The role of written witness statements in International Arbitration

A comparative study of the practice regarding the presentation of witnesses as evidence in the Nordic, German and British civil procedure as well as in International Arbitration

Master’s Thesis
Dina Stolt
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Supervisor: Professor Dan Frände
Department of Criminal Law,
Judicial Procedure and
General Jurisprudential Studies
Faculty of Law
University of Helsinki
### Tiivistelmä/Referat – Abstract

A comparative study on the presentation of witnesses in a civil, a common law, and a Nordic jurisdiction as well as in international arbitration. The main focus is a comparison of the use of written witness statements in England and in International Arbitration compared to the use of evidentiary themes in the Nordic countries as well as in Germany. The comparison covers the underlying principles of each Code of Judicial Procedure and the common practices regarding the presentation of witnesses. The relevant parts of each legal culture is also examined together with the common attitudes among local professionals regarding each practice. The theme was inspired by the anticipated Finnish Government Bill on changes to chapter 17 of the Finnish Judicial Procedure, e.g. allowing the use of written witness statements in certain situations.

### Avainsanat – Nyckelord – Keywords

Civil procedure, arbitration, international arbitration, witness evidence, evidence, comparative law, prosessioikeus, välimiesmenettely, todistelu, todistustee, skiljeförfarande, skiljemannarätt, bevisning, vittnen, bevistema

### Säilytyspaikka – Förvaringställe – Where deposited

### Muita tietoja – Övriga uppgifter – Additional information
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## Abbreviations

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<tr>
<td>CPR</td>
<td>Civil Procedure Rules 1998</td>
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<tr>
<td>ECHR</td>
<td>the European Convention on Human Rights</td>
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<tr>
<td>HD</td>
<td>Högsta domstolen (Finnish Supreme Court)</td>
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<tr>
<td>ICC</td>
<td>International Chamber of Commerce</td>
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<tr>
<td>LCIA</td>
<td>London Court of International Arbitration</td>
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<tr>
<td>NJA</td>
<td>Nytt Juridisk Arkiv (Swedish precedents)</td>
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<td>RB</td>
<td>Rättegångs Balk 1.1.1734/4</td>
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<tr>
<td>SCC</td>
<td>Stockholm Chamber of Commerce</td>
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<tr>
<td>UNIDROIT</td>
<td>International Institute for the Unification of Private Law</td>
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<tr>
<td>ZPO</td>
<td>Zivilprozessordnung in der Fassung der Bekanntmachung vom 5. Dezember 2005</td>
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1. Introduction and method

1.1 Objectives

The purpose of this thesis is to examine which practice of presenting witnesses as evidence is the most fair and efficient and if it is due to fairness and efficiency the current practice in modern international arbitration has developed into its current form. This has been done through a comparison of the practice for presenting witnesses as evidence in civil proceedings in Finland, Germany, England and Wales and the practice in international arbitration.

It is clear that the underlying principles in the four systems are practically the same, but the rules in force still differ significantly due to differences in the legal thinking in the different legal cultures. Since the principles are similar, the goal has been to find the best solution that serves these principles that on an international level fall under the term due process.

The specific legal systems chosen here represent four different legal cultures. The German procedural rules represent the culture of the traditional civil law family, whereas the English and Welsh rules represent the traditional common law family. The Finnish procedural system on the other hand, has a long tradition of copying the German way of thinking, but has developed in its own direction during the past 60 years or so. It is common to see Finland listed as a civil law country, but in regards to rules on evidence, it can no longer be called a purely civil law system but rather a hybrid typical for the Nordic countries, as some provisions resemble practices typical for common law systems rather than civil. The fourth system is international arbitration, which is a result of international cooperation to serve the need for an international separate dispute resolution method that pleases all parties and nationalities and which does not clearly match one or the other traditional legal culture.

On one hand, the use of the right terminology has been crucial due to the similarities in the systems. In addition to the similarities also the original languages have added to the challenge of finding the right terminology. On the other hand, the use of the same term for
similar less significant elements, has added to the uniformity of the study. The aim has been to produce a comprehensible text while conducting a thorough and exact comparative study.

1.2 Demarcation
The rules presented are those of civil procedures, although rules on criminal and administrative proceedings are mentioned where there is a significant contrast or common important moral rule. For the rules to be comparable to international arbitration, the norms chosen are those for civil disputes where settlement is allowed, i.e. disputes that could also be solved through arbitration, which is why only the rules of the first instance have been studied. The aim of this thesis has been to compare the practices regarding the presentation of fact witnesses. Due to their special nature, the presentation of expert witnesses will not be discussed.

1.3 Method
The method used in this thesis is comparative legal research. The most fundamental objective of comparative legal research is to collect materials and do research on the matters, which differ and those, which are similar in various legal systems and to explain and assess the reasons and developments behind these diversities and conformities. Comparative studies in procedural law serve a purpose as, although two systems might share similar rules in a substantive sense, those might be nullified by differences in the procedural rules or by mandatory procedural provisions.

There are four practical benefits of comparative law. These are comparative law as an aid for the legislator, comparative law as a tool of construction, comparative law as a component of the curriculum of the universities and comparative law as a contribution to the systematic unification of law. This study aims to serve two of these purposes. First, the result is aimed to aid the Finnish legislators in its development of the evidentiary rules in

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1 Husa, 1998 p. 19
2 H.C. Gutteridge, 1949 p.35
the Finnish Code of Judicial Procedure by highlighting the advantages and disadvantages of the current models in use in both Finland and the other jurisdictions under examination. Second, this study aims to point out the similarities in the developments and underlying principles in the various legal systems, to support the recent developments in international arbitration and therefore also support unification on some level of the evidentiary rules in these jurisdictions.

When assessing the efficiency and fairness of norms, comparative studies between various national systems are necessary. First, it is evident that most legal systems have been and are constantly influenced by other legal systems, wherefore they share many features while still being separate entities and second, it would be difficult to evaluate the efficiency of a norm without an adequate point of comparison. In addition, comparative law may serve as an aid in the interpretation of national law. In this thesis also Swedish precedents and commentaries have been taken into account and used as aid for the interpretation of the current Finnish evidentiary rules.

The forms of comparative analysis applied in this thesis are practical, theoretical and pedagogical comparative research models. A practical comparison is used as a tool for legislative purposes or as a tool of construction, in order to find better solutions for or fill the gaps in a national legal system. Theoretical comparisons are made to increase legal knowledge by not only recognizing the differences and similarities but also explaining the reasons behind them. This is done by studying theoretical questions and by systemizing various legal system’s systematics, terms and background models. A key thought behind theoretical comparisons is that legal systems have not developed as loose entities, but rather have the same underlying principles to some extent which may have led to better practical models in some systems than in others. Therefore a theoretical comparison can also be used as a base for improving one’s own legal system. A pedagogic comparison is made in order

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4 Husa, 1998 p. 24
5 Zweigert and Kötz, 1987 p. 17
to provide for better knowledge of the researcher’s own legal system and also in order to increase critical thinking of the researcher’s own system.\textsuperscript{6}

In this thesis the ways of presenting witnesses as evidence have been studied both on a theoretical and a practical level to facilitate a comparison of both the similarities and differences in the underlying principles and the practical execution of the realization of these principles.

Comparative studies can be performed either as micro- or macrocomparisons. A macrocomparison can discuss the development of law and the different styles of judicial opinion among other themes. The comparison at hand is however more of a classical microcomparison, where the rules used to solve a specific problem are compared on a smaller scale. There are elements of macrocomparison as well, as the line between the concepts is naturally blurry but also as a comparison on a simply micro level might not be successful as each legal rule is part of a judicial system and cannot be judged standing alone. Here both the development leading up to the current legislations in each jurisdiction is discussed before a deeper analysis of the current rules is presented.\textsuperscript{7}

The procedural rules compared in this thesis are the laws on civil procedure in Finland, Germany, England and Wales and the common practices used in international arbitration. The aim is to see which practice for presenting witnesses as evidence is the most efficient and why the systems have developed into what they are today. When comparing legal systems, it is important to have criteria for the evaluation and comparison. The procedural rules on evidence can be analyzed on the basis of legal certainty, i.e. fairness, and economical efficiency.\textsuperscript{8} I have chosen to focus on the underlying principles of each system, which represent the belief of fairness as well as the economic efficiency by looking at the effects on the speed of the trial and the amount of work each system requires of the parties.

\textsuperscript{6} Husa, 1998 pp. 26-39
\textsuperscript{7} Zweigert and Kötz, 1987 pp. 4-5
\textsuperscript{8} Waincymer, 2012 section 1.2.1
When analyzing the evidentiary rules of international arbitration, it is valuable to look at the differences between the legal cultures, as procedural rules tend to vary the most in evidentiary matters. Although international arbitration has developed a purely international community of lawyers who are familiar with the practices of international arbitration and are able to, to some extent, ignore their backgrounds when participating in international arbitrations, it is still evident that one of the reasons to the manifoldness of procedures applied is the various backgrounds of the arbitrators and counsels.

In 1949, Professor H.C. Gutteridge wrote that:

“So long as jurisdiction is founded on a territorial basis it is clear that rules of procedure must vary from country to country, and even if a world state were to come into existence is would, probably, still be necessary to adapt the machinery for the legal settlement of disputes to suit local conditions and variations in the psychological characteristics of litigants.”

Today, 65 years later, Professor Gutteridge’s statement still holds true. Despite the globalization of international arbitration and growing international community, proceedings are still being affected by the nationalities of the counsels and arbitrators. During the past decade however, a new trend has arisen. International arbitrations are becoming more and more uniform, especially in relation to the practices regarding the taking of evidence. Whether this is due to a desire for a more predictable form of dispute resolution, laziness, lack of fantasy or simply because the best practice has been discovered through trial and error, is unclear. What is clear, however, is that most common practices resemble the traditional common law ways rather than the civil law.
2. The practice for presenting witnesses in national courts

2.1 The presentation of witnesses in Nordic civil procedures, using Finland as an example

In relation to evidentiary matters, the Nordic procedural laws do not differ significantly from each other. The following is a portrayal of the presentation of witnesses as evidence in Finland, but due to the procedural systems being closely related, most parts apply for Norway and Sweden as well.

During the second half of the 20th century, the Finnish civil proceedings have developed in the direction of orality. In accordance with the current system, witnesses give their testimony orally and the use of written witness statements is prohibited. This development seems to have reached its culmination, as a new suggestion for a Government Bill suggest the presentation of witnesses solely through written statements in smaller civil disputes.

2.1.1 Background

The first Swedish procedural statutes were written in the 14th century. During the 18th century, some major amendments were made. These amendments laid the grounds for the procedural system that would be in use until the lower courts reform of the early 1990’s. The need for a reform had been evident for nearly a century, but postponed during wartimes. Before the reform, the proceedings clearly lacked orality, immediacy and concentration. After the filing of the statement of claim, the proceedings would go straight to a hearing, where the respondent was expected to react to the claims presented. There was no concentrated main hearing and weeks could pass between the sessions. The panel of judges did not always remain the same during the whole proceedings and the panel making the final judgement based it on a record of the different sessions. The two most important effects of the reform on civil procedures were that the proceedings are now split into two parts: the preliminary proceedings and a main hearing. In addition, the civil proceedings are now more clearly based on the principles of orality, immediacy and concentration in order
to fulfil the goals of a fast, affordable and legally certain procedural system. The new system received critique for being slow and expensive especially for the parties. To correct this, a new amendment was made in 2002. This amendment’s new alternative procedural models were one of the main changes, meaning that not all proceedings have to follow the same rules, which gives the procedural system some flexibility.

2.1.2 The nature of the Finnish procedural system

The Finnish procedural system is neither strictly adversarial nor inquisitorial, although the Nordic legal systems are typically referred to as part of the civil law culture. This view is not shared by the majority of practicing Finnish lawyers, as many elements of the procedural system for instance resemble the common law system more than the civil law as it is neither adversarial nor inquisitorial.

The adversarial principle is however connected to two main principles in the Finnish procedural system. First the parties have the burden of claim and second, the parties have the burden of allegation. In accordance with the principle of burden of claim, the court may not order something else or something more than what a party has claimed. The principle has two sides to it, on the one hand the claimant has the burden of presenting the claims it wishes the court to rule upon and on the other hand it serves as a protective scope for the respondent as the court is bound by the claimant’s claims. The burden of allegation restricts the court to basing its judgment solely on facts invoked by the claimant, i.e. the court may not take into consideration facts that it has knowledge of due to other circumstances. The court may, however gather evidence supporting facts that the claimant has invoked. In addition, it is more common for the questioning of witnesses to be conducted by the parties rather than the judges, which is also reflected in Nordic arbitrations. The common law type of extensive discovery, is however not a feature in the Finnish system, although it has

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9 See e.g. JRBela 2005, pp. 5-11, Lappalainen 2002, pp. 5-7 and Regeringens proposition 1990/15 pp. 5-8
10 Lappalainen 2002, pp. 18–19
11 Waselius & Jussila, 2011 p. 713
become more common for big law firms in the Nordics to make extensive requests for documents in arbitral proceedings.\textsuperscript{12}

\subsection*{2.1.3 The main principles governing the Finnish procedural system}

The Finnish procedural system strives to be quick, affordable and certain. To achieve these goals, the principles of orality, immediacy and concentration should be followed during the proceedings.\textsuperscript{13} In addition to these practical principles, there are two more general principles governing the procedural system, which are the contradictory and the publicity principle.\textsuperscript{14} The principles of orality, immediacy and concentration have not been seen to have any inherent value in themselves, but they are merely viewed as a means to an end. The contradictory principle and the publicity principle, on the other hand, are perhaps more abstract but also carry a higher inherent value.\textsuperscript{15}

In Finnish national law, the rules governing evidence can be found in the Code of Judicial Procedure, \textit{Oikeudenkäymiskaari} (OK).

\subsubsection*{2.1.3.1 The contradictory principle}

The contradictory principle in the Finnish procedural system represents the \textit{audiatur et altera pars} principle. It is also an element in the principle of due process\textsuperscript{16}. For proceedings to be in line with the principle, a party must have the right to present its own views on the case and on all the material the panel of judges will base its judgement on, meaning all the material the other party submits and all the material the court possibly gathers.\textsuperscript{17} The principle has been seen to have five dimensions:

1. the parties must have the right to present their claims and evidence,

\begin{flushright}
\textsuperscript{12} Mattson, 2011 p. 531
\textsuperscript{14} Eerola, 1996 p. 32
\textsuperscript{15} Virolainen, 1995 p.200
\textsuperscript{16} Ekelöf et al., 2009 p. 30
\textsuperscript{17} See e.g. Eerola p. 36, Virolainen, 1995 p.212
\end{flushright}
2. the parties must be informed of the claims and evidence presented by the other party,

3. the parties must be given the opportunity to present their counterclaims and counterevidence to the other party’s claims and evidence,

4. the parties must be given the opportunity to present their view on the possible material gathered by the court regarding the case, and

5. the parties must be given the opportunity to present their view on the legal assessment on the material presented during the proceedings.\(^\text{18}\)

The evidence in civil proceedings is practically limited to the evidence presented by the parties, wherefore the parties themselves determine the scope of their legal protection. The need to come as close to the absolute truth is much greater in criminal proceedings. This differentiation between criminal and civil proceedings can also be seen in the interpretation of the contradictory principle. While the accused must be heard in criminal proceedings, a party must only be given the opportunity to be heard and present its case in civil proceedings.\(^\text{19}\) This represents the freedom of contract, which also gives a party in civil proceedings some right of disposal.\(^\text{20}\)

In regards to evidence, the contradictory principle boils down to two main points. First a party must have the right to present its evidence and second, a party must have the opportunity to present its view on the evidence presented by the other party. The right to present one’s view on the other party’s evidence also contains the right to be informed of that evidence. The presentation of evidence must be organized in a way, which allows the parties to examine, evaluate and test the credibility of the other’s evidence. In addition, the parties must be given the opportunity to present their view on how their own evidence and the other party’s evidence affects the dispute.\(^\text{21}\) The contradictory principle does not require an oral hearing to be held, even though it might be easier for a party to react to evidence presented by the other party during an oral hearing.\(^\text{22}\)

\(^{18}\text{Eerola, 1996 p. 37}\)

\(^{19}\text{See Eerola, 1996 p. 38, Virolainen, 1995 p.219, Tirkkonen 1974, p. 75}\)

\(^{20}\text{Eerola, 1996 p. 38}\)


\(^{22}\text{See Virolainen, 1995 p. 216}\)
2.1.3.2 The publicity principle

According to the general rule, all civil proceedings are public in Finland. The publicity principle can be seen to cover only the publicity in regards to the parties or publicity in regards to the general public. Based on the contradictory principle alone, the parties must have the right to be present at least during the oral part of proceedings and also have access to all material affecting their judgment. 23

The main rule on publicity regarding the general public is that the main oral hearing and the possible oral preliminary hearing are public, in other words anyone has access to the sessions.

As the main rule is that all evidence is to be presented orally during the public main hearing, whether the evidence is in writing or an oral testimony, the publicity principle does not have any significant effect on the presentation of evidence in civil proceedings. Certain pieces of evidence can, however, have an impact on the publicity. There are exceptions for when oral hearings are to be kept behind closed doors, however, these are of a nature that is more relevant in criminal proceedings. E.g. when documents or information that could endanger state security, reveal sensitive details about someone’s private life or that contain information on the courts deliberation. 24

2.1.3.3 The principle of orality

The principle of orality represents the way in which the communication is handled during proceedings. From the 15th century until the procedural reformation in 1993, the Finnish procedural system was based on the principle of orality viewed in a broader sense, where the claims and evidence were in fact presented orally to the court, but where everything was entered into a record. The record was then referred to in the judgement and seen as the basis of the decision. The current model follows the principle of orality in a more narrow sense, where the judges are to base their judgement directly on the completely oral main hearing. 25

For the principle of orality to be fulfilled, it is required that all parties have the right to be

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23 See Eerola, 1996 p. 44
24 See Lag om offentlighet vid rättegång i allmänna domstolar 30.3.2007/370 §§ 9, 14-15
25 Vuorenpää, 2009 p. 66
present during the oral hearing. A witness is to testify orally and is not allowed to even use notes to support its memory during the oral hearing.

Although an oral hearing might easier fulfil the requirements of the contradictory principle, orality is not necessarily required by the principle. Due to economic reasons an oral hearing may not always be reasonable. Even though oral hearings are not always necessary, the power to evaluate the need has not been left to the courts. In civil proceedings the courts may only deviate from the principle of orality by virtue of law.

2.1.3.4 The principle of immediacy

The principle of immediacy stems from OK 24:2.1. The principle requires that all trial documents are reviewed and presented orally to the panel of judges during the main hearing. This on the other hand requires that the panel of judges remains the same throughout the whole hearing and proceedings. According to some scholars, the principle of immediacy is only fulfilled when the trial documents have been presented to the judges orally or visually, meaning that a judge who is presented material only in its written form has not been presented the material in a successful manner whereas pictures etc. are also shown directly to the judge. The principle of immediacy facilitates the rule of free submission of evidence.

When it comes to witnesses, the general principle of immediacy only requires that the testimony is presented orally. This requirement could also be successfully fulfilled through the reading of a written witness statement during the main hearing. This however, would not fulfil the principle of immediacy of evidence. The principle of immediacy of evidence requires the evidence chain to be as short as possible. E.g. if A witnesses an event of which A then tells B and B gives a hearsay testimony to the court, the chain of evidence could be shortened if A would tell the court about his observations. Therefore, the general principle of immediacy does leave room for the use of written witness statements, whereas the principle of immediacy of evidence would require witnesses to be examined orally during proceedings.

26 Frände & al, 2012 pp. 172-179
27 Frände & al, 2012 pp. 175-176
28 Virolainen, 1995 p. 227
29 See e.g. Virolainen, 1995 p. 226
the main hearing. This, in turn, means that the evidence should not be presented with the help of a written witness statement or a recording of any kind.\textsuperscript{30}

The principle of best available evidence can be drawn from the principle of immediacy. The principle of best available evidence requires that a matter is proved by the help of the best evidence at hand. An oral examination of witnesses may give a clearer and broader view of the matter than a written witness statement. This means that written witness statements cannot be accepted as evidence if it is possible to hear the witness orally during the main hearing. This in turn secures the parties’ right to question the other parties’ witnesses and gives the parties a better possibility for evaluating the credibility of the witness.\textsuperscript{31}

The principle of immediacy has traditionally been seen as the most important of the principles of orality, concentration and immediacy. This is because the principle of immediacy is seen as a guarantee for legal certainty, whereas the principles of concentration and orality mostly support the principle of immediacy.\textsuperscript{32}

\textbf{2.1.3.5 The principle of concentration}

The principle of concentration represents the will to try the whole case during one continuing main hearing, without any discontinuance. Therefore, the principle of concentration relates closely to the aspiration of quick proceedings. It is important for the sake of concentration that there are no longer breaks during the main hearing. If the case is too big for the main hearing to be completed during one day, the hearing can be arranged over several days, preferably during subsequent days. The principle of concentration is facilitated by the principle of orality, whereas an oral concentrated main hearing facilitates the principle of immediacy.\textsuperscript{33}

\textsuperscript{30} Ekelöf et al., 2009 pp.44 and 49 and Huovila, 1999 p. 1170
\textsuperscript{32} See Vuorenpää, 2009, p. 75, Eerola, 1996 p. 73, Virolainen, 1995 p. 225
\textsuperscript{33} See Vuorenpää, 2009, pp. 69-74, Virolainen, 1995 p. 226
2.1.4 The presentation of evidence

OK chapter 17 contains the majority of the rules governing the taking of evidence in court proceedings. The general rules govern both criminal and civil proceedings, as well as procedures in district and higher courts.

As mentioned above, the civil proceedings consist of two parts, the preliminary proceedings and the main oral hearing. The disputes are resolved during and based on the main hearing, even though it would often be possible already during the preliminary part. The main goal of the preliminary proceedings is to make sure that the dispute can be solved during a concentrated main oral hearing.34

During the preliminary proceedings, the parties submit the evidence they are going to present during the main hearing. The evidence is then orally presented during the main hearing and the evidence weighed by the panel of judges. The principle of free evaluation of evidence gives the court free discretion in the evaluation of evidence. The principle of free reception of evidence means that there are only a few restrictions on what can be presented as evidence. One of these prohibitions is the prohibition against the use of written witness statements, unless the use is allowed by law35.

The parties have the responsibility for gathering evidence in civil proceedings. The court may, however, both restrict the presentation of evidence and decide on further evidence in civil proceedings if the parties allow it. The court has the right to restrict the evidence presented if the evidence is unnecessary, irrelevant or sufficient evidence can be presented to significantly lower costs or inconvenience.36

2.1.4.1 The prohibition against the use of written witness statements

OK 17:11 explicitly prohibits the use of written witness statements as evidence in court proceedings. In Finnish proceedings, a witness is a person, who is not a party to the proceedings and is heard in order to establish matters relevant to solving the dispute37. The

34 Regeringens proposition 15/1990 pp. 62-64
35 RB 17:11
36 RB 17:7-8
37 Tirkkonen, 1977 p.179
prohibition does not concern expert witnesses, quite the contrary. OK 17:50 states that expert witnesses should primarily provide the court with written statements, unless the court decides otherwise.

The prohibition concerns statements made solely for the proceedings, when the witness knew that proceedings would be or had already been instituted. Other audio or video recordings of witnesses are also prohibited to use as evidence. Writings made for other purposes may be used, e.g. private letters and notes. The use of medical and work certificates and writings originating from exercise of occupation is allowed. The purpose of the prohibition is not to restrict the use of documents as evidence, but to secure the oral examination of witnesses.

There are two exceptions to the prohibition that concern civil proceedings. First, it is allowed to use a written witness statement or other recording of a witness who is unable to attend the main hearing. However, it is possible for a witness to be orally examined via videoconference due to e.g. illness of the witness restricting the possibility to travel or unreasonable travel expenses, since an amendment made in 2003. This solution is seen to be more favourable in the light of the principle of immediacy than arranging a hearing of a witness in another court. Second, if the respondent disputes a claim that is based on a negotiable bond, bill to be paid on sight or a check, the respondent may submit a written witness statement together with its statement of defence to give reasonable grounds for the dispute.

The purpose of the prohibition is to secure that witnesses show up for the oral hearing to answer the questions asked. This way the principle of orality is fulfilled. It has been argued that the prohibition against the use of written witness statements also facilitates the contradictory principle, as it gives the other parties than the one that appointed the witness a chance to counter-examination of the witness. Even in the case that the other parties would not like to execute their right to counter-examination, the use of a written witness would not

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38 Tirkkonen 1977, p. 96  
40 See Regeringens proposition 15/1990  
41 Frände & al, 2012 pp. 606-614  
42 RB 17:11
be allowed. This argument only takes the use of written witness statements without the possibility for oral examination into account. Should the parties submit written witness statements with the possibility to call witnesses for oral examination if the party wishes to cross-examine the witnesses, both the principle of orality and the contradictory principle would be fulfilled.

2.1.4.2 Evidentiary theme

As a result of the district court reform in the early 1990’s, the parties are obliged to give a theme for their evidence when submitting it to the court. This is to be done by the claimant already in connection with the filing of the complaint. The theme can either be a legal fact or an evidentiary fact. Evidentiary themes were introduced as a means to speed up the process, as the claimant usually in the drafting process of its complaint is aware of what kind of evidence it is going to use and for what purpose. This also gives the respondent a possibility to assess its need for counter evidence. The claimant does not have to list all evidence that it is going to use, as it may not be clear at that point. 43

The parties should already in their statement of claim/defence or at the latest during the preliminary proceedings clarify what evidence they are going to present together with an evidentiary theme.44 The most important legal and evidentiary facts should be investigated. The evidentiary theme should represent a matter that is relevant and in need of proof, as should evidence in general. In the case of witnesses, the evidentiary theme describes, in short, what the witness is going to talk about and which evidentiary fact the use of the witness is aimed to support, but not provide exactly what the witness is going to say during the main hearing.45 The evidentiary theme is therefore not in any way a written witness statement, but merely a heading, or theme, for the upcoming oral examination of the witness during the main hearing.

When the main hearing has begun, the parties may not submit new witnesses as evidence due to preclusion, unless the parties agree to it or there is a valid reason for the late

43 Lappalainen, 1994 p.60
44 RB 5:19.3
submission. The provision only mentions the submission of new pieces of evidence, but does not mention the evidentiary theme. It is unclear whether the provision is intended to cover also the submission of new evidentiary themes of already submitted witnesses evidence. Therefore the question whether it is allowed to ask the witness questions that are not related to the evidentiary theme given remains unsolved in Finland. In doctrine the following interpretations has been suggested. First of all, the court is always allowed to add new evidence also during the trial, which gives that at least the court would be allowed to expand the witness testimony to cover new matters. Second, it would be difficult for the court to restrict what the witness says on its own initiative. As the court is to take everything that has occurred during the main hearing into account according to OK 17:2.1, the whole testimony should be taken into account. It has also seen to be acceptable for the adverse party to expand the theme of a witness during the cross-examination.

The opinions differ regarding whether or not the party that appointed the witness is allowed to expand the theme through its questions during the oral hearing. Some scholars advocate that questions that are not covered by the evidentiary theme should be considered new evidence under OK 6:9.2 and therefore not be allowed. Other scholars are of the opinion that hearing a witness on a different matter does not constitute a new piece of evidence but rather a new evidentiary theme. As OK 6:9.2 does not prohibit new evidentiary themes, but only new pieces of evidence to be taken up during the hearing, an expansion of the witness theme would be allowed according to this theory. The Swedish Supreme Court, Högsta domstolen, has in its decision from 2006, concluded that evidence can be rejected on two grounds. First on irrelevance and second based on the rules for preclusion. If a question is irrelevant, it is dismissed whether it falls under the scope of the theme or not. Should a question be relevant for the case but fall outside the scope of the evidentiary theme, it should, according to the Swedish Supreme Court, be considered a piece of new evidence and fall under the rules of preclusion.

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46 RB 6:9.2  
47 Leppänen, 1998 pp. 328-330  
48 See e.g. Hirvonen, 1995 p. 443 and Leppänen, 1998 p. 331  
49 See e.g. Virolainen, 1995 p. 338 and Leppänen, 1998 p. 331  
50 NJA 2006:520, see also Ekelöf et al., 2009 pp. 39-41
The evidentiary theme serves two purposes. First, it enables the concentration of the main hearing, as the court may decide in which order the evidence is taken and which evidence is irrelevant or unnecessary based on the theme. The court may even point out a matter that needs further evidence. Second, and more importantly, it gives the adverse party a possibility to prepare for the evidence in the main hearing. The adverse party can seek to find counter-evidence and prepare its own line of questioning of witnesses.  

If the evidence theme is not accurate enough, it may endanger the concentration of the main hearing. The evidence presented during the main hearing might turn out to be irrelevant, which causes unnecessary expenses and is also a waste of time for the parties, the court and the witness. An unclear evidentiary theme may also lead to unnecessary surprises during the main hearing. E.g. in the appearance of a new evidentiary theme the adverse party might need time to find and present counter-evidence, which could lead to a break and postponement of the hearing and therefore limit the realisation of the principle of concentration. Exactly how accurate the evidentiary theme is supposed to be, is however unclear. It has been suggested that a theme in line with “what occurred during the contractual negotiations” is not too detailed as it would verge on being a written witness statement. The question is then where one draws the line between a written witness statement and the evidentiary theme for a witness. It has also been suggested that the evidentiary theme may not be too detailed, as that would not cover the actual oral statement in the end, leading to a mismatch between the theme and the actual evidence. The evidentiary theme should be specific enough for the court to be able to settle whether or not the evidence is needed, but not too specific as it might be misleading or even lead to the preclusion of parts of the oral testimony.

It is not allowed for the court to hear witnesses during the preliminary proceedings. It is however, allowed for the lawyers to contact and discuss with possible witnesses. This is

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51 Ekelöf et al., 2009 p.38 and Leppänen, 1998 pp. 198–199
52 See Leppänen, 1998 p.199
53 Ekelöf et al., 2009 pp.38-39
54 Leppänen, 1998 p.200
necessary for the lawyers to be able to assess which witnesses to use as evidence. The lawyers should therefore be capable of submitting a sufficient evidentiary theme.\textsuperscript{55}

When a party submits documents or objects as evidence, it does not only submit the evidentiary theme, but also the document either as an original or a copy or the object or a description of it. Therefore, when the court and the adverse party receive the piece of evidence, it is quite clear what the aim of it is, whether or not it comes with an evidentiary theme.\textsuperscript{56}

According to OK 5:29, both parties should present all evidence before the main hearing and if there is a need to present a new piece of evidence during the hearing, the party shall do it as soon as possible and inform the court of why it has not been presented earlier\textsuperscript{57}. OK 5:4 states that the claimant shall attach all written evidence it plans to use to its complaint, whereas OK 5:2 only requires that an evidentiary theme of witnesses evidence is to be submitted. This provision lays a clear distinction between the use of witnesses and the use of documents as evidence\textsuperscript{58}.

Although the written evidence has not been officially presented, as that happens during the main hearing when all evidence is orally presented, it is still both available for reading by the court and the counter-party and partly dealt with during the preliminary proceedings. The status of witness evidence, is however, quite different at that point. OK 5:25 states that written and physical evidence should be presented already during the preliminary proceedings, to ensure that the evidence is at hand during the main hearing. However, as mentioned above, both the oral examination of witnesses and the submission of written witness statements are prohibited during the preliminary proceedings. The whole and exact content of the witness statement remains a mystery until the witness is orally examined during the main hearing.

Therefore, documentary and witness evidence is treated differently by the law. Written documents are presented twice during the proceedings, once during the preliminary

\textsuperscript{55} Ekelöf et al., 2009 p.39
\textsuperscript{56} See Lappalainen, 1994 p.61
\textsuperscript{57} See Lappalainen, 1994 p.61
\textsuperscript{58} See Lappalainen, 1994 p.63
proceedings and once during the oral main hearing. The use of written witness statements during the preliminary proceedings and oral examination of the relevant witnesses during the main hearing would be equivalent to the handling of other evidence as that would put all evidence on the same level, however, that is not the case, as only the evidentiary theme is required for witnesses.

2.1.5 Suggested updates to the Code of Judicial Procedure

In a suggestion for a Government Bill, which is expected to become a Government Bill in the beginning of 2014, some changes regarding the regulation of evidence have been suggested. The main goal of the Bill is to favour regulations that help speed up trials to make the use of resources more efficient by lowering the costs and the burden of both officials and parties. This is to be done by e.g. taking the same evidence only once per trial. As support for the drafting of the Bill, a comparative survey of certain questions relating to evidence in Finland, Sweden, Norway and Denmark was conducted.

2.1.5.1 Recent updates to the Norwegian Code of Judicial Procedure

The new Norwegian Civil Procedure Code, Tvisteloven from 2005, allows written witness statements to be used in civil proceedings, provided that the parties agree to it or in the case a witness is not available for oral examination and the court finds it to be in accordance with the law to accept a written statement. This is an exception to the general prohibition against the use of written witness statements. The rules on evidence in Tvisteloven are governed by the same principles as the Finnish OK, which mostly speak against the use of written witness statements.

The Norwegian prohibition of the use of written witness statements aims to protect the principles of orality, immediacy and certainty. The effects of these principles are, however, limited in the use of written witness statements. Written witness statements do not allow for unclear parts of the statement to be cleared up properly during the main hearing. It also affects the possibility to test the reliability of the statement, as “papers do not blush” and a

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59 Justitieministeriets utredningar och anvisningar 65/2012, “presentationsblad”
60 See Skoghøy, 2010 pp. 731-732
witness might get caught up and exaggerate when writing its statement. In addition, the witnesses are more subject to pressure from the appointing party to write a statement that pleases the party’s claims when they are not orally examined. During oral examination, the witnesses are under the pressure of the sincere atmosphere of the court to stick with the truth.61

Even though the use of written witness statements is in conflict with the principle of immediacy, it is not an obstacle for the use of them. The use of written witness statements also has positive sides to it. In the case of a very complicated, technical witness statement, the proceedings might benefit from the statement being available to the court in clear writing. If the statement is delivered beforehand and the witness is called in for oral examination, it gives the counterparty a chance to prepare for the counter-examination and also a better chance at gathering efficient counterevidence. When both a written statement and oral examination of the witness is used, a witness is a better form of evidence than the traditional orally examined witness.62

2.1.5.2 Suggested updates to the Finnish Code of Judicial Procedure

According to the suggested Government bill, the role of witnesses and the mandatory nature of acting as a witness would remain the same after the amendment63. The most significant suggestions, in regards to this thesis, are the two new exceptions to the principle of immediacy. As stated above, it is prohibited according to the main rule in the law in force to use written witness statements or otherwise recorded statements as evidence in proceedings64. However, it is suggested in the Bill that written witness statements be allowed under certain circumstances in civil procedures and that recordings made during the preliminary investigation could be used in criminal procedures65.

The use of written witness statements without oral examination of the witness would be allowed in civil proceedings, where settlement is allowed, with the consent of both parties. Also the possibilities for hearing witnesses via video conference calls would be expanded

61 Skoghøy, 2010 p. 732
62 Skoghøy, 2010 pp. 732-733
63 Justitieministeriets utredningar och anvisningar 65/2012 p. 49
64 RB 17:11
65 Justitieministeriets utredningar och anvisningar 65/2012 p. 47
as well as the possibility of taking evidence outside the main hearing. As a contrast, the
duty to retake evidence that has been presented outside the main hearing in the main
hearing would be restricted.\footnote{66}{Justitieministeriets utredningar och anvisningar 65/2012 p. 65}

Therefore, the changes would reflect the current, new system in force in Norway. In
practice, the parties would first agree to the use of written witness statements. After the
statements have been exchanged, the parties would then request which witnesses, if any,
they would like to orally examine. Should a party after this stage request the oral
examination of a witness, it should be seen as a new piece of evidence and the situation
would be governed by the rules on preclusion. Therefore, the new system would in practice
be similar to the common practice in international arbitration. The effects of the changes
are expected to be seen in the costs of the proceedings.\footnote{67}{Justitieministeriets utredningar och anvisningar 65/2012 p. 18}

2.1.6 Critique of the current model

In Finland, the advantages of oral proceedings are seen to be much greater than those of
purely written ones. When claims and evidence are presented orally, a party can be sure
that the counterparty and the panel of judges have understood the meaning in the way that it
was meant to be understood. In addition, the persons attending the hearing cannot only hear
the parties and witnesses speak, they can also take in and process the body language and
tone of the speakers. During oral proceedings it is easy to quickly correct an error or
misunderstanding. Therefore, the oral proceedings have been seen to support the efficiency
and legal correctness of proceedings and also the principles of immediacy and
concentration. Written communication, on the other hand, has been seen to slow down
proceedings and make it impossible to concentrate the proceedings.\footnote{68}{Frände & al, 2012 pp. 172-174}

The orality of proceedings should, however, not be seen as an end in itself. Written
proceedings are often more affordable and require less resources in general. In addition, an
oral hearing also requires more time and effort from the parties than a simpler written
process. Especially smaller and less complicated matters could be solved through a written process. In bigger and more complicated matters it might be more effective if the preliminary phase is in writing.\textsuperscript{69}

The development of the Finnish procedural system during the last decades suggests that the principle of immediacy guarantees that proceedings are in line with the principle of due process and the contradictory principle. Although the contradictory principle and the principle of immediacy have not traditionally been seen as connected, the examination of a witness orally does provide the best grounds for contradictory proceedings. However, also written proceedings can be successfully contradictory even though the evidence is not presented in accordance with the principle of immediacy. There is no guarantee that proceedings that are in accordance with the principle of immediacy are contradictory either. Therefore, it is uncalled for to say that the principle of immediacy automatically fulfils or is connected to the principle of due process and contradictory principle.\textsuperscript{70}

As presented above, the principle of immediacy indirectly requires all witness evidence to be presented in its most direct and immediate form, i.e. by oral examination of the witness during the hearing. This however means that all witnesses, may the theme be of high or low importance, is called to the main hearing. This in turn means an unnecessary use of both time and money. If only the vital witnesses would be examined orally and less significant witnesses heard through written witness statements, this would make the proceedings economically more sufficient. In addition, witnesses tend not to stick to the same story. Witnesses are affected by what they hear about and during the proceedings.\textsuperscript{71} Therefore a written witness statement that has been drafted before the witness has become acquainted with other aspects of the case, could in many cases represent the cleanest version of the witness statement and therefore also the most direct form.

\textsuperscript{69} Frändê & al, 2012 pp. 172-174
\textsuperscript{70} See Huovila, 1999 p. 1164 and Virolainen, 1995 p. 242–243
\textsuperscript{71} See See Huovila, 1999 p. 1168
2.3 The impact of Article 6 of the European Convention on Human Rights on national civil proceedings

The Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights or ECHR) was signed in Rome in November 1950 by the 12 original member states of the Council of Europe and entered into force on 3 September 1953. The United Kingdom was one of the original member states, whereas Germany became a member in 1950 and Finland in 1989. Therefore the European Convention on Human Rights is binding upon all three states.\(^\text{72}\)

Art. 6 ECHR states that:

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\text{“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial...”}
\]

The article reflects the contradictory and publicity principles and the principle of orality in addition to access to justice and the right to a fair trial. In this case the contradictory principle has a broader meaning than just the right to be heard. It represents the right of all parties to have an equal possibility to have an actual and active part in the proceedings. The practice of the European Court of Human Rights has shown that the principle of orality does not have any intrinsic value, but that it is merely a means to secure the more fundamental principles of i.e. the right to be heard and equal treatment.

The right to equal treatment contains the right to oral examination of the counterparty’s witnesses. This right also extends to civil proceedings with the support of Art. 6 ECHR\(^\text{73}\). However, the orality of proceedings has been established as mandatory in most cases by the European Court of Human Rights, but mainly in connection to the possibility to present one’s case\(^\text{74}\). In civil proceedings the parties may choose the written alternative according to the convention. This has been allowed e.g. where the facts of the case are clear and undisputed, although this opinion was mainly referring to proceedings in an appellate

\(^{73}\) Dombo Beheer B.V. v. The Netherlands (27.10.1993)  
\(^{74}\) Muyldermans v. Belgium (23.10.1991)
court. The Convention, however, only requires the proceedings in the district court to be oral, whereas appeals may be handled through written proceedings, except for when the appeal also deals with factual questions that require the hearing of witnesses. In its practice, the European Court of Human Rights has shown that the evaluation of the credibility of and the possibility to challenge evidence, witnesses included, requires oral examination, but this alignment mainly concerns criminal proceedings. The European Court of Human Rights has made exceptions to this main rule, but only in cases where the parties have had a clear chance to challenge the witnesses’ credibility despite the lack of orality.  

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75 Allan Jacobsson v. Sweden (19.2.1998)  
76 Ervo, 2008 pp. 184-197
2.3 The presentation of witnesses as evidence in Germany

The German legal culture represents the traditional continental, inquisitorial, civil law culture. German practitioners give significantly little weight to witness evidence and find documentary evidence more reliable. This is evident from the regulations on witnesses as evidence, as well as the tone used in doctrine. As the trust in witnesses is low, the system requires witnesses to be heard in person. Like in Finland, the German procedural system also prohibits the use of written statements, with the exception for Gallup-like situations where a large number of witnesses are to be heard.

2.3.1 Background

The principle of immediacy of evidence was recognized in German legislation for the first time in 1877, through the German Code of Civil Procedure, then Civilprozessordnung. According to the main rule, witnesses were always to be heard orally by the court. The provision included four exceptions for when witnesses could be orally examined at another court or location by a member of the panel of judges. These exceptions included situations where the witness was prevented from attending the main hearing or where it would have caused unreasonable difficulties for the witness to appear, if the witness lived far away from the court or when it best served the truth to hear the witness at another location. The most commonly occurring exceptions were due to long travel distance or inability to attend the hearing. Because the decision of hearing a witness at another location was not appealable, the realisation of the principle of immediacy became more of an exception than a rule. Therefore, the main rule of always presenting witness evidence directly to the judging court did not meet the expectations put upon it. This was corrected through the amendments made to the German Code of Civil Procedure, at this point called Zivilprozessordnung (ZPO), in 1933. One of the main goals with the amendment was to strengthen the realisation of the principles of immediacy and orality. This also led to the principle of immediacy of evidence having more of an impact on proceedings. The most substantial amendment was made to the grounds for hearing a witness at another location. As a result of the rewording of the exceptions, single pieces of evidence could only be
presented outside the main hearing when the transmission of the truth was still secured albeit the lack of immediacy. After this amendment there have been no substantial amendments made to the ZPO concerning the presentation of witness evidence.\textsuperscript{77}

2.3.2 The main principles governing the German procedural system

The German civil proceedings resemble the system used in Finland. The main principles governing the taking of evidence in German law are most importantly the principles of orality, immediacy and publicity.\textsuperscript{78}

2.3.2.1 The principle of orality

The principle of orality is seen to promote the certainty and lawfulness of the proceedings, the realisation of both the principle of orality and immediacy is secured by § 128 ZPO.\textsuperscript{79} The orality of proceedings is not seen to have any intrinsic value, but to be a means of securing the legal certainty.\textsuperscript{80} § 355 ZPO states that all evidence is to be presented directly to the judging panel of judges.\textsuperscript{81} According to the main rule an oral hearing is always necessary. The panel of judges may only take into account what has been presented to them orally during the main hearing.\textsuperscript{82} As the orality is mandatory, a panel of judges is not allowed to make a decision without an oral hearing.\textsuperscript{83} There are, however exceptions to the rule of orality stipulated in the law. For instance in smaller disputes that do not require an oral main hearing, a hearing is to be held at the request of the parties. A dispute is considered small if the claimed amount does not exceed 600 euros.\textsuperscript{84}

2.3.2.2 The principle of immediacy

§ 355 ZPO represents the principle of immediacy of evidence in German civil procedure. The principle of immediacy in evidence means that during the oral main hearing, the

\textsuperscript{77} See Koch, 1996 pp 1-24  
\textsuperscript{78} Walter, 1970 p. 329 and p. 351  
\textsuperscript{79} Walter, 1970 p. 329, Hartmann in Baumbach et al., §128  
\textsuperscript{80} Walter, 1970 p. 329  
\textsuperscript{81} See Hartmann in Baumbach et al., §128  
\textsuperscript{82} Hartmann in Baumbach et al., §128  
\textsuperscript{83} Musielak, 2013 128§  
\textsuperscript{84} § 495a ZPO, Hartmann in Baumbach et al., §128 and Koch, 1996 p.52
evidence is to be presented immediately to the panel of judges so that the judges personally take part of the presentation and that no middlemen are used. Until the amendment made in 1933, evidence could be presented to a single judge of the panel of judges. The amendment strengthened the realisation of the principle of immediacy as the new version of § 355 ZPO requires evidence to be presented to the whole judging panel of judges.

The principle of immediacy of evidence is a cornerstone of the German civil proceedings and closely connected to the principle of orality. Traditionally, German commentators did not always separate the two principles, as one cannot be fulfilled properly without the other. Both the presentation of evidence, as well as the negotiations between the parties should be immediately conveyed to the panel of judges. The principle of immediacy is seen to mean that evidence is to be presented orally to the judging court.

According to a number of German scholars, it is more favourable if witnesses are heard in person, even though the principle of immediacy could be fulfilled through strictly written proceedings. To maximize the realisation of the principles of orality and immediacy witnesses should always be heard in person, as this allows the court to take in the whole appearance of the witness and get an immediate impression. Hearing the witness in person guarantees the realisation of both these fundamental principles and is therefore a guarantee for finding the truth contrary to presenting witness statements in writing.

2.3.2.3 The principle of publicity

The principle of publicity is governed by § 169 of the Courts Constitution Act, *Gerichtsverfassungsgesetz*, according to which all proceedings are to be public. The principle of publicity allows for both public surveillance and knowledge of the legal system and secures a transparent, independent and neutral administration of justice. The principle of publicity is of course due to practical reasons closely connected to the principle of

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85 See Koch, 1996 p.6
86 Koch, 1996 p.13 and Walter, 1970 p. 335
87 Walter, 1970 p. 333
88 Koch, 1996 p. 7
89 Walter, 1970 p. 334
orality.\textsuperscript{90} Therefore, the principle of publicity requires oral hearings and oral presentation of evidence. The principle of publicity also contains the principle of party publicity. The principle allows the parties to be present when the evidence is presented, but it is not mandatory.\textsuperscript{91}

2.3.2.4 The right to be heard

The right to be heard is stipulated in Art. 103(1) \textit{Grundgesetz}, the Basic Law\textsuperscript{92} for the Federal Republic of Germany. Although the right is not specifically mentioned in the ZPO, it is a general rule that applies to all German proceedings. The right to be heard under German law contains the right to file a claim, assert claims and provide the court with supporting evidence. The parties should have the right to present their view on the matter in a proper manner and to be informed of the grounds for the decision.\textsuperscript{93}

2.3.3 The presentation of evidence

The rules governing the presentation of evidence in German civil proceedings are found in the \textit{Zivilprozessordnung}. The ZPO only governs civil proceedings. The provisions regarding the presentation of witnesses are primarily title 7, §§ 373-401, but also other articles affect the witness evidence.

Witnesses are the most commonly used means of evidence in German civil proceedings. However, they are also considered by many to be the most unreliable means of evidence. The number of factors affecting the reliability of witnesses is debated intensively and the most trusted way for examining the reliability of a witness is thought to be oral examination, which also allows for intake of the witness’ body language.\textsuperscript{94}

\textsuperscript{90} Musielak in Musielak, 2013 Einleitung sections 49-50, Walter, 1970 pp. 334-335
\textsuperscript{91} Musielak & Stadler, 1984 p. 23
\textsuperscript{92} Official translation of the German Ministry of Justice, \textit{das Bundesministerium der Justiz und Für Verbraucherschutz}
\textsuperscript{93} Saenger, 2013, § 373 Einführung section 44-45, see also Musielak in Musielak, 2013 Einleitung section 28
\textsuperscript{94} See e.g. Musielak & Stadler, 1984 p. 29 and Koch, 1996 pp. 43-46
Under the ZPO, the aim is to solve the dispute during one main oral hearing. Before the main hearing the preparatory phase takes place, during which written material is exchanged and a preliminary oral hearing is held.\textsuperscript{95}

In Germany it has always been a goal to strive for amicable settlements in civil proceedings. This principle was strengthened through a reform in 2001. In addition to the regular preliminary proceedings, the court must also arrange a mandatory settlement conference, Güteverhandlung.\textsuperscript{96} The court does not have a duty to take evidence during this stage.\textsuperscript{97}

According to the main rules in §§ 128(1) and 355(1) ZPO, witnesses are always to be examined orally in court. This is due to the fact that witnesses are traditionally seen as the most unreliable means of evidence in German law and doctrine. According to many scholars, witnesses tend to remember things differently depending on their education and judgement. It is also believed that the relationship a witness has to the parties and which party it sympathises more with, will affect its statement. As various different factors can affect the memory of a witness, the outcome of the hearing of a witness can vary.\textsuperscript{98} In addition, there is always the possibility that the witness has decided not to tell the truth at all.\textsuperscript{99}

\textbf{2.3.3.1 Evidentiary theme}

To avoid preclusion, the parties should submit their evidence and define both the evidentiary theme and the means of evidence in their preparatory written pleadings.\textsuperscript{100} This applies mainly to fact witnesses. The submission of documentary evidence is governed by § 420 ZPO, which states that production of the evidence also constitutes the submission of the evidence. According to § 397(3) ZPO, the court has the right to determine the validity of the questions addressed to witnesses at the oral hearing. This has been interpreted to

\textsuperscript{95} §§ 273-279 ZPO, see also Karst in Grubbs, 2003 p. 247
\textsuperscript{96} § 278 ZPO, see also Rühl, 2002 p. 914
\textsuperscript{97} Foerste in Musielak, 2013 § 278 section 10
\textsuperscript{98} Koch, 1996 p.44
\textsuperscript{99} Koch, 1996 p.45
\textsuperscript{100} §§ 70, 130, 137 and 373 ZPO, see also Foerste in Musielak, 2013 §285 section 10
mean that the evidentiary theme of witness evidence regulates which questions the parties are allowed to present. Questions that are beyond the scope of the evidentiary theme are not allowed and should be prohibited by the panel of judges.\textsuperscript{101}

\subsection*{2.3.3.2 Hearing witnesses outside the main oral hearing}

As the immediacy and orality of witness statements as evidence cannot be secured at all costs, therefore there are exceptions to the rule that all witnesses are to be examined orally by the judging court. Compared to the Finnish system, the German ZPO goes to further lengths to secure the orality of witness statements. When the witness is not able to attend the oral hearing, the witness can be heard either by a sole judge, by a judge at another court or submit a written witness statement.

§ 375 ZPO governs the situations when a witness can be heard outside the main oral hearing. The article is to be interpreted in a narrow sense to protect the realisation of the principle of immediacy. Only when the witness cannot be heard orally by the judging panel of judges is it possible to hear the witness at another location or by a sole judge sitting on the panel.\textsuperscript{102} The judge is then to provide the judging court with a protocol of the hearing and the parties should be given the right to present their view of the examination. This is often seen to be an unfavourable solution by the parties, as they often, because of lack of time or economic reasons cannot travel to the distant location where the witness is examined to ask follow-up or clarifying questions. Therefore, it would be best if witnesses could always also appear in front of the judging panel of judges and the parties.\textsuperscript{103}

\subsection*{2.3.3.3 The use of written witness statements}

§ 377(3) ZPO allows for witnesses to provide the court with a written witness statement. When the court summons a witness it

“... may instruct that the question regarding which evidence is to be taken may be answered in writing should it believe that, in light of the content of the question regarding which evidence is to be taken and taking into consideration the person of the witness, it suffices to proceed in this manner.”

\footnotesize{\textsuperscript{101} Eichele in Saenger, 2013 § 397 section 4, Huber in Musielak, 2013 § 397 section 1
\textsuperscript{102} See Walter, 1970 p. 336
\textsuperscript{103} Musielak & Stadler, 1984 p. 22}
The attention of the witness is to be drawn to the fact that he may be summoned to be examined as a witness. The court shall direct the witness to be summoned if it believes that this is necessary in order to further clear up the question regarding which evidence is to be taken.\textsuperscript{104}

In certain cases where the court deems when taking into account the person giving the statement and the matter of the evidence that a written witness statement is sufficient, the court may order the witness to write a written answer to the witness summons.\textsuperscript{105} When assessing the question the court should evaluate the education level of the witness, its personal traits and the difficulty of the matter of the witness statement.\textsuperscript{106} The use of written statements is prohibited in complicated matters where follow up questions are clearly needed as well as when the court is aware that the witness in question has an unclear way of expressing itself. The court should not ask for a written statement in cases where it considers the immediate impression of the witness to be needed. In addition, the court should take the principle of party publicity into account when assessing whether or not a written statement would be sufficient.\textsuperscript{107}

The effect of a written statement should be equivalent to an oral statement.\textsuperscript{108} The nature of a written answer is regarded as a written witness statement, not a piece of documentary evidence. A written statement should not be regarded as a substitute for oral examination of the witness if it is not in accordance with the provisions.\textsuperscript{109} If one of the parties or a witness submits a written statement without a court order in accordance with § 377(3), the statement is not to be regarded as a witness statement but rather as documentary evidence.\textsuperscript{110}

A written statement is sent to the parties and they are given the chance to comment on it or demand that the witness is orally examined and to be allowed to execute their right to

\textsuperscript{104} Official translation of § 377(3) ZPO by the German Ministry of Justice, Bundesministerium der Justiz http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html 31.10.2013

\textsuperscript{105} Eichele in Saenger et al., 2013 § 377 section 5, Hartmann in Baumbach et al., 2002 p. 1409

\textsuperscript{106} Hartmann in Baumbach et al., 2002 p. 1409

\textsuperscript{107} Eichele in Saenger et al., 2013 § 377 section 5, Huber in Musielak, 2013 § 377 section 4

\textsuperscript{108} Huber in Musielak, 2013 § 377 section 8, Hartmann in Baumbach et al., 2002 p. 1409,

\textsuperscript{109} Koch, 1996 pp 66-67, see also Hartmann in Baumbach et al., 2002 p. 1409

\textsuperscript{110} Eichele in Saenger et al., 2013 § 377 section 8
question the witness under § 397 ZPO.\textsuperscript{111} If a witness statement is insufficient or unclear, the witness shall be called in for oral examination by the court.\textsuperscript{112}

If a witness that has provided the court with a written witness statement is examined orally during the oral hearing, that examination is to be regarded as repeated or subsequent examinations under § 398 ZPO.\textsuperscript{113} In other words, a written witness statement under § 375 ZPO is the equivalent of examining a witness orally for the first time, or the witness’ evidence in chief. This is however disputed in both case law and literature as a written witness statement lacks the full realisation of the principle of publicity and the court cannot take in the body language of the witness. The opinions on the reliability and weight to be given to written witness statements vary. In literature the concept of written witness statements has been labelled a witness statement of a \textit{minderer Art}, i.e. a lesser kind.\textsuperscript{114} In addition, witnesses that provide written statements are not sworn in by the court and therefore not necessarily aware of the consequences of a false statement.\textsuperscript{115} On the other hand, some are of the opinion that a written witness statement is not to be given lesser weight automatically, but that the panel of judges need to keep in mind that the presentation of the witness as evidence lacks the personal impression of the witness.\textsuperscript{116}

The panel of judges is obliged to always organize examination of a witness that has submitted a written statement when it finds it necessary in order to clarify the matter of the statement. In addition, the court must take into account the right of the parties to question the witness.\textsuperscript{117} This right, however, does not necessarily mean that the parties have a right to oral examination of the witness, if written questions are sufficient.\textsuperscript{118}

The requirements set on regular witnesses should also be required by a witness writing a written statement. These are e.g. that the witness provides the court with his name, age, profession and business as well as answers to possible questions regarding his credibility.

\begin{thebibliography}{9}
\bibitem{111}LG Berlin NJW-RR 1997, 1289, see also Eichele in Saenger et al., 2013 § 377 section 7, Huber in Musielak, 2013 § 377 section 7
\bibitem{112}Eichele in Saenger et al., 2013 § 377 section 7, Huber in Musielak, 2013 § 377 section 7
\bibitem{113}Hartmann in Baumbach et al., 2002 p. 1409
\bibitem{114}Koch, 1996 p. 69
\bibitem{115}Koch, 1996 p. 70
\bibitem{116}Huber in Musielak, 2013 § 377 section 8
\bibitem{117}§§ 375 and 397 ZPO, see also Hartmann in Baumbach et al., 2002 p. 1409
\bibitem{118}Hartmann in Baumbach et al., 2002 p. 1438
\end{thebibliography}
such as his relationship to the parties. The written statement should also be limited to the matters presented in the evidentiary theme.\textsuperscript{119}

The court has the discretion to decide the reliability of each piece of evidence.\textsuperscript{120} The immediacy of oral examination of witnesses has been seen to serve this purpose as it is easier to assess the reliability of a witness statement when the witness is physically present in the court room. However, the fact that the statement is in written form does not affect the reliability of the witness, only the possibility to assess the reliability. Because the use of a solely written witness statement has been limited by law, a written witness statement can in those cases be regarded as a complete replacement of an oral statement despite the lack of immediacy.\textsuperscript{121} As this exception goes against the above mentioned principles of orality, immediacy and party publicity, the courts should be cautious when ordering written witness statements according to most scholars.\textsuperscript{122}

Because of its lack of orality and immediacy, § 377(3) ZPO is not frequently applied. One situation where the provision is applicable is e.g. when there is a large amount of witnesses questioned in writing as a means to establish trade practice and only a few randomly selected witnesses are then called in for oral testimony as a means of control.\textsuperscript{123}

\begin{footnotesize}
\begin{itemize}
\item[119] §§ 373 and 395 ZPO, see also Koch, 1996 pp. 70-71
\item[120] § 286(1) ZPO, see also Koch, 1996 p. 72
\item[121] Koch, 1996 p. 75
\item[122] Hartmann in Baumbach et al., 2002 p. 1438
\item[123] See e.g. Germany 15 November 1984 Federal Supreme Court
\end{itemize}
\end{footnotesize}
2.4 The presentation of witnesses in England and Wales

The English and Welsh legal culture represents an adversarial, common law tradition where witnesses are seen as reliable evidence. Since the 1990’s witnesses are presented through the use of both written witness statements and oral examination. The system requires witnesses to be able for oral hearing, but will accept only a written statement if the statement only contains uncontested matters.

2.4.1 Background

In 1996 the English and Welsh procedural system underwent a major reform through the Woolf Reform. Between 1851 and 1996, there had been more than 60 reports, or attempts, to improve the procedural system. The problems were mainly that the system was seen to be too slow, costly and complex. The adversarial nature of the proceedings gave the parties too much freedom to set the pace of the proceedings and led to slow and costly proceedings. The last attempt before the Woolf Reform was the Civil Justice Review of 1988 with its 91 recommendations on improvement. The result of the Civil Justice Review was not as successful as expected, which led to the Woolf Reform. The Civil Justice Review had three underlying themes that were also endorsed through the Woolf Reform. These are that litigation should encourage early settlement, litigants and their lawyers are to act in an efficient manner and that procedures should be simple and easily comprehensible to both laymen and lawyers.  

In 1981, the idea of a voluntary exchange of written witness statements before trial was introduced by the Official Referees. The idea was that the exchange of written witness statements would improve the trial process as it was meant to encourage a more open approach to litigation. The intention was not for written witness statements to replace oral evidence in chief, but to give the parties insight in what the evidence would cover at an earlier stage. The system was considered to be a success and was therefore incorporated in

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124 Lord Woolf, 1995 Chapter 2
the procedural rules. Currently the written witness statements submitted are considered the evidence in chief of the witness.\textsuperscript{125}

Before the Woolf reform, however, there were several problems relating to the use of written statements reported. The practice did not live up to its expectations and had caused trials to be even costlier for the parties than before. This effect was due to the fact that lawyers treated the written statements like pleadings or memoranda, they would make draft after draft leading to huge bills to pay for their clients. This also led to the written statements to bear little resemblance to the witness’ actual story, which in turn led to witnesses “being caught” giving incoherent testimonies, as they during the oral examination might have said something different than what had been said in the written statement drafted by the lawyers. As the written and oral statements did not always match, it led to long sessions during trials figuring out whether the written or the oral statement resembles the truth the most. In addition, written statements gave the lawyers a possibility to prepare their cross-examinations, which in turn led to tediously long oral examinations, whereas the goal was for written statements was to speed up trials and not make them longer and more complicated. There was also critique given related to the performance of witnesses during trial, as the written statements were considered evidence in chief, the witnesses would be exposed to hostile cross-examination as soon as they set foot in the witness booth before they had time to warm up in their roles.\textsuperscript{126}

Lord Woolf defended the practice of requiring the exchange of written witness statements before trial. According to Lord Woolf, they ensure a just outcome of trials as they eliminate the element of surprise at trial and therefore give the parties more time to realise and prepare for the strengths and weaknesses of the case. In addition, the exchange of written statements should enable more settlements before trial and speed up and assist in case management as they enable judges to be up to speed with the matters of the witness evidence before the trial starts. Lord Woolf wanted to ensure this by removing the

\textsuperscript{125} Lord Woolf, 1995 Chapter 22
\textsuperscript{126} Lord Woolf, 1995 Chapter 22
circumstances that had disturbed the positive effects of the use of written witness statements.  

The biggest problem before the Woolf Reform lay in the strict approach to written statements, as it was not certain that witnesses would get the possibility to enlarge the matters addressed in the written statement during oral examination and because written statements could not be amended or supplemented. Lord Woolf’s solution to the problem was to loosen up the attitude and therefore also cut down on the amount of work put into perfecting the formulation of the written statements. Lord Woolf found the witness statements to be a sensible innovation aimed at a "cards on the table" approach, but was concerned with the fact that lawyers often used their skills to twist the words of the witnesses.

While Lord Woolf advocated for a more relaxed approach to the submission of the statements, he also saw the need to give the courts more power to control the activities of lawyers. Through the Woolf Reform, the rules changed into a more favourable form for the practice of the exchange of written witness statements. The current rules allow for witness summaries and written witness statements to be supplemented, but not for new matters to be raised without permission of the judge. This eliminates all excuses for over-exhaustive and -prepared statements. The rules even go as far as to allow for the trial judge to rule that the statements are unduly extensive and rule that no costs should be recovered for their preparation.

### 2.4.2 The principles governing the English and Welsh procedural system

According to Lord Woolf, the basic principles of every civil justice system as well as the English and Welsh system, should meet eight basic principles. The system should be just in its results and secure the fairness of proceedings by ensuring that litigants have an equal opportunity regardless of their resources to assert or defend its legal rights, providing every

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127 Lord Woolf, 1995 Chapter 22  
128 Lord Woolf, 1995 Chapter 3 section 9  
129 Lord Woolf, 1995 Chapter 5 section 7  
130 Lord Woolf, 1996 Sections 55-57
litigant an opportunity to state his case and answer to the opponent’s claims and by treating all cases equally. Proceedings and costs should be proportionate to the matter solved and also be solved with reasonable speed. The procedural system should be both understandable and responsive to its users and provide certainty. These principles should be resourced in a way that guarantees the principle of effectiveness of proceedings.\textsuperscript{131}

The English procedural system is based on the adversarial tradition, in contrast to the inquisitorial models in Finland and Germany presented above. In an adversarial model, the presentation of witnesses is on the parties’ responsibility and the whole process of presentation of evidence is controlled by the parties as the judge remains passive.\textsuperscript{132} In the modern Civil Procedure Rules, however, the court may control the presentation of evidence in several ways. The court may give directions on which matters it wishes to see evidence, in which nature and way the evidence is to be presented and it may also exclude evidence as well as limit cross-examination.\textsuperscript{133}

There are two main principles that govern the presentation of evidence in the English procedural system; these are the principle of orality and the principle of a neutral judge.\textsuperscript{134}

\textbf{2.4.2.1 The principle of orality}

The adversarial procedural system lays great weight on the oral testimony of witnesses. This is because it is believed that also the physical appearance and demeanor of a witness can indicate the reliability of the witness. It is also noted that the observation of a witness demeanor can only lead to speculations whether the witness is being truthful or remembers everything well. In the English Civil Procedure Rules (CPR), Rule 32.2(1)(a) CPR contains the rule of the principle of orality. In contrast to the Finnish and German systems presented above, the oral statement is preceded by a written witness statement, which includes the testimony that the witness is expected to present orally if called at the trial. The principle of orality plays a greater role in English criminal procedure.\textsuperscript{135}

\textsuperscript{131} Lord Woolf, 1995 Chapter 1
\textsuperscript{132} Choo, 2009 pp. 57-58
\textsuperscript{133} Civil Procedure Rules 32.1, McKeaown, 2012 pp.54-55
\textsuperscript{134} Choo, 2009 pp. 57-58
\textsuperscript{135} Choo, 2009 pp. 63-65
2.4.2.1 A neutral judge

In the adversarial English proceedings, the judge remains neutral as regards to the naming and calling the witnesses. The parties are free to decide in which order the witnesses shall be heard and which witnesses they choose to hear.136

2.4.3 The presentation of evidence

The rules governing the presentation of witnesses as evidence are found in Parts 32-35 of the CPR, which are complemented by a number of Practice Directions. As a general rule, anyone is competent to testify at an English trial, with exceptions such as children, persons of unsound mind and judges.137

Rule 34.2 CPR requires the parties to serve written statements before trial. When a written statement has been served, any party may require that the witness to be examined orally at the trial. When a witness is summoned, the witness is compelled to attend the hearing. If the witness does not appear, it can be ordered to compensate the losses caused due to its nonappearance.138 Should the witness not attend the hearing, the written statement may not be used unless the court gives its permission.139

The purpose of the use of written witness statements is to support the “cards on the table” approach of the civil proceedings. It assists in avoiding the element of surprise at the trial, as it helps promote fair settlement and makes it easier to identify the issues of the case as well as reduces the length of trials.140

In English civil proceedings, there are six main types of written witness evidence used. These are witness statements, witness summaries, affirmations, statements of case and the second page of an application notice.

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136 Choo, 2009 p. 65, see also Briscoe v Briscoe (1968) p.501 and 505
137 McKeaown, 2012 pp. 44- 45, Choo, 2009 p. 348
138 Civil Procedure Rules 34.10(4)
139 Civil Procedure Rules 32.7
140 Lord Woolf,
2.4.3.1 Written witness statements

In current practice in England today, the parties usually exchange written witness statements before the trial. The written witness statements contain the facts relating to the case that the witness can confirm. A written witness statement is considered the evidence-in-chief of the witness and is a substitute for what the witness would say orally at a trial if called in for oral examination.

The written witness statements have two purposes. First, the written statement serves as a heads up advance notice of what evidence would be presented during the trial should the witness be summoned. Second, written statements serve as presentation of the evidence in interim applications. According to the general rule in rule 32.2(1)(b), evidence at any other hearing than the trial is to be proven by the evidence of a witness in writing. Regarding interim proceedings, rule 32.6(1) provides that trial evidence is to be witness statements unless the court, a practice direction, or any other enactment requires otherwise.

The court may give directions on identifying or limiting the issues to which witness evidence may be directed, on identifying the witnesses that may be called or whose written statement may be read. The court may also limit the length or decide the format of the written witness statement.

The form requirements are found in Practice Direction 32. Among other things, the Practice Direction sets out the format requirements and guidelines for a written statement. The Practice Direction requires statements to contain a statement of truth. This is because a witness statement is considered to be the evidence in chief of the witness.

The statement of truth is to be in the following form:

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141 Sime, 2011 pp. 438-439
142 Sime, 2011 p. 291
143 Civil Procedure Rules 32.2(3)
“I believe that the facts stated in this witness statement are true.”

If a person makes or is the cause of a false statement that is verified by a statement of truth, proceedings for contempt of court may be brought against that person under rule 32.14(1).

The body text of the written statement should, if practicable, be in the witness’ own words. Therefore, the statement should be expressed in the first person. It should be based solely on matters that the witness has knowledge of and contain references to the sources of any information, may they be other persons or documents.

Written witness statements are usually not produced in small claims track cases, whereas they are the common practice in fast track and multi-track cases. Rule 32.4(2) provides the regulations for serving the written statement. According to the rule, a party is to serve the other parties the witness statements of the witnesses, whose oral testimony the party intends to rely on in relation to any matters of fact that are to be decided during the trial. The parties are given a date by when the statements are to be exchanged by the court at a case management conference. The witness statements are usually required to be exchanged a couple of weeks after disclosure, as the witnesses may be required to comment on some of the documents in their statements.

A written witness statement is a prerequisite for the possibility of oral examination of the witness during the trial. If a written witness statement is not served within the time limit, the witness may only be called for oral examination with the permission of the court.

According to the main rule in rule 32.5(2), the witness statement serves as the witness’ evidence-in-chief, if a witness is called in for oral examination. The written statement works as a restriction of the matters that the witness is allowed to talk about at the trial. If the court decides that there is no reason to tie the statement to the

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144 Practice Direction 32, 20.2
145 Practice Direction 32, 18.1
146 See Sime, 2011 p.442-443
147 Rule 32.10, see also Sime , 2011 p. 443
contents and matters of the written statement, the witness may enlarge its oral testimony in relation to its written statement to expand matters that have arisen since the statement was written and served.

2.4.3.2 Witness summaries

In case a party is not able to get a signed written witness statement by a witness, a party may submit a written summary instead. Witness summaries are therefore an exception and a lesser substitute to written witness statements. A party, who is required to submit a witness statement but is unable to get one, may apply for permission to submit a summary instead.148

The summary should contain the evidence that would have been the subject of a written witness statement. Should the party not be aware of which matters the witness will be able to testify on, the party shall submit a summary on the matters the party proposes to question the witness of at the trial. In other respects, the rules on written statements also apply on summaries, such as the deadline for submitting the witness summaries.149

2.4.3.3 Affidavits and affirmations

The rules on form of affidavits are broadly the same as for written statements and are to be found in Practical Direction 32. An affidavit shall begin with the words:

"I (full name) of (address) state on oath ..."150

Instead of ending with a statement of truth, an affidavit shall end with a jurat, which is a section at the end of the document that affirms the authenticity of the affidavit. The jurat must contain the signatures of the witness, or the deponent, and the person taking the affidavit. Before signing the affidavit, the deponent must take an oath. The person taking an affidavit must be duly qualified, which means that the person is i.e. a

148 Rule 32.9, see also Sime , 2011 p. 445
149 Rule 32.9, see also Sime , 2011 p. 445
150 Practical Direction 32, 4.1
solicitor, commissioner of oaths, court official or judge or a British consul. The person taking an affidavit should be independent of the parties.\footnote{Sime, 2011 pp. 445-446}

An affirmation is similar to an affidavit, but does not require the deponent to take a witness oath, but rather to affirm the authenticity. They can be used as a substitute whenever an affidavit is to be used.

If a person makes or is the cause of a false statement that is verified by a statement of truth proceedings for contempt of court may be brought against that person under rule 32.14(1).

As is the case with written witness statements, a person writing a false affirmation may be punished with contempt of court, if the document was likely to interfere with the course of justice. In the case of affidavits, the witness may also be prosecuted for perjury, if it knowingly made a false statement.\footnote{Malgar Ltd v ER Leach (Engineering) Ltd (2000) FSR 393} This is due to the jurat, as it makes the affidavit equivalent to oral examination under oath.\footnote{Hydropol Hot Tubs Ltd v Roberjot (2011)}

\textbf{2.4.4 Critique on the current model}

According to empirical studies, the Woolf Reform has proven to have had an impact on the procedural system. As soon as four years after the reform, there was a clear reduction in the amount of claims filed, more cases reached settlement and settlements were reached earlier in the process and the processes were had become significantly faster. It has also been reported that the current system is less complex than before the Woolf Reform. The current procedural system allows for a more cooperative environment through the increased exchange of information between the parties and the parties and the court.\footnote{Vorrasi, 2004 p. 374} The improvement in earlier and more settlements seems to be a lasting trend. There has however not been any significant decrease in cost. As the Woolf Reform put more weight on the preparatory stages of proceedings, the costs have simply been allocated to be related
to earlier stages of proceedings, which include the drafting of written statements.\textsuperscript{155} When evaluating the impact of the exchange of written witness statements on costs, one needs to bear in mind that a new procedural system aimed at decreasing costs can always be manipulated by those with an economical interest and therefore not be successful at all times.\textsuperscript{156}

As there were many big changes made at the same time, it is of course difficult to derive which change has led to the positive progress noticed. As it has been noted that the positive effects are due to increased exchange of information and that settlements are being reached earlier, one could come to the conclusion that the requiring of the exchange of written witness statements has had a positive impact on proceedings in terms of reaching settlements sooner and shortening the timely length of proceedings.

There are, however, still concerns about the involvement of lawyers during the drafting of the written statements and suggestions of a system which would include pre-trial hearing on video instead of written statements.\textsuperscript{157}

\textsuperscript{155} See Fenn et. al, 2009 and Goriely et. al, 2002
\textsuperscript{156} Zuckerman, 1998 p. 8
\textsuperscript{157} Choo, 2009 p.64
3. The presentation of witnesses as evidence in international arbitration

International arbitration is based on the principle of party autonomy, which gives the parties and tribunal the right to conduct the proceedings in their desired manner. At first glance, the legal framework of international arbitration might lead to confusion and the endless sea of terminology give a far too complex perception of the rules governing the proceedings. Although international arbitration is governed by a number of international conventions and national legislation, the main principle of all arbitration proceedings is the principle of party autonomy. Under the principle of party autonomy, parties may decide to conduct the proceedings in a range of manners, keeping in mind the relevant mandatory national norms and the provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, for the sake of enforceability. Although there are no specific binding rules on the taking of evidence that would concern all arbitration, it is possible to speak about common practices. The most common practice regarding the presentation of witnesses is similar to the system used in England, i.e. a combination of written witness statements being exchanged prior to the oral hearing together with oral examination of the witnesses called to the hearing.

3.1 Background

The history of international arbitration dates back to ancient mythology. Since then, arbitral proceedings have varied both over time and in different geographical and political settings. This shows that the nature of arbitration has always been characterized by its flexibility due to the principle of party autonomy, which is fundamental in international arbitration. Party autonomy gives the parties the authority to tailor the proceedings in the way they deem fit, which results in a wide range of procedural models. However, lately the trend has turned, as arbitral proceedings are adopting certain common characteristics, especially when it comes to the presentation of witnesses as evidence. Other common features of modern arbitral proceedings are that they resemble an adversarial model, with the decisions being based on
legal submissions and evidence submitted by the parties and the modern proceedings show consistent efforts for fair, efficient and expeditious arbitral proceedings.\textsuperscript{158}

The contemporary legal framework for international arbitration has been developing since the early 19\textsuperscript{th} century. The international business community worked as the driving force that lead to a wave of interrelated developments such as the adoption of international arbitration conventions, national arbitration legislation and institutional rules as well as a supporting role of national courts in developed jurisdictions. The current framework is the product of a public and private collaboration in search for a workable, effective international resolution mechanism. The International Chamber of Commerce (ICC), was established in 1919 and in 1923, under the auspices of the ICC a number of important trading nations entered into the Geneva Protocol on Arbitration Clauses in Commercial Matters (the Geneva Protocol). The Geneva Protocol laid the ground for the modern arbitral proceedings as a working system by requiring contracting states to recognize and enforce international arbitration clauses and awards. The Geneva Protocol also recognized the principle of party autonomy as the leading factor in establishing arbitral proceedings.\textsuperscript{159}

The contemporary legal framework has many components, of which some are of more importance than others. One of the most fundamental elements of international arbitration is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). After the Geneva Convention, several regional conventions were drafted on the matter until the New York Convention was promulgated in 1958. It is considered to be the most important pillar in international arbitration as well as the most effective international convention in the history of commercial law.\textsuperscript{160} The objective of the convention was to build an effective international legislative framework for the recognition and enforcement of arbitration awards and agreements, which could also be applied easily in practice. This was achieved by drafting the convention in a manner that pleases various fundamental legal principles of the various contracting states. Due to the

\textsuperscript{158} See Born, 2009 pp. 7-21
\textsuperscript{159} Born, 2009 pp. 57-58
\textsuperscript{160} See Liebscher in Schütze, 2012 p.4 and Redfern and Hunter, 2009 pp. 87-88
success of the convention, a party to arbitration enjoys the certainty of the possibility to enforce the award almost anywhere in the world.\textsuperscript{161}

In addition to the New York Convention, the numerous international arbitration institutes with their arbitration rules are an important part of the contemporary legal framework together with the IBA Rules on the Taking of Evidence in International Arbitration (IBA Rules).

The IBA Rules provide the parties the possibility to choose a more detailed set of rules for the taking of evidence in international arbitration. They contain rules on e.g. the evidentiary hearing and written witness statements. The IBA Rules were drafted to provide sensible solutions for the taking of evidence, while leaving room for flexibility. The first set of IBA Rules on evidence were the “IBA Supplementary Rules of Evidence”, which were designed to be a neutral set of procedural rules for the taking on evidence in international arbitration, neutral in the sense that they were designed to be equally fair and familiar to those of both civil and common law backgrounds. The second set of IBA Rules, the “IBA Rules on the taking of Evidence in International Commercial Arbitration”, was published in 1999 and said to lean more to the ways of common law systems, e.g. by expressly allowing counsel to be involved in the preparation of witness testimony. The newest and current set of IBA Rules, called simply the “IBA Rules of Evidence“, was published in 2010. The 2010 version were revised to reflect the common practices being applied in arbitration, hence they can be seen as a codification of the best practices for the taking of evidence. The working group consisted of renowned practitioners in the arbitration community. The parties to an arbitration may decide to include the IBA Rules as binding as a whole in their agreement for arbitration, or adopt them only in part. It is also possible and common to use the rules as guidelines when drafting their own procedure.\textsuperscript{162}

\textsuperscript{161} Liebscher in Schütze, 2012 pp.4-5
\textsuperscript{162} the IBA Rules, 2010 pp.2-3, Kaufmann-Kohler, 2010 p. 7 and Born, 2009, pp. 1793-1794
3.2 The main principles governing arbitral proceedings

There are two main principles that affect the arbitral proceedings. These are the principles of due process and party autonomy. It has also been suggested that procedural efficiency should count as a third main principle. Even though most scholars, jurisdictions and institute rules agree on these principles as being important in the course of any arbitral proceeding, there is no consensus on the exact meaning and content of each principle. E.g. there is no global consensus on whether or not it is mandatory for a tribunal to arrange an oral hearing to fulfil the requirement of due process.  

3.2.1 Due process in international arbitration

Traditionally, the term due process refers to the rights of an individual to some procedural rights in relation to a state or authorities. One might think that due process would have less meaning in arbitration since arbitration is based on an agreement between the parties which gives the tribunal its powers. However, the situation is quite the opposite due to two circumstances. First, the enforceability of arbitration awards under the New York Convention requires due process through ensuring the parties’ right to present their cases and it is also the most frequently invoked grounds for non-recognition, non-enforcement and the setting aside of awards. Second, as the parties usually give up their right to start proceedings in a state court by agreeing to arbitration, arbitration becomes a surrogate to regular court proceedings which means that the basic procedural rights have to be secured also when disputes are resolved through arbitration. For the sake of the integrity of arbitration as a dispute resolution mechanism, the principle of due process is generally regarded as a cornerstone of international arbitration.

The term due process has different meanings and connotations under different jurisdictions and contains for instance the contradictory principle, i.e. the right to be heard and the right

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163 Kaufmann-Kohler, 2003 p.1322
164 See Article V(1)(b) New York Convention
165 See Scherer in Schütze 2012, p. 280
166 Kurkela and Turunen 2010, p.2
167 Among others Levy in Reports of the International Colloquium of CEPANI October 15, 2004 p. 110 and Scherer in Schütze 2012, p. 280
167 Kurkela and Turunen 2010, p.2
to present one’s case, as well as the principle of equal treatment. As the goal of each arbitration is to produce an enforceable award, the most significant definition on a general level would be the definition of due process of the New York Convention.

Art. V(1)(b) the New York Convention is seen to be a purely international rule. Art V(1) states that recognition and enforcement of an award may be refused if:

“(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case…”

The two most important features of the article are proper notice and the right to present one’s case, of which the right to present one’s case is the more relevant in regards to the presentation of witness evidence. The principle is not precisely defined in the article, leaving the power of definition to the rules chosen by the parties to govern the arbitration or alternatively to the law at the place of the arbitration as art. V(1)(d) the New York Convention suggests. Art V(1) states that an recognition and enforcement of an award may also be refused if:

“(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place…”

Either way, it is up to the party refusing enforcement to prove that there has been a violation of due process. The standard of due process of the state where enforcement is sought is also applied, however usually in a lighter version than what is expected from purely national proceedings. E.g. in the US courts apply a standard of “minimal requirements of fairness”, whereas German courts refuse enforcement only if the arbitral proceedings differ from the fundamental principles of German procedural law that the arbitration cannot be seen to have been conducted in a proper, legally correct manner.

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168 Kaufmann-Köhler, 2003 p.1322
169 Mistelis, 2010 p. 17
170 Scherer in Schütze 2012, pp. 284-285
The principle of due process is incorporated in most institutional rules in some form as well, e.g. in art. 19 SCC Rules, art. 14(1) LCIA Rules and art. 22(4) ICC Rules which all mention the equal rights of the parties to a “reasonable opportunity” to present their cases. In national laws the level of opportunity varies, e.g. art. 18 UNCITRAL Model Law offers the parties a “full opportunity” whereas section 33(1)(a) English Arbitration Act only offers the parties a “reasonable opportunity” for presenting their case.

Art. V(2)(b) of the New York Convention, on the other hand, requires that the proceedings are in line with public policy. Although the content of public policy is to be decided by the states individually, most states consider the principle of due process to be part of their international public policy.\textsuperscript{171}

In regards to witness evidence, the New York Convention as well as most national laws grant the tribunal substantial discretion in managing the proceedings and the taking of evidence, wherefore objections to the recognition or enforcement of awards due to the tribunal’s exclusion or admission of witness evidence or requirement of the exchange of evidence are seldom, if ever, successful.\textsuperscript{172} In case law it has not been considered to constitute violations of due process when the tribunal has refused to postpone proceedings in order to orally examine an important witness with a valid reason not to attend during the planned dates or when the tribunal considers it unnecessary to hold a new hearing to orally examine a witness after the introduction of new documents.\textsuperscript{173}

One could conclude that when it comes to witness evidence, the principle of due process is followed when the arbitral tribunal acts in the scope of any agreement between the parties regarding procedure, in addition to the rules chosen to govern the procedure as well as any national laws impacting the arbitration. When limiting the evidence, e.g. which witnesses are examined orally, the tribunal should do so equally and secure each party’s right to comment on all evidentiary material submitted.

\textsuperscript{171} Di Pietro & Mistelis, 2010 p. 17
\textsuperscript{172} See Scherer in Schütze, 2012 p. 301 and Born, 2013 p. 2753
\textsuperscript{173} Scherer in Schütze, 2012 p. 301
3.2.1 Party autonomy in international arbitration

One of the most significant features of arbitration is that contrary to national proceedings, it is the parties who choose the procedural rules. The parties may choose existing rules to apply, i.e. those of an arbitral institute, or any rules they please. The principle of party autonomy is recognized by practically all developed jurisdictions and rules of arbitral institutions. The only requirements that restrict party autonomy are the mandatory requirements of the applicable national law as well as the requirement of due process, which is, as mentioned above, incorporated in most arbitration rules.\textsuperscript{174}

Art. V(1)(d) New York Convention, provides non-recognition of awards that are the product of an arbitration where the tribunal has failed to conduct the proceedings in line with the parties’ agreed procedures. Art. V(1)(d) New York Convention allows non-recognition of awards if:

\[
\text{“[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place” }
\]

The article raises two points, first it recognizes the principle of party autonomy and second, it states in explicit terms that the parties may derive from any national laws by agreeing on the procedural rules.

3.3 The presentation of evidence

The aim of international arbitral proceedings is said to be to establish the relevant facts by reconstructing the past to the extent necessary.\textsuperscript{175} How this is done varies, due to the flexible nature of international arbitration and is also influenced by the cultural background of the counsels and the tribunal in each arbitration. In contrast to national courts, tribunals are not bound to strict technical rules of evidence, but rather have a duty to conduct the proceedings in the most appropriate manner.\textsuperscript{176} Under many institutional rules, tribunals are

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{174} Born, 2013, p. 1748
\item \textsuperscript{175} Kurkela, 2005 p.123
\item \textsuperscript{176} Pietrowski, 2006 p. 393
\end{itemize}
\end{footnotesize}
quite free to disregard evidence freely. As a general rule, the taking of evidence in arbitration should be conducted in an orderly and efficient manner that ensures due process. The tribunal may limit the submission of evidence and it is in the tribunals discretion to evaluate the evidence at hand.\textsuperscript{177} International arbitration has clearly been mostly influenced by the civil and common law cultures, but as presented above, the opinions and practices regarding witness evidence varies significantly between these two cultures.\textsuperscript{178}

As presented above, the English and Finnish legal cultures find witnesses a reliable means of evidence, whereas witnesses are seen to be the least reliable means of evidence in the German legal culture. According to a survey made by the School of International Arbitration at the Queen Mary, University of London and White & Case LLP in 2012 (Queen Mary survey), these views were also represented among the respondents in the survey. To the question whether fact witness evidence should be eliminated as a form of evidence in international arbitration, 77\% i.e. the majority of all respondents replied that fact witnesses generally are an effective form of evidence, whereas 22\% find fact witnesses to be a necessary evil, 7\% have no view on the matter and only 1\% would eliminate fact witnesses as a form of evidence. Of the common lawyers 78\% think of witnesses as an effective form of evidence, whereas 61\% of civil lawyers agree.\textsuperscript{179} In other words, witness evidence is an appreciated form of evidence in international arbitration and is also used in the majority of proceedings.

\textbf{3.3.1 The presentation of witnesses as evidence}

Most often, any person may appear as a fact witness in international arbitration, regardless of its relationship to the parties, and also including parties and party representatives. The most common practice in international arbitration for the presentation of witnesses as evidence is a combined use of an exchange of written witness statements and oral examination of the witnesses. The parties submit a written statement, either in the form of a sworn affidavit, although most commonly as a signed declaration. Based on the written statement, the opposing party and the tribunal decide whether they deem oral questioning of

\textsuperscript{177} Pietrowski, 2006 p. 393  
\textsuperscript{178} ud-Din, 2013 p. 2-3  
\textsuperscript{179} Queen Mary survey, p. 24
the witness to be needed and choose to call the witness. It should be pointed out, however, that also the party calling the witness is entitled to request oral examination of the witness.\textsuperscript{180} Especially in the Nordic countries and in arbitrations with civil law tendencies, the use of evidentiary themes also occurs.\textsuperscript{181} According to the Queen Mary survey, written witness statements are exchanged in 87\% of arbitrations, together with either direct examination at the oral hearing (48\%) or limited or no direct examination at the hearing (39\%).\textsuperscript{182}

The use of written witness statements is seen to serve three purposes. First, it works as a framework for the intended oral testimony as it allows the parties to narrow down the points to be addressed. Second, it assists in ascertaining whether or not the testimony of the witness is necessary and third, it makes the preparation for the hearing easier both for the parties and the tribunal.\textsuperscript{183} Some say that the use of written witness statements together with oral hearing take away the element of surprise and therefore supply all parties in the process with equal arms instead of leading to a trial by ambush. In addition, if the witness is called for oral testimony, the written statement may serve as its evidence in chief, in order to save time and costs.

The use of written witness statements is traditionally viewed as general practice in common law cultures, whereas it was unknown to civil law systems. This became evident also during the drafting of the UNCITRAL Arbitration Rules in 1976, where the practice was included only after a lengthy debate including strong objections from some representatives with civil law backgrounds.\textsuperscript{184} Since then, both the IBA Rules and many institutional rules include provisions on the use of written witness statements.\textsuperscript{185}

\textsuperscript{181} see Gélinas, 2005 p. 35 and the IBA Rules 4.2
\textsuperscript{182} Queen Mary survey, p. 24
\textsuperscript{183} Schlaepfer, 2005 p.65, Levy in Reports of the International Colloquium of CEPANI October 15, 2004 pp. 113 and 120
\textsuperscript{184} Born, 2009 p.1829
\textsuperscript{185} see the IBA Rules 4.4
3.3.2 Rules on the presentation of witnesses as evidence

As stated above, most institutional arbitration rules support the practice of exchanging written witness statements together with oral examination of the witness. Three of the most frequently used and preferred institutional set of rules are those of the International Chamber of Commerce (ICC), London Chamber of Commerce (LCIA) and Stockholm Chamber of Commerce (SCC). The rules of the ICC, LCIA and ICC have constituted either the top three or all been part of the top four of the most frequently used institutional rules during the past decade.186

The LCIA Rules do not require the submission of written statements, but the tribunal may determine the evidence to be presented in written form, either as a signed statement or a sworn affidavit. The parties have the right to request oral hearing of a witness.187 This right may be limited by the general duties of the tribunal to conduct the proceedings in a fair and impartial manner, to adopt procedures suitable for the circumstances and to provide for an efficient and expeditious conduct of the arbitration.188 Under the SCC Rules the tribunal may request the parties to identify each witness they intend to call and specify the matters intended to be proved by each witness testimony189, the provision seems similar to the provisions on evidentiary themes in national Nordic laws presented above. In addition, the SCC Rules provide that the parties are allowed to submit written witness statements, which should be signed but no official authentication is required.190 Due to the fact that the use of written statements is not traditional practice in the Nordic national laws, written witness statements are more used in international arbitrations governed by the SCC Rules than in purely Swedish disputes. All witnesses are heard at the hearing, unless agreed otherwise by the parties.191 The tribunal should also under the SCC Rules act in the scope of the overriding guidelines of the Rules, namely conduct the arbitration in an impartial, practical...

187 20(2) and 20(3) LCIA Rules, Konrad/Hunter in Schütze 2012, p. 466
188 14(1) and 14(2) LCIA Rules, Konrad/Hunter in Schütze 2012, pp. 466 and 455
189 28(1) SCC Rules
190 28(2) SCC Rules, see also Öhrström in Schütze 2012, p. 841
191 See Öhrström in Schütze 2012, p. 841
and expeditious manner, giving each party an equal and reasonable opportunity to present its case. 192

The provisions of both the LCIA Rules and SCC Rules are very detailed compared to the ICC Rules. 193 The ICC Rules intentionally lack detailed rules regarding the conduct of the procedure, as the purpose is to provide a general framework while leaving room for flexibility. The tribunal should proceed by all appropriate means to establish the facts within as short as time as possible, while bound by any agreement of the parties. 194 The ICC Rules reflect the spirit of arbitration, as they leave room for the arbitrators and parties of each arbitration to conduct the proceedings in a way they deem fit for that particular dispute, although the LCIA Rules as well as the SCC Rules are in no way as detailed as the procedural codes of e.g. Finland and Germany.

3.3.3 Practical aspects of the written witness statement

In the written witness statement, the witness should introduce itself, by i.e. stating its curriculum vitae, connection to the parties and other background. In addition to the matters of the dispute, the witness should mention the source of the information. As a practical tool to help arbitrators remember the oral statements of the witnesses, a picture is often attached to the written statement. The witness may attach relevant documents to the written statement, but the counsels should not use a witness statement as a means to submit documents after deadlines. According to the IBA Rules, the written statement should also include an affirmation of truth. 195

It is commonly accepted that the written witness statements used are indeed drafted by lawyers and not the witnesses themselves. Most of the time, the written witness statements are written in an accurate, technical and sophisticated style, in a language that is not the witness’ mother tongue. Most commentators agree that a written statement drafted by a

192 SCC Rules, see also Öhrström in Schütze 2012, p. 833
193 see Konrad/Hunter in Schütze 2012, p. 466
194 20(1) and 20(2) 1998 ICC Rules of Arbitration, 25(1), 25(2) and 25(3) 2012 ICC Rules, see also Bond, Paralika et al., 2010 p. 356 and Reiner/Ashauer in Schütze 2012, p. 134
195 Art. 4(5) IBA Rules, see also Levy in Reports of the International Colloquium of CEPANI October 15, 2004 pp. 114 and 116
lawyer is of greater benefit to the arbitrators than if the witness would write the statement itself. This is because the help of a lawyer results in a more focused statement concerning only relevant matters. Some poor witness statements drafted by lawyers, however, are merely a repetition of the party’s pleadings and do not serve their purpose as a means of evidence.  

In case a written witness statement is poorly drafted, the tribunal may point it out either before the oral hearing or clear the matter during oral examination of the witness. In cases where the adverse party wishes to contact a witness for another written statement, the tribunals’ reactions vary between accepting it and only allowing the adverse party to present questions in writing to the witness for a written answer, which is then followed by oral examination.

The written statements are usually submitted as exhibits to the parties’ written briefs, with certain time limits in one or more rounds of memoranda. There may also be a possibility for written rebuttal statements either together with a second round of briefs or before a set date. They most often submitted before the hearing to have their desired function.  

3.3.4 The possibility for oral examination of the witness

After the written statements have been exchanged, or the evidentiary themes of the witnesses submitted, the parties and the tribunal may request which witnesses they wish to examine at the oral hearing.

The tribunal is not required to arrange oral examination of all witnesses requested to be heard by the parties. In the light of the principles of due process and equal treatment, the tribunal may in its discretion decide which witnesses are to be heard. E.g. the IBA Rules state that the tribunal may refuse or limit the hearing or questioning of a witness if it considers it irrelevant, immaterial, duplicative or addressing matters that are legally

196 Schlaepfer, 2005 p.68, Levy in Reports of the International Colloquium of CEPANI October 15, 2004 pp. 113
197 see the IBA Rules 4(6), see also Levy in Reports of the International Colloquium of CEPANI October 15, 2004 pp. 117

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protected in any way. 198 Should the tribunal rule that a witness should not be orally
examined, it should not imply that everything presented in the written statement is regarded
as the ultimate truth according to the tribunal. The tribunal still possesses the right to weigh
the evidence. 199 Whether this works in practice is unclear, as parties naturally are expected
to call witnesses for oral hearing whose testimonies are contested. Therefore not calling a
witness could be a bad tactical move, as arbitrators potentially would regard the testimony
as uncontested, at least unintentionally.

Under the ICC Rules, the tribunal is obliged to hold a hearing on the merits upon the
request of a party, but this obligation does not necessarily extend to the hearing of
witnesses. The same applies according to the majority of the institutional and some
mandatory national rules, unless of course the parties have agreed to not hold an oral
hearing, which they have the right to agree upon in accordance with the principle of party
autonomy. It is although, commonly held that the parties do not have any natural right to
oral examination of witnesses even under the principle of due process, when written
witness statements have been exchanged. 200 The refusal of a tribunal to hear a witness
orally upon the request of a party, may however, invite to a challenge of the award. 201

It is however, unheard of for arbitral proceedings to be organized without a hearing of some
sort at all. The attendance at the hearing is generally limited to the parties and other
necessary persons. Witnesses may be allowed to attend prior to their examination, with the
risk of their testimony being tainted. 202 In most cases, at least one main evidentiary hearing
together with some shorter hearings for particular witnesses and issues are organized. At
the oral hearings it is customary for the counsels to begin the hearing with opening
statements as well as closing remarks after the evidence has been presented. 203

It is commonly held that written witness statements do not serve as efficient evidence if
presented without the possibility for oral examination. Many are of the opinion that written

198 see the IBA Rules 4(8) and 8(1)
199 Art. 9(1) IBA Rules
200 see Waincymer, 2012 p.108, Bond et al., 2010 p.356 and Dalmia Dairy Industries v National
Bank of Pakistan (England)
201 Born, 2009 p. 1832
202 Levy in Reports of the International Colloquium of CEPANI October 15, 2004 p. 124
203 Born, 2009 pp. 1833 and 1863

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witness statements serve as an invitation for the tribunal or the adverse party to call the witness for oral testimony, this view is also evident in art. 4(7) and 8(3) of the IBA Rules.

The main rule in practice is that all witnesses whose written statements are submitted should be available for oral hearing if either the tribunal or the adverse party demands oral examination of the witness. A written witness statement may be taken into account without oral hearing in such situations if the witness has a valid reason for its non-appearance when called to the hearing. What in turn suffices as valid reason is highly debated, but at least serious illness is seen to be a valid reason, whereas lack of room in the witness’ personal schedule does not suffice. If a witness is not available for oral hearing without a valid reason, it can be seen to endanger the adverse party’s due process rights as it does not have the right to question the witness. The IBA Rules state clearly that the written witness statement, of a witness who does not appear for oral examination without a reason, should be disregarded. This is also the common approach in practice. The tribunal, may however, take a solely written statement into account and draw adverse inferences from the non-appearance or lower the evidentiary value of the witness.

There is no limit as to the scope of the witness statement; there is however normally a limitation to the direct and re-direct questioning. The oral examination of the witness usually begins with either the counsel of the party that appointed the witness or the presiding arbitrator performing the so-called direct examination. The direct questioning is often limited to the matters dealt with in the written statement and usually consists of the witness presenting itself and stating that the matters are correctly presented in the written statement. The written statement is seen to be a substitute for the oral direct questioning, wherefore the oral direct questioning is kept short. Should the counsel try to expand the witness testimony beyond the matters included in the written statement during the direct examination, it would be likely to be stopped by the tribunal as that would encourage trial by ambush as the opposing party would only have had the chance to prepare for the matters.

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204 see the IBA Rules 4(7)
205 Born, 2009 pp. 1843 and 1855
206 Aguas v. the Argentine
207 see the IBA Rules 4(7)
208 Born, 2009 pp. 1843 and 1855
209 see the IBA Rules 4(7)
presented in the written statement. Therefore, the written statements should include everything that the party wishes to bring up during the direct examination, as it both limits and to some extent replaces the direct examination during the oral hearing. There is however, no limitation to the scope of the cross-examination of the witness. This is to limit the possibility for extensive tactical reasoning while drafting the written statements, e.g. where a party only includes favourable or unrelated factual issues to the case to avoid unfavourable matters to become an issue during the cross-examination. The re-direct questioning on the other hand, is limited to the scope of the cross-examination.⁹⁹¹

According to the findings of the Queen Mary survey, 59% of the respondents believed that written witness statements are an effective substitute for direct examination of witnesses at the hearing. The respondents with similar backgrounds tended to answer the question in the same manner as 73% of North Americas, 71% of common lawyers, 69% of arbitrators and 60% of private practitioners found written witness statements to be a proper substitute for direct examination, while only 51% if civil lawyers, 40% of in-house counsels and 35% of Latin American practitioners agreed. In a minority of hearings, in only 13%, witness evidence was offered only orally at the hearing, e.g. without the exchange of written witness statements. Also here the background of the respondents seems to have had an impact on their opinion, as it occurred more commonly in arbitrations where the lawyers had civil law backgrounds (21%) compared to common law backgrounds (6%).²¹¹

According to the Queen Mary survey, 59% of the respondent’s found written witness statements used as a substitute for oral direct examination at the oral hearing generally effective, whereas 34% did not. During some interviews done with a smaller number of practitioners, it was found that lawyers generally find it effective as it is time saving, avoids trial by ambush and provides certainty as the counsels get a clearer overview of the opposing party’s case. The practice is also found to generate a more focused cross-examination. The practitioners point out, however, that they prefer a limited direct examination of e.g. 5-10 minutes to allow the witness to warm up in their role and be given a chance to discuss any issues that have arisen between the written statement and the

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²¹¹ Queen Mary survey, p. 24
hearing. The 34% who dislike the practice, on the other hand, expressed that they find it ineffective to substitute oral direct examination with written statements as the statements are usually written by lawyers and often repeat matters raised in the pleadings. It was also pointed out that direct oral hearing of witnesses gives the tribunal a chance to assess the credibility of witnesses before the experienced cross-examiners are let loose on them.\textsuperscript{212}

The tribunal should evaluate the written witness statement together with the oral testimony as a whole. Whether or not the arbitrators in practice actually take the written statement into consideration or simply base their evaluation of the evidence on the oral examination is however unclear. As a result of the generally accepted practice of counsels writing the written statements, a trend of not taking the written statements but solely the oral testimony into account has arisen.\textsuperscript{213}

If a witness is reluctant to attending the hearing, the tribunal may take actions to try to secure the oral examination of the witness. According to Art. 4(10) IBA Rules the tribunal may order any party to use its best efforts to provide for the witness’ appearance at the oral hearing. Should a party wish to present a witness reluctant to attending the oral hearing as their witness, the party could ask for assistance of the tribunal to secure the attendance of the witness. According to Art. 4(9) IBA Rules, the tribunal can be asked to take whatever legal steps available to obtain the testimony or give the party permission to take similar action. A tribunal may for instance seek assistance from national courts, which may not always be efficient as there is no legal obligation to serve as a witness in international arbitration proceedings.\textsuperscript{214}

In some cases, it could also be possible to perform the oral examination of a witness by video-link. With today’s advanced technology, examination by video-link can be practically as effective as hearing the witness in person at the oral hearing as long as the visual and audio connections are good enough. The question is however, whether or not a party should have the right to demand the presentation of its witness evidence for the purposes of oral examination through video-link in order to save costs. The practices at the

\textsuperscript{212} 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, pp. 24-25
\textsuperscript{213} Schlaepfer, 2005 p.68
\textsuperscript{214} Levy in Reports of the International Colloquium of CEPANI October 15, 2004 p. 122
moment suggest that most arbitrators would expect a compelling reason for non-physical appearance at the oral hearing, as physical appearance of witnesses is the main rule. The newest version of the IBA Rules have tackled the issue by stating that each witness should appear in person, unless the tribunal allows the use of technology similar to videoconference in regard to a particular witness, hence hinting that the expectation is for all witnesses to attend the hearing, while an exception could be given for single witnesses separately. If the tribunal should allow the oral examination of a witness over video-link, the tribunal should seek to ensure fairness and equality as well as make sure the technology is sufficient and have a backup plan ready in case of technical difficulties. In cases where witnesses have been examined over video-link, it has been common for both parties to have a lawyer present at the witness location, which might indicate that the economical outcome would not be entirely that much lower than if the witness would attend the hearing.215

3.4 Critique on the current situation

Arbitration has grown popular during recent decades thanks to its flexibility, which leads to advantages such as lower costs and shorter proceedings than in national courts. There is however, some concern that these once clear positive attributes of arbitration are starting to fade away. The more the proceedings are regulated by certain procedures and mechanism, e.g. related to the taking of evidence, the less flexible, fast and cheap the proceedings become. It has been argued that these findings may also be due to the growing complexity of disputes and not adhere from the modern arbitration rules and regulations of institutes. As arbitrations are becoming more and more global, with parties and counsels from significantly varied legal cultures, strict rules may also serve the parties interests in giving more certainty and foreseeability to the proceedings. This could also be solved in accordance with the IBA Rules, as they suggest that the parties agree on evidentiary issues as early as possible in the proceedings.216 On the other hand, these complex, global disputes

216 ud-Din, 2005 pp. 5-6
usually involve extensive factual and technical matters, which cannot be effectively solved without established functioning principles and rules of procedure.\footnote{Pietrowski, 2006 p. 376}
4. Comparison and conclusion

4.1 Comparison

Of the four legal systems examined, it is evident that the Finnish and German systems share a considerable amount of common features, whereas the common practice developed in international arbitration is clearly closely related to the English way of presenting witnesses as evidence in civil proceedings.

4.1.1 Similarities and differences between the Finnish and German rules on the presentation of witnesses as evidence in civil proceedings

Both the Finnish and German rules on the presentation of fact witnesses as evidence are based on practically the same principles, most importantly the principles of orality and immediacy. This is due to the great impact the German legal system has had on the then Swedish legal development, which still constitutes the basics of the Finnish procedural system. During the last 60 years or so, when the Finnish procedural system has developed independently and uninfluenced by the German procedural changes, the two systems have developed in their own directions, but not significantly.

Both systems have an explicit prohibition against the use of written witness statements. The prohibitions are supposed to ensure the realization of the principles of orality and immediacy as well as the contradictory principle by ensuring the opportunity to cross-examine the adverse party’s witnesses. Both systems, however, lack the trail of thought that written witness statements could be used together as a means of support with oral testimony as both systems only consider written witness statements to be a completely written substitute for oral examination of witnesses.

Instead of written witness statements, the Finnish and German systems use evidentiary themes. The evidentiary themes are seen to have two purposes in Finnish procedural law, first they facilitate the possibility of one concentrated main hearing and second they give the adverse party a chance to find sufficient counter-evidence as well as prepare its own
questioning for the witness. The problem is, that the practice regarding the use of evidentiary themes is far from consistent, which is why they are essentially ineffective. The evidentiary theme should address which disputed matter the piece of evidence is aimed to prove wrong or right. According to scholars as well as practitioners, evidentiary themes in practice range from being vague and unclear to simply just mentioning a situation that the witness will talk about, without describing which matter the piece of evidence is meant to prove. The provisions on the use of evidentiary themes lack clarity, wherefore the legal community would benefit from uniform guidelines on the subject. In cases of poor use of evidentiary themes, neither of the hoped benefits of their use is fulfilled. It is difficult to see how an adverse party could find sufficient counter-evidence and prepare a relevant line of questioning for the cross-examination, if it is unclear which disputed matter the witness is going to address during its oral examination. In addition to the counsels being uncertain of how evidentiary themes are to be used, also the judges seem to be uninformed of their proper use, wherefore poor evidentiary themes are rarely demanded to be corrected and improved.

Both the Finnish and German systems have a reputation of not regarding witness evidence as trustworthy, Germans even more so than Finns. In Finland witnesses seem to be regarded as a necessary evil, which is mostly needed to fill out the gaps between the documentary evidence at hand. Of course e-mail or other correspondence from before the dispute arose can be more reliable than a subjective memory, but not even lawyers can always get what they wish for and therefore have to rely on witness evidence as well as documentary evidence. In Germany the attitude seems to be a bit stern. This attitude is noticeable in the doctrine and may be connected to the strong prohibition against the use of written witness statements, as many scholars note that the atmosphere of the court keeps witnesses from exaggerating or straying from the truth.

The critical attitude against witnesses may also be the reason behind the differences between the handling of witnesses located too far from location of the main hearing for it to be reasonable to demand their presence. In Finland, the problem has been solved by allowing oral examination by video conference and a suggestion has been made to further expand the possibilities for hearing witnesses via video conference and outside the main
hearing. In Germany, on the other hand, the witness will have to see a judge at a court located nearer by, as the importance of the body language of the witness as a means of evaluating its reliability is still stressed.

Another indicator of that the Finnish procedural system is developing in its own direction is the suggested updates to the Finish Code of Judicial Procedure. As mentioned above, a suggestion has been made to allow the use of written witness statements in civil proceedings where settlement is allowed. The new system would reflect the practice in England and the majority of international arbitrations, as witnesses would be presented through the use of written statements together with oral examination upon the request of a party, if the parties agree to the procedure. The change is motivated with its presumed lower costs for the hearing of witnesses, but as seen in England, the use of written witness statements do not always tend to lead to lower costs, quite the opposite. The preparation of written witness statements takes time as it is generally accepted that they are drafted by lawyers, which in practice leads to several drafts and meetings with the witness, as opposed to only meeting the witness beforehand and compensating for their appearance at the main hearing. The cost of the use of written witness statements became evident through the Woolf reform in England, where it was noticeable that the practice did not reduce overall costs, but rather allocated them to the preparatory phase as opposed to being more evenly allocated before the introduction of the use of written witness statements.

4.1.2 Similarities and differences between the English rules and the common practices in international arbitration regarding the presentation of witnesses as evidence

The common practice in English civil procedure as well as in international arbitration is the combined use of exchange of written witness statements prior to the oral hearing and oral examination of the chosen witnesses at the hearing. It is rare for both systems for a procedure to be organized without an oral evidentiary hearing, but not impossible in international arbitration. In both systems, the written witness statement is a prerequisite for the possibility of oral examination of the witness at the oral hearing and not an alternative to oral examination. Therefore, the written witness statement serves mainly as a supportive tool to the oral testimony rather than an option for it. The exchange of witness statements
goes hand in hand with the cards on the table ways of the common law family, where also discovery is an important part of the proceedings.

During the oral hearing, the witness statements in both systems tend to serve as the witness’ evidence-in-chief, i.e. replacing the direct examination, making it harder for counsel to expand the testimony beyond the written statement as well as shortening the oral hearing in general. The two main advantages with written witness statements are seen to be their heads up effect, giving the adverse party a fair chance to see what its up against as well as their promotion of fair settlement, reduction of the length of trials and that they facilitate the identification of the issues of the case. Not only do they shorten the main hearing by replacing the direct oral examination, but also by making it possible and easier to sort out unnecessary or overlapping witnesses in an earlier stage.

4.1.3 Similarities and differences between the Finnish and German rules on the presentation of witnesses as evidence in civil proceedings as opposed to the English rules and the common practices in international arbitration

The common feature is that all four systems require more than just the name of the witness before the oral examination, only the practical execution differs as the priority order of the underlying principles vary. Due to their strong belief in the principle of orality and immediacy, the Finnish and German lawmakers have chosen a brief evidentiary theme to serve as an introduction to the oral testimony, whereas the English lawmakers and various arbitrators and parties to arbitrations, who value efficiency and the cards on the table approach, have chosen the use of written witness statements together with oral examination. However, the principle of orality is also stressed in English doctrine.

In theory, written witness statements and evidentiary themes are thought to serve the same purposes. Written witness statements and evidentiary themes should help the panel of judges or the tribunal to draw up the schedule for the main oral hearing. They are meant to assist the parties and the judges or the tribunal in choosing which witnesses are to be called for oral examination as well as help avoiding trial by ambush, as a written witness statement or a proper evidentiary theme allows for the adverse party to both gather proficient counter-evidence and prepare properly for the cross-examination.
Another common feature of the four systems is the requirement of an oral hearing. Oral hearings are not always mandatory in international arbitration, but in practice all four systems consist of a preparatory written phase and followed by an oral evidentiary hearing. During the oral hearings in Finland and Germany, the witness is examined, cross-examined and re-examined. The party, who has called the witness, has had a chance to prepare for the direct examination, whereas the adverse party basically experiences trial by ambush to some extent according to practitioners. This is due to two things, first, there are not clear enough rules on the drafting of evidentiary themes and second, it is unclear how strict the judges should be in relation to preclusion of the parts of the oral testimony that exceed the evidentiary theme. These are two issues that should be less likely to come up when using written witness statements instead of evidentiary themes together with oral testimony.

During the oral hearings in England and in international arbitration, when written witness statements have been exchanged, the written statement both limits and to some extent replaces the direct testimony. This both clarifies and speeds up the proceedings, as the written statements are detailed enough to efficiently limit the oral examination to the matters stated in them and also eliminate the need for oral direct examination. In addition, the clarity and scope of the written statements give the adverse party a fair chance to prepare for the cross-examination, i.e. excluding the possibility for trial by ambush and therefore, cultivating a fair trial where both parties have a better chance at presenting their cases properly, by being able to efficiently question the adverse party’s witnesses.

Although it is evident that the production of written witness statements bears higher costs than the submission of an evidentiary theme, the positive effects of the exchange of written witness statements can perhaps be found in an increase in information which promotes certainty and fairness and perhaps even earlier and more settlements.
4.1.3 Conclusion

Since all procedures are different and all four examined set procedural systems have different contexts, it is nearly impossible to assess which practice is the best in terms of costs or fairness. In addition, both the Finnish and English systems have undergone a major transformation in connection to the introduction of the use of evidentiary themes and written witness statements respectively, which makes it even more difficult to examine the results of the provisions.

As there are no reliable numbers on the actual effects of the two methods, one can turn to look at the popularity of the practices instead. In international arbitration, there is no universal code or binding practice for the taking of evidence. Despite the freedom to choose whichever type of proceeding they wish, parties and arbitrators have developed a common practice during the past decades by choosing to exchange written witness statements as a preparatory phase to the oral evidentiary hearing time and time again. This does not of course apply to all arbitrators and parties, as the Queen Mary survey showed, lawyers with civil law backgrounds were more prone to choosing a procedure with solely oral examination of the witnesses without exchange of written witness statements. At the same time, it has also been noticed that an international community of arbitration professionals is growing, who act rather in accordance with the best practices developed in international arbitration than their own legal culture. Either way, the fact that experienced practitioners develop one strong practice, should indicate that they agree on that certain practice being superior to the others.

One impact that the Woolf reform has had on the English civil procedures is an increased percentage of settlements, as well as earlier settlements all round. The increased exchange of information at an earlier stage might well be a reason for this. As the parties know what they are up against, they might realize their position sooner and be willing to negotiate and therefore save both time and costs by settling before the main hearing.

When studying the use of evidentiary themes in Finland and Germany compared to the use of written witness statements in England and international arbitration it is clear that both systems have their flaws. Written witness statements are seen as having a risk of being too
expensive, whereas the evidentiary themes do not facilitate the fairness and certainty of the proceedings, quite the opposite, allows for trial by ambush and lack of a proper chance to gather sufficient counter-evidence. From a legal perspective one might favour the risk of extra costs over the lack of equal arms and a possibility to present ones case properly through efficient cross-examination.

In regards to the presentation of witnesses as evidence, the suggestion to make the use of written witness statements possible in some cases is, in my opinion, a step in the right direction. Unfortunately, the step is not quite long enough, as written witness statements could be the most effective in big or complicated disputes, rather than in simple and small ones, which the new amendment is aimed at. As Skoghøy has stated, after a similar amendment was made to the Norwegian Code of Civil Procedure, there might be more useful ways in which to use written witness statements. This update further strengthens the view that Finland is neither a solely common or civil law country, as this new practice resembles common law proceedings rather than the old civil law rules that are based on German law.

As the principles of orality and immediacy are fundamental in Finnish civil procedure, there is no need to infringe their realization, but rather maximize the outcome of every witness’ testimony. The use of written witness statements should, as in English procedures as well as in international arbitration, never be a substitute for oral hearing as a default, but rather a supportive tool.

In the Finnish legal community, the problems in connection to large disputes have been under discussion lately. The problem is often that the amount of witnesses is substantial, which leads to a lengthy main hearing, spanning over weeks. As a consequence, the trials become both expensive and ineffective. In such cases the exchange and submission of written witness statements could shorten and make the trials more efficient, as it would be easier to plan the evidentiary hearings, as there would be more information about the testimonies at hand. Not all witnesses would have to be heard for instance, as overlapping testimonies and testimonies containing mostly undisputed fact would be detected during the preparatory phase. Direct questioning could be partially avoided and cross-examinations would be more on point thanks to an increased possibility of preparation.
Another type of disputes which could benefit from the use of written witness statements in Finnish civil proceedings, are technically challenged proceedings, e.g. patent disputes. Cases where the line between fact and expert witnesses is fine and a written witness statement could serve as an aid, both for the judges and the adverse party, in a similar manner as written witness statements of expert witnesses. The same applies for any complicated matter, where a mostly oral testimony might be too detailed to comprehend properly.

Conclusively, the underlying principles governing the presentation of witnesses in Finland, England, Germany and in international arbitration are similar. There are however some strong cultural traits that clearly separate the Finnish and the German systems from the British and the practice in international arbitration. As the fundamental principles are related, the lawmakers could easily learn and borrow from each other, e.g. the Finnish Code of Civil Procedure could very well take in influences of the English way of using written witness statements together with oral examination of witnesses in civil proceedings.
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