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BEYOND LOGISTICS: VIDEO-BASED WITNESS EXAMINATIONS IN GERMAN AND U.S. CIVIL PROCEEDINGS

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ABSTRACT: This paper explores how the common law tradition of the U.S. and the civil law system of Germany regulate and assess video-based witness examinations in civil proceedings. By examining Rule 43(a) FRCP (Federal Rules of Civil Procedure) and Sections 284 (2) and (3) ZPO (German Code of Civil Procedure), the study identifies critical differences in legal prerequisites and judicial practice. Ultimately, it demonstrates that technical adoption remains constrained by a shared skepticism toward the evidentiary value of digital testimony.

KEYWORDS: remote testimony; demeanor evidence; video-based witness examinations; digitalization in civil proceedings.

SUMMARY: 1. INTRODUCTION 2. THE LEGAL FRAMEWORK FOR VIDEO-BASED WITNESS EXAMINATIONS IN THE UNITED STATES: 2.1 The Prerequisites: 2.1.1 Motion 2.1.2 Good Cause in Compelling Circumstances; 2.1.3 Appropriate Safeguards; 2.1.4 Court's Discretion 2.2 Practical Implementation; 2.3 Reception of Video-based Witness Examinations.— 3. THE LEGAL FRAMEWORK FOR VIDEO-BASED WITNESS EXAMINATIONS IN GERMANY: 3.1 The Prerequisites; 3.1.1 Initiation: Upon Request or Ex Officio; 3.1.2 Suitability of the Video-Based Examination for the Specific Taking of Evidence; 3.1.3 Availability of Sufficient Capacities for the Video-Based Examination; 3.1.4 Court's discretion; 3.2 Practical Implementation; 3.3 Reception of Video-based Witness Examinations.— 4. DIFFERENCES AND SIMILARITIES: 4.1 The Prerequisites; 4.2 Judicial Practice; 4.3 Reception of Video-based Witness Examinations.— 5. CONCLUSION.— BIBLIOGRAPHY

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1. INTRODUCTION

Propelled by the pandemic, digital communication has reshaped judicial procedures worldwide. A particularly significant development is the examination of witnesses via live video transmission in civil proceedings. By removing the need for travel, this approach streamlines the legal process and allows for more adaptable scheduling that offers considerable potential benefits—particularly relating to judicial efficiency—such as time savings[1]. Nevertheless, these gains in efficiency are often offset by concerns over the integrity and value of the evidence—specifically the judge's capacity to gauge witness sincerity and the potential for outside interference[2]. While seemingly a global remedy for logistical constraints, the implementation of video-based witness examinations is deeply shaped by contrasting legal traditions and procedural norms. The following analysis examines the use of video-based witness testimony in the courts of the United States of America and Germany. By comparing the common law tradition of the U.S. and the civil law tradition of Germany, this study seeks to uncover how these two major legal systems approach, regulate, and assess witness evidence taken via live-video.

This paper begins by outlining the distinct legal frameworks governing video testimony in the United States and Germany respectively. The analysis then identifies critical differences and similarities in how each jurisdiction handles such evidence. Ultimately, the central contention is that the legal treatment of video-based witness examinations transcends technical concerns, arguing that adoption remains constrained by a shared skepticism toward the evidentiary value of digital testimony.

2. THE LEGAL FRAMEWORK FOR VIDEO-BASED WITNESS EXAMINATIONS IN THE UNITED STATES

Remote testimony—the examination of a witness via simultaneous transmission from another location—has been possible in US civil proceedings on the basis of Rule 43(a) of the Federal Rules of Civil Procedure ("FRCP") since its revision in 1996[3]. Rule 43(a) FRCP was amended in 2007 as part of

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[1] Hemler, A. (2022). Virtuelle Verfahrensteilnahme aus dem Ausland und Souveränität des fremden Aufenthaltsstaats. *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 906; Lafontaine, C. (2020). Die Beweisaufnahme über den EU-Auslandssachverhalt. *Deutsches Autorecht*, 541; Voß, W. (2022). Grenzüberschreitende Videoverhandlungen jenseits des Rechtshilfewegs – Wunsch oder Wirklichkeit?. In B. Windau and P. Reuß (Eds), *Göttinger Kolloquien zur Digitalisierung des Zivilverfahrensrechts, Kolloquien im Sommersemester 2021*, 1st edn, 43.

[2] Mantz, R. & and Spoenle, J. (2020). Corona-Pandemie: Die Verhandlung per Videokonferenz nach § 128a ZPO als Alternative zur Präsenzverhandlung. *Monatsschrift für Deutsches Recht*, 641; Reuß, P. (2020). Die digitale Verhandlung im deutschen Zivilprozessrecht. *JuristenZeitung,* 1136.

[3] This analysis will focus on the federal legal provisions laid down in the Federal Rules of Civil Procedure (FRCP). In many respects, however, the comments on federal regulations can be applied to the legal situation in individual states, as federal regulations have served and continue to serve as

a general reform of the FRCP, but the content of the provision has remained essentially the same since the 1996 revision[4]

> "Taking Testimony. (a) In Open Court. At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location. [...]"

Most state court rules on the possibility of remote testimony are modelled after this provision[5].

2.1 The Prerequisites

Overall, in accordance with Rule 43(a) FRCP, it is necessary to submit a motion, that there be a good cause in compelling circumstances, and that appropriate safeguards be in place. The court then exercises its discretion. The individual requirements set forth by the provision are brought to life by the relevant case law. The following section takes a closer look at the individual requirements.

2.1.1. Motion

To initiate a video-based examination, a motion must be filed as soon as the necessity for remote testimony becomes known[6]. While the court may consider mutual consent between the parties, such consent is not a legal requirement[7]. The right to file this motion lies with the parties in dispute. Since witnesses are typically associated with one party, the relevant party usually files the motion on the witness's behalf; even for neutral witnesses, a party must initiate the request[8].

2.1.2. Good Cause in Compelling Circumstances

The central requirement for remote testimony is the existence of "good cause in compelling circumstances". The term is left undefined by the provision.

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a model for many state procedural codes., see Burnham, W. (2016). Introduction to the law and legal system of the United States, 246.

[4] Fobes, C. (2020). Rule 43(A): Remote Witness Testimony and a Judiciary Resistant to Change, *Lewis & Clark Law Review*, 24 (1), 305 Fn. 40; Rule 43 (a) FRCP advisory committee's note (2007).

[5] Harris, R. (2022). Behind the Screen: The Constitutionality of Remote Testimony for Survivors of Domestic Violence, *Hastings Constitutional Law Quarterly*, 49 (2), 211.

[6] See Rule 43 (a) FRCP advisory committee's note (1996).

[7] Rule 43 (a) FRCP advisory committee's note (1996); see also Gensler, S. & Mulligan, L. (2025). Federal Rules of Civil Procedure, Rules and Commentary, Rule 43.

[8] See for instance *VMX-Global USA, LLC v. Noble Environmental Tech*, 339 F.R.D. 690 (S.D.Fla., 2021).

However, the legislative intent—as set out in the advisory notes—suggests a restrictive application[9]. According to the advisory committee[10], remote testimony is not justified merely because on-site attendance is "inconvenient" for the witness[11]. Instead, these circumstances are generally intended to be limited to exceptional, unexpected events—such as sudden illness or an accident—where the witness remains capable of testifying remotely[12]. The committee maintains this cautious approach for two primary reasons. First, the formal and solemn environment of the courtroom is believed to encourage truthful testimony, as the presence of the fact-finder underscores the gravity of the proceedings[13]. Second, the committee prioritizes the fact-finder's ability to evaluate a witness's demeanor through direct, face-to-face observation, which is considered essential for accurately assessing credibility[14].

Decisions interpreting Rule 43(a) FRCP reflect uncertainty and inconsistency in defining "good cause in compelling circumstances". They offer no consistent guidance on when the circumstances in a specific case meet the necessary threshold. Because the U.S. Supreme Court has not addressed the limits of Rule 43(a) FRCP, case law is shaped by varying decisions across circuit and district courts. The inconsistency of the cases decided illustrates, on the one hand, the leeway granted to judges in applying the rule and, on the other hand, the inconsistency that this creates for the parties[15]. Ultimately, the application of Rule 43(a) FRCP remains highly dependent on the unique facts of each individual case.

There are a number of courts that are more inclined to allow video examinations and approve them more frequently in a more generous interpretation

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[9] See Glunz, B. (2012). Psychologische Effekte beim gerichtlichen Einsatz von Videotechnik: eine empirische und rechtsvergleichende Untersuchung zum US-amerikanischen, australischen und deutschen Zivilprozess, 221.

[10] The advisory committee is a key player in the U.S. legislative process. Although the Supreme Court has original jurisdiction over amendments to the FRCP, it has delegated the drafting of the rules to the Judicial Conference of the United States. Generally, the U.S. Supreme Court enacts the proposed amendments without influencing their content. Within the Judicial Conference, an advisory committee and a standing committee are responsible for drafting reform proposals. Both committees are composed of judges, practitioners, and legal scholars, so that the different interests of the parties involved are reflected in the legislative process. In addition, various interest groups, including lawyers and bar associations, are involved in the so-called committee hearings. As a result, lawyers' interests have a considerable influence on legislation. The advisory committee attaches its proposed amendments and additions to so-called notes, which have gained in importance over time and now play a key role in the regulatory process. These notes generally explain the purpose of the amendment and the systematic classification of the amended regulation, and in some cases also contain practical information for lawyers and judges. The courts do not provide a uniform answer as to whether the notes provide binding guidance for the application of the rule by the courts. It is striking that the Supreme Court avoids assigning binding character to the notes and resorts to ambiguous wording, but at the same time regularly uses them for the interpretation of the FRCP and emphasizes their importance; see Struve, C. T. (2002). The paradox of delegation: interpreting the federal rules of civil procedure, *University of Pennsylvania Law Review*, 150 (4), 1167.

[11] Rule 43 (a) FRCP advisory committee's note (1996).

[12] *Ibid*.

[13] *Ibid*.

[14] *Ibid*.

[15] Fobes (n 4), 309.

of the rule. These courts adopt a more expansive interpretation of Rule 43(a) FRCP, arguing that modern technology provides a comprehensive view of a witness's behavior[16]. Decisions like *In re RFC & RES-CAP* and *Aoki v. Gilbert* maintain that video links allow fact-finders to observe nuances—such as hesitation or confidence—effectively preserving the integrity of cross-examination[17]. In *F.T.C. v. Swedish Match*, the court went further, labeling the preference for in-person testimony over equivalent video transmission as "irrational", since these two modes of examination were deemed equivalent[18].

In contrast, many courts strictly follow the advisory committee's restrictive view, prioritizing the traditional courtroom setting. In *In re Kirkland*, the Ninth Circuit reaffirmed that live testimony is superior for observing witness behavior and determining the truth[19]. Under this standard, video testimony is reserved for exceptional, unexpected circumstances like sudden illness or accidents[20]. Similarly, the courts *in J.D. v. Price, Julian Liu v. State Farm Mutual Automobile Insurance Company*, and *Herrmann v. United States* consistently denied requests based on distance, inconvenience, or foreseeable personal commitments[21]. These rulings indicate that "good cause" requires a genuine emergency rather than mere logistical difficulty, maintaining a high threshold for deviating from in-person examination.

Judicial discrepancies are particularly sharp regarding travel-based requests, a common reason for requesting remote testimony. While some courts view long-distance or international travel as "good cause" due to associated costs and burdens[22], others remain unmoved unless additional obstacles are present[23]. Ultimately, these decisions are highly fact-specific. For instance, in *Matovski v. Matovski,* the court granted remote testimony by considering multiple factors: the witness's location in Australia, financial constraints, and visa issues[24]. However, the court also noted a significant caveat: highly con-

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[16] See *In re RFC & RESCAP Liquidating Tr. Action*, 444 F. Supp. 3d 967, 971 (D. Minn. 2020); *In re Vioxx Prods. Litig*., 439 F. Supp. 2d 640, 644 (E.D. La. 2006); *Aoki v. Gilbert*, No. 2:11-cv-02797, 2019 WL 1243719, at *1 (E.D. Cal. Mar. 18, 2019); *F.T.C. v. Swedish Match North America, Inc*., 197 F.R.D. 1, 2, 48 Fed. R. Serv. 3d 144 (D.D.C. 2000).

[17] *In re RFC & RESCAP Liquidating Tr. Action*, 444 F. Supp. 3d 967, 971 (D. Minn. 2020); *Aoki v. Gilbert*, No. 2:11-cv-02797, 2019 WL 1243719, at *1 (E.D. Cal. Mar. 18, 2019).

[18] *F.T.C. v. Swedish Match North America, Inc*., 197 F.R.D. 1, 2, 48 Fed. R. Serv. 3d 144 (D.D.C. 2000).

[19] *In re Kirkland,* 75 F.4th 1030 (2023).

[20] *Ibid*.

[21] *J.D. v. Price,* 619 F.Supp.3d 523 (2022); *Julian Liu v. State Farm Mutual Automobile Insurance Company*, 507 F.Supp.3d 1262 (2020); *Herrmann v. United States*, 129 Fed.Cl. 780 (2017).

[22] *Flores v. Alvarado,* 2018 WL 1697314, at *1-2 (W.D. N.C. 2018); *Vite-Cruz v. Sanchez,* 2018 WL 4359217, *1 (D.S.C. 2018); *Junjiang Ji v. Jling Inc*., 2017 WL 6501865, *2–3 (E.D. N.Y. 2017); *Virtual Architecture, Ltd. v. Rick,* 2012 WL 388507, *2 (S.D. N.Y. 2012); *Lopez v. NTI, LLC*, 748 F. Supp. 2d 471, 480 (D. Md. 2010).

[23] *Gil-Leyva v. Leslie*, 780 Fed. Appx. 580, 2019 WL 2651093, *3 (10th Cir. 2019); *U.S. v. Kivanc,* 714 F.3d 782, 791, 85 Fed. R. Serv. 3d 863 (4th Cir. 2013); *Kraan Investments (USA) LLC v. Tarpenning, 2022 WL 843491,*

[24] *Matovski v. Matovski,* No. 06 Civ. 4259(PKC), 2007 WL 1575253 (S.D.N.Y May 31, 2007).

troversial testimony typically requires a physical presence to ensure the most rigorous possible assessment of witness credibility[25].

The COVID-19 pandemic in particular has led to increased use of remote testimony in recent years. In principle, the federal courts were inclined to approve the use of video testimony during this period—the reasoning varied depending on the respective phase of the pandemic and the restrictions to which the courts were subject[26]. In the pandemic's early stages, courts like those in *In re RFC and ResCap Liquidating Trust Action* allowed video testimony to prevent transmission during travel, treating the outbreak as an "unexpected event" that prioritized health and safety over physical presence. Legitimate interests, such as protecting vulnerable family members, were also recognized as grounds for remote testimony[27]. During peak phases when courthouses were closed, the unpredictability of reopening and the prioritization of criminal backlogs led judges to favor remote civil proceedings to avoid indefinite delays. In *Flores v. Town of Islip*, the court cited the plaintiffs argument regarding COVID-19 as "perhaps the most compelling circumstances in history in favor of conducting this trial remotely"[28]. As courthouses reopened, courts continued to approve video testimony for high-risk individuals or those facing hazardous travel conditions, solidifying the pandemic's role in normalizing remote alternatives to in-person testimony[29].

2.1.3. Appropriate Safeguards

In addition, remote testimony requires that appropriate safeguards be observed to ensure the integrity of legal proceedings, in particular protecting against misidentification, external influence, or faulty transmissions. While the rules lack a formal definition, courts in cases like *Julian Liu v. State Farm* hold that modern video technology generally fulfills these needs by enabling immediate cross-examination and credibility assessments[30]. However, *Martinez v. Continental Tire* emphasizes that the technology must remain reliable and that the proceedings must maintain a formal, ceremonial tone[31]. Because these safeguards are often presumed satisfied when "good cause" is shown, specific case law is sparse; however, standard requirements include simulta-

[25] *Ibid*.

[26] See for example *Gould Elec. Inc. v. Livingston Cty. Road Comm'n*, 470 F.Supp.3d 735, 740-741 (E.D. Mich. 2020; *In re RFC and ResCap Liquidating Trust Action*, 444 F. Suppp.3d 967, 969-71 (D. Minn. 2020); *Argonaut Ins. Co. v. Manetta Enters*., Inc., No. 19-000482, 2020 WL 3104033, at *2-3 (E.D.N.Y. June 11, 2020)); *Whitt v. K-Va T Food Stores*, No. 3-17-cv-254, 2021 WL 5234967, at *1 (E.D. Tenn. 2021).

[27] *In re RFC & ResCap Liquidating Trust Action*, 444 F.Supp. 3d 967, 970, (D. Minn. Mar. 13, 2020).

[28] *Flores v. Town of Islip*, 18-CV-3549 (GRB)(ST) 2 (E.D.N.Y. Sep. 1, 2020): "In terms of good cause, plaintiffs argue that "COVID-19 creates perhaps the most compelling circumstances in history in favor of conducting this trial remotely."

[29] See *Sherrod, Teed, Vanderhagen & Ware v. VNA & LAN*, 5:17-cv-10164-JEL-KGA, (E.D. Mich. Mar. 30, 2022); *In re Junior Larry Hillbroom Litig*., 1:10-CV-00009, 15 (D.N. Mar. I. May. 26, 2022).

[30] *Julian Liu v. State Farm Mutual Automobile Insurance Company*, 507 F.Supp.3d 1262 (2020).

[31] *Martinez v. Continental Tire the Americas, LLC*, Not Reported in Fed. Supp. (2022): "maintaining decorum".

neous testimony under oath, a private setting free from distractions—unlike the moving vehicles or break rooms warned against in *McNeese v. United States*—and a reliable channel for sharing trial materials[32]. Ultimately, as seen in *McNeese*, the responsibility for technical preparation often falls on counsel, and judges retain the authority to revoke remote testimony permissions mid-trial if the technology fails or the witness behaves inappropriately[33].

2.1.4. Court's Discretion

Even if the requirements for remote testimony are met, the final decision remains within the court's discretion. This authority is further bolstered by the broad power judges hold under the Federal Rules of Evidence to determine how evidence is presented[34]. While mutual agreement between parties is a factor the court may consider, it does not dictate approval[35]. Appellate courts, such as the Tenth Circuit in *Eller v. Trans Union, LLC*, have consistently upheld these trial-level decisions, noting that Rule 43(a) FRCP represents a possibility for admission rather than an obligation[36]. Consequently, there are currently no appellate rulings suggesting that a court abuses its discretion by denying a request for video testimony.

2.2. Practical implementation

The court may issue an order setting out the logistics for the video hearing, including the time, platform, and any additional requirements to ensure fairness and reliability[37]. If a request for remote testimony is denied, the decision is typically categorized as an interlocutory order, meaning it is not a final judgment and cannot be immediately appealed under 28 U.S.C. § 1291. While limited exceptions exist, such as 28 U.S.C. § 1292(b) or the collateral order doctrine, they are rarely applied to procedural matters[38]. The collateral order doctrine specifically requires that the issue be conclusively resolved, independent of the case's merits, and effectively unreviewable later; however, judges are generally reluctant to use this for video hearings unless the denial causes significant, irreparable harm that a final appeal could not remedy[39].

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[32] *McNeese v. United States*, No. 1:17-CV-01164 MIS/KK, 2022 WL 194392 (D.N.M. Jan. 21, 2022).

[33] *Ibid*.

[34] *In re RFC & RESCAP Liquidating Tr. Action*, 444 F. Supp. 3d 967, 971 (D. Minn. 2020) with reference to *Parkhurst v. Belt*, 567 F.3d 995, 1002 (8th Cir. 2009): "Moreover, the Court's discretion on this question is supplemented by its "wide latitude in determining the manner in which evidence is to be presented" under the Federal Rules of Evidence."

[35] *Gensler/Mulligan,* FRCP Commentary, Rule 43.

[36] *Eller v. Trans Union, LLC,* 739 F.3d 467 (2013).

[37] Vgl. *VMX-Global USA, LLC v. Noble Environmental Tech,* 339 F.R.D. 690 (2021).

[38] See *Leonard v. Martin*, 38 F.4th 481 (2022).

[39] See *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978) (with reference to *Abney v. United States,* 431 U.S. 651, 658, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977); *United States v. MacDonald,* 435 U.S. 850, 855, 98 S.Ct. 1547, 56 L.Ed.2d 18 (1978).

2.3. Reception of Video-based Witness Examinations

Since its inception, remote testimony has been the subject of extensive debate in US legal scholarship, characterized by a fundamental tension. While the resulting procedural flexibility is widely welcomed, significant apprehension persists regarding the impact of 'digital distance' on the evaluation of witness testimony. Central to this controversy is the concept of demeanor evidence—a concept based on the premise that a fact-finder can assess a witness's veracity through non-verbal cues—such as facial expressions, gestures, and vocal inflection—exhibited during testimony[40]. Historically, the observation of demeanor has been regarded as a primary method for verifying the accuracy and truthfulness of witness account[41]. Courts mostly still view these cues as essential to determining credibility[42]. Regarding remote testimony scholars continue to question whether the psychological nuances of credibility can be accurately captured via video, or if the lack of physical presence inherently undermines the court's truth-seeking function[43]. Scholars point out possible changes in witness behavior due to difficulties in communicating with the court or manipulation of the witness by third parties[44]. On the other hand, the discussion highlights the weakness of video questioning with regard to the changed or more difficult assessment of the truthfulness of the statement[45]. Various contributions argue that video interrogations lead to a distortion of perception and that, overall, witnesses who testify via video are considered less credible and/or are generally evaluated more negatively than witnesses who testify in the courtroom[46]. Only rarely is credibility assumed to be assessable to a similar degree[47].

3. THE LEGAL FRAMEWORK FOR VIDEO-BASED WITNESS EXAMINATIONS IN GERMANY

In Germany, the taking of evidence, including witness examination, by means of video communication is permitted under Sections 284(2) and (3) of the German Code of Civil Procedure (*Zivilprozessordnung,* "ZPO").

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[40] Burnham (n 3), 90.

[41] *Ibid*.

[42] *Ibid*.

[43] See Fobes (n 4), 311f.

[44] Bandes, S. & Feigenson, N. (2020). Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom, Buffalo Law Review, 68 (5), 1298; King, G. (2022). Testimony in Open Court: The Case for a Traditional Application of a Cornerstone of the American Civil Trial Tradition, Federal Rule of Civil Procedure 43(a), *American Journal of Trial Advocacy*, 45 (2), 418.

[45] Bandes & Feigenson (n 44), 1298; Feigenson, N. (2023). Adjudication on Zoom and beyond: Human Interaction in Virtual Courts, *Washburn Law Journal*, 62 (3), 476; King (n 41), 418.

[46] Bandes & Feigenson (n 44), 1295; Feigenson (n 45), 476.

[47] See for instance Fobes (n 4), 324.

The legislator views expanded videoconferencing as a cornerstone for modernizing and digitalizing the justice system, aiming for more citizen-friendly, resource-saving, and efficient proceedings[48]. Beyond general efficiency, this technology improves access to justice for persons with disabilities in alignment with Article 13 of the UN Convention on the Rights of Persons with Disabilities[49]. More specifically, video-based witness examinations are intended to accelerate proceedings by providing flexibility and overcoming geographical barriers[50]. By facilitating the remote testimony of witnesses who live far away or face travel difficulties, the new legal framework streamlines scheduling and reduces resource consumption[51]. Ultimately, these reforms are designed to encourage more frequent use of video technology in evidence-taking, whether initiated by the court, the parties, or the witnesses themselves[52].

3.1. The Prerequisites

In order to analyze the legal framework, it is necessary to examine the requirements and modalities that must be met for a court to schedule a video-based witness examination—namely, the court's authority to order such measures, the criteria for determining suitability, the prerequisite of sufficient capacities, the scope of judicial discretion, the designation of the witness's location, the procedural steps for ordering or authorizing video-based testimony, and the legal remedies available against such decisions.

3.1.1. Initiation: Upon Request or Ex Officio

Under Section 284(2) sentence 1 ZPO, video-based witness examinations can now be initiated either upon request or *ex officio*. This new judicial authority to act *ex officio* allows courts to proactively manage proceedings, enhancing planning certainty and minimizing delays. According to Section 284(2) sentence 2 ZPO, the right to request a video link extends to all participants and the witnesses themselves. This is particularly beneficial for witnesses seeking to testify from convenient locations to reduce travel costs[53]. Additionally, it allows participants to request remote testimony in sensitive cases involving safety concerns, emotional strain, or difficult personal relationships[54].

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[48] See Explanatory Memorandum, Bundestags-Drucksache 20/8095, p. 23.
[49] *Ibid*.
[50] *Ibid*, p. 23, 59.
[51] *Ibid*, p. 59.
[52] *Ibid*.
[53] Foerste, U. (2025). In H-J Musielak & Voit, W (Eds.), Zivilprozessordnung (ZPO), Kommentar (22nd Edn.), 284 para 29.
[54] Müller, H. In S. Ory & S. Weth (Eds.), Juris-Praxiskommentar Elektronischer Rechtsverkehr (2nd Edn.), § 284 ZPO para 117.

3.1.2. Suitability of the Video-Based Examination for the Specific Taking of Evidence

Pursuant to Section 284(2) sentence 3 in conjunction with Section 128a(1) sentence 1 ZPO, the video-based examination must be deemed "suitable" for the specific evidentiary purpose. This requirement formalizes part of the previous judicial discretion into a standardized statutory mandate[55]. A video hearing is appropriate only when no significant loss of information or impairment of evidentiary value is expected[56]. In its assessment, the court must weigh the benefits of remote testimony—such as cost reduction, travel ease, and procedural acceleration—against the value of direct physical observation[57]. Among other things, the court evaluates whether the reduced perception of facial expressions and gestures constitutes an acceptable risk given the testimony's importance[58].

3.1.3. Availability of Sufficient Capacities for the Video-Based Examination

Pursuant to Section 284(2) sentence 3 in conjunction with Section 128a(1) sentence 1 ZPO, "sufficient capacities" must exist before a video-based examination can be scheduled. This so-called "equipment proviso[59] ensures that the new statutes do not create enforceable claims against judicial administrations for additional resources[60]. It requires that courts possess the technical and spatial conditions necessary to conduct the examination properly[61]. The fundamental technical standard is "mutual visual and acoustic perceptibility[62], ensuring the right to be heard and procedural fairness remain equivalent to in-person examinations[63]. Both the witness and the courtroom must have the infrastructure for reliable two-way transmissions[64]. If a witness lacks the necessary equipment or technical competence, the court may, under Section 284(3) ZPO, order them to appear at a nearby court facility to participate.

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[55] Von Selle, D. (2022). In V. Vorwerk & C. Wolf (Eds), Beck'scher Online-Kommentar Zivilprozessordnung (47th Edn), § 128a para 8.

[56] Von Selle (n 64), § 128a para 8; Foerste (n 62) § 284 para 29.

[57] Bacher, K. (2022). In V. Vorwerk & C. Wolf (Eds), Beck'scher Online-Kommentar Zivilprozessordnung (47th Edn), § 284 para 63c; Foerste (n 62) § 284 para 29.

[58] Foerste (n 62) § 284 para 27; Greger, R. (2022). In R. Zöller (Ed.), Zivilprozessordnung, Kommentar (34th Edn.), § 128a para 8.

[59] Rebehn, S. (2024). Ausbau von Videoverhandlungen: Es geht doch!, *Deutsche Richterzeitung*, 170.

[60] Rebehn (n 68), 170; Greger (n 67), § 128a para 9.

[61] Stadler, A. (2025). In H-J Musielak & Voit, W (Eds.), Zivilprozessordnung (ZPO), Kommentar (22nd Edn.), § 128a para 8.

[62] *Ibid*.

[63] Greger (n 67), § 128a para 10.

[64] Von Selle (n 64), § 128a para 11; Stadler (n 70), § 128a para 8.

3.1.4. Court's Discretion

The court decides whether to permit a video-based witness examination via a formal order (*Beschluss*), exercising judicial discretion. Notably, the law does not include a presumption in favor of remote evidence-taking, unlike the rules for oral hearings under Section 128a(3) ZPO. This exclusion reflects the judiciary's successful effort to maintain autonomy over evidentiary procedures. In exercising this discretion, courts must prioritize procedural economy, though the exact scope of relevant factors remains debated[65]. While some scholars advocate for a balancing test[66] —weighing applicant motives, efficiency, and testimony significance—others argue these elements are now largely covered by the "suitability" and "capacity" prerequisites[67]. This lack of clear demarcation creates practical uncertainty. Furthermore, monitoring how courts apply these rules is challenging, as judges are not strictly required to provide detailed reasoning, and such decisions are rarely published.

3.2. Practical Implementation

When a video-based examination is permitted or ordered, the witness generally retains the freedom to choose their location—provided it is within the territory of Germany—including participation from private premises or their workplace[68]. However, under Section 284(3) ZPO, the court may now mandate that the witness appear at an alternative court location. By exercising this authority, the court ensures the testimony occurs in a neutral, controlled environment, preventing third-party interference or witness manipulation[69]. Additionally, this provision supports witnesses who lack the technical expertise or equipment required to participate from a private setting, ensuring they can still provide evidence remotely via the court's infrastructure[70].

When a video-based examination is permitted by formal court order (*Beschluss*), the witness is summoned and informed that physical attendance at the court house is not required. However, in accordance with Section 377(2) No. 3 and Section 402 ZPO the summons must warn the witness that failing to establish a functional, timely video connection carries the same legal consequences as failing to appear in person. The court may also impose technical requirements or order attendance at a designated court location under Section 284(3) ZPO in the summons. If the examination was granted upon request, the witness retains the right to appear in person instead. If ordered

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[65] Spoenle (n 51), 2649; Greger (n 67), § 128a para 12.
[66] Bacher (n 66), § 284 para 63c; Müller (n 63), § 284 ZPO para 123; Foerste (n 62) § 284 para 31.
[67] Von Selle (n 64), § 128a para 13.
[68] Müller (n 63), § 284 para 32.
[69] See Explanatory Memorandum, Bundestags-Drucksache 20/8095, p. 61.
[70] Bacher (n 66), § 284 para 63c.

ex officio, the witness is not summoned to the court premises at all. In either case, in accordance with Section 284(2) sentence 3 in conjunction with Section 128a(2) sentence 3 ZPO witnesses must be informed of their right to lodge an objection within two weeks. Notably, while the court must issue a formal order to reject a request for video examination, it is not legally obligated to provide reasons for the rejection—a distinct difference from the rules governing requests for oral hearings.

Under Section 284(2) sentence 3 and Section 128a(7) ZPO, court orders permitting, ordering or rejecting video-based examinations are not subject to appeal. However, parties and witnesses may lodge an objection (*Einspruch*) against the decision of the court within two weeks without providing reasons. This mechanism safeguards the fundamental right to be heard, ensuring no participant is forced into remote testimony against their will[71]. If a witness or a party objects to a mandatory order, the court's order is automatically converted into mere permission. Crucially, if any party to the proceedings objects, the court is precluded from allowing video testimony altogether. This reflects the legislative position that video-based evidence-taking cannot occur against a party's will, as they have a vested interest in the witness's physical presence before the court[72]. While the orders themselves are not immediately appealable, procedural errors may still be challenged during an appeal of the final judgment.

3.3. Reception of Video-based Witness Examinations

Before the COVID-19 pandemic, the then-applicable Section 128a ZPO was rarely utilized, but the crisis acted as a "technology driver" that catalyzed a widespread "technical upgrade" of German courtroom infrastructure[73]. While remote participation for parties and legal counsel has since become routine, video-based witness examinations have not seen a similar revival and remain the exception[74]. Significant judicial reservations persist, particularly when assessing witness credibility is pivotal, as courts continue to prioritize the perceived reliability of in-person testimony. [75]

Similarly, scholars question the evidential value of video examinations—focusing on two core questions: firstly, what impact does the video transmission have on the court's ability to assess the credibility of the testimony and the witness, and secondly, what consequences does the unusual testi-

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[71] See Explanatory Memorandum, Bundestags-Drucksache 20/8095, p. 61.

[72] See Recommended resolution and report of the Legal Affairs Committee, Federal Law Gazette, Bundestags-Drucksache 20/9354, p. 39.

[73] Greger, R. (2024). Videokonferenz im Zivilprozess? Ja, aber…, *Deutsche Richterzeitung*, 26.

[74] Stadler, A. (2022). Digitale Gerichtsverhandlungen im Zivilprozess. In B. Windau & P. Reuß (eds), *Göttinger Kolloquien zur Digitalisierung des Zivilverfahrensrechts, Kolloquien im Sommersemester 2021*, 1st Edn., 8.

[75] *Ibid*, 8f.

mony situation have on the witness's testimony behavior[76] Overall, legal literature on video interrogations focuses heavily on the weaknesses of witness testimony via video interrogation and thus on its tendency to have reduced evidentiary value. In particular, the weaknesses in the court's assessment of credibility and plausibility are widely emphasized[77]. Only rarely is the fundamental evidentiary value of witness testimony in general also considered in greater depth or criticized in connection with the debate on the evidentiary value of video interrogations[78].

Consequently, despite legislative efforts and a shift in general mindset, the deep-rooted concerns regarding the integrity of remote assessments make it uncertain whether the new Section 284(2) ZPO will successfully normalize video-based witness examinations.

4. DIFFERENCES AND SIMILARITIES

In recent years, video-based examinations have become a relevant topic in legal practice and literature in both jurisdictions, accelerated in particular by the COVID-19 pandemic. While both Germany and the U.S. allow witness examinations via live video-conferencing in their civil proceedings, the regulations are based on different procedural law principles and understandings of the process. These differences, but also similarities, shape the reception and application of this form of testimony in both legal systems.

4.1. The Prerequisites

The requirements under German and U.S. law have been brought closer together by the German legislative reform enacted in July 2024. Prior to the reform, German law did not make the admission of video testimony subject to any special requirements apart from a motion, leaving it to the discretion of the court. After the reform German law now, like U.S. law, links video testimony to special circumstances. However, at first glance, the German requirements—a suitable case and sufficient capacity—represent a lower threshold than the U.S. requirements—good cause in compelling circumstances and appropriate safeguards. The decisive difference is that in U.S. law, the circumstances of the witness are decisive and whether these can justify a video hearing as an exception to testimony in the courtroom. In German law, on the other hand, the circumstances of the witness can only play a role only in the court's discretionary considerations. U.S. law makes it particularly clear

[76] Irskens, G. (2023), Die digitale Beweisaufnahme. In T. Riehm & S. Dörr (Eds.), *Digitalisierung und Zivilverfahren,* 1st Edn., 426.

[77] See for instance Mantz/Spoenle (n 2), 641; Reuß, P. (2020). Die digitale Verhandlung im deutschen Zivilprozessrecht, *JuristenZeitung*, 1136.

[78] See for instance Stürner, M. & Stürner, J. (2023). Videoverhandlung im zivilprozessualen Erkenntnisverfahren, *JuristenZeitung,* 347.

that the special circumstances must outweigh the benefits of the witness testimony on site, which are lost through video examination. In this respect, U.S. law reflects a different basic attitude towards video examination than is the case in German law. Furthermore, U.S. law does not contain any requirements stipulating that a case must be suitable for video examinations, as is the case in German law. Of course, this question is left to court's discretion in the U.S.—as was also the case in German law under the old legal situation.

However, the harmonization of the legal frameworks through the German reform is particularly interesting in that both legal systems now consider certain safeguards to be important. While U.S. Rule 43 (a) FRCP uses appropriate safeguards as a prerequisite for admission, German law now offers the possibility of ensuring that the witness is not subject to any influence by summoning them to another court location. According to Section 284 (3) ZPO. Through these safeguards, both legal systems make it clear that there is a risk of abuse and influence in video hearings that must be countered.

The capacity requirement stipulated by German law since the reform has no direct counterpart in U.S. statutes. However, the rigorous "compelling circumstances" test in the U.S. suggests that the fundamental premise of the German rule is already well-established: that video testimony is a privilege rather than a right. Because U.S. courts guard the tradition of on-site presence rather closely, the idea of an entitlement to video examinations remains foreign to both systems.

In the U.S., the regulations governing video testimony also show that witnesses are generally connected to one of the parties. Under U.S. law, only the parties can submit a request, which they then make on behalf of "their" witnesses. The situation is different in Germany, where witnesses can also submit a request for video testimony on their own behalf. At the same time, in Germany, a party can also file such a request for a witness in order to avoid a confrontation with the witness. This is hardly conceivable in the U.S., especially since it concerns the circumstances of the witness that prevent them from coming to the courtroom. In this respect, the German regulatory regime offers more comprehensive protection than its U.S. counterpart. In the U.S., video testimony is essentially based on the witness's actual inability to travel to the court location and less on other situations or circumstances that may make video testimony appropriate.

4.2. Judicial practice

A look at judicial practice reveals differences. While in Germany the practice of using video examinations is generally very limited, judicial practice in the U.S. is divided. There are courts that are clearly in favor of video hearings on the one hand, and very skeptical courts on the other.

The German skepticism can be explained by the rather rigid structure and lack of flexibility of civil proceedings. Added to this is the rather rigid as-

sumption that witness statements made in person in the courtroom are of particular value and significance and that their veracity cannot be reliably assessed via video transmission. This also clearly shows the difference in the perception of video hearings, which are perceived differently in Germany and used much more frequently than video examinations. All of this leads to an adherence to traditional in-court witness examinations—at least in proceedings where witness testimony plays a decisive role.

The inconsistent U.S. court practice is complex in its entirety. Broken down into its constituent parts, it shows above all that there is essentially a progressive camp of judges in the US judiciary who attest to the high reliability and integrity of this type of technology, while on the other hand there is a camp of traditionalist judges who attribute primary importance in interpreting of the provision to the cautious genesis of the advisory committee and thus to witness statements testimony in the courtroom.

This traditionalist view is bolstered by the adversarial nature of U.S. proceedings, where the presentation of evidence is an act of storytelling frequently aimed at a jury. Since litigation strategy often relies on the emotional and visual impact of an in-person witness, part of the legal culture continues to resist the transition from the courtroom to the screen. Lawyers must spin a compelling narrative of their own side in the form of a consistently credible story—with the focus on presenting a comprehensible narrative to the jury—in the form of staging, visualization, and presentation—including the show of emotion[79]. Given the importance of this presentation of evidence for U.S. lawyers, it is coherent to rely on witnesses testifying in the courtroom. Although this type of presentation primarily stems from the interests of the lawyers, this type of court procedure is also anchored in the culture of court proceedings—not least because of the adversary system.

Both countries share the commonality that the COVID-19 pandemic acted as a major catalyst for the adoption of video examinations. Observers were largely surprised by the speed with which the legal profession and judiciary adapted to these shifting circumstances. This rapid transition was significantly bolstered by the existing legal frameworks for remote testimony in both nations, a factor that distinguishes them from many other jurisdictions.

4.3. Reception of Video-based Witness Examinations

The intensity of legal discourse regarding video witness examinations differs notably between the U.S. and Germany. In the U.S., the discussion is more prominent and holistic, driven by a larger scholarly community and the heightened importance of fact-presentation in jury trials. Conversely, German discourse focuses primarily on general video hearings, leaving witness questioning as a peripheral topic. Despite these different levels of engagement,

[79] Bandes & Feigenson (n 44), 1327.

both countries share a fundamental skepticism concerning the evidential value of remote testimony and the court's ability to assess witness credibility effectively. On both sides of the Atlantic, the question of the extent to which the evidential value of witness testimony obtained in a video hearing changes plays a special role. The U.S. scholarly skepticism can be traced back—similarly to the judicial skepticism—to the significance of the presentation of evidence and the theatrical nature of civil proceedings due to jury participation.

5. CONCLUSION

The evolution of video-based witness examinations in German and U.S. civil proceedings reveals a shared tension between the pursuit of judicial efficiency and the preservation of evidentiary integrity. While the COVID-19 pandemic served as a global catalyst for digital adoption, the legal frameworks in both nations as well as their judicial and scholarly reception remain deeply rooted in their respective procedural philosophies. The U.S. courts continue to treat remote testimony inconsistently—either as an exceptional measure or in a more generous approach. While Germany's recent 2024 legislative reform signals a shift toward normalizing video technology by empowering courts to order remote evidence-taking *ex officio* based on suitability and technical capacity, the judicial practice remains skeptical. Overall, both systems struggle with the "digital distance" that complicates a judge's ability to gauge sincerity and protect against external interference.

Ultimately, the successful integration of video examinations depends less on technical logistics and more on overcoming deep-seated judicial and scholarly skepticism. In the U.S., the adversarial nature of proceedings and the importance of "storytelling" for jury impact partly create a cultural preference for in-person presence that resists digitization. Meanwhile, the German judiciary remains cautious, often viewing personal presence as essential for high-stakes credibility assessments. As both legal systems continue to refine their safeguards—such as requiring neutral testimony locations—it becomes clear that video-based examinations are not yet viewed as fully equivalent to in-person examinations in the courtroom. While technology offers a path toward more accessible and resource-saving justice, the transition from the physical courtroom to the digital screen remains a work in progress, shaped by a persistent commitment to the traditional values of face-to-face testimony.

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