topic in scholarly literature, the majority of scholars and courts consider printouts of other document generally as objects for inspection instead of documentary evidence.[225]

The law distinguishes between public and private documents. Public documents are 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

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[219] Cf. Part I, 1.1, para. 41.
[220] Cf. Part I, 3.9, para. 113 ff.
[221] Cf. Part I, 3.4, para. 93.
[222] BGH, NJW, 1976, p. 294.
[223] Musielak/ Voit, Grundkurs ZPO, 12. ed., 2014, Rz. 446.
[224] Bach in Vorwerk/ Wolf (eds.), Beck'scher Online-Kommentar ZPO, 15. ed., 2015, § 371 Rz. 1; Greger in Zöller, Kommentar zur ZPO, 28. ed., 2010, § 371 Rz. 1.
[225] BGH, NJW, 1980, pp. 1047 f.; BGH, NJW, 1990, pp. 1170 f.; Roßnagel/ Wilke, Die rechtliche Bedeutung gescannter Dokumente, NJW, 2006, pp. 2145 ff.; regarding printouts as documents: Zoller, Die Mikro-, Foto- und Telekopie im Zivilprozeß, NJW, 1993, pp. 429 ff.

it.[226] Typical examples for public documents are notarially certified contracts or court decisions.

Records and documents which, by their form and content, appear to have been executed by a public authority or by a person or entity, shall be presumed to be authentic, § 437 para. 1 ZPO. A document is authentic if the undersigned is also the bearer of the name and the text above the signature stems from the issuer.[227] Consequently, the party, which contests the authenticity of the document has to proof its unauthenticity, § 292 ZPO.

Private documents are private records and documents that are issued by a private party.[228] According to § 440 para. 1 ZPO the party who relies on its authenticity has to proof that the document is authentic. Prior to that, the opposing party has to comment on the authenticity of the document, §§ 439 para. 1, 138 ZPO. If the opposing party fails to do so, the document is acknowledged to be authentic, § 439 para. 3 ZPO.

Public and private documents differ in their evidentiary value. An unflawed and authentic document proves that its issuer made a statement with the content stated in the document. This effect is described in §§ 415 to 418 ZPO, which are specific rules for the assessment of evidence that limit the principle of free assessment of evidence (§ 286 ZPO). In contrast, objects for an inspection can be freely assessed by the court.

A public document in the sense of § 415 para. 1 ZPO proves that statement as contained in the document was actually made by the issuer, that the statement is complete, that statement was made before the certifying authority as well as the time and place when the statement was made. The evidentiary value of a private document in limited in the sense that it proves the statement was made by the issuer, but it does not prove the accompanying circumstances. In general, the rules for the assessment of documents do not extend to the correctness or truthfulness of the respective statement.[229]

The law stipulates in § 371 para. 1 s. 2 ZPO that electronic documents are objects for an inspection. For printouts of electronic documents the law in § 416 a ZPO regulates that they shall be equivalent to a document given that they have been certified by the issuing public authority. E contratio, this means that printouts without such certificate and printouts of private electronic documents are not documents under the German Code of Civil Procedure but objects for an inspection.[230] Regarding the assessment of electronic documents as evidence the law refers to the evidentiary value of public (§§ 415, 417 and 418 ZPO) and private documents (§ 416 ZPO). These rules for the assessment of evidence replace the principle of free assessment of evidence (§ 286 ZPO).[231]

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[226] Foerschler/ Steinle, Der Zivilprozess, 7. ed., 2010, Rz. 860.
[227] BGH, NJW, 1988, p. 2741.
[228] Foerschler/ Steinle, Der Zivilprozess, 7. ed., 2010, Rz. 868.
[229] Schreiber in Münchener Kommentar zur ZPO, 4. ed., 2013, § 415 Rz. 26.
[230] Bach in Vorwerk/ Wolf (eds.), Beck'scher Online-Kommentar ZPO, 15. ed., 2015, § 371 Rz. 3.
[231] Cf. Part I, 2.1, para. 68 ff.

The law stipulates in § 371 a para. 1 s. 1 ZPO that a private electronic document with a qualified electronic signature has the same evidentiary value as a private document, which has been signed by the issuer or is notarially certified. Such a document proves that a statement of that kind was made by the holder of the signature key. With regard to the authenticity of the document there is a special provision in § 371 a para. 1 s. 2 ZPO: the electronic signature is prima facie presumed to be authentic. The opposing party can only prove the inauthenticity by providing facts which raise serious doubts in that regard.[232]

The taking of evidence regarding written evidence is not different from the process for other means of evidence. The court can order the taking of evidence upon the petition of one party or on its own motion. The details depend on the fact whether the document is in the possession of the party relying on the documents to fulfill its burden of proof, in the opposing party's possession or in the possession of a third person. Is the document in the possession of the party relying on it, then that party needs to provide the document, § 420 ZPO. If the party, who has the burden of proof, alleges that the document is in the opposing party's possession evidence shall be offered by filing a petition that the court direct the opposing party to produce said document, § 421 ZPO. The petition needs to fulfill the requirements set out in § 424 ZPO. The (potentially) following order of the court is unenforceable. If the opposing party despite an order of the court does not provide the document, the court will consider this violation in its free assessment of evidence. In particular, the court would have to consider whether the party in violation has legitimate reason not to provide the document, such as to maintain business or trade secrets. If the party relying on the document alleges that it is in the possession of a third person evidence can also be offered by filing a petition with the court that it determine a period for the production of the document or that it issues an order according to § 142 ZPO, § 428 ZPO. Should the third person not follow such an order – without having compelling reasons not to do[233] – the third person has to bear the consequences stipulated in § 390 para. 1 ZPO. In case that the document is in the possession of public authorities or civil servants the party relying on the document can offer evidence by filing a petition with the court that the public authority or the civil servant be requested to provide the record or document.[234]

6 Witnesses

6.1 Witnesses Obligation to Testify

Under German law there is a general obligation for witnesses to testify. Every natural person, who is subjected to German jurisdiction, is under an obligation to appear (§§ 380, 382 ZPO), to testify truthfully (§§ 390, 393 ff. ZPO) and – if necessary – to testify

[232] Bach in Vorwerk/ Wolf (eds.), Beck'scher Online-Kommentar ZPO, 15. ed., 2015, § 371a Rz. 4 f.
[233] Cf. Part I, 3.9, para. 114.
[234] Musielak/ Voit, Grundkurs ZPO, 12. ed., 2014, Rz. 450.

under oath (§§ 390, 391 ff. ZPO).[235] The witness can refuse to testify under oath under the same conditions as it can rightfully refuse to testify.[236]

A witness who gives false testimony will be liable to prosecution, § 153 StGB[237]. The sentence for false testimony is imprisonment from three months to five years. The sentence for perjury is stricter and calls for a sentence of imprisonment of not less than one year and in less serious cases from six months to five years, § 154 StGB.

6.2 Summons of Witnesses by the Court

In contrast to the other means of evidence under the German Code of Civil Procedure, a witness testimony cannot be obtained by the court on its own motion. The court can issue an order for evidence to be taken only after it has received a corresponding petition by one of the parties. The party will generally offer evidence by naming the witness and the fact, which the witness should testify about, in its written submission prior to the main hearing.[238]

The court will then formally issue an order for evidence to be taken, § 358 ZPO. With reference to this order the witness will then be summoned, § 377 ZPO.[239] Should the witness fail to appear, it then has to bear the costs resulting from the non-appearance, § 380 para. 1 s. 1 ZPO. Additionally, the court shall impose a coercive fine and, for the case that this cannot be recovered from the witness, it shall be sentenced to a coercive detention, § 380 para. 1 s. 2 ZPO. If the witness fails to appear repeatedly, the court shall impose the means of administrative coercion once again and it can also order the forcible production of the witness, § 380 para. 2 ZPO.

The party, who has the burden of proof on a certain fact, may spontaneously bring a witness to the hearing, who has not been summoned beforehand, if the witness is familiar with the fact to be proven and has had some time to reflect.[240]

6.3 Right to Refuse Testimony

In general, a witness is under an obligation to testify.[241] The German Code of Civil Procedure contains certain provisions, which a witness can rely on in order to refuse to testify, §§ 383, 384 ZPO.[242]

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[235] Scheuch in Vorwerk/ Wolf (eds.), Beck'scher Online-Kommentar ZPO, 15. ed., 2015, § 373 Rz. 33.
[236] Ahrens, Der Beweis im Zivilprozess, 1. ed., 2015, chapter 39 Rz. 56.
[237] Strafgesetzbuch (StGB): German Criminal Code.
[238] Huber in Musielak/ Voit, Kommentar zur ZPO, 12. ed., 2015, § 373 Rz. 10.
[239] Huber in Musielak/ Voit, Kommentar zur ZPO, 12. ed., 2015, § 373 Rz. 14.
[240] Ahrens, Der Beweis im Zivilprozess, 1. ed., 2015, chapter 33 Rz. 37; Berger in Stein/ Jonas, Kommentar zur Zivilprozessordnung, 22. ed., 2005, § 377 Rz. 2.
[241] Cf. Part I, 6.1, para. 149.
[242] Cf. Part I, 6.4, para. 157.

The German statutory law does not cover the ability to testify in court. The court has to assess the evidence freely[243] and in this context may consider potential limitations of the witness.[244] Only natural entities have the ability to testify in court.[245] Every person, who is intellectually able to make observations, to keep these in mind, to answer questions regarding these observations and reproduce them, has the ability to testify in court.[246] The ability to testify does neither equate with the legal capacity of a person ("Geschäftsfähigkeit"), §§ 104ff. BGB[247], nor with the ability to be placed under an oath, § 393 ZPO. Consequently, the court may reject an offer to hear a person as a witness if it does not expect the witness to be able to clarify the evidentiary questions.[248]

Under German law a witness is protected against self-incrimination. Such provision exist for criminal matters, § 55 StPO. Likewise, in civil procedure the witness does not have to answer those questions that would result in the witness or one of its relatives (§ 383 para. 1 no. 1 to 3 ZPO) being dishonored or subject to prosecution for a criminal or administrative offence, § 384 no. 2 ZPO.

The German Code of Civil Procedure covers reasons for a refusal to testify in its §§ 383 and 384 ZPO. A witness can refuse to give evidence in accordance with § 383 ZPO for personal reasons. This provisions purposes to protect the witness against conflicts due to the witness' close relationship to one of the parties. The right to refuse to testify in § 384 ZPO is based on factual reasons, namely not to force a witness to cause harm to itself or a relative. Fiancés, (former) spouses, (former) partners under a civil union, relatives and relatives by marriage of one of the parties can refuse to testify, § 383 para. 1 no. 1 to 3 ZPO. The court has to instruct these persons about their right to refuse to testify prior to being examined, § 383 para. 2 ZPO. Should the court fail to instruct the witness in that regard, the witness' testimony is nevertheless admissible if this infringement is not objected to in time, § 295 ZPO.[249] Equally, members of the clergy, members of the press and of broadcasting and persons, who are obliged to secrecy by virtue of their office, profession or status, are allowed to refuse testimony, § 383 para. 1 no. 4 to 6 ZPO. The category of persons, who are professionally obliged to secrecy in the sense of § 383 para. 1 no. 6 ZPO, includes inter alia medical doctors, lawyers, judges, tax consultants, civil servants, mediators, auditors and the (former) organ of a legal entity.[250]

A witness may refuse to answer question if the witness testimony would result in a direct patrimonial damage to the witness or one of its relatives (§ 383 para. 1 no. 1 to 3

[243] Cf. Part I, 2.1, para. 68.
[244] Findeisen, Der minderjährige Zeuge, 1992, p. 22 f.
[245] OLG Düsseldorf, MDR, 1988, p. 593.
[246] BGH, NJW, 1985, p. 1158 f.; Scheuch in Vorwerk/ Wolf (eds.), Beck'scher Online-Kommentar ZPO, 15. ed., 2015, § 373 Rz. 27.
[247] Bürgerliches Gesetzbuch (BGB): German Civil Code.
[248] Damrau in Münchener Kommentar zur ZPO, 4. ed., 2013, § 373 Rz. 6.
[249] Scheuch in Vorwerk/ Wolf (eds.), Beck'scher Online-Kommentar ZPO, 15. ed., 2015, § 383 Rz. 38.
[250] Eichele in Saenger, Kommentar zur Zivilprozessordnung, 6. ed., 2015, § 383 Rz. 11.

ZPO), § 384 no. 1 ZPO. Likewise, if the testimony would result in the witness or one of its relatives (§ 383 para. 1 no. 1 to 3 ZPO) being dishonored or subject to prosecution for a criminal or administrative offence, the witness may refuse to testify, § 384 no. 2 ZPO. Furthermore, the witness does not have to answer questions it would not be able to answer without disclosing a technical or trade secret, § 384 no. 3 ZPO.

The reasons set out in § 383 para. 1 no. 1 to 3 ZPO allow the witness to fully refuse to give evidence. In contrast, the reasons stipulated in § 383 para. 1 no. 4 to 6 ZPO and § 384 ZPO allow the witness only to remain silent and refuse to testify with regard to the evidentiary issue ("Beweisthema").

The law stipulates in § 385 ZPO exceptions from the right to refuse testimony. In case the witness is closely related to one of the parties in the sense of § 383 para. 1 no. 1 to 3 ZPO or may refuse testimony as set out in § 384 no. 1 ZPO, the witness may not refuse to testify about the following subjects: the implementation and subject matter of a legal transaction which he or she was asked to attend as a witness, civil status matters of family members, facts concerning property matters of his family and actions of the witness in the capacity of a predecessor or representative of a party, which are related to the issue at hand, § 385 para. 1 ZPO. Witnesses, who have a right to refuse to testify according to § 383 para. 1 no. 4 and 6 ZPO, are compelled to give testimony if they have been released from their confidentiality obligations, § 385 para. 2 ZPO. With regard to clerics (§ 383 para. 1 no. 4 ZPO) the provision of § 385 para. 2 ZPO is substantially redundant due to Art. 9 Reich Concordat ("Reichskonkordat"). The Reich Concordat is a treaty between the Holy See and Germany from 1933, which is still in effect. Art. 9 Reich Concordat states that clerics of catholic faith cannot be released from their confidentiality obligation regarding facts which they became aware of as a result of their pastoral work. For reasons of equality this rule also applies to clerics of other denominations. Consequently, the confidentiality obligation of the clergy has the status of an institutional guarantee.[251]

The witness, who wants to refuse testimony, needs to submit to the court the facts on which it is basing its refusal and to substantiate them prior to the hearing in writing or for the files of the court registry or by submitting them at the hearing itself, § 386 para. 1 ZPO. The witness substantiates its refusal by indicating the facts and circumstances which justify the refusal to testify, such as facts regarding the witness family relationship in the sense of § 383 para. No. 1 to 3 ZPO. The court must be able to verify the legal situation, however, not the witness' motives.[252] If the witness relies on § 383 para. 1 no. 4 to 6 ZPO its refusal is sufficiently substantiated if an assurance is given that an oath of office has been sworn, § 386 para. 2 ZPO. Has the witness in due form informed the court of its refusal to testify, it is not obliged to attend the hearing.[253] If the interested party wishes to contest a witness' refusal to testify it can initiate interlocutory proceedings against the witness to determine if the refusal is lawful, § 387 para. 1 ZPO.

[251] Scheuch in Vorwerk/ Wolf (eds.), Beck'scher Online-Kommentar ZPO, 15. ed., 2015, § 385 Rz. 9; Greger in Zöller, Kommentar zur ZPO, 28. ed., 2010, § 385 Rz. 8.
[252] Huber in Musielak/ Voit, Kommentar zur ZPO, 12. ed., 2015, § 386 Rz. 1.
[253] Huber in Musielak/ Voit, Kommentar zur ZPO, 12. ed., 2015, § 386 Rz. 3.

Against an interlocutory judgment a complaint subject to a time limit can be lodged, § 387 para. 3 ZPO. The court in assessing the evidence may not draw any conclusions to the disadvantage of one of the parties from the fact that the witness refused to testify because it is the witness' own right to refuse testimony.[254]

Person to whom confidential facts are entrusted by virtue of their office, profession or status (§ 383 para. 1 no. 6 ZPO) may be released from their duty of confidentiality only by the person in whose the favor the obligation exists, § 385 para. 2 ZPO. Whether additionally a permission to testify is required has to be assessed according to § 376 ZPO.[255] The general obligation to testify is restricted in § 376 ZPO for persons subject to official secrecy obligations. The provisions aims to ensure official secrecy. Thus, it purposes to protect public interests in contrast to the provisions dealing with rights to refuse testimony, which serve the individual person.[256] The provision refers to the specific rules of civil service law in order to determine whether and to what extend an official secrecy obligation exists, § 376 para. 1 ZPO. It expressly mentions judges, civil servants and other persons in the public service to fall within its scope. This also includes e.g. soldiers, European Community officials and members of NATO troops.[257] The same shall apply for members of the Bundestag[258], a Landtag[259], the Federal government or the government of a Landtag as well as for the employees of a parliamentary group of the Bundestag or of a Landtag, § 376 para. 2 ZPO. The court hearing the case has to procure the corresponding permission by the person, who is competent to grant such a permission according to the relevant civil service law, and then has to make this known to the witness, § 376 para. 3 ZPO. The persons mentioned in § 376 para. 1 and 2 ZPO are generally obliged to secrecy longer than their working relationship or mandate lasts. Consequently, the rules set out in § 376 para. 1 and 2 ZPO continue to apply, § 376 para. 5 ZPO.[260] The President of the Federal Republic of Germany decides according to his own discretion if he needs to refuse to testify because his testimony would be detrimental to the welfare of the Federal Republic or of one of the German federal states, § 376 para. 4 ZPO. The examination of a person subject to official secrecy obligations is unlawful. Nonetheless, a violation does not result in an inadmissibility of the evidence.[261]

Resulting from the principle of directness is the rule to obtain evidence directly before the court hearing the case, § 355 ZPO. Consequently, in general the witness gives testimony orally before the court hearing the case. Nevertheless, it is possible for witness testimony to be obtained in a written form, § 377 para. 3 ZPO. A written testimony is still considered to be evidence through a witness and not documentary

[254] Huber in Musielak/ Voit, Kommentar zur ZPO, 12. ed., 2015, § 383 Rz. 10.
[255] Huber in Musielak/ Voit, Kommentar zur ZPO, 12. ed., 2015, § 385 Rz. 6 f.
[256] Ahrens, Der Beweis im Zivilprozess, 1. ed., 2015, chapter 36 Rz. 68.
[257] Damrau in Münchener Kommentar zur ZPO, 4. ed., 2012, § 376 Rz. 7 and 9.
[258] Bundestag = German Parliament.
[259] Landtag = State parliament.
[260] Eichele in Saenger, Kommentar zur Zivilprozessordnung, 6. ed., 2015, § 376 Rz. 8.
[261] Eichele in Saenger, Kommentar zur Zivilprozessordnung, 6. ed., 2015, § 376 Rz. 9; BGH, NJW, 1952, p. 151; OVG Lüneburg, NVwZ, 2004, p. 1381.

evidence.[262] The court can instruct a witness to answer a question in writing if it believes that a written testimony is sufficient to fully answer the relevant question and it considers the person of the witness able to do so while still maintaining the right to summon the witness at a later stage. Such a course of action might appear easier for the court, but bears the risk that the court cannot obtain an authentic impression of the witness. For that reason the court may decide to additionally summon the witness if it believes this necessary in order to clarify its testimony with regard to the evidentiary issue in question.[263] As soon as the court receives the written witness testimony it will transmit it to the parties. The parties may then ask the court to summon the witness and exercise their right to ask questions, § 397 ZPO.[264]

Another deviation from the principle of directness can be found in § 375 ZPO, which allows the taking of evidence by hearing the witness to be conducted by a delegated or requested judge, § 375 ZPO.[265] It is also possible to hear the witness not at the seat at the court, but instead at a different location or to hear the witness via image and sound transmission (§128a ZPO), § 375 para. 1 no.1 and 2 ZPO.

Witness are generally examined individually and without those witnesses being present who are to be heard at a later time, § 394 para. 1 ZPO. The examination of the witness starts with the instruction of the witness by the court to tell the truth and to state its personal information such as its name and surname, its age, its profession or business and its residence, § 395 ZPO. The court may also ask the witness' relationship to the parties in order to assess whether the witness has a right to refuse testimony.[266] After that the witness will the asked to tell the court in context whatever facts are known to him regarding the subject matter of its examination, § 396 para. 1 ZPO. This provisions purposed to obtain a coherent statement by the witness. Additionally, the court may ask further questions where it seems necessary to get a clear and complete impression of the evidentiary matter, § 396 para. 2 ZPO.

6.4 Cross Examination of Witnesses under German Law

The cross examination of a witness – as practiced in common law countries – is not possible under German law. The German Code of Civil Procedure stipulates that a witness shall testify coherently (§ 396 para. 1 ZPO) and may only be additionally questioned when necessary. Such additional questions will primarily be asked by the court and only subsidiary by the parties, § 396 para.2 and para. 3 ZPO. While a court will most likely not prohibit a question just because it deems it irrelevant, it may decide whether a question is admissible, § 397 para. 3 ZPO. Leading questions for example are not admissible.[267]

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[262] Scheuch in Vorwerk/ Wolf (eds.), Beck'scher Online-Kommentar ZPO, 15. ed., 2015, § 377 Rz. 12.
[263] Eichele in Saenger, Kommentar zur Zivilprozessordnung, 6. ed., 2015, § 377 Rz. 4.
[264] Eichele in Saenger, Kommentar zur Zivilprozessordnung, 6. ed., 2015, § 377 Rz. 7.
[265] Cf. Part I, 1.5, para. 56.
[266] Ahrens, Der Beweis im Zivilprozess, 1. ed., 2015, chapter 39 Rz. 78.
[267] Damrau in Münchener Kommentar zur ZPO, 4. ed., 2013, § 397 Rz. 5.

7 Taking of Evidence

7.1 Sequence of Evidence to be taken

There is no mandatory sequence in which evidence has to be taken.

7.2 Appearance of Witnesses and Experts in Court

The German Code of Civil Procedure deviates from the general principle of party presentation ("Beibringungsgrundsatz") and as part of the principle the parties are generally obliged to offer evidence for the facts, which they have the burden to prove. Nevertheless, the court may order the taking of evidence regarding documents (§ 142 para. 1 ZPO), visuals inspections and expert reports (§ 144 para. 1 ZPO) as well as party testimony (§ 448 ZPO) on its own motion according to its best judgement. This possibility does not exist for the evidence by witness testimony.[268] The parties will generally offer evidence by filing an application to the court to issue an order for evidence to be taken.

The party's offer of evidence has to be timely, § 282 para. 2. If the party does not comply with the requirements set out in that provision, the court can refuse to follow the party's offer of evidence, § 296 para. 2 ZPO.[269] Even though the German Code of Civil Procedure authorizes the courts to reject submission by the parties if the requirements of § 292 para. 2 ZPO are met, the courts tend be careful to invoke that provision following the decision of the German Federal Constitutional Court in 1987. In that decision[270] the court held that belated submissions may not be rejected if the delay in the proceedings would also have occurred had the party submitted its submission timely. The court further stated that any provision dealing with preclusion limits the constitutional right to be heard and such a limitation is seldom justified. Merely in exceptional cases the right to be heard can be overruled by considerations of legal certainty and efficiency. Consequently, following that decision the scope of § 296 para. 2 ZPO is considerably narrower than the wording of the provision might suggest and courts will only seldom reject evidence that was submitted belated.

7.3 Deadline for the Taking of Evidence

A party's offer for evidence can be rejected as belated, §§ 282 para. 1, 296 para. 2, 530, 531 ZPO. The court may set a deadline for evidence to be submitted and can refuse to accept submissions that were made later than said deadline, § 296 para. 1 ZPO. In general, the parties are obliged to present evidence as promptly as possible (§ 282 para. 1 ZPO). A failure to do so without having sufficient reasons for the delay might also lead to a refusal by the court to accept such belated submissions, § 296 para. 2 ZPO.

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[268] Ahrens, Der Beweis im Zivilprozess, 1. ed., 2015, chapter 12 Rz. 7.
[269] Ahrens, Der Beweis im Zivilprozess, 1. ed., 2015, chapter 12 Rz. 8 f.; cf. Part I, Preliminary remarks, para. 6; 3.8, para. 111 f.; 4.9, para. 137 f.; 5.4. para. 149; 6.2, para. 152 ff.
[270] BVerfG, NJW 1987, pp. 2733 ff.

Evidence may not be submitted after the closing of the (last) oral hearing, § 296 a ZPO.[271]

The order for evidence to be taken can be modified or cancelled by the court in charge of the judgment. § 360 ZPO regulates the modification of the order for evidence to be taken. The unspoken principle of § 360 ZPO is that the court is free to modify an order for evidence to be taken after an oral hearing.[272] § 360 ZPO stipulates certain conditions which must be fulfilled to modify the order for evidence to be taken if the court wants to do so without an additional oral hearing. Also, § 358 a ZPO allows the court to take evidence previously to the oral hearing. It is unclear whether § 358 a ZPO means previous to the first oral hearing or previous to any oral hearing.[273]

7.4 Rejection of an Application to Obtain Evidence

It is derived from the constitutional right to have justice administered ("Justizgewährungsanspruch", Art. 19 para. 4 GG) and the right to effective judicial protection that, in general, the parties' applications for evidence to be taken shall not be rejected and that the court need to exhaust all offered means of evidence. As the three examples below show, certain exception from this general rule have been established in case law referring to the reasons set out in § 244 StPO for the rejection in criminal procedure.[274]

The court can reject an application for evidence if the disputed fact does not require to be proven be evidence because the fact is not disputed by the opposing party (§ 138 para. 3 ZPO), the facts alleged by one party were admitted by the other party (§ 288 ZPO), the facts are common knowledge (§ 291 ZPO) or a legal presumption regarding a certain fact being given exists (§ 292 ZPO).[275]

It can equally reject to issue an order for evidence to be taken if the taking of evidence is unlawful. The taking of evidence can be unlawful if the process of obtaining the evidence is not permitted, e.g. §§ 595 para. 2, 295 para. 2 ZPO. Similarly, the taking of evidence is unlawful if the consideration of the result of the taking of evidence would be inadmissible.[276]

The court can also reject a means of evidence if the piece of evidence is not available, e.g. the document is lost or a witness cannot be located.[277]

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[271] Cf. Part I, 1.1, para. 41 f.; 7.2, para. 170.
[272] Stadler in Musielak/ Voit, Kommentar zur ZPO, 12. ed., 2015, § 360 Rz. 3.
[273] Cf. Part I, Preliminary remarks, para. 28.
[274] Prütting in Münchener Kommentar zur ZPO, 4. ed., 2013, § 284 Rz. 91.
[275] Prütting in Münchener Kommentar zur ZPO, 4. ed., 2013, § 284 Rz. 93.
[276] Saenger in Saenger, Kommentar zur Zivilprozessordnung, 6. ed., 2015, § 284 Rz. 56.
[277] LG Saarbrücken, NJW-RR 1998, p. 1685; BGH, NJW 1992, p. 1768.

7.5 The Hearing

As a general rule the German Code of Civil Procedure stipulates that the evidence shall be taken before the court hearing the case, § 355 para. 1 ZPO.[278] In deviation from this principle the taking of evidence may be conducted by a delegated or requested judge, § 375 ZPO.[279]

The taking of evidence may be conducted by a delegated or requested judge if the court hearing the case will still be able to properly evaluate the result obtained in taking the evidence without gaining a direct impression of the course of the taking of evidence. Additionally, one of the requirements set out in § 375 para. 1 no. 1 to 3 ZPO must be met.

§ 375 para. 1 no. 1 ZPO allows to examine the witness at a different location than the seat of the court if this serves the purpose to establish the truth. Equally, if the witness is a member of the Federal Government or of a state government, the witness is to be examined at its official residence or at its place of abode, § 382 para. 1 ZPO. Also, the members of the Bundestag, Bundesrat[280] or a state parliament are to be examined at the venue of that assembly, § 382 para. 2 ZPO.

Alternatively, the examination may be conducted by a delegated or requested judge if the witness is prevented from appearing before the court hearing the case and the witness is not examined by image and sound transmission (§ 128 a para. 2 ZPO), § 375 para. 1 no. 2 ZPO. Typical reasons why a witness may be reasonably prevented from appearing before the court hearing the case are long-term illness, imprisonment, high age or incapacity to travel.[281]

Similarly, the taking of evidence may be conducted by a requested judge if, in light of the great distance the witness would have to travel and taking into account the significance of its statement, it cannot be reasonably expected of the witness to appear before the court hearing the case and the witness is not examined by image and sound transmission (§ 128 a para. 2 ZPO), § 375 para. 1 no. 3 ZPO.

In complex cases a member of the court hearing the case may conduct the taking of evidence if suitable for the purpose of simplifying the oral argument and the court hearing the case will still be able to properly evaluate the result obtained in the taking of evidence without the direct impression, § 375 para. 1 a ZPO. Typical cases are construction processes.[282]

The German Code of Civil Procedure requires the parties or, in proceedings in which the parties' representation by a lawyer is mandatory, their lawyer to attend the hearing.

[278] Cf. Part I, 1.5, para. 54; 2.3, para. 84; 6.4, para. 164.
[279] Cf. Part I, Preliminary remarks, para. 28; 1.5, para. 56: 6.4, para. 165.
[280] Bundesrat = German Federal Council.
[281] Damrau in Münchener Kommentar zur ZPO, 4. ed., 2013, § 375 Rz. 4.
[282] Damrau in Münchener Kommentar zur ZPO, 4. ed., 2013, § 375 Rz. 6.

Otherwise the absent party runs the risk that a default judgment is rendered against it, §§ 330 ff. ZPO. The mandatory attendance of the parties or their legal representatives serves to protect the principle of orality and the principle of party presentation.[283] Accordingly, the parties have a right to attend the taking of evidence, § 357 ZPO.

Directness in the sense that always the 'closest' or direct piece of evidence must be offered is neither regulated in the German Code of Civil Procedure nor established by case law.[284] On the contrary, the German Federal Constitutional Court held that indirect evidence is possible and stated that indirect evidence does not violate the right to heard and to a fair trial.[285] The possibly lower value of such evidence may be regarded by the court when evaluating the evidence.[286]

The German Code of Civil Procedure deals with evidence which is located abroad in its § 363 ZPO. According to that provision the presiding judge shall file a request with the responsible public authority and ask it to take the evidence, § 363 para. 1 ZPO. It is also possible to have a Consul of the Federal Republic of Germany take the evidence, § 363 para. 2 ZPO. In order to obtain evidence in another country the court has to ask for judicial assistance in that country.[287]

7.6 Witnesses

Witnesses are in general summoned by the court, § 377 ZPO. Still, the party, who has the burden of proof on a certain fact, may spontaneously bring a witness to the hearing, who has not been summoned beforehand, if the witness is familiar with the fact to be proven and has had some time to reflect.[288]

Normally, a witness will give testimony orally. Only if the court believes that, in light of the content of the question regarding which evidence is to be taken and taking into consideration the person of the witness, it suffices to obtain the witness testimony in a written form, § 377 para. 3 ZPO.[289]

Usually, a witness does not testify under oath. The court places a witness under oath if it deems this reasonable in the light of the significance of the testimony or if it believes that this will procure a truthful statement, § 391 ZPO.[290]

Witness are generally examined individually and without those witnesses being present who are to be heard at a later time, § 394 para. 1 ZPO.[291]

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[283] Prütting in Münchener Kommentar zur ZPO, 4. ed., 2013, § 330 Rz. 1
[284] BGH, NJW 2006, pp. 3416 ff.
[285] BVerfG, NJW 1994, p. 2347.
[286] Rauscher in Münchener Kommentar zur ZPO, 4. ed., 2013, Einl. Rz. 371; cf. Part I, 1.5, para. 55.
[287] Heinrich in Münchener Kommentar zur ZPO, 4. ed., 2013, § 363 Rz. 7.
[288] Cf. Part I, 6.2, para. 152.
[289] Cf. Part I, 6.4, para. 164.
[290] Cf. Part I, 6.1, para. 149.

The German law does not explicitly regulate witness preparation in the German Code of Civil Procedure nor can one derive an approach from its Federal Lawyer's Act.[292] The only limitation with regard to witness preparation are regulated in German Criminal Code. The lawyer preparing a witness runs the risk – depending of the intensity of the preparation – of being liable to prosecution due to inducing the witness to give false testimony or committing perjury as an abettor (§ 26 StGB), procuring false testimony (§ 160 StGB) or committing fraud in connection with a matter of procedure (§ 263 StGB). Apart from these limitations the preparation of witness might be less common than in Anglo-American countries, but permissible.[293]

7.7 Expert Witnesses

The provisions regarding *expert testimony* can be found in §§ 402 to 414 ZPO. § 402 ZPO refers to the rules regarding witnesses unless there are specific rules with regard to experts. The party, who has the burden of proof, can offer evidence by designating the items regarding which an expert report is to be prepared, § 403 ZPO. The court can also on its own motion order an expert report, § 144 ZPO. For expert witnesses the provisions regarding witnesses shall apply, § 414 ZPO.

The court selects (§ 404 ZPO) and direct the expert (§ 404 a ZPO). The law stipulates that the court selects the expert according to its own discretion, § 404 para. 1 ZPO. It does not need to consult with the parties regarding the person of the expert.[294] § 404 para. 2 ZPO stipulates that publicly appointed experts should be preferred. The rationale behind this rule is the assumption that publicly appointed experts have special expertise. These publicly appointed experts may not reject to file a report, but are under an obligation to do so, § 407 ZPO.[295]

Primarily the court will ask the expert questions, § 397 para. 1 ZPO. The parties can ask questions through the judge (§ 397 para. 1 ZPO) or with the judge's permission (§ 397 para. 2 ZPO).

The parties have also the right to reject an expert for the same reasons for which a party is entitled to challenge a judge (§§ 41, 42 ZPO), § 406 para. 1 ZPO.

It is in the court's discretion whether the expert report shall be in oral or written form, § 411 ZPO. Regularly, the court will prefer a written report because then the expert can thoroughly prepare the report. A written report also gives the parties and the court the opportunity to familiarize themselves with the report in detail and, consequently, be able

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[291] Cf. Part I, 6.4, para. 166.
[292] Bundesrechtsanwaltsordnung (BRAO) = Federal Lawyer's Act.
[293] Bertke/ Schroeder, Grenzen der Zeugenvorbereitung im staatlichen Zivilprozess und im Schiedsverfahren, SchiedsVZ 2014, pp. 80 ff.
[294] Zimmermann in Münchener Kommentar zur ZPO, 4. ed., 2013, § 404 Rz. 5.
[295] Scheuch in Vorwerk/ Wolf (eds.), Beck'scher Online-Kommentar ZPO, 15. ed., 2015, § 404 Rz. 8.

to discuss the result obtained in the taking of evidence process.[296] A written report in the current proceedings may be forgone if another expert report can be used, that has been obtained by the court or the public prosecution office in other court proceedings, § 411 a ZPO.[297]

A private expert report obtained by one of the parties may only be admitted as expert evidence with the consent of both parties.[298]

The expert shall be remunerated pursuant to the Judicial Remuneration and Compensation Act[299], § 413 ZPO. The party, who has the burden of proof has to pay the costs for an expert.[300] The expert may request an advance payment, §§ 402, 379 ZPO, §3 JVEG.

While there are rules regarding the evidentiary value of public or private records and documents (§§ 415 to 418, 435, 438 para. 2 ZPO)[301], the judge generally has to assess the evidence freely, § 286 ZPO. This applies for expert reports as well. If a written report has been prepared by the expert the judge will have to thoroughly explain the reasons why he chose to follow or chose to reject the opinion of the expert in the court's decision.[302]

8 Costs and Language

8.1 Costs

The German Code of Civil Procedure covers the issue of legal expenses in it §§ 91 to 107 ZPO. Law, literature and courts acknowledge the term legal expenses as costs, arising out of the involvement of a party into a dispute.[303] They are divided into judicial and extrajudicial costs.[304] Judicial costs are public service charges for the use of judicial organs, including potential expenses by courts, e.g. for the compensation of witnesses, experts and translators, document delivery charges and charges for telecommunication-services or the enforcement of custody.[305] Extrajudicial costs of the proceedings are understood to be all costs besides the judicial costs. These especially include the

[296] Zimmermann in Münchener Kommentar zur ZPO, 4. ed., 2013, § 411 Rz. 3.
[297] Foerste in Musielak/ Voit, Kommentar zur ZPO, 11 ed., 2014, § 286 Rz. 5; cf. Part I, 3.10, para. 118.
[298] Musielak/ Voit, Grundkurs ZPO, 12. ed., 2014, Rz. 437 f.; cf. Part I, 3.4, para. 97.
[299] Justizvergütungs- und -entschädigungsgesetz (JVEG) = Judicial Remuneration and Compensation Act.
[300] Ahrens, Der Beweis im Zivilprozess, 1. ed., 2015, chapter 42 Rz. 33
[301] Cf. Part I, 5.2, para. 144 ff.
[302] Prütting in Münchener Kommentar zur ZPO, 4. ed., 2013, § 286 Rz. 22.
[303] Lackmann in Musielak/ Voit, Kommentar zur ZPO, 12. ed., 2015, Vorbem. zu §§ 91 ff. para. 3.
[304] Schulz in Münchener Kommentar zur ZPO, 4. ed., 2013, Vorbem. zu §§ 91 ff. para. 5 ff.; Lackmann in Musielak/ Voit, Kommentar zur ZPO, 12. ed., 2015, Vorbem. zu §§ 91 ff. para. 3.
[305] Lackmann in Musielak/ Voit, Kommentar zur ZPO, 12. ed., 2015, Vorbem. zu §§ 91 ff. para. 4.

attorney's fees, necessary travel expenses and compensation for time loss due to court appointments or loss of earnings.[306]

At first, each party has to pay for the costs which were caused by their own procedural measures.[307] In order to definitively distribute the burden of cost, §§ 91, 92 ZPO state, that an unsuccessful party must reimburse successful party for all necessary expenses, § 91 ZPO.[308] Where a party succeeds on some and fails on other parts of its claim, the court may order that the costs be shared proportionally, § 92 para. 1 ZPO. Parties introduce their claims for reimbursement of costs through their submissions. The court rarely takes a separate decision on the final burden of cost, but, regularly, includes it into its ruling.

Particular costs (e.g.: Costs of witnesses, experts and interpreters) are often paid upfront through public resources. The party who has to pay according to §§ 91, 92 ZPO has to reimburse the public sector.

In order to avoid said reimbursement-procedure and to secure the payment by the parties,[309] the court may order the parties to pay in advance for the costs of witnesses and experts according to § 379 ZPO, provided that the party has not been granted legal aid, §§ 114 ff. ZPO.

If a party does not comply with the order to pay in advance for the costs of a witness, the summons of the respective witness is not going to be issued. The court will continue proceedings. In case the witness appears without summons or payment, it can be heard by the court (§ 379 ZPO).[310] The same applies to the advance on costs for interpreters and expert witnesses (402 ZPO) who are generally less likely to appear without any payment. In case the court finds that the advance on costs is not paid to obstruct the proceedings a party can be precluded from using that evidence again according to § 269 para. 2 ZPO.[311]

However this does not apply where the court takes evidence *ex officio*.[312] Although in this case the court can still order an advance on costs according to § 17 GKG[313], there is neither a consequence of preclusion nor any other sanction linked with the non-compliance.[314]

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[306] Jaspersen in Vorwerk/ Wolf (eds.), Beck'scher Online-Kommentar ZPO, 15. ed., 2015, § 103 para. 16.
[307] Cf. § 22 GKG; Becker-Eberhard in Münchener Kommentar zur ZPO, 4. ed., 2013, § 253 para. 191.
[308] Lackmann in Musielak/ Voit, Kommentar zur ZPO, 12. ed., 2015, § 91 para. 11.
[309] Damrau in Münchener Kommentar zur ZPO, 4. ed., 2012, § 379 para. 1.
[310] Damrau in Münchener Kommentar zur ZPO, 4. ed., 2012, § 379 para. 10.
[311] Prütting in Münchener Kommentar zur ZPO, 4. ed., 2012, § 269 para. 135.
[312] Zimmermann in Binz/ Dörndorfer/ Petzold/ Zimmermann Kommentar zu GKG, FamGKG, JVEG, 3. ed., 2014, § 17 GKG para. 16.
[313] Gerichtskostengesetz (GKG) = German Court Fees Act.
[314] Zimmermann in Binz/ Dörndorfer/ Petzold/ Zimmermann Kommentar zu GKG, FamGKG, JVEG, 3. ed., 2014, § 17 GKG para. 16 ff.

Compensation of witnesses, experts, interpreters and lay judges is regulated by the Judicial Remuneration and Compensation Act. Witnesses may assert claims for travel and subsistence expenses as well as compensation for loss of earnings caused by their duty to appear and testify in court (§ 19 para. 1 to 6 JVEG).[315]

Necessary travel costs (a journey to the court and back home or to the place of work), either by means of mass transportation or other means of transportation as well as distances covered by foot, are falling within the scope of § 5 JVEG. Compensation for a journey by mass transportation (except for airplane travel) includes the price for the highest-class ticket[316] whereas distances covered by other means of transportation (e.g. cars) and by foot are specified in terms of kilometers, for witnesses 0,25 € per kilometer.[317] Moreover, the witness is to be compensated 3,50 € per hour, § 20 JVEG. However, this only applies in cases where a witness is not compensated regarding a loss of earnings (max. 21,00 € per hour), § 22 JVEG, or is compensated for being unable to manage household (max. 14,00 € per hour), § 21 JVEG.

The witness can claim the following amount as compensation:

- Actual loss of earnings: up to 21,00€ per hour
- Actual compensation for household management: up to 14,00€ per hour
- Compensation for traveling costs per kilometer: up to 0,25€ per kilometer
- Compensation for travel via mass transportation: up to first class tickets except for airplane travel

In case an expert witness is appointed in the proceedings, the hourly rate is between 50,00 € and 95,00 €. The details are given in the Judicial Remuneration and Compensation Act (§§ 9 and 10 JVEG), in which a table sets out hourly rates for 60 different subject areas.[318] In addition, the necessary expenses such as the costs of labor, photocopies, photographs, travel and accommodation are to be compensated. The costs of the expert are part of the legal costs and to be borne by the losing party, depending on the outcome of the process.

§ 9 para. 3 JVEG specifies that interpreters are to be remunerated at a rate of 70,00 € per hour, for simultaneous translation at a rate of 75,00 € per hour. The interpreter receives compensation according to § 8 JVEG. The compensation is a legal expense (GKG KV[319] 9005). The freedom of costs according to Art. 6 para. 3 of the ECHR applies only in criminal proceedings, not in civil proceedings.

§ 11 JVEG specifies the conditions for compensating translators and it reads:

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[315] Zimmermann in Binz/ Dörndorfer/ Petzold/ Zimmermann Kommentar zu GKG, FamGKG, JVEG, 3. ed., 2014, § 19 JVEG para. 1 ff.
[316] Zimmermann in Binz/ Dörndorfer/ Petzold/ Zimmermann Kommentar zu GKG, FamGKG, JVEG, 3. ed., 2014, § 5 JVEG para. 2 ff.
[317] Zimmermann in Binz/ Dörndorfer/ Petzold/ Zimmermann Kommentar zu GKG, FamGKG, JVEG, 3. ed., 2014, § 5 JVEG para. 1 ff.
[318] E.g. for medical advice the hard hourly rates are 50,00 to 85,00 €.
[319] Kostenverzeichnis (KV) = cost catalogue.

§ 11 - Fee for translations[320]

The fee for a translation amounts to 1,25 € for each 55 keystrokes or fraction thereof in the written text. If the translation is considerably more difficult, in particular due to the use of technical terms or due to poor legibility of the text, the fee increases to 1,85 €; in the case of extraordinarily difficult texts it is 4 €. The target language text is the standard for the number of keystrokes; if, however, Latin characters are used only in the source language, the number of keystrokes in the source language text is the standard. If counting the keystrokes is associated with excessive effort, their number is determined by taking into account the average number of keystrokes per line and counting the lines.

For one or more translations which are part of the same order, the minimum fee is 15 €.

Insofar as the service of the translator consists of reviewing documents or telecommunication recordings for specific content without the need of preparing a written translation for these, the fee received will be that of an interpreter.

Whether and under what conditions a German court may participate in the taking of evidence abroad or take the evidence itself and directly in another state, is regulated in §§ 363 (, 1074) ZPO. These national provision were adopted in the context of the Regulation 1206/2001, but are applicable in relation to Member States and third countries alike.[321]

As usual, any legal expenses are to be reimbursed. In addition to a fee for the judicial administrative review of the request for judicial assistance to foreign countries itself (usually 30 €), the costs of translation for the request and the costs incurred in the requested foreign authority are held to be expenses.[322]

8.2 Language and Translation

The proceedings, including oral hearing as well as written submission, are to be conducted in German, § 184 GVG. An interpreter is required in the oral hearing if a person is participating in the hearing who does not speak the German language, § 185 para. 1 GVG. This provision aims to safeguard the right to be heard and to a fair trial.[323] Accordingly, the provision in § 185 para. 1 GVG is mandatory unless all the persons involved in the hearing have a command of the foreign language, § 185 para. 2 GVG. In that case the court is dispensed from consulting an interpreter.[324]

The court accepts a document in a foreign language if it is able to translate it. Should the party, who did not submit the document, not be of command of the foreign language,

[320] No official translation available.
[321] Heinrich in Münchener Kommentar zur ZPO, 4. ed., 2013 § 363 para. 1.
[322] Heinrich in Münchener Kommentar zur ZPO, 4. ed., 2013 §363 para. 16.
[323] BVerfG, NJW 1983, p. 2762.
[324] Zimmermann in Münchener Kommentar zur ZPO, 4. ed., 2012, § 185 GVG Rz. 1.

that party may instruct an interpreter with a translation of the document and can then claim the costs according to § 91 ZPO. If the court is not in command of the foreign language, it can direct the party submitting a document in a foreign language to submit a translated version of the document that has been translated by an interpreter, who has been authorized or publicly appointed by the authorities, § 142 para. 3 ZPO. Such a translation is presumed to be correct and complete if thisis confirmed by the translator, § 142 para. 3 s. 2 ZPO. Instead of directing a party to submit a translation the court can also order a translation on its own motion, § 144 para. 1 s. 1 ZPO.[325]

The interpreter is reimbursed for his services according to § 8 JVEG. The reimbursement is part of the expenditures of the court, GKG KV 9005. Since the court decides on its own motion if an interpreter is necessary, an advance on costs is not possible. The costs for an interpreter are legal expenses in the sense of §§ 91 ff. ZPO, which, ultimately, the losing party will have to pay.[326]

9 Unlawful Evidence

Since the German Code of Civil Procedure as well as the European Convention on Human Rights[327] are silent on the question if illegally obtained evidence is also inadmissible and may not be considered for the final judgment, this topic has mostly been dealt with in scholarly literature and case law in Germany.

In order to clarify which kinds of errors in the taking of evidence are understood to be unlawful, one has to differentiate three different scenarios.

First, the German Code of Civil Procedure directs the court to not obtain evidence in certain situation. For example, the court shall instruct the witness if the witness has a right to refuse to testify, § 383 para. 2 ZPO. If the court violates that rule resulting in the witness giving testimony despite its right to refuse testimony, according to the leading opinion in scholarly writing and case law the court may not use said testimony in its final decision.[328]

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[325] Von Selle in Vorwerk/ Wolf (eds.), Beck'scher Online-Kommentar ZPO, 15. ed., 2015, § 142 Rz. 19.

[326] Zimmermann in Münchener Kommentar zur ZPO, 4. ed., 2012, § 185 GVG Rz. 16.

[327] Europäische Menschenrechtskonvention (EMRK) = European Convention on Human Rights (ECHR).

[328] Zeiss, Die Verwertung rechtswidrig erlangter Beweismittel, ZZP 89 (1976), pp. 377 ff.; Kiethe, Verwertung rechtswidrig erlangter Beweismittel im Zivilprozess, MDR 2005, pp. 965 ff.; Rosenberg/ Schwab/ Gottwald, Zivilprozessrecht, 17. ed., § 110 Rz. 24. There are two other opinions in scholarly writing regarding the consequences for the admissibility of evidence if an irregularity occurred in the taking of evidence process. For example *Werner* (NJW 1988, pp. 993 ff.) deems the illegal way of obtaining the evidence of no concern for its use in the court's decision. Others, such as *Kellner* (JR 1950, p. 271), are of the opinion that any irregularity in process of obtaining the piece of evidence leads to its inadmissibility for the final decision of the court.

Second, if one of the parties obtains information out-of-court, which it then uses to build its claim, to apply to the court for an order for evidence to be taken or to question the evidence provided by the other party, it does not have to fear procedural consequences from this behavior. In German civil procedure there is no inadmissibility with regard to the facts brought forward by the parties and, equally, considerations such as the fruit-of-the-poisonous-tree-doctrine do not apply in the case of information that were illegally obtained out-of-court by one of the parties.[329]

Third, if one party illegally obtains a piece of evidence, which it then uses to support its submission, according to the leading opinion the court will have to assess whether the violation of rights by that party was so severe that the evidence is not admissible. This is generally the case if the party has violated constitutionally protected rights or a provision regarding the violation of privacy in §§ 201 to 203 StGB when obtaining the evidence.[330] In that case the court cannot consider that piece of evidence in its judgment without running the risk that its decision would be overturned in the next instance. Typical cases, in which the illegally obtained evidence is considered to be also inadmissible, are the following two examples. A person, who listened to a conversation where one or both of the conversation partners were unaware that this person could overhear what they were talking about, cannot be heard as a witness in court if the conversation the witness overheard was of private or confidential nature.[331] Equally, a secretly recorded tape violates the constitutional right of privacy (Art. 1 para. 1 in conjunction with 2 para. 1 GG) as well as the privacy of the spoken word (§ 201 StGB) and is, consequently, not admissible in civil proceedings.[332]

[329] Ahrens, Der Beweis im Zivilprozess, 1. ed., 2015, chapter 6 Rz. 29f.
[330] Prütting in Münchener Kommentar zur ZPO, 4. ed., 2013, § 284 Rz. 67.
[331] BGH, NJW 1991, p. 1180.
[332] BVerfG, NJW 1973, p. 891; BGH, NJW 1988, p. 1016.

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