

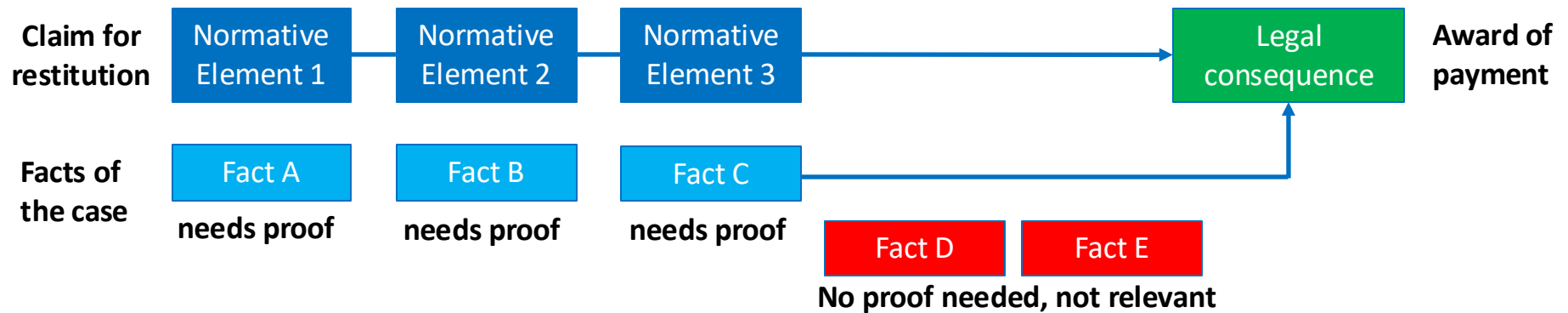
Evidence Part 1

20. Modes of Evidence (1)

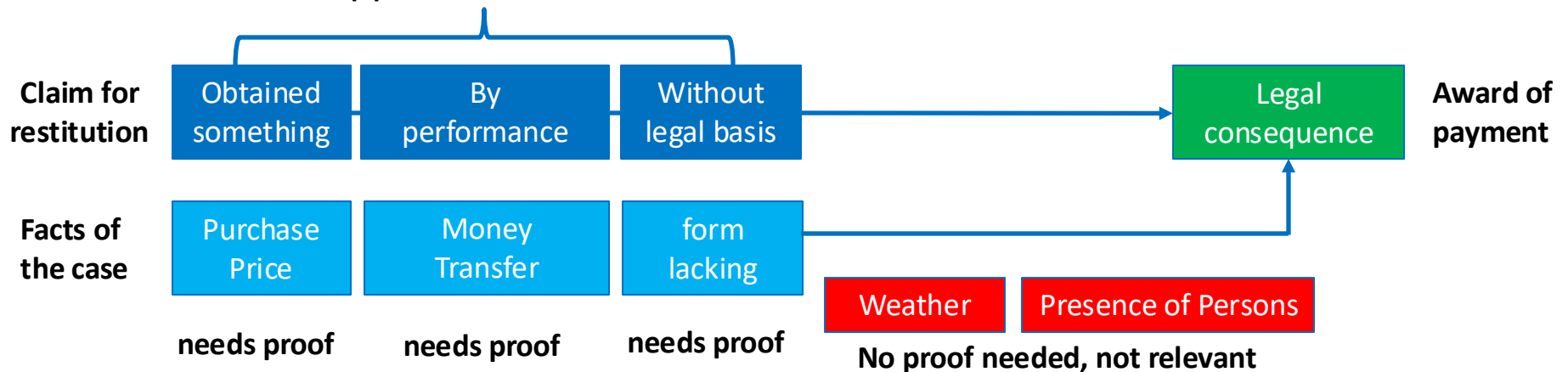
- Purpose of the law of evidence
 - Set up rules of how to find out
 - What actually happened
 - To determine the facts of the case that the court must base its decision on
- Who has to present evidence?
 - General Principle of Party Disposition and Principle of Party Presentation
 - Parties' responsibility to obtain and present facts and evidence to the court
- Requirement of proof
 - A fact only requires proof if
 - it is relevant to the outcome of the case,
 - It is not already proven and
 - is sufficiently disputed by the opposing party
 - No need for proof if opposing party admits sth. has happened

20. Modes of Evidence (2)

■ Example



Sec. 812 (1) 1 Alt. 1 German Civil Code



20. Modes of Evidence (3)

■ Burden of Proof

Section 138 CPC (Obligation to make declarations as to facts; obligation to tell the truth)

- (1) The parties are to make their declarations as to the facts and circumstances fully and completely and are obligated to tell the truth.
- (2) Each party is to react in substance to the facts alleged by the opponent.
- (3) Facts that are not expressly disputed are to be deemed as having been acknowledged unless the intention to dispute them is evident from the other declarations made by the party. [...]

- **Objective Burden of Proof (“materielle Beweislast”)**: Decisive for the issue of who has to bear the consequences of uncertain factual circumstances
 - Determined by substantive law not by procedural law
- **Subjective/individual Burden of Proof („formelle Beweislast”)**: Decisive as to who has to provide evidence
 - Follows the objective burden of proof
- **General rule**: Each party has to present facts and provide evidence for facts that support their decision
 - Claimant: Facts that establish the normative elements of the claim
 - Defendant: Facts that support defences
- Substantive law may alter this e.g. by shifting the burden of proof to the other party

20. Modes of Evidence (4)

- Standard of Proof („Beweismaß“)

Section 286 CPC (Evaluation of evidence at the court's discretion and conviction)

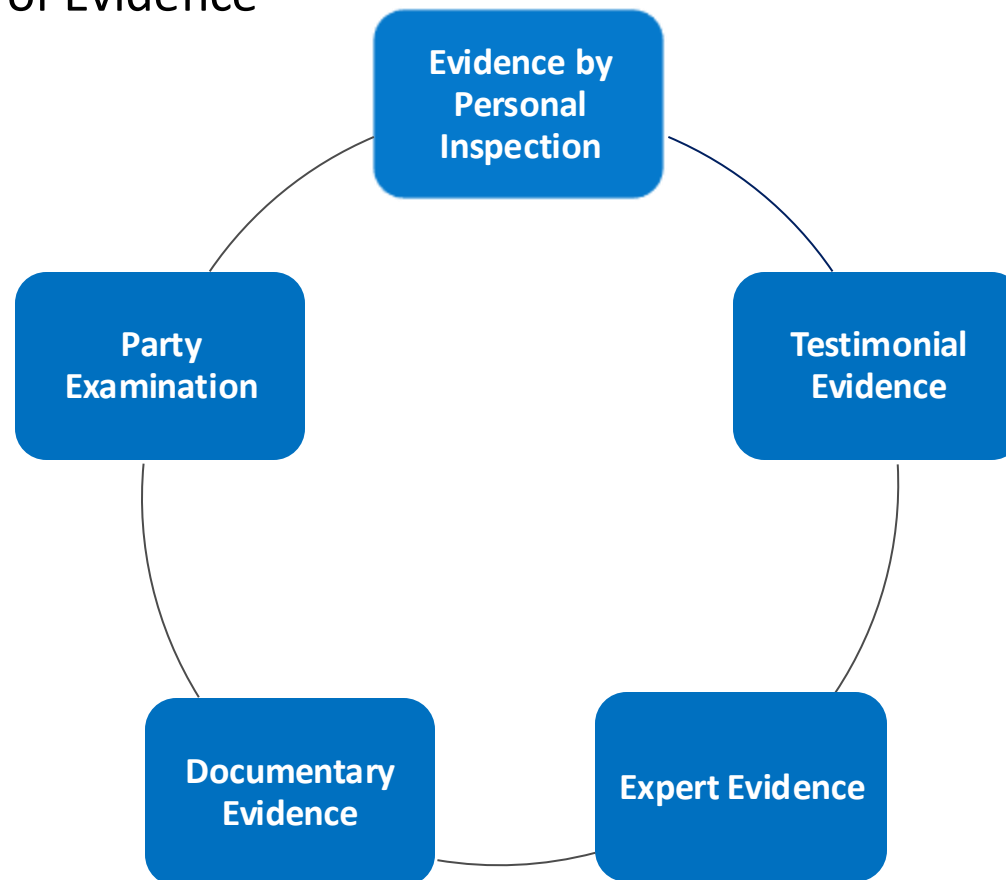
(1) **The court is to decide, at its discretion and conviction**, and taking account of the entire content of the hearings and the results obtained by evidence being taken, if any, **whether an allegation as to fact is to be deemed true or untrue**. The judgment is to set out the reasons informing the conviction of the judges.

(2) The court shall be bound to statutory rules of evidence only in the cases designated in the present Code.

- Principle of free evaluation of the evidence
- Standard necessary = **Conviction beyond reasonable doubt**
- Reduced standard in some exceptional situations sufficient
 - Standard = **Conviction on balance of probabilities**
 - „Glaubhaftmachung“
 - Only applies if law so provides, e.g. in provisional legal protection measures like injunctions etc. Sec. 920 (2), 936 CPC

20. Modes of Evidence (5)

- Strict Evidence Procedure (Sec. 355 et seq. CPC) vs. Free Evidence Procedure
- Formal Types of Evidence



21. Digital Gathering of Evidence (1)

- Reform of German CPC rules on online hearings and on gathering evidence online
 - See [Act to promote the use of video conferencing technology in civil jurisdiction and specialised jurisdictions](#) of July 15th 2024
 - Applicable from July 19th 2024

Section 284 CPC (Taking of Evidence)

- (1) The taking of evidence and the ordering of a special procedure for the taking of evidence by order shall be governed by the provisions of Titles Five to Eleven. With the consent of the parties, the court may take evidence in the manner it deems appropriate. Consent may be limited to individual items of evidence. It may only be revoked in the event of a significant change in the procedural situation prior to the commencement of the taking of evidence to which it relates.
- (2) **Upon application or ex officio**, the court may authorise or order **the taking of evidence by video and audio transmission**. The parties to the proceedings, witnesses and experts shall have the right to apply. **Section 128a (1), (2), (4) sentences 1 and 2 and (5) to (7) shall apply accordingly**. The parties to the proceedings shall also be **entitled to object** in accordance with section 128a (2) sentence 2. Sentence 1 **shall not apply to documentary evidence**.
- (3) In the case of parties, witnesses and experts to be heard, **it may additionally be ordered that they remain at a court location to be specified by the court during the hearing of evidence** in accordance with subsection (2).

21. Digital Gathering of Evidence (2)

- In accordance with Sec. 128a CPC, the taking of evidence may be ordered by the court or granted upon party motion
 - Witnesses and experts may be ordered to be present at a court close to their residence
 - The same applies to parties
- **Evidence by personal inspection (visual evidence)** may be gathered by means of video conferencing. E.g. by holding relevant objects up to the camera
- **Not admissible** to gather **documentary evidence** by videoconferencing
 - Documents may nevertheless be presented to the camera within the Evidence of personal inspection
 - See for relevance and evidentiary value Sec. 371a CPC

21. Digital Gathering of Evidence (3)

Section 371a CPC (Evidentiary value of electronic documents)

- (1) The **rules concerning the evidentiary value of private records and documents shall be applied mutatis mutandis to private electronic documents bearing a qualified electronic signature**. The appearance of authenticity of a declaration available in electronic form, as obtained from reviewing it pursuant to the Electronic Signature Act (Signaturgesetz), can be cast into doubt only by facts giving rise to serious doubts as to the declaration having been made by the holder of the signature key.
- (2) Where **an individual has registered securely for a “De-Mail” account** that is assigned solely to that individual (section 4 (1), second sentence, of the Act on De-Mail (De-Mail Gesetz)), the appearance of authenticity attendant on an electronic message sent from this De-Mail account, as resulting from the verification of the sender authentication pursuant to section 5 (5) of the Act on De-Mail, will be called into question only by facts giving rise to serious doubts as to the message with that content having been sent by that person.
- (3) The **rules concerning the evidentiary value of public records and documents shall be applied mutatis mutandis to electronic documents created, in accordance with the requirements as to form (public electronic documents), by a public authority within the purview of its official responsibilities**, or by a person or entity vested with public trust within the sphere of business assigned to him or it. Where the document bears a qualified electronic signature of the public authority that has created it, or of the person or entity vested with public trust, section 437 shall apply mutatis mutandis. The same shall apply if an accredited service provider furnishes the document, on behalf of the public authority that has created such document, or on behalf of the person or entity vested with public trust that has created such document, with his qualified electronic signature pursuant to section 5 (5) of the Act on De-Mail and the sender authentication identifies the public authority that has created such document, or the person or entity vested with public trust, as the user of the De-Mail account, or the person or entity vested with public trust.

21. Digital Gathering of Evidence (4)

- Treatment of digital documents in the evidence procedure
 - See Sec. 371 (1) 2 CPC = All documents, that are readable electronically
 - Sec. 126a CC, Sec. 130a CPC
 - Examples:
 - Text, Image, and Sound
 - Position data of a car
 - Image files
 - E-Mails
 - Chat data of WhatsApp Chats etc.

Section 371 CPC (Evidence taken by visual inspection)

- (1) Evidence taken by visual inspection is offered by designating the object to be inspected visually and by citing the facts regarding which evidence is to be provided. **If an electronic document is to serve as evidence, it shall be so offered as evidence by producing or transmitting the file.**
- (2) Where the party tendering evidence alleges that the object is not in its possession, additional evidence shall be offered by filing the application with the court to set a period within which the object must be procured, or to deliver an order pursuant to section 144. Sections 422 to 432 shall apply mutatis mutandis.
- (3) Should a party frustrate the taking of visual evidence on site that it can reasonably be expected to tolerate, the court may deem the allegations made by the opponent regarding the nature of the object to have been proven.

Summary

- Modes of Evidence
- Digital Gathering of Evidence