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Evidence in Civil Law - Austria

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Title: Evidence in Civil Law – Austria

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First published 2015 by
Institute for Local Self-Government and Public Procurement Maribor
Grajska ulica 7, 2000 Maribor, Slovenia
www.lex-localis.press, info@lex-localis.press

Book Series: Law & Society

Series Editor: Tomaž Keresteš

CIP - Kataložni zapis o publikaciji
Narodna in univerzitetna knjižnica, Ljubljana

347(436)(0.034.2)

NUNNER-Krautgasser, Bettina
Evidence in civil law - Austria [Elektronski vir] / Bettina Nunner-Krautgasser, Philipp Anzenberger. - El. knjiga. - Maribor : Institute for Local Self-Government and Public Procurement, 2015. - (Lex localis) (Book series Law & society)

Način dostopa (URL): http://books.lex-localis.press/evidenceincivillaw/austria

ISBN 978-961-6842-44-0 (epub)
1. Anzenberger, Philipp
281102080

Price: free copy

This project has been funded with support from the European Commission. This publication reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

With the support of
the Civil Justice Programme
of the European Union

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ABSTRACT This report outlines the rules on the taking and using of evidence in Austrian civil procedure law. On the basis of principles such as the free disposition of parties, the attenuated inquisitorial principle or the principles of orality and directness, the judge and the parties form a "working group" when investigating the matter in dispute. The Austrian concept of an active judge, however, goes along with the judge's duty to do case-management and especially to induce a truthful fact-finding using judicial discretion. While only five means of proof (documents, witnesses, expert opinions, evidence by inspection and the examination of parties) are explicitly listed the Austrian civil procedure code, there is no *numerus clausus* regarding the means of evidence. Evidence may be freely assessed by the judge.

KEYWORDS: • general principles of civil procedure • principles of taking evidence • burden of proof • taking evidence in civil procedure • witness evidence • documentary evidence • expert opinions • evidence by inspection • examination of parties • unlawful evidence

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DOI 10.4335/978-961-6842-44-0 ISBN 978-961-6842-44-0 (epub)

Available online at http://books.lex-localis.press.

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Foreword

The Austrian Civil Procedure Code (ZPO) by *Franz Klein* dates back to 1898 and is often considered a role model for other procedural codifications. Recently, however, the process of European Integration and the Single Market have led to a substantial increase of cross-border activities and hence of cross-border litigation, challenging national civil procedure law systems. While in the field of evidence law the European Regulation on the Taking of Evidence (EC No. 1206/2001) alleviates some problems, Europe will have to take some further steps to sustainably assure efficient and just civil litigation. Convinced that the DEECP-project will help paving the way for those necessary steps, we are very proud to have participated as national reporters within this ambitious project. Our report outlines large parts of the Austrian civil procedural evidence law and was created on the basis of a detailed common questionnaire, ensuring the comparability between the national reports of all participating countries. We would like to give our special thanks to Prof. Dr. *Vesna Rijavec*, Prof. Dr. *Tomaž Keresteš* and their whole team from the Faculty of Law at University of Maribor. They not only initiated but also perfectly organized this project, enabling a flawless and fruitful researching process over the last couple of years. Also we would like to thank Mag. *Patrick Mayrhuber*, Mag. *Thomas Metesch* and Mag. *Patricia Sailer* for their great effort in helping to prepare this report.

Graz, May 2015

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Contents

Part I

1 Fundamental Principles of Civil Procedure

1.1 Principle of Free Disposition of the Parties and Officiality Principle

The **principle of free disposition of the parties** and the **principle of ex officio proceedings** (officiality principle) both exist in Austrian civil procedural law. They are known by these names in scientific literature;[2] the wording of the law itself, however, does not explicitly name those principles. The extent of their realization largely depends on the matter in dispute and on the type of the respective procedure: In contentious civil proceedings, the parties can **determine the subject matter in dispute and dispose of it**[3] as well as of the **beginning and the end of the proceedings**,[4] which is realized mainly in the following principles:[5] Firstly, it is only the parties that can start civil procedures by bringing in an action or filing a motion (*iudex ne procedat ex officio*). Secondly, the applications of the parties decide what will be treated during the proceedings and in the judgement (*ne eat iudex ultra petita partium*). Thirdly, the parties decide whether to bring in a legal remedy and to what extent the appeal court may revise the decision. Finally, the parties may (prematurely) end the proceedings by admitting (or waiving) the claim or by settling the dispute. All this is an expression of the **principle of free disposition of the parties** in Austrian contentious civil proceedings. However, some **non-contentious proceedings** (such as probate proceedings[6] or proceedings for the appointment of a legal guardian[7]) can be commenced ex officio. This largely depends on the extent of public benefit in the proceedings in question.

With regard to the subject of litigation, the scope of court authority to adjudicate the civil case is defined in § 405 ZPO; this rule states that the court is **not allowed to decide *ultra petita***. In Austrian civil procedure law, the *petitum* is one part of the subject matter in dispute (the other one being the cause of action) and derives from the

[2] Cf. Fasching, 1990: p 642; Rechberger/Simotta, 2010: p 401.
[3] Fasching, 1990: p 642; Rechberger/Simotta, 2010: p 401.
[4] Fasching, 1990: p 642; Fasching, 2002: Einleitung p 6; Kodek/Mayr, 2013: p 68.
[5] Cf. Fasching, 1990: p 643-644; Rechberger/Simotta, 2010: p 401.
[6] Cf. § 143 para 1 AußStrG.
[7] Cf. § 117 para 1 AußStrG.

wording in the claim.[8] In other words: the court may not adjudicate more than what has been asked by the claimant.

§ 179 ZPO sets the general rule that new allegations and new evidence can be introduced **until the closing of the oral proceedings** at the court of first instance. However, new evidence can be rejected by the court if the evidence was either not introduced earlier solely through gross negligence or its treatment would considerably delay the closing of the proceedings.[9] According to the prevailing opinion, this exception shall be applied in a very cautious and restrained way.[10] Apart from the exception in § 179 ZPO, the eventual maxim applies only in proceedings opposing the claim (§ 35 EO) or the enforcement of (§ 36 EO), in proceedings on the judicial termination of rental agreements (§ 33 para 21 MRG) as well as in proceedings on the *restitution in integrum* (§ 149 para 1 ZPO).[11] At the court of second instance, however, there are vast limitations for introducing new evidence.[12]

In general, the court is **not bound by party submissions regarding the means of evidence**;[13] instead it can arrange for several means of evidence to be introduced into the proceedings (§ 183 para 1 ZPO). However, as far as written evidence and witnesses are concerned, the court cannot demand the taking of evidence if both parties object to it (§ 183 para 2 ZPO).[14] In proceedings with a strong officiality characteristic (such as proceedings on the nullity of marriage), this exception is inapplicable (cf. for example § 183 para 1 number 4 ZPO).[15]

1.2 Adversarial and Inquisitorial Principle

Again, the Austrian civil procedure law does not explicitly name those principles; however, they are commonly used by courts and academics.[16] Both of those principles are partly realized in the Austrian civil procedure code, with a slight emphasis on the inquisitorial principle; the prevailing scientific opinion therefore speaks of a so-called **"attenuated inquisitorial principle"**.[17] This means that in contentious proceedings it is the **parties' duty to assert propositions** ("burden of assertion"), whereas generally both the **court and the parties have to collect evidence**.[18] Only in some very specific proceedings with a strong public interest (such as proceedings on the nullity of marriage), it is the court's duty to collect all evidence necessary (cf. § 460 number 4 ZPO).

[8] Rechberger/Simotta, 2010: p 385.
[9] Fucik, 2014: § 179 ZPO p 2-3.
[10] Fucik, 2014: § 179 ZPO p 2; for an in-depth discussion cf. McGuire, 2010: p 1153-1156.
[11] Fucik, 2014: § 179 ZPO p 1; Kodek/Mayr, 2013: p 98; Rechberger/Simotta, 2010: p 426.
[12] Cf. chapter 2.2.
[13] Rechberger/Simotta, 2010: p 404.
[14] Schragel, 2003: § 183 ZPO p 8.
[15] Rechberger/Simotta, 2010: p 406.
[16] Kodek/Mayr, 2013: p 73-76; Rechberger/Simotta, 2010: p 403-406.
[17] Kodek/Mayr, 2013: p 74; Rechberger/Simotta, 2010: p 403.
[18] Fasching, 1990: p 653-665; Rechberger/Simotta, 2010: p 403-406.

The court is allowed to decide to take **evidence other than the one submitted by the parties** if it expects this evidence to clarify or prove a fact.[19] However, there are some restrictions to this general rule: for instance, the court is bound to the parties' confessions on asserted facts (§§ 266 and 267 ZPO).[20] Also, the court cannot demand the taking of written evidence or the hearing of witnesses if both parties object (§ 183 para 2 ZPO).[21]

The **role of a judge** in Austrian civil procedure law largely depends on the respective specific procedure. Generally spoken, in a formal sense, the judge has to do **case-management** (guidance of the proceedings), for example by timetabling.[22] In a content-oriented sense, the judge has to **induce a truthful fact-finding** (for example by determining relevance and priorities of proof to be taken), which he or she can do "by raising questions or other means" (§ 182 para 1 ZPO). For this purpose, the judge is given a certain amount of **judicial discretion**; for example he or she can (with some exceptions) decide to take any kind of evidence that he or she expects to contribute to the truthful fact-finding.[23] In order to document the conduct of the procedure, the judge has to produce a **court record** (§§ 207-217 ZPO); he or she (nowadays) usually does so with the use of a dictaphone to record the relevant events during the procedure. The court record includes the parties' description of facts, the evidence offered (§ 209 para 1 and 2 ZPO), the parties' admissions, waivers or settlements of the dispute (§ 208 para 1 number 1 ZPO), or the court's decisions during the proceedings (§ 208 para 1 number 3 ZPO).[24]

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

Austrian civil procedure law has incorporated the principle of a mutual, fair hearing. According to this principle, anyone whose rights may be affected by a judicial decision needs to be granted the right to be heard in the respective proceedings.[25] Any person that has the status of a party (or a similar status) must therefore be **enabled to produce arguments** for his or her legal (or factual) point of view, **submit evidence, respond to the counterparty's propositions, and debate the results from the taking of evidence**.[26] An oral hearing is not always necessary in order to fulfil the requirements of this principle; under certain circumstances (e.g. in some summary proceedings) the possibility to submit written statements can be enough.[27] Also, an oral hearing of both parties in the proceedings on legal remedies is dispensable if the parties were heard at

[19] Fasching, 1990: p 659.
[20] Fasching, 1990: p 660.
[21] Schragel, 2003: § 183 ZPO p 8.
[22] Rechberger/Simotta, 2010: p 736-746.
[23] Rechberger/Simotta, 2010: p 404.
[24] Rechberger/Simotta, 2010: p 495.
[25] Rechberger/Simotta, 2010: p 427.
[26] Rechberger/Simotta, 2010: p 427.
[27] Rechberger/Simotta, 2010: p 427.

the court of first instance. Still, not only the appeal procedure but also (since 2009) the recourse procedure is generally contradictory in Austrian civil procedure law.[28]

The principle of hearing of both parties implies the parties' right to present evidence until the closing of the oral proceedings at the court of first instance. The **claimant** must define all evidence he or she wants to rely on during the proceedings when **submitting the claim** (§ 226 para 1 ZPO);[29] the same applies to the **defendant** when turning in a written **statement of defence** (§ 239 ZPO). However, if there is a need to introduce new evidence during the procedure, the judge can only refuse its taking if the party's request is obviously supposed to and will delay the procedure significantly (§ 275 para 2 ZPO). This displays the parties' obligation to support the **fast conduct of the proceedings** (§ 178 para 2 ZPO).[30] Court decisions can under some circumstances be taken without a prior hearing of the party; examples of this would be default judgments if one party fails to attend the proceedings (§§ 396-403, § 442, § 548 para 4, § 557 para 6 ZPO)[31] or proceedings on injunctions (cf. § 397 para 1 EO).[32] However, there are special legal remedies for those exceptions (such as the objection to default judgements ["Widerspruch"] according to §§ 397a, 442a and 548 para 4 ZPO). The parties have the right to be present during the whole proceeding (**"party-publicity"**);[33] this includes the right to be present during the taking of evidence. A **violation of the right to be heard** is a reason for the annulment of the proceeding according to § 477 para 1 number 4 ZPO**,** which allows the party to appeal.

The **right to an equal treatment** (cf. Art 7 B-VG[34] and Art 2 StGG[35]) implies that any differentiation needs to be founded on an objective basis.[36] It is realized in Austrian civil procedure law through the **principle of equality of arms**.[37] For example, the judge is obliged to guide and instruct parties (§ 182 para 1 ZPO), especially those who are not represented by a lawyer (§ 432 ZPO).[38]

There are several possible **sanctions for passivity and absence of a party in the procedure**: the **omission of performing necessary procedural steps** generally leads to the party's preclusion of those procedural steps (§ 144 ZPO).[39] Additionally, if a party **fails to engage in the proceedings** (cf. § 396 para 2 ZPO), a default judgment can be issued if the counterparty requests so (§§ 396-403, § 442, § 548 para 4, § 557 para 6 ZPO).[40] Another important example for sanctions is the **failure of both parties to**

[28] Rechberger/Simotta, 2010: p 427.
[29] Rechberger/Simotta, 2010: p 525.
[30] Cf. chapter 1.8.
[31] Rechberger/Simotta, 2010: p 885-870.
[32] Neumayr/Nunner-Krautgasser, 2011: p 305.
[33] Rechberger/Simotta, 2010: p 418.
[34] Austrian Federal Constitution (*„Bundes-Verfassungsgesetz [B-VG]"*).
[35] Act on the Common Rights of the Citizens (*"Staatsgrundgesetz"*).
[36] Fasching, 1999: Einleitung p 72.
[37] Fasching, 2002: Einleitung p 64.
[38] Rechberger/Simotta, 2010: p 606.
[39] Rechberger/Simotta, 2010: p 664.
[40] Rechberger/Simotta, 2010: p 885-870.

appear in court; in this case the proceeding is suspended (§ 170 ZPO).[41] However, in proceedings with a strong inquisitorial principle there are very few sanctions (or no sanctions at all) for passivity or absence of a party.[42]

1.4 Principle of Orality – Principle of Written Form

The **principle of oral proceedings** is grounded in the Austrian constitution (Art 90 para 1 B-VG) and can therefore definitely be classified as **one of the general principles of Austrian civil procedure law**.[43] There is no explicit definition of this principle; Art 90 B-VG just states: "All trials in civil and criminal law are held orally and in public. Exceptions are specified by law." As a result, the Austrian civil procedure law is based on a **mixture** of **orality and a written form of procedural acts**.[44]

Generally said, orality is predominant at the court of first instance,[45] whereas the proceedings at the courts of second and third instance are mainly of written nature.[46] A civil procedure is in principle initiated by a **written claim** (§§ 226, 78, 79 ZPO); within the jurisdiction of district courts, however, a claim can also be put on the court's record orally (§ 434 ZPO).[47] The **court's decision** may only be **based** on facts, i.e. evidence and arguments brought forward during the **oral proceedings**.[48] **Judgements** can be proclaimed orally or in written form (§§ 414 and 415 ZPO); however, they generally have to be issued in written form (§ 414 para 3 ZPO; cf. § 416 para 3 ZPO for the – rare – exceptions).

Resolutions made during the hearing only need to be issued in a written form under special circumstances (for example, if legal remedies can be raised; cf. § 426 para 1 sentence 2 ZPO).[49] Resolutions that were not made during the hearing have to be issued in written form (§ 427 para 1 ZPO). Proceedings on **legal remedies** are mostly of written nature; proceedings on an **appeal can** be held orally at the court of second instance as well as (under very rare circumstances) at the court of third instance. Recourse proceedings are always of written nature.[50]

1.5 Principle of Directness

The **principle of immediacy** does exist in Austrian civil procedure law. Again, there is no explicit legal definition of this principle; however, it is known by academics and

[41] Rechberger/Simotta, 2010: p 664.
[42] Rechberger/Simotta, 2010: p 664.
[43] Rechberger/Simotta, 2010: p 409; for a slightly different opinion cf. Fasching, 1990: p 666.
[44] Fasching, 1990: p 669.
[45] Fasching, 1990: p 669.
[46] Fasching, 1990: p 669; Rechberger/Simotta, 2010: p 410.
[47] Fasching, 1990: p 669.
[48] Fasching, 1990: p 667; Rechberger/Simotta, 2010: p 409.
[49] Fasching, 1990: p 669.
[50] Fasching, 1990: p 669.

courts.[51] The principle of immediacy implies that the court's decisions must be **based on facts and evidence that were taken and discussed by the sentencing court**.[52]

There are several sub-categories to the principle of immediacy: According to § 276 para 1 ZPO, evidence generally has to be taken **before the court of the present instance** (so-called **"objective immediacy"**). The judge's possibility to form his or her opinion according to his or her very own perceptions is necessary in order to justify the idea of a free assessment of evidence.[53] For the sake of procedural economy, however, there are some **exceptions to the principle of objective immediacy**: Examples are the possibility of **judicial assistance** (cf. § 37 JN or the regulation EC No 1206/2001 on the taking of evidence) on the taking of evidence,[54] the **preservation of evidence** (cf. §§ 384-389 ZPO), or the rule on **usage of evidence from former proceedings** (§ 281a ZPO).[55] Also, according to § 281a ZPO, the **written transcript** on evidence that was taken during previous proceedings as well as a **written expert's opinion** from a previous proceeding can be used as evidence if

1.) the parties were involved in the previous proceedings, and
   a.) none of the parties explicitly applies for the opposite, or
   b.) the piece of evidence is not available anymore; or if
2.) the parties that were not involved in the previous proceedings explicitly agree.

"Personal immediacy" means that a judgement may only be passed by a judge who took part in the underlying oral proceeding (§ 412 para 1 ZPO). If there happens to be a change of judges, the oral hearing has to be held again.[56] However, the **claim**, the **evidence that was taken to the record,** and the **written minutes** can be used in the rerun of the hearing (§ 412 para 2 ZPO).

The **continuity of collecting evidence** (cf. § 138 ZPO) as well as a **temporarily close usage** of the collected evidence (in the form of passing a judgement within a short time frame after the proceeding; cf. § 414 para 3 and § 414 ZPO) form the so-called **"temporal immediacy"** of the proceedings.[57]

According to § 488 para 1 ZPO, an **appellate court can take evidence** not only to assess the grounds for appeal, but it can also repeat or complete the taking of evidence from the court of first instance if necessary. This is rather exceptional in practice, however.[58] The appellate court can evaluate evidence that was taken during the appellate proceeding, but if it wants to **deviate from an evaluation of the court of first instance**, it has to **take the evidence again**.[59]

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[51] Cf. Fasching, 1990: p 671-680; Rechberger/Simotta, 2010: p 412-415.
[52] Rechberger/Simotta, 2010: p 412.
[53] Rechberger/Simotta, 2010: p 413.
[54] Kodek/Mayr, 2013: p 85; Rechberger/Simotta, 2010: p 413.
[55] Kodek/Mayr, 2013: p 85; Rechberger/Simotta, 2010: p 413.
[56] Rechberger, 2014: § 412 ZPO p 1.
[57] Kodek/Mayr, 2013: p 87; Rechberger/Simotta, 2010: p 414.
[58] Rechberger/Simotta, 2010: p 1032.
[59] Kodek, 2014: § 488 ZPO p 2.

1.6 Principle of Public Hearing

The **principle of public hearing** is outlined in the Austrian constitution (Art 90 para 1 B-VG; Art 6 para 1 ECHR[60]). According to the principle of public hearing, proceedings generally have to be held in such a manner that **everybody (not only the parties) can attend** them **without having to prove any special interest** in the proceedings.[61] This principle is supposed to strengthen people's trust in the justice system as well as to guarantee the effectiveness and independence of jurisdiction through the public control it provides.[62] According to § 171 para 1 ZPO, **all hearings before court** as well as the **announcement of the decision** have to take place publicly.

The principle of public hearing has **several limitations**: Firstly, it is restricted by the **room conditions** (courtrooms only seize a certain amount of people), but also by **other obstacles** that do not intentionally influence the principle of public hearing.[63] Secondly, only **unarmed persons** are granted access to the trial.[64] Thirdly, there are some **types of proceedings** (such as matrimonial proceedings or several other proceedings on rights emerging from a matrimonial relationship) that are excluded from the principle of public hearing due to the very personal nature of the give subject matter.[65] And finally, there is a certain number of **circumstances that allow the judge to limit the publicity** of the hearing: This can be the case if **public morality or public security is in danger** (§ 172 para 1 ZPO), if a **disturbance of the hearing** or a **hindrance in the fact-finding** is to be expected (§ 172 para 1 ZPO), if **circumstances of the family life** have to be debated and proven (§ 172 para 2 ZPO), or if **business and company secrets** could be in danger (e.g. § 26 UWG, § 30 KSchG).[66]

1.7 Principle of Pre-trial Discovery

There is no **"principle of pre-trial discovery"** in Austrian civil procedure law. However, there is the possibility to **preserve evidence** in some special cases (see chapter 7.2).

1.8 Other General Principles

Austrian civil procedure law contains two more principles worth mentioning:
The **principle of ex officio conduct** of the proceedings means, that once the proceedings are initiated by the parties (principle of free disposition of the parties), it is the **court's task to carry out the proceedings** by serving the claim to the defendant, scheduling the hearings, summoning witnesses, et cetera.[67]

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[60] European Convention on Human Rights.
[61] Rechberger/Simotta, 2010: p 416.
[62] Rechberger/Simotta, 2010: p 416.
[63] Rechberger/Simotta, 2010: p 416.
[64] Rechberger/Simotta, 2010: p 416.
[65] Rechberger/Simotta, 2010: p 417.
[66] Rechberger/Simotta, 2010: p 417.
[67] Rechberger/Simotta, 2010: p 407.

Finally, there is the **principle of concentration of the proceedings** and of **procedural economy** that aims at simple, fast, and cheap proceedings.[68] Along with the *ex officio* conduct of the proceedings, there are several other means to guarantee that the proceedings are carried out quickly and economically, such as limitations to the *ius novorum,*[69] or the parties' obligation to support the fast conduct of the proceedings (§ 178 para 2 ZPO).

2 General Principles of Evidence Taking

2.1 Free Assessment of Evidence

In Austria, all administrative and judicial procedures are led by the **principle of free assessment of evidence**.[70] This is one of the fundamental principles laid down in the general provisions on the taking of evidence (cf. §§ 266-291c ZPO).[71] When forming an opinion on whether asserted facts are to be considered true, the court needs to assess the **outcome of the evidence-taking**.[72] However, not only the results of the taking of evidence, but the whole **hearing in general** (e.g.: the conduct of persons involved in the case during the trial) are relevant to the forming of the judge's conviction.[73]

This assessment is "free": that means that there are (in general) **no legal rules** for assessing the results of evidence-taking (the opposite would be a set of legal norms determining when a fact is conclusively proved, which would constitute the so-called **principle of fixed or bound assessment of evidence**).[74] After evidence has been taken, the **court examines according to its own independent conviction** („freie Überzeugung") whether or not it considers the facts put forward by the parties to be true (in some cases the facts must be clarified by the court itself).[75]

The judge shall carry out the assessment of evidence to his or her best knowledge and judgment according to his or her life experience and knowledge of human character.[76] However, the decision must state the circumstances and considerations that were relevant for the court's conviction (§ 272 para 3 ZPO). This means that the court's assessment needs to be grounded comprehensibly in order to withstand the control of a superior court.[77] Therefore, **not only subjective considerations, but also objective components** contribute to the formation of the judge's conviction.[78] Other than that, there are generally no legal rules for the assessment of evidence.

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[68] Kodek/Mayr, 2013: p 92.
[69] Cf. chapter 2.2.
[70] Fasching, 1990: p 812.
[71] Kodek/Mayr, 2013: p 5; Rechberger/Simotta, 2010: p 753.
[72] Fasching, 1990: p 812; Rechberger/Simotta, 2010: p 753.
[73] Fasching, 1990: p 819; Kodek/Mayr, 2013: p 762; Kodek/Mayr, 2013: p 5; Rechberger/Simotta, 2010: p 753.
[74] Fasching, 1990: p 812; Rechberger/Simotta, 2010: p 753.
[75] Fasching, 1990: p 812; Rechberger/Simotta, 2010: p 753.
[76] Rechberger/Simotta, 2010: p 753; similarly Fasching, 1990: p 814.
[77] Fasching, 1990: p 817; Kodek/Mayr, 2013: p 763; Rechberger/Simotta, 2010: p 753.
[78] Fasching, 1990: p 814; Rechberger/Simotta, 2010: p 753.

However, there are some **exceptions from the principle of free assessment of evidence**: For instance, the evidential value of official documents is legally determined in § 292 ZPO (cf. chapter 3.3). And § 215 ZPO states that the written record provides full proof of the trial's course and content, given that no party formulates an objection.[79]

There are some rules of evidence that bind the court to **party dispositions**. That could be the case when parties unanimously claim certain facts to be true (so-called "confessions"; cf. §§ 266, 267 ZPO) or unanimously decide against the use of certain documents or witnesses (§ 183 para 2 ZPO). According to jurisdiction, confessions restrict the **taking of evidence** in these matters.[80] This however is criticized by the prevailing scientific opinion because it would cut down the court's ability to freely assess evidence.[81]

2.2 Relevance of Material Truth

2.2.1 Principle of Material Truth

Even though no **"principle of material truth"** is explicitly realized civil procedure law, it noticeably influences the division of tasks between the court and the parties to a case: Establishing the material truth forms the **basis of the inquisitorial principle**, which entrusts the court with the selection of material (facts and evidence). Therefore, the court has to determine the true facts of the case, regardless of the parties' conduct and actions.[82] Although the inquisitorial principle (in a strong form) mostly exists in matters subject to high public interest (e.g. the declaratory action concerning the existence of a marriage) or non-contentious proceedings,[83] the principle of material truth is also relevant within the context of the **attenuated inquisitorial principle**.[84] In Austrian civil procedure law, there is no such category as the "standard of material truth".[85]

For instance, some aspects of the principle of material truth can be found in the **duty of the court to conduct the civil procedure** (§§ 182-183 ZPO; "materielle Prozessleitungspflicht des Richters"). This means that the judge must work towards getting the facts provided and the necessary evidence indicated by the parties. The court is able to take evidence *ex officio* as well (**discretionary power** of the court),[86] including the power to order a party to provide documents and other objects.[87] Another

[79] Kodek/Mayr, 2013: p 96, 761; Rechberger/Simotta, 2010: p 753; for more exceptions cf. Fasching, 1990: p 821.
[80] OGH 5 Ob 631/89 JBl 1990, p 590.
[81] Cf. Fasching, 1990: p 821; Holzhammer, 1976: 244; Rechberger, 2004: § 266 ZPO p 6; Rechberger/Simotta, 2010: p 775.
[82] Fasching, 1990: p 664; Palten, 1980: p 427.
[83] Fasching, 1990: p 639 and 662-663/1; Kodek/Mayr, 2013: p 76; Rechberger/Simotta, 2010: p 406; cf. Simotta, 2005: § 460 p 58-63.
[84] Cf. chapter 1.2.
[85] For the standard of proof cf. chapter 3.3.
[86] Rechberger, 2004: Vor § 266 p 77; Rechberger/Simotta, 2010: p 404; Kodek/Mayr, 2013: p 587-592; Fasching, 1990: p 658-659, 781-789.
[87] Rechberger/Simotta, 2010: p 404.

indicator for the importance of the material truth in Austrian civil procedure law is the **parties' duty to provide the facts truthfully and entirely** (§ 178 ZPO).[88] Another aspect of the principle of material truth is the witnesses' obligation to appear, testify, and to swear an oath.[89]

2.2.2 Limitations

Any prohibitions regarding evidence impose restrictions on the court's obligation (and possibility) to establish the material truth.[90] In Austrian civil procedure law, there are different categories of such restrictions:

In some cases, there are **restrictions on the taking of evidence** concerning certain facts. For example, if parties unanimously claim a fact to be true in accordance with §§ 266, 267 ZPO (**confession**), the court is then bound according to the prevailing opinion and therefore is not able to take evidence regarding this certain fact.[91] Furthermore, certain **means of evidence** (e.g. priests, civil servants and registered mediators in case their respective official secrecy applies, § 320 number 2-4) are prohibited. Another kind of prohibition concerns the **method of collecting evidence** by the court. For instance, if someone was ill-treated during an interrogation, the taking of evidence would be considered unlawful because of the method, not because the person would not be allowed to testify in general.[92]

Moreover, the judge cannot order the submission of a document if none of the parties has referred to it (§ 183 para 1 number 2 ZPO). Similarly, witnesses and documents cannot be produced if the parties unanimously decide against it (§ 183 para 2 ZPO).[93]

2.2.3 Ius novorum

After the oral procedure is closed by the court of first instance, the parties to a case cannot provide new facts or evidence (§ 179 ZPO *e contrario*).[94] As a result, an appeal against the judgment of a court of first instance must be limited to those facts and evidence that found their way into the proceedings of the first instance (§ 482 para 1 and 2 ZPO).[95] This strict **prohibition of novation** ("Neuerungsverbot") has a long tradition and is characteristic of Austrian contentious proceedings.[96]

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[88] Fasching, 1990: p 653-654, 781-789; Rechberger/Simotta, 2010: p 404.
[89] Fasching, 1990: p 976-989; Rechberger/Simotta, 2010: p 804-806.
[90] Fasching, 1990: p 824.
[91] Fasching, 1990: p 660, 849; Rechberger/Simotta, 2010: p 772, 775; dissenting Kodek/Mayr, 2013: p 75, 785, 1160.
[92] Rechberger/Simotta, 2010: p 772; Fasching, 1990: p 825-827; Kodek/Mayr, 2013: p 785-787; cf. chapter 9.
[93] Rechberger/Simotta, 2010: p 404; Kodek/Mayr, 2013: p 796.
[94] Rechberger/Simotta, 2010: p 750.
[95] Fasching, 2005: Einleitung IV/1 p 111; Rechberger/Simotta, 2010: p 1007; Kodek/Mayr, 2013: p 1031.
[96] Fasching, 2005: Einleitung IV/1 p 113-114; Fasching, 1990: p 1725; Kodek/Mayr, 2013: p 1031.

Nevertheless, facts and evidence that support or refute the appellant's pleas are exempted from the prohibition of novation; however, *in praxi* this exception is rarely applicable.[97] Furthermore, there is a general exception for cases concerning the nullity of marriage and declaratory action concerning the existence of a marriage and labour law matters (if the party has not been represented by a qualified person).[98]

3 Evidence in General

3.1 Strength of Methods of Proof, Formal Rules of Evidence and Standards of Proof

Generally said, legal norms that determine the strength of certain means of proof would conflict with the principle of free assessment of evidence.[99] However, some of the exceptions from the principle of free assessment of evidence can actually make certain types of evidence stronger than others. For instance, the evidential value of documents is legally determined in §§ 292-294 ZPO, strengthening the probative value of official documents. Similarly, the court records of the hearing provide full proof of the trial's course and content if neither party formulates an objection (§ 215 ZPO).[100]

Besides the legal provisions on the evidential value of documents in §§ 215 and 292-294 ZPO, especially the concept of the **default judgment** in §§ 396, 442 para 1 ZPO is considered an exception to the principle of free assessment of evidence. In this case, the court **has to consider those facts established** that are provided by the party not in default (unless those facts have already been disproven by evidence available). This constitutes a formal rule of evidence.[101]

The necessary level of conviction for the court to consider a fact true (the minimum standard of proof) is in scientific dispute. Some doctrines[102] argue that the full (subjective) conviction of the judge is required, while others[103] assume that the court's task is to ascertain (objective) probabilities. *In praxi*, the Austrian Supreme Court decided that **"high likelyhood"** shall be the minimum standard of proof.[104]

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[97] Fasching, 2005: Einleitung IV/1 p 123; Fasching, 1990: p 1730; Rechberger/Simotta, 2010: p 1008.
[98] Fasching, 2005: Einleitung IV/1 p 127; Fasching, 1990: p 1732; Rechberger/Simotta, 2010: p 750; Kodek/Mayr, 2013: p 1032.
[99] Cf. chapter 2.1.
[100] Kodek/Mayr, 2013: p 96, 761; Fasching, 1990: p 633, 821, 953-954; Rechberger/Simotta, 2010: p 499-500, 753, 798; Rechberger, 2004: § 272 ZPO p 3.
[101] Kodek/Mayr, 2013: p 96; Fasching, 1990: p 821; Rechberger, 2004: § 272 ZPO p 3.
[102] Fasching, 1990: p 815.
[103] Kodek/Mayr, 2013: p 765; Rechberger/Simotta, 2010: p 755; Rechberger, 2004: Vor § 266 ZPO p 8-10.
[104] OGH 2 Ob 185/98i; OGH 2 Ob 97/11w Zak 2011/631.

3.2 Means of Proof

3.2.1 Explicit List of Means of Proof

The ZPO **lists five means of proof: documents** (§§ 292-319 ZPO), **witnesses** (§ 320-350 ZPO), **expert opinions** (§§ 351-367 ZPO), **evidence by inspection** (§§ 368-370 ZPO) and **examination of the parties** (§§ 371-383 ZPO). However, according **to prevailing opinion**, the aforementioned list is **not exhaustive**.[105] Instead, any source of information can be admitted as evidence; therefore new means of evidence are admissible even if they do not fit into one of the explicitly named categories. In this light, there is **no "*numerus clausus* principle"** for the means of evidence. Nevertheless, "new" means of proof can usually be classified as one of the five listed means of proof (e.g. public opinion polls are viewed as expert opinions, requests to the authorities and electronic documents are both considered documents, and image and sound carriers are classified as evidence by inspection).[106]

The ZPO does **rule out certain means of proof**: according to § 320 number 1 ZPO, persons who were either unable to perceive the fact to be proven or who are unable to express their perceptions are incapable of testifying. The same applies with regard to priests, state officials, and registered mediators in terms of their respective official secrecy (cf. § 320 number 2-4).[107]

3.2.2 Examination of Parties

Parties' statements (now) do count as evidence within the framework of the examination of the parties according to §§ 371 ff ZPO; however, up until 1983 the examination of the parties was only a subsidiary means of proof.[108]

Nevertheless, a distinction must be drawn between the **examination** and **hearing** of the parties. The hearing serves the right to be heard (therefore it can be sufficient to hear the party's attorney), while the examination concerns itself with the truth of the facts provided by the parties and thus must be carried out orally and by the party itself.[109] The examination of the parties can serve as proof on all contentious questions relevant to the decision (§ 371 ZPO).

The **examination of the parties** constitutes one of the five primary means of proof. As a general rule, the examination of parties is carried out because a party applies for the evidence to be taken ("Beweisanbot"). However, the court may decide to take the

[105] Kodek/Mayr, 2013: p 856; Fasching, 1990: p 925-926; Rechberger/Simotta, 2010: p 791; Rechberger, 2004: Vor § 266 ZPO p 100; dissenting OGH 1 Ob 171/52 SZ 25/88.
[106] Kodek/Mayr, 2013: p 856; Fasching, 1990: p 925; Rechberger/Simotta, 2010: p 792; Rechberger, 2004: Vor § 266 ZPO p 101-107.
[107] Fasching, 1990: p 826, 971-973; Rechberger/Simotta, 2010: p 772, 803; Rechberger, 2004: Vor § 266 ZPO p 69.
[108] Fasching, 1990: p 1021; Rechberger/Simotta, 2010: p 819.
[109] Spenling, 2004: § 371 ZPO p 3; Kodek/Mayr, 2013: p 850; Rechberger/Simotta, 2010: p 819.

evidence *ex officio* as well (§ 371 ZPO).[110] In practice, it is usually done at the beginning of the evidence-taking (since 2002, it has been a non-obligatory item on the agenda of the preliminary hearing; cf. § 258 para 1 number 5 ZPO).[111] Regarding the capability to testify, the legal provisions on witnesses (§ 320 ZPO) apply: there is no minimum age for either parties or witnesses to testify in court. The question whether underage and mentally disabled persons are capable of testifying needs to be evaluated in every respective case.[112]

As it is the case for witnesses,[113] **parties are obliged to appear, testify and to swear an oath**. However, neither the party's duty to appear, nor the party's duty to testify is enforceable (as an exception, the court may enforce the duty to appear in matrimonial proceedings; cf. § 460 number 1 ZPO). The only consequence of unlawful absence or refusal to testify on the part of a party therefore is the court's inclusion of these violations in its free assessment of evidence (§ 381 ZPO).[114] Parties can **lawfully refuse to testify** under similar conditions as witnesses can, but they cannot refuse for solely proprietary disadvantages (§ 380 para 1 in conjunction with § 321 number 2 ZPO).[115] The admissible grounds for the witnesses' refusal are listed in § 321 ZPO: disgrace or threat of criminal liability for the witness itself or other close persons (number 1); direct proprietary disadvantage for those people (number 2); matters that are subject to a state-approved obligation of confidentiality (number 3-4a); issues that represent business and art secrets (number 5); and matters of voting in case they are legally declared a secret (number 6). The witness or party has to claim the right to refuse testimony and state its reasons. The trial court itself evaluates the legality of such a claim by court order, which cannot be subject to a separate appeal.[116]

Giving false evidence (generally) goes unpunished for parties. Nevertheless, **giving false evidence under oath** constitutes a criminal offence according to § 288 para 2 StGB and can be sentenced with a minimal term of imprisonment of six months up to five years.[117] However, in practice a party is rarely demanded to testify under oath.[118]

The parties' testimonies are subject to the court's free assessment of evidence as any other evidence;[119] with respect to this there are no specific rules.

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[110] Spenling, 2004: § 371 ZPO p 4.
[111] Spenling, 2004: § 371 ZPO p 2; Rechberger/Simotta, 2010: p 819.
[112] Fasching, 1990: p 971, 1026; Rechberger/Simotta, 2010: p 803, 820.
[113] Cf. chapter 6.
[114] Kodek/Mayr, 2013: p 851; Fasching, 1990: p 1024; Rechberger/Simotta, 2010: p 820-821; Spenling, 2004: § 371 ZPO p 6.
[115] Kodek/Mayr, 2013: p 852; Rechberger/Simotta, 2010: p 820.
[116] Rechberger/Simotta, 2010: p 805; Fasching, 1990: p 985.
[117] Plöchl/Seidl, 2010: § 288 StGB p 43; Kodek/Mayr, 2013: p 853.
[118] Kodek/Mayr, 2013: p 853; Fasching, 1990: p 1029; Rechberger/Simotta, 2010: p 822.
[119] Cf. chapter 2.1.

3.2.3 Judicial and Administrative Decisions

Judgments, court orders, and administrative decisions **constitute** (if handed out in a written form) **authenticated (official) documents**, thereby proving that its content is accurate (§ 292 para 1 ZPO).[120] This, however, must not be confused with the (potential) binding effect of an earlier judicial or administrative decision.

3.3 Necessity for Certain Means of Proof

Generally, there is no **need for any facts to be proven by formally prescribed types of evidence**. In some specific cases, however, exceptions are foreseen. For example, a choice of court agreement (*prorogation fori*) needs to be proven by a written document (§ 104 para 1 JN).[121] Also, a special type of proceeding is applied for claims that emerge from a cheque or a bill of exchange (§§ 555-559 ZPO). It is a summary procedure that is characterized by the principle of limited findings, which means that the court is not entitled to verify the existence of the entitlement on the basis of anything else but the cheque or bill of exchange.[122] According to the prevailing opinion, in this type of proceeding **the original document has to be presented**.[123]

Nevertheless certain means of proof may show greater evidential value than others. In that regard, a distinction must be made between (a) those **types of evidence that are *de jure* strengthened** by formal rules of evidence, and (b) those that ***de facto* play an important role** within the free assessment of evidence ("logical persuasiveness"):
(a) **Official and private documents**: The evidential value of documents is legally determined in §§ 292-294 and 310 ZPO. These formal rules of evidence strengthen the probative value of this certain type of proof and therefore represent an exception to the principle of free assessment of evidence.[124] According to § 310 ZPO, official documents[125] are presumed to be **authentic** (that means that the document was truly issued by the person named as the issuer); yet, in case of doubt the authenticity needs to be proven.[126] According to § 292 para 1 ZPO, official documents also provide full proof that **the content of the document is accurate**.[127] However, the contrary can be proven (§ 292 para 2 ZPO).[128] By contrast, the accuracy of private documents is subject to the free assessment of evidence. According to § 294 ZPO, private documents just prove (under certain formal circumstances) that the statements within the private document

[120] Fasching, 1990: p 953; Rechberger/Simotta, 2010: p 798; similarly Bittner, 2004: § 292 ZPO p 31; cf. chapter 3.3.
[121] Simotta, 2013: § 104 JN p 53.
[122] Klicka, 2005: Vor §§ 555-559 ZPO p 3; Fasching, 1990: p 2126; Rechberger/Simotta, 2010: p 1120; Kodek/Mayr, 2013: p 1188.
[123] Fasching, 1971: 596; Klicka, 2005: Vor §§ 555-559 ZPO p 9.
[124] Cf. chapter 2.1.
[125] Cf. chapter 5.1.
[126] Kodek, 2004: § 310 ZPO p 1-2; Rechberger, 2014: § 310 ZPO p 2-3.
[127] Fasching, 1990: p 949; Rechberger/Simotta, 2010: p 798; Bittner, 2004: § 292 ZPO p 41.
[128] Fasching, 1990: p 953; Rechberger/Simotta, 2010: p 798.

originate from the person who signed the document ("qualified presumption of authenticity"); again, the contrary can be proven.[129]
(b) **Witnesses and expert opinions**: there are no formal, legal rules regarding the evidential value of witnesses and expert opinions, which means both are subject to the court's free assessment of evidence (§§ 327 and 367 ZPO in conjunction with § 272 ZPO). Nevertheless, **expert opinions are particularly important in practice** because if factual circumstances are very complicated, there is little leeway for the court to assess the evidence according to its "own independent conviction" (§ 272 para 1 ZPO).[130] As a result, the evaluation of experts' opinions is often limited to the issue of their coherence and consistency.[131]

Also, in light of the principle of directness,[132] there is an **order of priority between original** (e.g. the testimony of an eyewitness, an original document, etc.) **and derived** (e.g. testimony of a witness who discovered something from hearsay or documents that allow conclusions regarding an original document etc.) **means of evidence**. The latter are only admissible in case the original means are unavailable or insufficient.[133]

3.4 Duty to Produce Evidence

3.4.1 Parties

In principle, the parties' duty of truthfulness requires them not only to provide the facts truthfully and entirely, but also to **indicate the evidence necessary to prove those facts** (§ 178 para 1 ZPO). In addition, the duty of the court to guide the civil procedure obliges the judge to work towards getting the parties to provide the facts as well as indicate the necessary evidence. Even if the parties do not indicate the evidence, the court is able to take it *ex officio* where it is necessary in order to establish the asserted facts (discretionary power of the court).[134] As a consequence of the discretionary power of the court,[135] the judge has the power to order that the parties submit documents, objects of inspection, files, etc., given that one of the parties had referred to them during the proceedings (§ 183 para 1 number 2 ZPO). Furthermore, the judge may request the parties to appear in person (§ 183 para 1 number 1 ZPO).[136]

The requested appearance or the testimony of a party **cannot be enforced** (§ 380 para 3 ZPO). However, the refusal to appear or to testify maybe taken into consideration when

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[129] Bittner, 2004: § 294 ZPO p 4; Rechberger/Simotta, 2010: p 797; similarly Fasching, 1990: p 954.
[130] Fasching, 1990: p 1007; Rechberger/Simotta, 2010: p 809; Rechberger, 2004: Vor § 351 ZPO p 4.
[131] Kodek/Mayr, 2013: p 838.
[132] Cf. chapter 1.5.
[133] Kodek/Mayr, 2013: p 804; Fasching, 1990: p 811; Rechberger/Simotta, 2010: p 787; Rechberger, 2004: Vor § 266 ZPO p 92.
[134] Rechberger, 2004: Vor § 266 ZPO p 77; Rechberger/Simotta, 2010: p 404; Kodek/Mayr, 2013: p 589; Fasching, 1990: p 658-659; cf. chapter 2.2.1.
[135] Fasching, 1990: p 782; Schragel, 2003: § 183 ZPO p 1.
[136] Fasching, 1990: p 784; Rechberger/Simotta, 2010: p 404; Schragel, 2003: § 183 ZPO p 2-3.

freely assessing evidence (§ 381 ZPO).[137] Again, matrimonial proceedings and proceedings concerning parentage constitute exceptions; appearance can be enforced through penalties for contempt of court ("Ordnungsstrafe") and, in the case of proceedings regarding parentage, through compulsory attendance ("zwangsweise Vorführung").[138] Similarly, the order to submit documents is not enforceable; if the party does not comply with the order, the court must take its conduct into consideration in its free assessment of evidence (§ 307 para 2 ZPO).[139]

3.4.2 Third Persons

The court can oblige a third person to **submit documents,** provided that there is either a civil obligation to do so or the document is a joint document (cf. § 308 para 1 ZPO).[140] The party giving evidence needs to apply for such an order and, in the event that the third person denies possession after being heard by the court, provide *prima facie* evidence ("Glaubhaftmachung") for the third person's possession of the evidence. A court order that obliges third persons to deliver evidence is enforceable (§ 308 para 2 ZPO). If possible, the document will be taken from the third person; otherwise, its submission will be enforced through fines or custodial sentences.[141]

If the third person is a **witness**, there is then an obligation to appear, testify and swear an oath. These obligations can be enforced by court. If a witness fails to appear before court, the court may impose a penalty for contempt of court ("Ordnungsstrafe"); a repeated infringement may result in the imposition of compulsory attendance ("zwangsweise Vorführung"). If the witness does not comply with the duty to testify, the testimony may be enforced by the means of execution proceedings, for example through fines or custodial sentences (§ 354 EO).[142]

4 General Rule on the Burden of Proof

4.1 Main Doctrine

There is a **general rule on the burden of proof** in Austrian civil procedure law: Any party has to prove the **existence of all factual requirements for the legal rule favourable to him**.[143] This means that if relevant facts or circumstances remain unclear, the judge has to decide as if it had been proven that the fact does not exist or the circumstance did not occur.[144]

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[137] Cf. chapter 3.2.2.
[138] Schragel, 2003: § 183 ZPO p 2.
[139] Kodek/Mayr, 2013: p 823; Kodek, 2004: § 307 ZPO p 13; Rechberger/Simotta, 2010: p 800.
[140] Kodek/Mayr, 2013: p 824; Rechberger/Simotta, 2010: p 801.
[141] Kodek, 2004: § 308 ZPO p 15; Rechberger/Simotta, 2010: p 801.
[142] Fasching, 1990: p 976, 978, 982; Rechberger/Simotta, 2010: p 804-806; Frauenberger, 2004: § 325 ZPO p 1 and 3 as well as § 333 ZPO p 1-7.
[143] Fasching, 1990: p 882; Rechberger/Simotta, 2010: p 760.
[144] Rechberger/Simotta, 2010: p 760.

4.2 Standards of Proof

There are several standards of proof in Austrian civil procedure law. The **regular standard of proof** requires the judge's conviction of a **high likelihood** of the relevant matter of fact.[145] Sometimes, however, this regular standard of proof is increased to an **utmost likelihood** (this concerns for example the proof, that a child is not a descendent of the mother's husband[146]) or decreased to a **predominant likelihood** (which means that the existence of the matter of fact is more likely than its nonexistence; this concerns for example the proof of the reasons to reject a judge, cf. § 22 para 3 JN).[147]

4.3 Exceptions from the Burden of Proof

There are some exceptions from the **necessity of proof**:
1. Confessions (**§§ 266 and 267 ZPO**): confessions are declarations of knowledge (not declarations of intent) from one party stating that the other party's allegations are correct.[148] According to **jurisdiction,** explicitly confessed facts or circumstances have to be taken as true and must not be evaluated when the judge takes the decision.[149] According to this view, a confession creates a **prohibition on the confessed topic of evidence** unless the opposite is generally known, came up in the course of the court's official activities, or if the confession was made in a proceeding with a prevailing inquisitorial principle.[150] Most of scientific literature, however, criticizes the assumption of such a binding effect of a confession.[151]
2. Obvious facts or circumstances (**§ 269 ZPO**):
According to § 269 ZPO, evident facts and circumstances do not need to be proven; they actually do not even need to be asserted.[152] Facts and circumstances are obvious if they are **common knowledge** (for example, if they are known to a vast number of people or if they can easily be found out, such as geographic facts) or if they are **known to the court** through its official activities.[153]
3. Legal presumptions (**§ 270 ZPO**):
According to § 270 ZPO, **legally presumed facts or circumstances do not need to be proven**. Generally, however, it is admissible to prove the contrary unless the law explicitly prohibits it (*praesumptio iuris et de iure*; cf. § 270 sentence 2 ZPO).[154] This creates a **shift in the burden of proof**: the party does not have to prove the fact in

[145] Rechberger/Simotta, 2010: p 755; Rechberger, 2004: Vor § 266 ZPO p 10; Kodek/Mayr, 2013: p 765.
[146] Rechberger/Simotta, 2010: p 756.
[147] Rechberger/Simotta, 2010: p 756.
[148] Fasching, 1990: p 841; Rechberger/Simotta, 2010: p 775.
[149] OGH 3 Ob 376/56 EvBl 1957/90; 10 ObS 319/01m; RIS-Justiz RS0040110; Rechberger/ Simotta, 2010: p 775.
[150] Kodek/Mayr, 2013: p 789; Rechberger/Simotta, 2010: p 775.
[151] Cf. Fasching, 1990: p 821; Holzhammer, 1976: 244; Rechberger, 2004: § 266 ZPO p 6; Rechberger/Simotta, 2010: p 775.
[152] Fasching, 1990: p 852; Rechberger/Simotta, 2010: p 776.
[153] Fasching, 1990: p 854-857; Kodek/Mayr, 2013: p 790; Rechberger/Simotta, 2010: p 776.
[154] Kodek/Mayr, 2013: p 791.

question, rather only the fact **serves as a base for the presumption**.[155] If the party successfully does so, the counterparty either has to prove the **nonexistence of the base for the presumption** ("Gegenbeweis") or the **nonexistence of the factual requirements** for the legal rule **un**favourable to him ("Beweis des Gegenteils").[156]

4. Exemptions in § 273 ZPO

If the existence of a damage claim is proven but the amount of the obligation is either **unprovable** or **unreasonably difficult to prove**, the judge can (for economic reasons) **assess the value** of that claim (§ 273 para 1 ZPO).[157] In that case, the claimant only has to assert but not to prove the value of the claim.[158] Also, according to § 273 para 2 ZPO, if a law suit comprises of several claims and some of these claims have **only minor importance,** or if a claim **does not exceed € 1.000**, the judge can **freely decide on the existence and the amount** of the claim if the necessary information would be unreasonably difficult to obtain.[159]

4.4 Duty to Contest Specified Facts and Evidence

There is no enforceable "duty" to contest specified facts and evidence in Austrian civil procedure law. The consequences of a party failing to contest facts and evidence are rather set by the **rules on the burden of proof**.

4.5 The Doctrine of iura novit curia

The doctrine *iura novit curia* applies to Austrian civil procedure law. This means that the **rule of law cannot be the subject of evidence**;[160] the only exceptions are **foreign law** and some **special types of national law** ("customary rights, privileges and statutes"; cf. § 271 ZPO). The collection of this legal knowledge takes place in a special procedure (**"collection procedure"**) that is carried out *ex officio*.[161]

4.6 Incomplete Facts Claimed or Incomplete Evidence Proposed

According to § 182 para 1 ZPO the court is obliged to ensure all necessary information is given and assertions are made, incomplete assertions are completed, all necessary evidence is named and described, an incomplete offer of evidence is completed, and all necessary information is given to evaluate the validity of the asserted claims truthfully (so-called **"judicial guidance"**).[162]

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[155] Fasching, 1990: p 866.
[156] Fasching, 1990: p 866-867; Rechberger/Simotta, 2010: p 777.
[157] Rechberger/Simotta, 2010: p 779.
[158] Kodek/Mayr, 2013: 792; Rechberger/Simotta, 2010: p 779.
[159] Kodek/Mayr, 2013: 793; Rechberger/Simotta, 2010: p 780; Rechberger, 2014: § 273 ZPO p 8.
[160] Kodek/Mayr, 2013: 776; Rechberger/Simotta, 2010: p 764.
[161] Rechberger/Simotta, 2010: p 764; Rechberger, 2004: § 271 ZPO p 1.
[162] Fucik, 2014: § 182 ZPO p 1.

4.7 Means to Induce Parties to Elaborate on Claims and Express an Opinion on a Factual or Legal Matter

Courts have the means to induce the parties to elaborate on claims and to express an opinion on any factual or legal matter (§§ 182 and 182a ZPO).[163] The court is even **obliged to discuss** its own legal opinion and to give the parties a chance to elaborate on it (as far as the main claim is concerned) if the judgement shall be based on this opinion and the parties clearly overlooked these legal aspects or mistook them for irrelevant (§ 182a ZPO).[164] The question whether the court is allowed to provide this information also in written form is not explicitly outlined in the ZPO. In practice, the court usually provides such information during the hearings.

4.8 Proposition to Submit Additional Evidence

Within the judicial guidance (§ 182 ZPO) the **court can propose** the submission of additional evidence to the parties. The time restraints of such a proposal are set by the limitations of the *ius novorum*;[165] so generally the end of the hearing at the court of first instance. If a party does not comply with the court's request, this party has to bear the consequences of not being able to prove the fact or circumstance in question. So, according to the general doctrine of the burden of proof, the judge has to decide as if it had already been proven that the fact does not exist or the circumstance did not occur.[166]

4.9 Collection of Evidence by the Court on its Own

In procedures with a strong **inquisitorial principle** (such as proceedings on the nullity of marriage; cf. § 460 number 4 ZPO), the court has to collect evidence on its own.[167] This is usually the case when the subject matter of the proceedings is in public interest.[168] The court can – within **discretionary power** – also collect evidence on its own, if facts or circumstances seem relevant to the judge for his or her decision taking (cf. § 183 ZPO).[169] The underlying idea is that the civil procedure shall be part of the state's social welfare service.[170]

4.10 Presentation of New Evidence

In principle, new evidence can be introduced **until the closing of the oral proceedings** at the court of first instance (§ 179 sentence 1 ZPO). Such **new evidence** can **be rejected** by the court, however, if the evidence **was not introduced earlier through**

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[163] Fucik, 2014: § 182 ZPO p 1.
[164] Fucik, 2014: § 182 ZPO p 1; Schragel, 2003: § 182 ZPO p 4-10.
[165] Cf. chapter 2.2.
[166] Rechberger/Simotta, 2010: p 760.
[167] Kodek/Mayr, 2013: p 796.
[168] Cf. chapters 1.2 and 2.2.
[169] Kodek/Mayr, 2013: p 796; Rechberger/Simotta, 2010: p 782.
[170] Rechberger/Simotta, 2010: p 403.

gross negligence and if its treatment would **considerably delay the closing of the proceedings** (§ 179 sentence 2 ZPO).

4.11 Obtaining Evidence from the Counterparty or a Third Person

Regarding obtaining **documents** from the counterparty or third persons, see chapter 5.3. In principle, the same rules (§§ 301, 303-307 ZPO) apply to obtaining **real evidence** (for inspection) from the **counterparty** (§ 369 ZPO): **Under the conditions of § 304 ZPO** the **counterparty cannot refuse to hand out the evidence** (if either the counterparty refers to the real evidence, the counterparty is obliged by civil law to surrender the real evidence, or the evidence is a joint one).[171] There are some legitimate reasons for refusing to deliver real evidence (§ 305); however, the duty to submit the evidence or to tolerate the taking of evidence is not enforceable.[172] Instead, an unjustified refusal of submitting real evidence or an unjustified refusal of tolerating the taking of real evidence **by the counterparty** has to be assessed within the judge's free assessment of evidence.[173] Since § 369 ZPO does not refer to § 308 ZPO, there is generally **no possibility to oblige third persons** to hand over real evidence or tolerate the inspection of real evidence.[174]

5 Written Evidence

5.1 Concept of a Document

5.1.1 General Aspects

Documents are one of the five means of proof listed in the ZPO (§§ 292-383 ZPO). They are the "written embodiment" of thoughts.[175] It makes no difference whether the document was produced for evidential purposes (e.g.: a contractual document, a receipt etc.), or if it coincidentally became a subject of evidence (e.g.: a personal letter).[176] In Austria, documentary evidence has great importance, not least because documents generally are a relatively credible means of proof.[177]

The ZPO distinguishes between **two types of documents**: **official documents** and **private documents**:[178] **Official documents** are documents provided by authorities or persons officially appointed for that purpose (notaries, architects, consulting engineers etc.); furthermore documents that are declared official and finally foreign authenticated

[171] Fasching, 1990: p 1016.
[172] Fasching, 1990: p 1016; Rechberger/Simotta, 2010: p 816.
[173] Fasching, 1990: p 1016; Rechberger/Simotta, 2010: p 816.
[174] Rechberger/Simotta, 2010: p 816; also cf. Fasching, 1990: p 1016.
[175] Kodek/Mayr, 2013: p 813; Rechberger/Simotta, 2010: p 794.
[176] Kodek/Mayr, 2013: p 813; Rechberger/Simotta, 2010: p 794; see also Bittner, 2004: § 292 ZPO p 1.
[177] Fasching, 1990: p 970; Neumayr, 2014: 63.
[178] Cf. Rechberger/Simotta, 2010: p 795.

(official) documents.[179] All other documents are **private documents;** however, they can be officially authenticated, which confirms that they were signed by the person who issued the document.[180]

5.1.2 Video and Audio Recording

Video or audio recordings are not considered to be a document in Austrian civil procedure law. They are generally classified as **evidence by inspection** (§§ 368-370 ZPO);[181] however, in certain cases (for example if they contain written records, such as microfilms) the rules applying to documents will apply to them.[182]

5.1.3 Electronic Documents

There is **no explicit definition** of "electronic documents" in Austrian civil procedure law.[183] The applicable rules depend on the very nature of the electronic document: **image and sound storage media** are generally considered evidence by inspection.[184] **Written electronic documents** (in other words: electronically "written embodiments of thoughts"[185]), however, are explicitly considered equal to "classic" written documents according to §§ 292 and 294 ZPO.[186]

The probative value of electronic written documents is set in §§ 292-294 ZPO (which represents an exception to the principle of free assessment of evidence[187]). According to § 310 ZPO, official documents[188] are presumed to be **authentic** (that means that the document was truly issued by the person named on it as an issuer); however, in case of doubt, the authenticity needs to be proven.[189] According to § 292 para 1 ZPO, official documents also provide full proof that **the content of the document is accurate**;[190] however, the opposite can be proven (§ 292 para 2 ZPO).[191] By contrast, the accuracy of private documents is subject to the free assessment of evidence. According to § 294 ZPO, private documents just prove (under certain formal circumstances) that the statements within the private document **originate from the person who signed the**

[179] See § 292 para 1 ZPO and § 293 para 1 and 2 ZPO.
[180] Kodek/Mayr, 2013: p 816; Rechberger/Simotta, 2010: p 795.
[181] Kodek/Mayr, 2013: p 856; see also Fasching, 1990: p 929; Rechberger/Simotta, 2010: p 792; Rechberger, 2004: Vor § 266 p 101-107.
[182] Fasching, 1990: p 929; Rechberger/Simotta, 2010: p 792.
[183] Rechberger, 2006: Vor § 292 ZPO p 6; Rechberger/Simotta, 2010: p 792.
[184] Rechberger, 2014: Vor § 292 ZPO p 4; Rechberger/Simotta, 2010: p 792.
[185] Rechberger, 2014: Vor § 292 ZPO p 6.
[186] Rechberger/Simotta, 2010: p 792.
[187] Cf. chapter 2.1.
[188] Cf. chapter 5.1.
[189] Kodek, 2004: § 310 ZPO p 1-2; Rechberger, 2014: § 310 ZPO p 2-3.
[190] Fasching, 1990: p 949; Rechberger/Simotta, 2010: p 798; Bittner, 2004: § 292 ZPO p 41.
[191] Fasching, 1990: p 953; Rechberger/Simotta, 2010: p 798.

document ("qualified presumption of authenticity"); again, the contrary can be proven.[192]

The electronic version of a document is considered to be equivalent to a document (see §§ 292 and 294 ZPO). Therefore, the electronic version of a document provides the same probative value as an analog document (as long as the rules for drafting an official electronic document – for example an electronic signature according to § 2 numbers 1, 3 and 3a SigG[193] – are respected).

5.1.4 Electronic Signatures

The federal law on electronic signatures ("*Bundesgesetz über elektronische Signaturen; Signaturgesetz – SigG*") establishes the legal framework for the creation and the use of electronic signatures. This law is complemented by the regulation on electronic signatures ("*Verordnung des Bundeskanzlers über elektronische Signaturen; Signaturverordnung 2008 – SigV 2008*"). There are **three forms of electronic signatures**:

- An **"ordinary electronic signature"** (§ 2 number 1 SigG) is any electronic data attached to (or logically associated with) other electronic data, which serves as a method of authentication.
- An **"advanced electronic signature"** (§ 2 number 3 SigG) is an electronic signature that meets the following requirements:
  a) it is uniquely linked to the signatory (the person who signed);
  b) it is capable of identifying the signatory;
  c) it is created using means that the signatory can keep under his or her exclusive control; and
  d) it is linked to the relevant data in a manner that any subsequent change of the data is detectable;
- A **"qualified electronic signature"** (§ 2 number 3a SigG) is an advanced electronic signature (§ 2 number 3 SigG) that is based on a qualified certificate and that is created by a secure signature creation device.

A qualified electronic signature meets the legal requirements of a personal signature unless otherwise specified by law or by common agreement (§ 4 para 1 SigG). According to § 4 para 3 SigG, the formal rule in § 294 ZPO applies to electronic documents furnished with a qualified electronic signature.[194]

5.1.5 Other Objects Equivalent to Written Evidence

With the exception of electronic written documents there is no other "archetype" of objects equivalent to written evidence. However, other "new" means of evidence can be

[192] Bittner, 2004: § 294 ZPO p 4; Rechberger/Simotta, 2010: p 797; similarly Fasching, 1990: p 954.
[193] Federal law on electronic signatures ("Bundesgesetz über elektronische Signaturen; Signaturgesetz – SigG").
[194] Rechberger, 2010: Vor § 292 ZPO p 7.

regarded as written evidence (which means, that the rules applying to written evidence apply to them), for example microfilm records of archives.[195]

5.2 Presumption of Correctness

There are **two "dimensions" of correctness** of documents: **Authenticity** and **accuracy**. A document is considered **authentic** if it was (truly) issued by the person named on it as an issuer.[196] A document is considered **accurate** if the documented facts are materially true.[197]

According to § 310 ZPO, **Austrian official documents** are presumed to be **authentic** (that means that the document was truly issued by the person named on it as an issuer); however, in case of doubt, the authenticity needs to be proven.[198] The question whether a **foreign official document** is authentic is subject to the free assessment of evidence (§ 311 para 1 ZPO). However, there are many exceptions listed in international treaties.[199]

According to § 292 para 1 ZPO, official documents also provide full proof that **the content of the document is accurate**;[200] again, the opposite can be proven (§ 292 para 2 ZPO).[201] By contrast, the accuracy of private documents is subject to the free assessment of evidence. According to § 294 ZPO, private documents just prove (under certain formal circumstances) that the statements within the private document **originate from the person who signed the document** ("qualified presumption of authenticity"); once more, the contrary can be proven.[202] As far as the **authenticity** of the document goes, it is sufficient to make the judge doubt that the document was issued by the person named as an issuer.[203]

A judgement can theoretically be rendered on the basis of such an authenticated (official) document only. For proceedings concerning claims arising from a cheque or bill of exchange (§§ 555-559 ZPO) see chapter 3.3.

There is **no presumption of accuracy** for private documents.[204] If the **authenticity** of a private document is not contested, it is **considered uncontested** (§ 312 para 1 ZPO). Also, the signature of the issuer of a private document provides **full proof of the authenticity** of the document (§ 294 ZPO). However, the contrary can be proven.[205]

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[195] OGH 3 Ob 197/07b.
[196] Bittner, 2004: § 292 ZPO p 40; Rechberger, 2014: Vor § 292 ZPO p 14.
[197] Bittner, 2004: § 292 ZPO p 41; Rechberger, 2014: Vor § 292 ZPO p 15.
[198] Kodek, 2004: § 310 ZPO p 1-2; Rechberger, 2014: § 310 ZPO p 2-3.
[199] Neumayr, 2014: 65; Rechberger/Simotta, 2010: p 796.
[200] Fasching, 1990: p 949; Rechberger/Simotta, 2010: p 798; Bittner, 2004: § 292 ZPO p 41.
[201] Fasching, 1990: p 953; Rechberger/Simotta, 2010: p 798.
[202] Bittner, 2004: § 294 ZPO p 4; Rechberger/Simotta, 2010: p 797; similarly Fasching, 1990: p 954.
[203] Kodek, 2004: § 310 ZPO p 2; Rechberger, 2014: § 310 ZPO p 2-3.
[204] Rechberger/Simotta, 2010: p 798.
[205] Rechberger, 2014: § 296 ZPO p 3.

5.3 Taking of Written Evidence

5.3.1 General Aspects

Documents do not necessarily have to be read aloud during the hearing according to the ZPO. They only need to be "sensually perceived" by the judge.[206] However, after the evidence-taking the evidence needs to be discussed (cf. § 259 para 1 ZPO);[207] in the course of that discussion it might be necessary to read out some of the documents that were produced.

5.3.2 Obligation of the Parties to Produce Evidence

The **producing party** is not obliged to deliver the evidence in his or her possession. The procedural consequence of not producing the evidence, however, is the party's eventual loss of the process if the alleged facts cannot be proven.

Documents in the possession of a **public authority or a notary** can be summoned by the court (§ 301 ZPO) if the producing party is unable to obtain the evidence on his or her own.

If the document is in the possession of the **counterparty,** there is an **absolute obligation** to hand it out (which means that the counterparty must not refuse to do so; cf. §§ 303-307 ZPO), **if**

- the counterparty refers to the document,
- there is an obligation under civil law (§ 1428 ABGB), or if
- the document is a joint one (e.g.: a joint contract; cf. § 304 para 1 ZPO).[208]
  Regarding any other documents in possession of the counterparty, there is a **relative obligation to submit**: the counterparty is generally obliged to submit the document; however, the counterparty can refuse to hand it out (§ 305)[209]
- if the content concerns matters of family life (number 1),
- if by submitting the document the counterparty would violate an obligation of honor (number 2),
- if the content of document is disgraceful or holds the risk of criminal prosecution for the counterparty or a third person (number 3),
- if the counterparty would violate a legal obligation of secrecy (number 4),
- as well as in any other case that is equally important (number 5).

The counterparty can be **ordered by court** to hand out the document in question. However, that order is unenforceable. If the counterparty does not comply with the

[206] Fasching, 1990: p 912.
[207] Fasching, 1990: p 912.
[208] Kodek/Mayr, 2013: p 821; Rechberger/Simotta, 2010: p 799-801.
[209] Kodek/Mayr, 2013: p 822.

order, the court has to assess this refusal within the free assessment of evidence (§ 307 para 2 ZPO).[210]

The court can oblige a third person to **submit documents,** given that there is either a civil obligation to do so or the document is a joint document (§ 304 para 2 ZPO).[211] The party giving evidence needs to apply for this and, in case the third person denies possession after being heard by the court, provide *prima facie* evidence ("Glaubhaftmachung") for the third person's possession of the evidence. A court order that obliges third persons to deliver evidence is enforceable (§ 308 para 2 ZPO). If possible, the document will be taken from the third person; otherwise, its submission will be enforced through fines or custodial sentences.[212]

5.3.3 Necessity to Produce Original Documents

Generally, it is not necessary to produce the original version of documents; it is rather enough if **copies or transcripts** of the original document are submitted. However, the presentation of the original version can be requested by court upon application of the counterparty or *ex officio* (§ 299 ZPO).[213] There is no legal remedy against such a decision (§ 319 para 1 ZPO).[214] If the producing party fails to deliver the original version of the document, the court has to take this into consideration within its free assessment of evidence (§ 299 ZPO).

6 Witnesses

6.1 Obligation to Testify

Witnesses are obliged **to appear, to testify, and to swear an oath**. The duties to appear, to testify, and to swear an oath are **enforceable** (cf. § 333 ZPO).[215]

6.2 Summoning of Witnesses

Witnesses are **summoned by court** according to § 329 para 1 ZPO in conjunction with § 288 para 1 ZPO. It is not up to the parties to assure their presence in court.[216]

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[210] Kodek/Mayr, 2013: p 823.
[211] Kodek/Mayr, 2013: p 824; Rechberger/Simotta, 2010: p 801.
[212] Kodek, 2004: § 308 ZPO p 15; Rechberger/Simotta, 2010: p 801.
[213] Kodek, 2004: § 299 ZPO p 1; Neumayr, 2014: p 66.
[214] Kodek, 2004: § 299 ZPO p 3.
[215] Fasching, 1990: p 976, 979 and 982; Frauenberger, 2004: Vor § 320 ZPO p 5; Kodek/Mayr, 2013: p 830; Rechberger/Simotta, 2010: p 804.
[216] Fasching, 1990: p 978; Frauenberger, 2004: § 329 ZPO p 1.

6.3 Refusal to Testify

A witness **can refuse** to testify in certain cases.[217] However, there are no "full" exceptions for witnesses; instead, the witness can only refuse to answer single questions or topics (§§ 320 and 321 ZPO); cf. chapters 6.5 and 6.6.[218]

Despite refusing, the witness nevertheless has **to appear in court anyway**.[219] The witness can notify the court about his or her refusal according to § 323 para 1 ZPO (so-called *written statement*). However, if requested, the witness still has to appear in court. There he or she has to claim the right not to testify and state the reasons for not testifying.[220]

The court decides on the lawfulness of the refusal by court order (§ 324 para 1 ZPO). The order has to be pronounced immediately during the hearing after hearing the parties.[221] There is no separate, legal remedy against such an order (§ 349 para 1 ZPO).[222]

According to § 323 para 1 ZPO, the **parties can object to such refusal.** In that case, the witness has to assert the reasons for his or her refusal and provide prima facie evidence for it.[223]

6.4 Persons Unfit to be a Witness

According to § 320 number 1 ZPO, persons that are either

- **incapable of communicating their perceptions,** or
- that **were incapable of perceiving the matter of fact in question** during the time their testimony shall refer to

must not be heard as a witness.[224] Besides that, there is **no minimum age for witnesses** to testify in court. Whether underage and mentally disabled persons are capable of testifying or not, depends on a case-by-case assessment.[225]

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[217] Fasching, 1990: p 939 and 983.
[218] Fasching, 1990: p 983; Frauenberger, 2004: § 321 ZPO p 1; Kodek/Mayr, 2013: p 828; Rechberger, 2014: § 322 ZPO p 1; see also OGH 1 Ob 254/99f JBl 2000, 657 = ÖJZ 2000/79.
[219] Frauenberger, 2004: § 324 ZPO p 1; Rechberger, 2014: § 324 ZPO p 1.
[220] Frauenberger, 2004: § 324 ZPO p 1; Rechberger, 2014: § 324 ZPO p 1; Rechberger/Simotta, 2010: p 805.
[221] Frauenberger, 2004: § 324 ZPO p 1-2.
[222] Rechberger/Simotta, 2010: p 805.
[223] Cf. § 323 para 1 ZPO; Fasching, 1990: p 985; Rechberger/Simotta, 2010: p 805; Rechberger, 2014: § 323 p 1.
[224] Cf. Frauenberger, 2004: § 320 ZPO p 3-4.
[225] Fasching, 1990: p 971 and 1026; Rechberger/Simotta, 2010: p 803.

6.5 Privilege against Self-incrimination

There is a privilege against self-incrimination in Austrian civil procedure law: According to § 321 para 1 number 1 ZPO, a witness has the **right not to answer questions** if the answer would be disgraceful or holds the risk of criminal prosecution for the witness him- or herself or his or her close relatives.[226]

6.6 Possibility of Refusing to Give Evidence

§ 321 para 1 ZPO contains a list of legitimate reasons for a witness's refusal to testify:

- **Disgrace or threat of criminal liability** for the witness him- or herself or other close persons (number 1);
- immediate **proprietary disadvantage** for him- or herself or other close persons (number 2);
- matters subject to **a state-approved obligation of confidentiality** (number 3-4a),
- matters subject to **business and art secrets** (number 5) and
- **voting matters** in case they are legally declared secret (number 6).

However, other acts also contain special provisions on the possibility to refuse testimony – for example the Act on the Lawyers' Profession (*"Rechtsanwaltsordnung - RAO"*) or in the Act on the Medical Profession (*"Ärztegesetz"*).[227]

Judges (as well as the keeper of the court records) must not give evidence in proceedings in which they currently act as a judge (or as a keeper of the court records).[228] Usually in those cases the judge will be biased anyways (cf. § 19 number 2 ZPO). However, if the interrogation of the judge is indispensable, there needs to be a change in judges before hearing him or her as a witness.[229]

Also, according to § 320 ZPO, some persons (e.g.: mediators, priests, state officials) are not allowed to be heard on certain topics.[230]

6.7 Secrets that Can Affect the Taking of Evidence

There are several secrets recognized in Austrian civil procedure law, which can affect the taking of evidence, e.g.:

- **Secrecy of confession** (§ 320 number 2 ZPO)[231]
- **Official secrecy** (§ 320 number 3 ZPO)[232]
- **Banking secrecy** (§ 38 para 1 BWG)[233]

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[226] Cf. Frauenberger, 2004: § 321 ZPO p 6.
[227] Fasching, 1990: p 984; Kodek/Mayr, 2013: p 828.
[228] Fasching, 1990: p 974; Frauenberger, 2004: § 320 ZPO p 10.
[229] Frauenberger, 2004: § 320 ZPO p 10.
[230] Fasching, 1990: p 972-973; Rechberger/Simotta, 2010: p 803.
[231] Cf. Frauenberger, 2004: § 320 ZPO p 5.
[232] Cf. Frauenberger, 2004: § 320 ZPO p 6 ff.
[233] Cf. Frauenberger, 2004: § 321 ZPO p 36.

- **Data protection and data secrecy** (§§ 1, 15 DSG 2000)[234]
- **Secrecy of telecommunications** (§ 93 para 1 TKG 2003)[235]
- **Postal secrecy** (§ 5 Postmarktgesetz)[236]
- **Business and art secrets** (§ 321 para 1 number 5 ZPO)[237]
- **Secrecy of the ballot** (§ 321 para 1 number 6 ZPO)[238]
- **The protection of journalistic sources** (§ 31 para 1 MedienG)[239]
- **Medical secrecy** (§ 321 para 1 number 3 ZPO, § 54 para 1 ÄrzteG)[240]
- **Lawyers' secrecy** (§ 321 para 1 Z 3 and 4, § 9 para 2 RAO)[241]

6.7.1 Business Secrets

A witness may refuse to testify for the sake of a company´s business secret (cf. § 321 para 1 number 5 ZPO). The definition of a company´s business secret is **determined by substantive law** (e.g.: §§ 11-12 UWG; §§ 122-124 StGB).[242] Such business secrets are for example procedural technologies, models, patterns, recipes, results of research, computer programs, customer lists, cost of salaries, the amount of turnover, tax situations, et cetera. The evaluation of the alleged secrets as "business secrets" needs to be done on a case-by-case assessment.[243]

If the company is a holder of public service or a public law entity, the witness may also refuse testimony according to § 321 para 1 number 3 ZPO (state-approved obligation of confidentiality).[244]

6.7.2 State Secrets

According to § 320 number 3 ZPO, a state official shall not be examined on facts that are covered by the **official secrecy** (so called "relative inability to testify"). However, the state official can be exempted from the obligation of secrecy by his or her superior.[245]

First, the court needs to ascertain whether the conditions in § 320 number 3 ZPO are met.[246] If the court has no objections in this regard, the state official has to testify.

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[234] Cf. Frauenberger, 2004: § 321 ZPO p 37.
[235] Cf. Frauenberger, 2004: § 321 ZPO p 38.
[236] Cf. Frauenberger, 2004: § 321 ZPO p 39.
[237] Cf. Frauenberger, 2004: § 321 ZPO p 48.
[238] Cf. Frauenberger, 2004: § 321 ZPO p 53.
[239] Cf. Frauenberger, 2004: § 321 ZPO p 17; Rechberger, 2014: § 322 ZPO p 5.
[240] Cf. Rechberger, 2014: § 322 ZPO p 5.
[241] Cf. Frauenberger, 2004: § 321 ZPO p 21-23; Rechberger, 2014: § 322 ZPO p 6.
[242] Frauenberger, 2004: § 321 ZPO p 50; Schumacher, 1987: p 674.
[243] Frauenberger, 2004: § 321 ZPO p 50; Schumacher, 1987: p 675.
[244] Frauenberger, 2004: § 321 ZPO p 50; Schumacher, 1987: p 676.
[245] Frauenberger, 2004: § 320 ZPO p 8.
[246] OGH 1 Ob 93/72 SZ 45/56.

However, if the court has objections, is has to clarify whether or not the state official will be exempted from the obligation of secrecy.[247]

6.7.3 Journalists

According to § 31 para 1 MedienG, a journalist can refuse to testify about his or her sources. He or she has to claim that the sources are covered by **protection of journalistic sources.** It is important to note that the protection of journalistic sources according to § 31 para 1 MedienG is **not an obligation of secrecy** (such as the one in § 321 para 1 number 3 ZPO). Instead, § 31 para 1 MedienG "only" creates a right to refuse testimony.[248]

6.7.4 Priests

According to § 320 number 2 ZPO, a priest must not be examined on facts covered by the **secrecy of confession** (so called "relative inability to testify"). In those cases, the priest **has to refuse to give evidence**.[249] In contrast to a state official, a priest cannot be exempted from the obligation of secrecy by the penitent (= person who confesses).[250]

6.7.5 Medical Doctors

According to § 321 para 1 number 3 ZPO in conjunction with § 54 para 1 ÄrzteG, a medical doctor has to refuse to testify about certain facts that are subject **to a state-approved obligation of confidentiality** (**= "medical secrecy"**). If the fact is covered by the medical secrecy, the court has to accept the refusal.[251]

According to § 54 para 2 ÄrzteG, there are some exceptions to this medical secrecy, for example:

- if the medical doctor is obliged to report on the medical condition according to special provisions in legislation (number 1),
- if the medical doctor is exempted from the medical secrecy by the patient (number 3), or
- if it is necessary to reveal the secret in order to protect even more important interests of public healthcare or of administration of justice (number 4).

6.7.6 Attorneys and Other Legal Professions

According to § 321 para 1 number 3 and number 4 ZPO in conjunction with § 9 para 2 RAO, the attorney at law has the **obligation to refuse testimony on certain facts regarding his or her client**. The authorities are not allowed to circumvent the

[247] Frauenberger, 2004: § 320 ZPO p 6 and 8.
[248] Fasching, 1990: p 984; Frauenberger, 2004: § 321 ZPO p 5.
[249] Fasching, 1990: p 972; Rechberger/Simotta, 2010: p 803.
[250] Frauenberger, 2004: § 320 ZPO p 5.
[251] Frauenberger, 2004: § 321 ZPO p 30.

obligation (for example by examining the attorney's employees instead of the attorney him- or herself; cf. § 9 para 3 RAO).[252]

There are other legal professions that have the same privilege:

- **Notaries** are obliged to keep all participant-related facts and assessments, which he or she becomes aware of in the context of notarial transactions, confidential (§ 37 para 1 notary act; *Notariatsordnung – NO*).[253]
- **Patent attorneys** must not testify on facts that were confided in him in the course of his or her professional work (§ 17 para 2 Patentanwaltsgesetz).[254]
- **Certified accountants and tax consultants** are obliged to keep those facts that were confided to them during their work in confidence; however, procedurally, there is only a reference to the legal rules in the civil procedure code (§ 91 para 1 and 3 in conjunction with § 1 para 1 Wirtschaftstreuhandberufsgesetz).[255]

6.8 Declaring under Oath

A witness **can be obliged** to swear an oath. This obligation can be enforced **by the means of an enforcement procedure**; i.e. through **fines** or **custodial sentences** (§ 354 EO).[256]

Some persons, however, are **incapable of testifying under oath** (§ 336 para 1 ZPO):[257]

- a witness who was punished for "giving false evidence in court" (§ 288 StGB),
- a witness who has not reached the age of 14, or
- a person who is mentally incapable to understand the significance of an oath.

Only persons who are incapable of testifying under oath according to § 336 para 1 ZPO can refuse to do so. All other persons have to testify under oath if asked to do so.[258] A witness who does not comply with the duty to testify under oath can be forced to do so (see above). Besides, there may be **cost implications** (§ 326 para 2 ZPO), and the court may impose a **penalty for contempt of court** (§ 326 para 3 ZPO). [259]

In this context, it is noteworthy that in practice a witness is rarely placed under oath.[260] According to § 337 para 1 ZPO, the witness generally has to take the oath before giving evidence (so-called "pre-oath"); however, the court may also let the witness take the

[252] Fasching, 1990: p 984/1; Frauenberger, 2004: § 321 ZPO p 21.
[253] Frauenberger, 2004: § 321 ZPO p 26; for further information cf. Wagner/Knechtel, 2006: § 37 NO p 1-18.
[254] Frauenberger, 2004: § 321 ZPO p 27.
[255] Frauenberger, 2004: § 321 ZPO p 28.
[256] Fasching, 1990: p 982, 988; Rechberger/Simotta, 2010: p 805.
[257] Fasching, 1990: p 988; Frauenberger, 2004: § 336 ZPO p 4.
[258] Frauenberger, 2004: § 336 ZPO p 5.
[259] Fasching, 1990: p 982, 988; Frauenberger, 2004: § 336 ZPO p 5; Rechberger/Simotta, 2010: p 805.
[260] Kodek/Mayr, 2013: p 832; Rechberger, 2014: § 336 ZPO p 1; Rechberger/Simotta, 2010: p 806.

oath after giving evidence (so-called "post-oath", cf. § 337 para 2 ZPO). The court can forego the taking of an oath if none of the parties requests so (§ 336 para 2 ZPO).[261]

6.9 Obtaining Evidence from Witnesses

The hearing of the witness is regulated in §§ 336-345 ZPO. At first, the judge shall instruct the witness to tell the truth. Then, **the witness needs to be instructed on the consequences of giving false evidence in court**[262] as well as on **the right to refuse testimony** (§ 338 para 1 ZPO).[263]

According to § 340 para 1 ZPO, the questioning starts with the **interrogation of personal data** (name, date of birth, employment, and place of residence). Then, the judge interrogates the witness about the merits of the case (§ 340 para 2 ZPO). The parties have the right to be present at the questioning; if the judge agrees upon it, they can ask complementary questions themselves (§ 341 para 1 in conjunction with § 289 para 1 ZPO). Unreasonable or inadmissible questions, however, have to be rejected by the judge (§ 289 para 1 and § 342 ZPO). The statements of the witness have to be documented with respect to its essential content; if necessary, in its original wording (§ 343 para 1 ZPO).[264]

The witness has to produce oral testimony. A written testimony by witnesses is not provided in contentious proceedings.[265] The admission of a written testimony would conflict with the principle of immediacy and would therefore be considered a substantial defect of the proceedings (cf. § 496 para 1 number 2 ZPO).[266]

6.10 Perjury

Giving false evidence in court constitutes a **criminal offence** according to § 288 para 1 StGB ("Falsche Beweisaussage") and can be sanctioned with a term of imprisonment of up to three years.[267] **Giving false evidence under oath** constitutes even a more severe crime according to § 288 para 2 StGB ("Meineid") and is to be sanctioned with a term of imprisonment of in-between six months and five years.[268]

There are different rules regarding **the criminal liability of parties**: if a party gives false evidence he or she generally goes unpunished. However, giving false evidence under oath also constitutes a crime for parties according to § 288 para 2 StGB.[269]

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[261] Kodek/Mayr, 2013: p 832.
[262] Cf. chapter 6.10.
[263] Kodek/Mayr, 2013: p 834.
[264] Kodek/Mayr, 2013: p 834-835; Fasching, 1990: p 992; Rechberger/Simotta, 2010: p 807.
[265] Kodek/Mayr, 2013: p 826; Neumayr, 2014: 67; Rechberger/Simotta, 2010: p 802.
[266] Fasching, 1990: p 967; Frauenberger, 2004: Vor § 320 ZPO p 9-12; Rechberger/Simotta, 2010: p 802; differently Ballon, 2009: p 253.
[267] Plöchl/Seidl, 2010: § 288 StGB p 72.
[268] Plöchl/Seidl, 2010: § 288 StGB p 73.
[269] Kodek/Mayr, 2013: p 853; Plöchl/Seidl, 2010: § 288 StGB p 43.

6.11 Cross-Examination

There **is no cross-examination** (in a strict "Anglo-American" sense) in Austrian civil procedure law.[270] Instead, the judge has the powers and duties during the process of questioning. He starts with the interrogation and questions the witnesses about the facts. The parties may ask questions on their own only with permission of the court (§ 341 para 1 in conjunction with § 289 para 1 ZPO).[271]

7 Taking of Evidence

7.1 General Aspects

There is no mandatory sequence in which evidence has to be taken. Prior to the preparatory hearing ("vorbereitende Tagsatzung"), the judge may invite the parties to exchange briefs and to submit evidence (e.g.: documents and other exhibits) to the court. In the preparatory hearing the parties and the judge discuss the program for the proceeding (if a settlement of the case is not possible at that point).[272] This program is a kind of **"road map"**[273] that contains for example a time schedule for the hearings and the sequence of the taking of evidence.[274] This program may be altered at any time and is not binding for the court or for the parties.[275]

In accordance with the **attenuated inquisitorial principle**,[276] the taking of evidence takes place *ex officio* or upon a request by a party. The judge has to work towards getting the necessary declarations and assertions as well as the evidence necessary to prove the facts in question (§ 182 ZPO).[277] In this regard, the judge has the competence (and obligation) to order the submission of evidence.[278] However, there are some exceptions to this competence: according to § 183 para 1 number 2 ZPO, the judge must not order the submission of a document from a party if none of the parties has referred to it. Furthermore, a witness cannot be summoned and documentary evidence cannot be produced if the parties unanimously decide against it (§ 183 para 2 ZPO).[279] Both aspects represent a limitation of the court's duty to guide the procedure by restricting its ability to take evidence *ex officio*.

In certain cases, the court has to set a **time limit** for the taking of evidence if one of the parties requests so (the so-called **"Beweisbefristung"**). This can be the case (§ 279 ZPO),

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[270] Ziehensack, 2013: Allgem 16 p 15.
[271] Rechberger/Simotta, 2010: p 807.
[272] Rechberger/Simotta, 2010: p 738.
[273] Kodek, 2004: § 258 ZPO p 21; Rechberger/Simotta, 2010: p 738.
[274] Kodek, 2004: § 258 ZPO p 22.
[275] Kodek, 2004: § 258 ZPO p 25; Rechberger/Simotta, 2010: p 738.
[276] Cf. chapter 1.2.
[277] Fasching, 1990: p 658-659, 781-789; Kodek/Mayr, 2013: p 587-592, 795-796.
[278] Rechberger/Simotta, 2010: p 404.
[279] Rechberger/Simotta, 2010: p 404; Neumayr, 2014: 59.

- if an obstacle impedes the evidence-taking (e.g.: serious illness of a witness) and cannot be surmounted quickly;
- if the practicability of the evidence-taking is doubtful (e.g. the object of inspection cannot be found), or
- if the needs to be taken abroad.[280]

Apart from the time limit, there are no additional instructions on how to produce the evidence. If the deadline set by the court is missed, the proceedings shall continue on application by any party without **consideration of that evidence**. This piece of evidence is then (generally) **precluded**;[281] however, it can still be used if this will not cause any delay of the proceedings (§ 279 para 2 ZPO).[282] Also, the time limit may be extended according to § 128 ZPO.[283] The court´s decision on such a time limit shall be taken during the oral hearing;[284] albeit there is no separate legal remedy against such a decision (§ 291 para 1 ZPO). § 279 ZPO serves the **concentration of the proceedings**.[285]

The offering party has to specify **the facts to be proven** and **the means of proof** that shall be used to do so (§ 226 para 1 ZPO).[286] For example, in the case of a document the party needs to name the issuer of the document, the place of storage, the type of document, and its presumed content. In the case of a witness it is necessary to announce first name and surname as well as the exact address.[287]

7.2 Preservation of Evidence

Austrian civil procedure law offers the possibility to secure evidence before or during the main hearing; this is called **preservation of evidence** (**"Beweissicherung"**). Such preservation of evidence before the main hearing is only possible if one of the parties requests so; preservation of evidence during the main hearing is possible on application as well *ex officio*.[288]

The preservation of evidence is regulated in §§ 384-389 ZPO and is only provided **for certain means of proof**, namely **evidence by inspection, witnesses,** and **experts**.[289] Also, the preservation of evidence is only admissible if there is a **special interest** of the applicant. This is the case

1. if it is to be feared that the proof might get lost or the use of the proof will significantly more difficult later (§ 384 para 1 ZPO), or

[280] Fasching, 1990: p 910.
[281] Rechberger, 2004: § 279 ZPO p 1.
[282] Rechberger, 2004: § 279 ZPO p 13.
[283] Rechberger, 2004: § 279 ZPO p 10.
[284] Fasching, 1990: p 911; Rechberger, 2004: § 279 ZPO p 10
[285] Cf. Fasching, 1990: p 909; Rechberger, 2004: § 279 ZPO p 1; cf. chapter 1.8.
[286] Fasching, 1990: p 904; Kodek/Mayr, 2013: p 795.
[287] Fasching, 1990: p 904.
[288] Neumayr, 2014: 74.
[289] Rechberger/Simotta, 2010: p 823.

2. if there is a relevant legal interest in determining the current status of an object (§ 384 para 2 ZPO).[290]

The results of the preservation of evidence can be used by reading the protocol of the taking of evidence or the expert's findings during the proceeding.[291]

7.3 Application to Obtain Evidence

The application for evidence has to include the **facts to be proven** (**"Beweisthema"**) and the **means of proof**.[292] Generally, the application can be submitted by the end of the oral hearing.[293] After the closing of the oral procedure at the court of first instance, the parties can neither provide new facts nor evidence (§ 179 ZPO *e contrario*).[294]

The judge is authorized **to reject the parties' application** for evidence to be taken; if he or she considers the evidence to be insignificant (§ 275 para 1 ZPO); if the application is obviously supposed to delay the proceedings (§ 275 para 2 ZPO); or if there was a time limit on the taking of evidence and the deadline has already passed (§ 279 para 2 ZPO).[295] No separate legal remedy can be brought in against those rejection orders (§ 291 para 1 ZPO).[296] Similarly, according to § 179 ZPO, the judge is authorized **to reject evidence** if it has not been submitted in due course and if it would considerably delay the procedure. Again, a rejection order cannot be fought with a separate legal remedy (§ 179 sentence 3 ZPO).[297] According to § 428 para 1 ZPO, any order that rejects an application needs to be justified; this rule also applies on orders that reject an application to obtain evidence.[298]

7.4 Facts Established in Other Proceedings

According to **the principle of directness**,[299] evidence generally has to be taken directly before the court of trial.[300] However, there an important exception from this principle can be found in **§ 281a ZPO**. The using of the court records on the taking of evidence taken in another proceeding (e.g.: statements of parties or witnesses, expert's reports, visits to the scene) or a written expert opinion from another proceeding is permitted

- if both parties were part at that proceeding, and (number 1)
  - none of the parties explicitly request the opposite (lit a),
  - or the evidence is no longer available (lit b);

[290] Fasching, 1990: p 922; Rechberger/Simotta, 2010: p 823.
[291] Neumayr, 2014: p 74.
[292] Kodek/Mayr, 2013: p 795.
[293] Neumayr, 2014: p 59.
[294] Rechberger/Simotta, 2010: p 750.
[295] Kodek/Mayr, 2013: p 797; Rechberger/Simotta, 2010: p 783.
[296] Rechberger/Simotta, 2010: p 788; Rechberger, 2004: § 291 ZPO p 1-2.
[297] Neumayr, 2014: p 59.
[298] Cf. for example Schragel, 2003: § 179 ZPO p 10.
[299] Cf. chapter 1.5.
[300] Fasching, 1990: p 675; Rechberger/Simotta, 2010: p 785.

- or if the parties that did not participate a r the previous proceedings explicitly agree (number 2).[301]

It is up to the judge to decide upon whether he or she uses evidence that was taken in previous proceedings; however, the judge's discretion is limited by the purpose of the procedure of taking evidence: the clarification of the facts of the matter.[302]

7.5 The Hearing

7.5.1 General Aspects

The evidence generally has to be taken during the hearing unless the court orders the taking of evidence outside of a hearing (§ 276 para 1 ZPO); this is part of the principle of directness.[303] However, there is the possibility of the **taking of evidence by a requested judge or an assigned judge**: an **assigned judge** is one member of the deciding senate that was assigned to carry out the taking of evidence.[304] A **requested judge** is a judge of a different court that takes the evidence by means of legal assistance. However, this is only admissible if the direct taking of evidence before the court of trial would imply great difficulty or even be impossible (cf. §§ 300, 328, 352, 368 para 2, § 375 para 2 ZPO).[305] This can be the case if:

- the document or the object of inspection cannot be brought before the court (or there would be a high risk of loss or damage of the evidence);
- the interrogation of witnesses, experts, or examination of the parties is more appropriate at the location of that person;
- the witness or the party are unable to appear in court; or
- the costs of the direct taking of evidence are disproportionately high.[306]

Recently, the ZPO introduced and even prefers the taking of evidence supported by **videoconference technologies** (§ 277 ZPO).[307]

According to **§ 194 ZPO**, evidence can even be taken after the hearing has already ended if the court **reopens the oral hearing**. § 194 ZPO allows a reopening if it is necessary for the clarification or completion of the parties' pleas or for the discussion of produced evidence **after the closing of the hearing**.[308]

According to **§ 289 para 1 ZPO**, the parties have **the right to be present** at the taking of evidence.[309] However, there is **no obligation** for the parties to be present when

[301] Kodek/Mayr, 2013: p 803; Rechberger, 2004: Vor § 266 ZPO p 89.
[302] Rechberger, 2004: § 281a ZPO p 4.
[303] Fasching, 1990: p 675; Rechberger/Simotta, 2010: p 785.
[304] Kodek/Mayr, 2013: p 801.
[305] Kodek/Mayr, 2013: p 801-802.
[306] Fasching, 1990: p 916.
[307] Cf. chapter 7.5.3.
[308] Fucik, 2006: § 194 ZPO p 1.
[309] Fasching, 1990: p 914; Rechberger, 2004: Vor § 266 ZPO p 95.

evidence is being taken (cf. § 289 para 2 ZPO), except if the evidence cannot be taken without the presence of the parties (e.g.: examination of the parties, [cf. § 381 ZPO]; identification of blood groups).[310]

7.5.2 Direct and Indirect Evidence

There is a distinction between direct and indirect evidence in Austrian civil procedure law. The so-called **direct evidence** (**"unmittelbarer Beweis"** or **"direkter Beweis"**) shall prove one of the elements of a legal rule (for example a witness stating that one party had stabbed the other party).[311] In contrast, the so-called **indirect evidence** (**"mittelbarer Beweis"** or **"indirekter Beweis"**) represents circumstantial evidence. This evidence only leads to the conclusion that another fact that could not be proven directly is true (for example the bloody knife that was found at the crime scene).[312]

With respect to the principle of immediacy, it is generally required to use the **most immediate source of evidence**;[313] for example, the hearing of a witness is preferable to a tape record of that witness, and a record is preferable to the transcript of that record, etc. In Austrian terminology, this, however, has nothing to do with the "directness" of evidence.

7.5.3 Remote Evidence

Videoconference technologies can be used to collect live testimony remotely (cf. § 277 ZPO). Since 2009, the ZPO even **prefers** the taking of evidence supported by **videoconference** technologies over legal assistance, unless legal assistance is more appropriate or necessary for special reasons (§ 277 ZPO). The underlying reason is that videoconference conveys a better personal impression than a transcript of a questioning carried out by a requested judge.[314]

It is possible to use the videoconference technologies abroad; **within the EU**, this works within the legal frame of the regulation 1206/2001 with the help of a local court. According to Art 10 para 4 of the regulation, the requesting court may ask the requested court to use communications technology during the course of the taking of evidence, particularly by using videoconference and teleconference. The requested court shall comply with such a requirement unless this is incompatible with the law of the member state of the requested court or by reason of major practical difficulties (Art 10 para 4 of the regulation).[315]

As far as the use of videoconference technologies **outside the EU** is concerned, there are only few regulations. But even if there is no explicit legal basis, the use of

[310] Fasching, 1990: p 915.
[311] Fasching, 1990: p 810.
[312] Fasching, 1990: p 810; Kodek/Mayr, 2013: p 779.
[313] Fasching, 1990: p 678.
[314] Kodek/Mayr, 2013: p 801.
[315] Cf. Schmidt, 2009: 170.

videoconference technologies is still possible if the competent authorities of the foreign country are cooperative.[316]

7.6 Witnesses

Witnesses are summoned by the court according to § 329 para 1 ZPO in conjunction with § 288 para 1 ZPO.[317] However, the parties are allowed to bring along witnesses to the hearing without any previous summons (cf. § 288 para 2 ZPO).[318] A witness needs to be summoned properly in order to legitimately demand the fulfilling of his or her obligations as a witness. This happens according to the rules of the ZPO and the delivery act (*"Zustellgesetz – ZustellG"*).[319] A summoning is the written request by the court addressed to the witness to appear and testify at a specified place and time (cf. § 329 para 2 ZPO).[320] The summoning shall also refer to the consequences of any failure to appear as well as to the legal provisions on the remuneration for a witness (§ 329 para 2 ZPO). The summoning must contain information on the content of the hearing of evidence.[321] According to § 329 para 1 ZPO, a proof of delivery ("*Zustellnachweis*") is not necessary the first time a witness is summoned.[322]

The **witness** has to produce **oral testimony**; a written testimony is not provided in contentious proceedings.[323] The parties do not have to deliver a written statement of the witnesses' testimony before the oral testimony.

In Austrian civil procedure law, witnesses shall **swear an oath**. However, the court can omit the affirmation by oath if none of the parties has applied for it (§ 336 para 2 ZPO).[324] The practical relevance of the oath has decreased drastically nowadays.[325] If an oath is sworn, the witness generally has to do so before giving evidence (the so-called "pre-oath"; cf. § 337 para 1 ZPO). However, the affirmation by oath can also take place after giving evidence if the court deems it necessary after having heard the witness (so-called "post-oath"; cf. § 337 para 2 ZPO).

The witnesses are not present at the same time. Instead, they are to be **questioned individually** in the absence of witnesses that will be heard later on (§ 339 para 2 sentence 1 ZPO).[326] This is supposed to avoid any mutual influence between the witnesses.[327] The judge decides the order in which the witnesses are heard (§ 339 para 2

[316] Cf. Schmidt, 2009: p 171.
[317] Fasching, 1990: p 978; Frauenberger, 2004: § 329 ZPO p 1.
[318] Fasching, 1990: p 914; Rechberger, 2004: § 288 ZPO p 1.
[319] Fasching, 1990: p 978; Frauenberger, 2004: § 329 ZPO p 1.
[320] Fasching, 1990: p 978.
[321] Frauenberger, 2004: § 329 ZPO p 4.
[322] Frauenberger, 2004: § 329 ZPO p 3; Rechberger, 2014: § 329 ZPO p 4.
[323] Kodek/Mayr, 2013: p 826; Rechberger/Simotta, 2010: p 802.
[324] Kodek/Mayr, 2013: p 832.
[325] Kodek/Mayr, 2013: p 832; Rechberger/Simotta, 2010: p 806.
[326] Frauenberger, 2004: § 339 ZPO p 2; Neumayr, 2014: 69.
[327] Neumayr, 2014: p 69; Rechberger 2014: § 339 ZPO p 2; Rechberger/Simotta, 2010: p 807.

sentence 2 ZPO). If a witness' testimony differs from another witness' testimony, those witnesses can be interrogated together (§ 339 para 4 ZPO).[328]

The witnesses are **not to be prepared by the parties**. Instead, the judge has to "prepare" the witness before the beginning of the interrogation by simply **instructing the witness to tell the truth as well as** informing about the **consequences of giving false evidence in court** and the **right to refuse testimony** (§ 338 para 1 ZPO).[329] This is called **"informative questioning"**; the "real" examination of the witness begins – according to § 340 para 1 ZPO – with the interrogation of the witness' personal data (name, date of birth, employment, and place of residence).[330]

7.7 Experts

According to § 289 para 1 ZPO, the parties have the right to be present at the interrogation. Primarily it is the **judge** who **interrogates the expert**. The parties have the right to request the judge to ask questions on their behalf or ask questions themselves if the judge allows so. Unreasonable or inadmissible questions shall be rejected (§ 289 para 1 ZPO).[331]

Generally, the expert provides **a report** ("Befund") and **an expert opinion** ("Gutachten"). According to **§ 357 ZPO**, the expert shall generally produce an **oral opinion**, unless he or she is asked by the judge to produce a written opinion.[332] However, in common practice, the experts normally produce written documentation to alleviate the complexity of the facts.[333] The expert opinion has to be discussed on the parties' or the court´s request (§ 357 para 2 ZPO; so-called "Gutachtenserörterung");[334] such a discussion takes place during the oral hearing.

The expert not only counts as a means of proof, but also functions as an **assistant to the judge**.[335] It is the judge's duty to consult an expert:[336] The judge is responsible for the selection and appointment of the experts; he or she has the freedom of choice, even if the parties agree on another person[337] or reject the appointment of an expert.[338] The selection has to be made *ex officio* (cf. §§ 351, 352 ZPO); however, the parties shall be heard by the court beforehand (§ 351 para 1 ZPO).[339] The parties may **reject** the expert, similarly to the rejection of a judge (§ 355 para 1 ZPO).[340] The parties can also propose

[328] Frauenberger, 2004: § 339 ZPO p 3.
[329] Kodek/Mayr, 2013: p 834; Neumayr, 2014: p 69.
[330] Neumayr, 2014: p 69; Rechberger/Simotta, 2010: p 807.
[331] Kodek/Mayr, 2013: p 794; Rechberger, 2004: § 289 ZPO p 4.
[332] Fasching, 1990: p 1006; Rechberger, 2004: § 357 ZPO p 1.
[333] Rechberger, 2004: § 357 ZPO p 1.
[334] Kodek/Mayr, 2013: p 841; Rechberger/Simotta, 2010: p 811-812.
[335] Rechberger/Simotta, 2010: p 809.
[336] Fasching, 1990: p 1009.
[337] Fasching, 1990: p 1009.
[338] Fasching, 1990: p 997.
[339] Rechberger/Simotta, 2010: p 812.
[340] Kodek/Mayr, 2013: p 838.

another expert, but the judge is not bound to such a proposal; instead, he or she has the free choice.[341]

There is a **list of registered experts**, which is kept by the court ("list of court experts and court interpreters"; cf. http://www.sdgliste.justiz.gv.at/). Experts shall "preferably" be selected from this list; however, the judge is not obliged to do so.[342]

The expert is always **appointed by the court**,[343] but the appointment may be requested *ex officio* or on party's application.[344] With respect to this, there is one important differnce regarding the costs of the expert: Generally, **each party has to pay for the costs caused by their respective procedural measures** (§ 40 para 1 ZPO).[345] § 40 para 1 ZPO provides the following system of **preliminary payment of costs** ("vorläufige Kostentragung"): (1) the **party who applied** for the evidence to be taken has to pay (temporarily) for the costs arising if he or she solely bears the burden of proof for the facts concerned unless he or she was granted legal aid (also cf. §§ 365, 332 ZPO); in case (2) **both parties apply** for the evidence to be taken, or (3) the requested proof is **in both of the parties' interest**, they both have to pay preliminary costs; and (4) in the event that the court takes the evidence **ex officio**, the party in whose interest the evidence is taken (or both parties, if it is in their common interest) must pay for it.[346] If a party **does not comply** with the order to pay for the expert costs in advance, the summoning of the expert is not issued. The court will continue proceedings without taking this particular means of evidence if the opposing party requests so (§ 365 ZPO in conjunction with § 332 para 2 ZPO) and the evidence is **precluded**.[347] According to the prevailing opinion, however, there is no preclusion if the court takes the evidence *ex officio*.[348]

As far as the **definitive** distribution of costs goes, § 41 para 1 ZPO states that **the unsuccessful party must reimburse all the necessary expenses to the successful party** ("Prozesskostenersatz"). In cases where a party partly succeeds and partly fails, the court may order that the costs shall be shared proportionally or that they cancel out each other (§ 43 para 1 ZPO).[349]

The parties may present **private expert reports and expert opinions** as evidence. However, those private expert reports or the expert opinions are not qualified as expert evidence; instead they are qualified as **private documents**.[350] According to jurisdiction,

[341] Rechberger, 2004: § 351 ZPO p 2.
[342] Rechberger, 2004: § 351 ZPO p 3; Rechberger, 2004: § 353 ZPO p 2.
[343] Fasching, 1990: p 997.
[344] Fasching, 1990: p 1009.
[345] Kodek/Mayr, 2013: p 452; Rechberger/Simotta, 2010: p 433.
[346] Fischer, 2008: p 469.
[347] Frauenberger, 2004: § 332 ZPO p 8-9; Krammer, 2004: § 365 ZPO p 32.
[348] Krammer, 2004: § 365 ZPO p 8; for further references see Fischer, 2008: p 467, 475-477.
[349] Cf. chapter 8.1; Kodek/Mayr, 2013: p 444, 452-453; Rechberger/Simotta, 2010: p 435.
[350] Fasching, 1990: p 1008.

the court is not obliged to clear up contradictions between private expert reports and court appointed expert reports.[351]

There are no formal legal rules regarding the evidential value of expert opinions, which means that they are subject to the court's **free assessment of evidence** (§ 367 ZPO in conjunction with § 272 ZPO). Nevertheless, expert opinions are particularly important in practice because if factual circumstances are very complicated, there is little leeway for the court to assess the evidence according to its "own independent conviction" (§ 272 para 1 ZPO).[352] As a result, the evaluation of experts' opinions is often limited to the issue of their coherence and consistency.[353]

8 Costs and Language

8.1 Costs

The Austrian civil procedure law **does not explicitly define** the term **legal expenses** ("Prozesskosten"). However, scientific literature accepts the formulation in § 41 para 1 ZPO as an implicit definition:[354] According to this, legal expenses are all costs which are caused by the conducting of legal proceedings and which are necessary for appropriately pursuing the claim or appropriately defending against the claimant; this includes pre-litigation expenses (e.g. if evidence must be secured or settlements are negotiated, etc.).[355] These costs can be further categorized into **court costs** (generalized court fees and costs of witnesses, experts, and interpreters), **attorneys' fees** and the **parties' costs** (travelling expenses and loss of earnings).[356]

At first, each party has to **preliminarily** pay for the **costs** that were caused by their respective procedural measures (§ 40 para 1 ZPO; "vorläufige Kostentragung").[357] As for the **definitive** distribution of costs (which generally happens when the decision is taken), § 41 para 1 ZPO states that **the unsuccessful party must reimburse all the necessary expenses to the entirely successful party** ("Prozesskostenersatz"). Where a party partly succeeds and partly fails, the court may order that the costs are shared proportionally or that they cancel each other out (§ 43 para 1 ZPO).[358] Parties introduce their claims for reimbursement of costs by submitting a table of expenses (§ 52 para 5, § 54 para 1 ZPO); the court generally includes the decision on the costs into its judgment (the decision on costs does not deal with the temporary, but with the definitive bearing

[351] OGH 8 Ob 110/02p; also cf. Rechberger, 2014: Vor § 351 ZPO p 8.
[352] Fasching, 1990: p 1007; Rechberger/Simotta, 2010: p 809; Rechberger, 2004: Vor § 351 ZPO p 4.
[353] Kodek/Mayr, 2013: p 838.
[354] Cf. Kodek/Mayr, 2013: p 443.
[355] Cf. Bydlinski, 2015: Vor §§ 40 ff ZPO p 1; Kodek/Mayr, 2013: p 443; Rechberger/Simotta, 2010: p 429.
[356] Kodek/Mayr, 2013: p 447-451; Rechberger/Simotta, 2010: p 430-432.
[357] Kodek/Mayr, 2013: p 452; Rechberger/Simotta, 2010: p 433.
[358] Kodek/Mayr, 2013: p 444, 452-453; Rechberger/Simotta, 2010: p 435.

of costs).[359] However, in complex cases the decision on costs can be suspended until the formal legal force of the main decision (§ 52 para 1-3 ZPO).

Regarding the obligation to temporarily pay for the costs (§ 40 para 1 ZPO), it shall not be decisive which party put in the actual application that led to a procedural measure, but rather in whose interest it is. For instance, if one party applies for evidence to be taken by means of an expert opinion, but both parties have referred to this type of proof, they will both have to (temporarily) pay for the costs. The same applies where the expert opinion is in both of the parties' interest because either (a) they disagreed on the facts of the case, which hereinafter have to be clarified by the expert,[360] or (b) because both parties bear the burden of proof for some of those facts that are to be clarified by the expert (in general, evidence is taken *in a party's interest* where this party bears the burden of proof for the specific fact).[361]

Some costs (e.g. costs of witnesses, experts, and interpreters) may be paid upfront through public resources.[362] The party who has to pay according to § 40 para 1 ZPO hereinafter generally has to reimburse the Austrian state (§ 2 para 1 GEG).[363]

In order to avoid the above-mentioned reimbursement-procedure according to § 2 GEG and to secure the payment by the parties,[364] the court shall order the **parties to pay in advance for the costs of witnesses and experts** ("Kostenvorschuss") unless the party has been granted legal aid (cf. §§ 332, 365 ZPO). Additionally, according to § 3 GEG, whenever an official act entails costs, the court shall demand an advance on costs.[365]

If a party does not comply with the order to pay in advance for the costs of a witness, the summoning of the respective witness will not be issued, and the court will continue proceedings regardless of this particular means of evidence at the request of the opposing party (so-called **preclusion**; cf. § 332 para 2 ZPO).[366] The same applies with regard to experts (§ 365 in conjunction with § 332 para 2 ZPO).[367]

§§ 332 and 365 in conjunction with § 332 para 2 ZPO do not apply where the court takes evidence ***ex officio***.[368] Although in this case the court can still order an advance on costs according to § 3 GEG, there is neither the consequence of preclusion nor any other sanction linked with non-compliance.[369]

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[359] Kodek/Mayr, 2013: p 462-463; Rechberger/Simotta, 2010: p 438-439.
[360] Dissenting Fischer, 2008: p 467, 469.
[361] Bydlinski, 2015: § 40 ZPO p 3.
[362] Cf. for example Frauenberger, 2004: § 332 ZPO p 5.
[363] Bydlinski, 2015: § 40 ZPO p 2; Frauenberger, 2004: § 332 ZPO p 5.
[364] Fischer, 2008: p 467, 468.
[365] Kodek/Mayr, 2013: p 467, 836, 845-846; Bydlinski, 2015: § 40 ZPO p 2.
[366] Frauenberger, 2004: § 332 ZPO p 8-9.
[367] Krammer, 2004: § 365 ZPO p 32.
[368] Frauenberger, 2004: § 332 ZPO p 7; Krammer, 2004: § 365 ZPO p 8; cf. for further references Fischer, 2008: p 467, 475-477.
[369] Frauenberger, 2004: § 332 ZPO p 7; Krammer, 2004: § 365 ZPO p 15-16.

Compensation of witnesses, experts or interpreters is regulated in the act on the entitlement of fees (*"Gebührenanspruchsgesetz – GebAG"*). 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 (§ 3 para 1 GebAG).[370]

Necessary **travel costs** (for example a journey to and from the court or to the place of work – either by means of public transportation or other means of transportation, including walking distances) are within the scope of § 6 para 1 GebAG. Compensation for a journey via public transportation can be claimed for the lowest-class ticket, whereas distances covered by other means of transportation (e.g. cars) and by foot are specified in terms of kilometers ("Kilometergeld"). However, the costs for means other than public transportation can only be reimbursed under certain conditions according to § 9 para 1 GebAG (e.g. if there is no public transportation available, if there are time constraints, physical infirmity, etc.). **Subsistence expenses** include meals and unavoidable overnight stays (§§ 14, 15 GebAG).

In the event that an **expert** is appointed in the proceedings, there are no particular costs to be paid by the requesting court; the definitive bearing of costs is to be assessed by the conventional method. However, if the court takes evidence by means of an expert *ex officio*, there are some specifics concerning the regulation of preliminary payment and costs that must be paid in advance by the parties (cf. chapter 7.7).

According to § 73a ZPO, in the event that a party is deaf or strongly impaired regarding their sense of hearing or their ability to speak, the court must call in an **interpreter for sign language**. The costs for that are to be borne by the Austrian state (§ 73a para 1 ZPO). In other cases, parties incapable of communicating comprehensibly in the official language (mostly German)[371] are supposed to appear in the hearing before the court represented by an adequate agent (§ 185 para 1 ZPO).[372] Both temporary payment and definitive bearing of those costs is to be assessed with the conventional method.

Whether and under what conditions an Austrian court may participate in the taking of evidence abroad or take the evidence itself directly to another state is regulated in §§ 291a-291c ZPO. These national provisions were adopted in the context of the Regulation 1206/2001, but are applicable in relation to member states and other non-member states alike.[373]

According to § 291a para 1 number 3 ZPO, the **anticipated costs**, especially the judge's traveling costs and any necessary interpretation expenses, shall be **paid in advance** by

[370] Kodek/Mayr, 2013: p 836.
[371] Schragel, 2003: § 185 ZPO p 1.
[372] Schragel, 2003: § 185 ZPO p 3.
[373] Implementation Decree of the Ministry of Justice (Einführungserlass des BMJ) from December 17th 2003, JMZ 30.043 B/9-I 11/2003, concerning the Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (in German: "BeweisaufnahmeVO"), 5.1.1.

the parties unless those parties have been granted legal aid.[374] However, § 291a para 1 number 3 ZPO does not apply the taking of evidence by means of experts (§ 291c ZPO).

8.2 Language and Translation

According to § 82 para 1 of the Geschäftsordnung (Geo), an interpreter has to be appointed whenever a person that has no knowledge of the official court language (and is unable to express him- or herself in a language spoken by the judge) is being questioned. According to jurisdiction (with a reference to Article 6 ECHR), the court has to appoint an interpreter *ex officio* if the judge recognizes any language difficulties of the interrogated person.[375] In that vein the court does not rely on the parties or their counsels. The witnesses themselves have no right to interpretation; therefore, they cannot renounce the appointment of an interpreter.

The appointed interpreter has to be trustworthy, but does not necessarily have to be a professionally accredited interpreter; instead, he or she can also be another judge or a servant of the court (cf. § 82 para 1 Geo). According to § 86 of the act on judicial organisation (*"Gerichtsorganisationsgesetz" – GOG*), interpreters appointed by the court have to prove their skills and education before starting their work in the proceedings. Generally sworn and court-certified interpreters do not have to prove their skills, they just have to refer to their valid certification (cf. § 1 SDG).

As far as the use of documents written in a foreign language is concerned there are no special regulations on their translation. Due to § 13 SDG, the translator for documents (called "*Übersetzer*") is equal to the interpreter for spoken language. Therefore, the rules regarding the interpreter have to be applied.

Generally, the rules on costs[376] also apply to the costs of an interpreter (cf. § 2 para 1 GEG, where costs of an interpreter are explicitly named).[377] However, in some special cases, the costs for an interpreter are covered by the Republic of Austria, e.g. for parties that are deaf or strongly impaired regarding their sense of hearing or their ability to speak; cf. § 73a ZPO.[378]

There are also no special rules on the appointment of an interpreter in connection with videoconferences for the taking of evidence.

[374] Fucik, 2004: § 291a ZPO p 14-15.
[375] Spenling, 2004: § 375 ZPO p 7.
[376] Cf. chapter 8.1.
[377] Cf. Bydlinski, 2015: § 40 ZPO p 2.
[378] Anzenberger, 2015: § 73a ZPO p 27-28.

9 Unlawful Evidence

9.1 Terminology

Austrian civil procedure law distinguishes between three types of exclusion of evidence: (1) The exclusion of **evidence regarding certain facts** ("Beweisthemenverbote"), (2) the exclusion of **certain means of evidence** ("Beweismittelverbot"), and (3) the exclusion of **using a certain method of taking evidence** ("Beweismethodenverbot"). Those types of exclusion limit the judge's power (and obligation) to establish the truth and can either lead to an **inadmissibility of the taking of evidence** ("Beweisaufnahmeverbot") or even an **inadmissibility of using the evidence** already taken ("Beweisverwertungsverbot").[379]

As far as the questionnaire talks about **"illegal evidence"**, this report will refer to any of the above-mentioned three types of excluded evidence in general. The term **"illegally obtained evidence"** will be understood as any evidence that was unlawfully gathered **by a party or by the court**, which (according to Austrian doctrine) may lead to the exclusion of the means of evidence or of the method of taking evidence.[380] In that regard, there is a distinction between illegally obtained evidence and illegal evidence; however, this distinction is not explicitly detailed in the ZPO.[381] Furthermore, there are **no explicit rules on illegally obtained evidence**.

9.2 Illegally Obtained Evidence

There is no explicit legal provision on how to treat illegally obtained evidence; scientific literature, however, has developed certain rules regarding this topic:[382] Generally, the **illegal obtainment of evidence by the parties** does not exclude such evidence from being used in court.[383] This is, for example, the case if one of the parties breaches private law in order to obtain the evidence[384] or even commits a (minor) criminal offense for that purpose.[385] In those cases, if the court admits the piece of evidence in question, there are no limitations to the court's evaluation of the evidence.[386] The fact that such evidence may be used in court does not mean, however, that the proposing party is not liable (under civil or even criminal law) for their behaviour.[387]

However, **in some cases, the taking (and using) of illegally obtained evidence is illegal** too, namely if:

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379 Rechberger/Simotta, 2010: p 772-773.
380 Rechberger/Simotta, 2010: p 772.
381 Instead cf. Rechberger/Simotta, 2010: p 772.
382 Cf. Fasching, 1990: p 934; Kodek, 1987: p 122-192.
383 Cf. Fasching, 1990: p 934-937; Rechberger/Simotta, 2010: p 773.
384 Fasching, 1990: p 935.
385 Fasching, 1990: p 937.
386 Rechberger/Simotta, 2010: p 773.
387 Fasching, 1990: p 935.

1. the obtaining party **broke criminal law** that secures the core values of constitutionally protected rights (e.g. assault and battery, kidnapping etc.);[388]
2. the means of taking evidence (by the court) **violates the core area** of constitutionally granted **fundamental rights**, such as the prohibition of torture (Art 3 ECHR) or the right to liberty and security of person (Art 5 ECHR) (this could be the case if evidence was gained from compulsory action or torture),[389] or
3. the means of obtaining evidence **breaks procedural law** (such as the prohibition to enforce the hearing of a party).[390]

In those cases the court must not use the evidence taken;[391] any use represents a **ground for an appeal or even for the annulment of the proceedings.**[392] These rules apply to all means of evidence.

9.3 Illegal Evidence

There are **several problems** concerning **illegal evidence** (for the definition of illegal evidence cf. above in chapter 9.1). Some of them are explicitly regulated in the Austrian ZPO; others are "only" treated in scientific literature and jurisdiction.

There is no explicit **exclusion of evidence regarding certain facts** ("Beweisthemenverbot") in Austrian civil procedure law.[393] However, according to jurisdiction, confessions restrict the **taking of evidence** in these matters.[394]

Narrowly defined, the exclusion of **certain means of evidence** ("Beweismittelverbot") on the one hand prohibits some **means of proof in general** (for example witnesses that are unable to perceive impressions or reproduce their perceptions must not be heard in court; § 320 number 1 ZPO).[395] On the other hand, there are several **restrictions regarding certain content of evidence**: for example, priests are not allowed to be heard on facts covered by the secrecy of confession (§ 320 number 2 ZPO); state servants are not allowed to be heard on facts that are bound by official secrecy unless they are freed from this secrecy by their superiors (§ 320 number 3 ZPO), and mediators are not allowed to be heard on facts they were entrusted with by their clients (§ 320 number 4 ZPO). In a broader sense, restrictions on the means of evidence also concern **evidence that was illegally obtained by the parties** (cf. chapter 9.2).[396] The consequences of a breach of the exclusion of certain means of evidence are controversially discussed;[397]

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[388] Fasching, 1990: p 937.
[389] Cf. Fasching, 1990: p 933; Rechberger/Simotta, 2010: p 773.
[390] Cf. Fasching, 1990: p 933.
[391] Rechberger/Simotta, 2010: p 773.
[392] Cf. Fasching, 1990: p 933.
[393] Kodek/Mayr, 2014: p 785; Rechberger/Simotta, 2010: p 772.
[394] OGH 5 Ob 631/89 JBl 1990, p 590.
[395] Cf. Fasching, 1990: p 826.
[396] Rechberger/Simotta, 2010: p 772.
[397] Cf. Frauenberger, 2004: § 320 ZPO p 2.

according to the prevailing opinion, (most of) this evidence can still be used by the court without any consequences.[398]

Finally, the exclusion of **using a method of taking evidence** ("Beweismethodenverbot") restricts the court's course of action when taking the evidence.[399] This is the case, when the means of obtaining evidence **breaks procedural law** (such as the prohibition to enforce the hearing of a party)[400] or **violates the core area** of constitutionally granted **fundamental rights** (cf. chapter 9.2).[401] In those cases the court must not use the evidence taken;[402] any use represents a **ground for an appeal or even for the annulment of the proceedings.**[403] These rules apply to all means of evidence.

10 The Report about the Regulation No 1206/2001

There is no plan to maintain bilateral agreements or arrangements. According to the Austrian Ministry of Justice, this is still accurate. Also, there are as for right now no plans to sign any bi- or multilateral agreements to further facilitate the taking of evidence according to Art 21 para 2 of the regulation.

11 Table of Authorities

According to § 3.1 of the *Einführungserlass zur BeweisaufnahmeVO* the Austrian Ministry of Justice (*Bundesministerium für Justiz)* is the competent central authority referred to in Article 3 (3) of the Regulation 1206/2001.

The relevant statute in this context is the *Einführungserlass zur BeweisaufnahmeVO*, *JMZ 30.043 B/9-I 11/2003* (implementation decree regarding the regulation 1206/2001 issued by the Austrian Ministry of Justice). An official English translation does not exist. The authentic German version can be found at http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Erlaesse&Dokumentnummer=ERL_07_000_20041217_001_30043B_9_I11_03&ResultFunctionToken=eeb3f6f5-478b-4812-a229-e2b6db712827&Position=1&Titel=&VonInkrafttretedatum=&BisInkrafttretedatum=&FassungVom=28.11.2014&Einbringer=&Abteilung=&Fundstelle=&GZ=&Norm=&ImRisSeit=Undefined&ResultPageSize=50&Suchworte=beweisaufnahme+in+zivil-+und+handelssachen.

[398] Frauenberger, 2004: § 320 ZPO p 2.
[399] Rechberger/Simotta, 2010: p 772.
[400] Cf. Fasching, 1990: p 934.
[401] Cf. Fasching, 1990: p 934; Rechberger/Simotta, 2010: p 773.
[402] Rechberger/Simotta, 2010: p 773.
[403] Cf. Fasching, 1990: p 933.

Part II – Synoptical Presentation

1 Synoptic Tables

1.1 Ordinary/Common Civil Procedure Timeline

Phase #	Name of the Phase Name of the Phase in National Language	Responsible Subject	Duties of the Responsible Subject (related only to Evidence) and Consequences of their Breach	Rights (related only to Evidence) of the Responsible Subject
1.	Application for a payment order (not exceeding EUR 75.000) *("Mahnklage")*	Plaintiff *("Kläger")*	Prior to the preparatory hearing ("vorbereitende Tagsatzung"), the judge may invite the parties to exchange briefs and to submit evidence (e.g.: documents and other exhibits) to the court. In practice the taking of evidence is normally based on the offer of evidence.[404] Therefore it is advisable – but not obligatory – to include information about evidence (which can proof the maintained facts) in the claim.[405]	Additional evidence can be offered until the end of the oral proceedings of first instance (cf § 179 ZPO).
2.	Examination of the application *("Klagsprüfung")*	Court *("Gericht")*		
3.	(Conditional) Payment order *(„Bedingter Zahlungsbefehl")*	Court *("Gericht")*		
4a.	No objection = non-appealable executory title	Defendant *("Beklagter")*		

[404] Kodek/Mayr, 2013: p 286.
[405] Rechberger/Simotta, 2010: p 298.

	(„Kein Einspruch = rechtskräftiger Exekutionstitel“)			
4b.	Objection *(“Einspruch”)*	Defendant *(“Beklagter”)*	If the defendant files an objection, it is advisable – but not obligatory – to include information about evidence (proving the alleged facts) in the objection (see answer above).	Additional evidence can be offered until the end of the oral proceedings of first instance (cf § 179 ZPO).
5.	Preparatory hearing *(“Vorbereitende Tagsatzung“)*	Plaintiff, Court, Defendant *(„Kläger, Gericht, Beklagter“)*	In the preparatory hearing the parties and the judge discuss the program for the proceeding (if a settlement of the case isn’t possible at that point).[406] The program is some sort of "road map"[407] that contains, for example, the time and the sequence of the taking of evidence.[408] This program can be altered at any time; it is not binding for the court or for the parties.[409]	
6.	Additional Hearings *(“Weitere Tagsatzungen”)*	Plaintiff, Court, Defendant *(„Kläger, Gericht, Beklagter“)*	The actual taking of evidence is carried out during the oral proceedings (cf § 258 para 1 no 5, § 259 para 1 ZPO).[410]	Due to the attenuated inquisitorial principle, the taking of evidence takes place *ex officio* or upon a request by a party. The judge has to work towards getting the necessary declarations and assertions as well as the evidence necessary to prove the facts in question (§ 182 ZPO).[411] The parties have several rights of participation (cf §§ 281a, 288 (2), 289 ZPO), especially the right to question witnesses and experts (§ 289 para 1 ZPO). However this right refers to additional questions only; initially, questions are asked by the court.[412]

[406] Rechberger/Simotta, 2010: p 738.
[407] Kodek, 2004: § 258 ZPO p 21; Rechberger/Simotta, 2010: p 738.
[408] Kodek, 2004: § 258 ZPO p 22; Neumayr, 2014: p 60.
[409] Kodek, 2004: § 258 ZPO p 25; Rechberger/Simotta, 2010: p 738.
[410] Kodek/Mayr, 2013: p 285.
[411] Fasching, 1990: p 658-659, 781-789; Kodek/Mayr, 2013: p 587-592, 795-796.
[412] Kodek/Mayr, 2013: p 285.

				The parties are allowed to produce (offer) new evidence and facts until the closing of the oral proceedings of first instance (cf § 179 ZPO). Such assertion can be rejected by the court if the evidence was not introduced earlier solely through gross negligence and if its treatment would considerably delay the closing of the proceedings (cf § 179 ZPO).[413]
7.	Judgement *("Urteil")*	The Court *("Gericht")*		
	Regular Proceedings			
1.	Action (exceeding EUR 75.000 and actions not only on pecuniary claims) *("Klage")*	Plaintiff *("Kläger")*	Prior to the preparatory hearing ("vorbereitende Tagsatzung"), the judge may invite the parties to exchange briefs and to submit evidence (e.g.: documents and other exhibits) to the court. In practice the taking of evidence is usually based on the offer of evidence.[414] Therefore it is advisable – but not obligatory – to include information about evidence (which can proof the maintained facts) in the action.[415]	Additional evidence can be offered until the closing of the oral proceedings of first instance (cf § 179 ZPO).
2.	Examination of the action *("Klagsprüfung")*	Court *("Gericht")*		
3.	Order to file a statement of defence *(„Auftrag zur Klagebeantwortung")*	Court *("Gericht")*		
4.	Statement of defence *("Klagebeantwortung")*	Defendant *("Beklagter")*	It is advisable – but not obligatory – to include information about evidence (which can proof the alleged facts) in the	Additional evidence can be offered until the closing of the oral proceedings of first instance (cf § 179 ZPO).

[413] Rechberger/Simotta, 2010: p 412.
[414] Kodek/Mayr, 2013: p 286.
[415] Rechberger/Simotta, 2010: p 298.

			statement of defence (see answer above).	
5.	Preparatory hearing *("Vorbereitende Tagsatzung")*	Plaintiff, Court, Defendant *(„Kläger, Gericht, Beklagter")*	In the preparatory hearing the parties and the judge discuss the program for the proceeding (if a settlement of the case isn't possible at that point).[416] The program is some sort of "road map"[417] that contains for example the time and the sequence of the taking of evidence.[418] This program can be altered at any time; it is not binding for the court or for the parties.[419]	
6.	Additional Hearings *(„Weitere Tagsatzungen")*	Plaintiff, Court, Defendant *(„Kläger, Gericht, Beklagter")*	The actual taking of evidence is carried out during the oral proceedings (cf § 258 para 1 no 5, § 259para 1 ZPO).[420]	Due to the attenuated inquisitorial principle, the taking of evidence takes place *ex officio* or upon a request by a party. The judge has to work towards getting the necessary declarations and assertions as well as the evidence necessary to prove the facts in question (§ 182 ZPO).[421] The parties have several rights of participation (cf §§ 281a, 288 (2), 289 ZPO), especially the right to question witnesses and experts (§ 289 para 1 ZPO). However this right refers to additional questions only, initially questions are asked by the court.[422] The parties are allowed to produce (offer) new evidence and facts until the closing of the oral proceedings of first instance (cf § 179 ZPO). Such assertion can be rejected by the court if if the evidence was not introduced earlier solely

[416] Rechberger/Simotta, 2010: p 738.
[417] Kodek, 2004: § 258 ZPO p 21; Rechberger/Simotta, 2010: p 738.
[418] Kodek, 2004: § 258 ZPO p 22; Neumayr, 2014: p 60.
[419] Kodek, 2004: § 258 ZPO p 25; Rechberger/Simotta, 2010: p 738.
[420] Kodek/Mayr, 2013: p 285.
[421] Fasching, 1990: p 658-659, 781-789; Kodek/Mayr, 2013: p 587-592, 795-796.
[422] Kodek/Mayr, 2013: p 285.

				through gross negligence and if its treatment would considerably delay the closing of the proceedings (cf § 179 ZPO).[423]
7.	Judgement *(„Urteil“)*	The Court *(„Gericht“)*		
	Appeal Procedure			
I.	Appeal *(„Berufung“)*	Plaintiff or Defendant (*„Kläger oder Beklagter“)*	After the oral procedure is closed by the court of first instance, the parties cannot introduce new facts or evidence (§ 179 ZPO *e contrario*).[424] As a result, an appeal against the judgment of a court of first instance must be limited to facts and evidence that found their way into the proceedings of the first instance (§ 482 para 1 and 2 ZPO).[425]	Nevertheless, facts and evidence that support or refute the appellant's pleas are exempted from the prohibition of novation. *In praxi*, however, this exception is rarely applicable.[426] Furthermore, there is a general exception for cases concerning the nullity of marriage and declaratory action concerning the existence of a marriage and labour law matters (if the party has not been represented by a qualified person).[427]
II.	Answer to the Appeal *(„Berufungs-beantwortung“)*	Plaintiff or Defendant (*„Kläger oder Beklagter“)*		
III.	Hearing of the Appeal *(“Berufungs-verhandlung”)*	Plaintiff, Court, Defendant *(„Kläger, Gericht, Beklagter“)*		
IV.	Appeal Judgment *(„Berufungsurteil“)*	Court *(„Gericht“)*		
V.	Second Appeal *(„Revision“)*	Plaintiff or Defendant (*„Kläger oder Beklagter“)*		
VI.	Answer to the second Appeal	Plaintiff or Defendant		

[423] Rechberger/Simotta, 2010: p 412.
[424] Rechberger/Simotta, 2010: p 750.
[425] Fasching, 2005: Einleitung IV/1 p 111; Rechberger/Simotta, 2010: p 1007; Kodek/Mayr, 2013: p 1031.
[426] Fasching, 2005: Einleitung IV/1 p 123; Fasching, 1990: p 1730; Rechberger/Simotta, 2010: p 1008.
[427] Fasching, 2005: Einleitung IV/1 p 127; Fasching, 1990: p 1732; Rechberger/Simotta, 2010: p 750; Kodek/Mayr, 2013: p 1032.

	("Revisions-beantwortung")	(*„Kläger oder Beklagter"*)		
VII.	Second Appeal Judgment *(„Revisionsurteil")*	The Court *(„Gericht")*		

1.2 Basics about Legal Interpretation in Austrian Legal System

An explicit provision regarding the interpretation of legal rules can be found in § 6 ABGB ("*Allgemeines bürgerliches Gesetzbuch"*, Austrian Civil Code). § 6 ABGB offers four different interpretation-methods, which have to be applied in the following hierarchy: literal interpretation, systematic interpretation, historical interpretation and teleological interpretation.

The protocol described above is also applicable on procedural rules, because § 6 ABGB has to be understood as a general rule; its application is not limited to the ABGB or the substantive law.

1.3 Functional Comparison

Legal Regulation / **Means of Taking Evidence**	**National Law**	**Bilateral Treaties**	**Multilateral Treaties**	**Regulation 1206/2001**
		There are bilateral treaties existing as additional agreements to the Hague Convention of 1st March 1954 on Civil Procedure (e.g. with Denmark, Germany, Finland, France), and as separate contracts (e.g. Greece, Tansania, United Kingdom). Most of the Austrian bilateral treaties are very similar;[428] the **treaty with Tansania**[429] will be used as an example here.	The most important multilateral treaty is the **Hague Convention of 1st March 1954 on Civil Procedure** because the Hague Convention of 18th March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters was not ratified by Austria. This Convention will be used as an example here.	

[428] Sengstschmid, 2009: p 379.

[429] Agreement on legal proceedings in civil and commercial matters between the republic of Austria and the United Republic of Tanzania („Vertrag über das gerichtliche Verfahren in Zivil- und Handelssachen zwischen der Republik Österreich und der Vereinigten Republik Tansania"); BGBl 1980/222.

Hearing of Witnesses by Mutual Legal Assistance (Legal Aid)	Due to conflicts with the principle of immediacy, mutual legal assistance is only admissible in exceptional cases. Namely if the direct taking of evidence before the court of trial would imply great difficulty or even be impossible.[430] Nevertheless, there are several provisions in the ZPO that contain rules on legal assistance (cf. §§ 300, 328, 352, 368 para 2, § 375 para 2 ZPO); § 328 ZPO regulates the hearing of witnesses by the means of legal aid.	The court addresses itself by means of "Letter of Request" to the competent authority of the country where the evidence is to be taken, requesting such authority to take the evidence (Art 7 lit a). This "Letter of Request" shall be drawn up in one of the official languages employed in the country where the evidence is to be taken, or be accompanied by translation in such language (Art 7 lit b). The competent authority shall obtain the evidence required by the use of the same compulsory measures and the same procedure as are employed in the execution of a commission or order emanating from the authorities of his own country unless the "Letter of Request" wishes for a special procedure. In that case this wish shall be followed unless it is incompatible with the law of the country where the evidence is to be taken (Art 7 lit d).	In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, apply, by means of a Letter of Request, to the competent authority of another Contracting State to request it, within its jurisdiction, to obtain evidence, or to perform some other judicial act (Art 8). Unless there is agreement to the contrary, the Letter of Request must be written either in the language of the requested authority, or in the language agreed between the two States concerned, or else it must be accompanied by a translation (Art 10). The judicial authority, to which the Letter of Request is addressed, shall be obliged to comply with it using the same measures of compulsion as for the execution of orders issued by the authorities of the State of execution or of requests made by parties in internal proceedings. These measures of compulsion shall not necessarily be	Hearing of a witness by mutual legal assistance is admissible. A request shall be made using request forms (Art 4); this request shall be dealt with according the rules in Art 10. This can be carried out with the presence and participation of the parties (Art 11) and of representatives of the requesting court (Art 12). Where necessary, in executing a request the requested court shall apply the appropriate coercive measures in the instances and to the extent as are provided for by the law of the Member State of the requested court for the execution of a request made for the same purpose by its national authorities or one of the parties concerned (Art 13).

[430] Kodek/Mayr, 2013: p 801 f.

			employed where the appearance of the parties to the case is involved (Art 11 para 1).	
Hearing of Witnesses by Video-conferencing with Direct Asking of Questions	Recently, the ZPO prefers the taking of evidence supported by videoconference technologies (§ 277 ZPO) since videoconference do convey a better personal impression than the transcript of a questioning by a requested judge.[431]	There are no references to videoconferencing in the treaty.	There are no references to videoconferencing in the treaty.	According to Art 10 para 4 the requesting court may ask the requested court to use communications technology at the performance of the taking of evidence, in particular by using videoconference and teleconference. The requested court shall comply with such a requirement unless this is incompatible with the law of the Member State of the requested court or by reason of major practical difficulties. If the requested court does not comply with the requirement for one of these reasons, it shall inform the requesting court, using form E in the Annex. If there is no access to the technical means referred to above in the requesting or in the requested court, such means may be made available by the courts by mutual agreement.

[431] Kodek/Mayr, 2013: p 801.

Direct Hearing of Witnesses by Requesting Court in Requested Country	The direct hearing of a witness by the requesting court (Austrian court) in the requested country (foreign court) is admissible according to the conditions in §§ 291a, 291b, 291c ZPO. These provisions regulate the taking of evidence by an Austrian court in a foreign country and are not limited to the European Union.[432]	According to Art 8 lit a of the treaty evidence may also be taken without any request for or intervention of the authorities of the country in which it is to be taken by a person in that country directly appointed for the purpose by the court by whom the evidence is required. This person may request the individuals named by the court appointing him to appear before him and give evidence, or to produce any document, sample or other object (Art 8 lit b).	The provisions on a direct hearing are rather scarce. According to Art 15 each State has the right to have Letters of Request executed directly by its diplomatic officers or consular agents, if that is allowed by conventions concluded between the States concerned or if the State on the territory of which the Letter is to be executed does not object.	The direct taking of evidence by the requesting court is regulated in Art 17: It may only take place if it can be performed on a voluntary basis without the need for coercive measures (Art 17 para 2). The taking of evidence shall be performed by a member of the judicial personnel or by any other person such as an expert, who will be designated, in accordance with the law of the Member State of the requesting court (Art 17 para 3)

Legal Regulation / **Means of Taking Evidence**	**National Law**	**Bilateral Treaties**	**Multilateral Treaties**	**Regulation 1206/2001**
		There are bilateral treaties existing as additional agreements to the Hague Convention of 1st March 1954 on Civil Procedure (e.g. with Denmark, Germany, Finland, France), and as separate contracts (e.g. Greece, Tansania, United Kingdom). Most of the Austrian bilateral treaties are very similar;[433] the treaty with **Tansania**[434] will	The most important multilateral treaty is the **Hague Convention of 1st March 1954 on Civil Procedure** because the Hague Convention of 18th March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters was not ratified by Austria. This Convention	

[432] Rechberger, 2014: Vor § 291a ZPO p 1.
[433] Sengstschmid, 2009: p 379.
[434] Agreement on legal proceedings in civil and commercial matters between the republic of Austria and the United Republic of Tanzania („Vertrag über das gerichtliche Verfahren in Zivil-

		be used as an example here.	will be used as an example here.	
Hearing of Witnesses by Mutual Legal Assistance (Legal Aid)	Hearing of a witness by mutual legal assistance by an Austrian court as requested court is possible according to §§ 38, 39 JN. Doing so, the Austrian court applies Austrian civil procedure law (§ 39 para 1 ZPO); any deviation has to be asked for explicitly and is only allowed if no Austrian legal rules would be broken by doing so (§ 39 para 2).	Same as above.	Same as above.	Same as above.
Hearing of Witnesses by Video-conferencing with Direct Asking of Questions	Since the requested Austrian judge has to apply Austrian civil procedure law, there is the possibility of hearing a witness by videoconferencing (cf. § 277 ZPO and the answer in the table 1.3.1).	Same as above.	Same as above.	Same as above.
Direct Hearing of Witnesses by Requesting Court in Requested Country	Direct hearing of a witness by the requesting court in Austria is possible if it is authorised by the federal minister of justice. (§ 39a para 1 ZPO). The conditions necessary for granting can be found in §§ 39a, 40 JN.	Same as above.	Same as above.	Same as above.

und Handelssachen zwischen der Republik Österreich und der Vereinigten Republik Tansania“); BGBl 1980/222.

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