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Tea Micevska, PhD student

Faculty of Law "Justinianus Primus", Ss. Cyril and Methodius University in
Skopje, North Macedonia
t.micevska@pf.ukim.edu.mk

THE ODYSSEY OF WRITTEN WITNESS STATEMENTS IN CIVIL PROCEDURE

ABSTRACT

In today's continuously evolving world, where change is the only constant, one enduring necessity remains: the imperative to adjust the legal solutions to the emerging trends. Echoing the epic odyssey of Odysseus, the aim to ensure a balanced approach between the oral and the written form of the civil procedure represents a profound journey through the modern challenges of the legal theory and practice. Originating in the ancient legal traditions, these principles adjust to the evolving nature of the courtroom practices. Without exception, this reflects on the legal position and evidentiary value of the written statements of the witnesses as well. Namely, the right to an oral hearing of a party's case, as a fundamental principle of the civil procedure, is an integral part of the right to a fair trial. However, the pressing need for expeditious and cost-effective administration of justice calls upon emphasizing, or even preferencing the written form in a manner that maintains balance and does not create a disproportionate focus to either of the principles. Given the potential significance of these changes, a careful examination of their benefits and drawbacks is required. Presented with such a legal conundrum, an emerging question persists: should these principles evolve at all? If so, to what extent should the evolution extend?

Keywords: civil procedure, evidence, written statements, witnesses

1. INTRODUCTION

Since ancient times in the Roman Empire, the legitimacy to rule over other people was primarily established by the principle of justice.¹ In a formal legal

¹Verboven, K.; Hekster, O., Introduction. In *The Impact of Justice on the Roman Empire*, Leiden, The Netherlands, Brill, 2018, https://doi.org/10.1163/9789004400474_002, 21 March 2024.

sense, justice entails application of the law to all parties equally.² As the law operates on facts, justice is dependent on factual truth.³ In the pursuit of justice within civil proceedings, judges diligently adhere to the evidentiary procedural rules, which serve as a legal framework for the admission, examination and evaluation of the evidence presented before the court. These rules vary depending on the national legislation and contribute to the process of formalization of the procedure. However, it must be highlighted that even though the form is essential to the proceedings, the civil procedure cannot and must not be reduced to the form alone.⁴ The formalization is imposed as a necessity in order to provide optimal content: the process of gathering the factual and evidentiary material has to be organized in a way which unbridles the burden of the court and places it primarily on the parties and their representatives.⁵ To achieve the intended level of effectiveness, this should be concentrated as much as possible in the preparatory hearing of the proceeding. The regulation of the rules of the evidence calls upon the epic odyssey of the oral and the written form of the proceedings which, retrospectively, are in a constant interplay. However, the goal remains the same: the pursuit of truth which will enable effective administration of justice.

Regarded as a subjective reflection of the objective reality, the concept of 'truth' is influenced by many contributive factors. In that regard, Engels imposes a very important question, "whether any, and if so which, products of human knowledge ever can have sovereign validity and an unconditional claim to truth."⁶ However, the absolute truth, or in the words of Engels - "the sovereignty of thought", cannot be fully realized "except through an endless eternity of human existence".⁷ Therefore, the idea of achieving absolute truth in civil proceedings remains even more unattainable. Within the court proceedings, the evidentiary rules are essential in getting the judge's perspective as close to the objective truth as possible. The legislator tailors the rules by choosing which principle of litigation process will prevail while achieving the highest degree of procedural economy. Different civil procedural systems may be characterized with

² Hock Lai, H., *A Philosophy of Evidence Law: Justice in the Search for Truth*, Oxford University Press, 2008, p. 6.

³ *Loc. cit.*

⁴ Georgievski, S., *Basic principles for a civil procedure law: Reform of Civil Procedure in the Republic of Macedonia*, Faculty of Law 'Iustinianus Primus' in Skopje, Ss. Cyril and Methodius University in Skopje, Republic of Macedonia, Skopje 1995, p. 93.

⁵ *Loc. cit.*

⁶ Engels, F., *Anti-Dühring*, Moscow, 1959, p. 79.

⁷ *Loc. cit.*

significant disparities, mainly because of the historical approach in the distinction between the Common Law and Civil Law families.⁸

North Macedonia is traditionally counted among the countries that belong to the civil law system. In retrospect, the Macedonian civil procedure was defined as inquisitorial and dominantly governed by the principle of oral form. However, as the social and economic changes required a procedure that would be an expression of contemporary needs, the prevalent principles evolved over time. As a holder of judicial power, the court proceeded to hold a monopoly over the implementation of the law, but the collection of evidence and fact-finding are left to the litigants themselves.⁹ The principle of written communication was straightened, mainly by transferring the activities to the preliminary procedure, which disburdens the main hearing, which, as a central stage of the legal proceedings, involves the most expenses.¹⁰ The court continued to maintain order during proceedings, and should decide whether some issues could be raised, that is, it decides on objections made in connection with the witness hearing.¹¹ Nonetheless, even the regime for witnesses who are orthodoxly examined orally has been increasingly raised as a question recently. There is an occurring tendency in the European regulations,¹² as well as some of the countries with traditional civil law systems,¹³ to introduce written witness statements in civil proceedings.

The aim of the paper is multi-dimensional, but the center of gravity are the written statements of the witnesses and their implication in practice. For that purpose, an evaluation of the European framework will be made, especially through the prism of ELI-UNIDROIT Model Rules of Civil Procedure (ELI-UNIDROIT MERCP).¹⁴ Furthermore, a comparative analysis will contribute to the understanding of the use of written witness statements in practice. Finally, the Macedonian legislation will be presented, by making a retrospective overview of the witnesses as a means of evidence and elaborating the possibility of introducing the written witness statements in Macedonian civil procedure. Therefore, the odyssey of the written witness statements continues in the sound

⁸ van Rhee, C. H., *Civil procedure beyond national borders*, Access to justice in Eastern Europe, Issue No. 1/2018, 2018, p. 15.

⁹ Georgievski, *op. cit.* note 5, p. 122.

¹⁰ *Loc. cit.*

¹¹ *Loc. cit.*

¹² For example, the ELI-UNIDROIT Model European Rules of Civil Procedure.

¹³ For example, Germany, Netherlands, France, Italy, Poland, Serbia, see Part 3 of the paper "COMPARATIVE OVERVIEW OF THE WRITTEN WITNESS STATEMENTS".

¹⁴ Model European Rules of Civil Procedure (ELI-UNIDROIT, Oxford University Press, 2021) (hereinafter: ELI-UNIDROIT MERCP).

of the question that echoed through history - which one should prevail, the principle of orality or the principle of written form of the civil proceedings?

2. REFLECTIONS OF THE ELI-UNIDROIT MODEL RULES OF CIVIL PROCEDURE

In order to increase efficiency, minimize costs and modernize civil procedure by implementing information and communications technology (ICT) applications, many countries are reforming their national legislations, thus, the European Union (EU) law is becoming increasingly significant.¹⁵ From that point of view, the ELI-UNIDROIT MERCIP are crucial in the process of harmonization of the European civil legislations. Published in 2021, they aim at adopting the ALI-UNIDROIT Principles of Transnational Civil Procedure to a European perspective in order to decrease the uncertainties of the parties litigating in unfamiliar settings.¹⁶ The adoption was developed in the light of *i*) the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union; *ii*) the wider *acquis* of binding EU law; *iii*) common traditions in the European countries; *iv*) the Storme Commission's work; and *v*) other pertinent European sources.¹⁷ However, it has to be highlighted that the main goal of the ELI-UNIDROIT project is to take the best European practices as a touchstone regarding fairness, efficiency and speediness rather than to make rules that are acceptable in all of the European states.¹⁸ According to the above-mentioned sources, the goal of reaching the highest quality of justice is attainable by avoiding a specific emphasis on either oral or written form of the proceedings.¹⁹

The crystalized form of either of the principles is found only in specific stages in the proceedings. Regarding witness statements, the ELI-UNIDROIT MERCIP provide that 'ordinarily, witness evidence should be received orally. The court

¹⁵ Kramer, X., *Towards ELI-Unidroit Model Rules of Civil Procedure: Basic Premises and Challenges*, paper presented at the Bay Area Civil Procedure Forum, Hastings (San Francisco), 2016, p. 1.

¹⁶ ELI-UNIDROIT Model European Rules of Civil Procedure Dissemination Conference, February 2024, <https://www.uiehj.com/2024/02/06/eli-unidroit-model-european-rules-of-civil-procedure-dissemination-conference/> March, 2024.

¹⁷ See: ELI-UNIDROIT Model European Rules of Civil Procedure, <https://www.europeanlawinstitute.eu/projects-publications/publications/eli-unidroit-model-european-rules-of-civil-procedure/>, 29 April, 2024.

¹⁸ van Rhee, C. H., *Towards harmonized European rules of civil procedure: obligations of the judge, the parties and their lawyers*, Access to Justice in Eastern Europe, Issue No. 1(6)/2020, 6-33, p. 8.

¹⁹ ELI-UNIDROIT MERCIP, p. 73.

may, however and upon having received submissions from the parties on the issue, require that such evidence be given initially in writing.²⁰ Therefore, it can be seen that the oral witness statement is prescribed as a general norm, however, in exceptional situations the court may accept written evidence instead. In such circumstances, some of the deciding factors could be the complexity of the litigation, as well as the improvement of the case management of the case.²¹ The oral hearing of the witnesses is one of the purest manifestations of the adversarial principle, deeply rooted in the jurisprudence of the European Court of Human Rights (ECHR). The right to adversarial trial, in the words of the ECHR, “means the opportunity for the parties to have knowledge of and comment on the observations filed or evidence adduced by the other party.”²²

However, such exceptions may be permitted only in accordance with Rule 18 of the ELI-UNIDROIT MERCIP which refers to the oral and written form of the proceedings. In this rule, both of the forms are included by blending their benefits and applying them in different stages of the proceeding. Rule 18(1) expresses a particular preference to the written form in the initial phase of the proceedings, taking into consideration that written factual and evidential contentions are strong prerequisites for achieving accuracy in timely and cost-effective manner.²³ Regarding the witness statements, Rule 18 further provides that the court has discretion to allow evidence to be given by witness statements, to require it to be given orally or to combine the both approaches. However, if ‘a party requests it, the court must permit oral argument, and may permit oral examination.’²⁴ The flexibility is enshrined due to the tendency of the majority of European jurisdictions of reducing litigation time and cost while ensuring proportionality between the form of the procedure and the nature of the proceedings.²⁵ In other words, the rules are conceived to avoid the rigid form of the proceeding, while adhering to the fundamental rights requirements.²⁶

²⁰ ELI-UNIDROIT MERCIP, Rule 115(1).

²¹ In regards to these circumstances, the comment of the ELI-UNIDROIT MERCIP makes reference to Articles 4.4-4.10 of the IBA Rules on the Taking of Evidence in International Arbitration (2021) which elaborate the possibility of the parties to submit witness statements by each witness on whose testimony they intend to rely, the content of the statement, the situation if the party fails to appear at the evidentiary hearing etc. This may be regarded as *bona fide* to adapt the evidence-gathering strategies that proved to be effective in arbitration; ELI-UNIDROIT MERCIP, p. 240.

²² Judgment of the European Court of Human Rights, Application no. 12952/87, Case of Ruiz-Mateos v. Spain, 23 June 1993, para. 63

²³ ELI-UNIDROIT MERCIP, p. 73-74.

²⁴ ELI-UNIDROIT MERCIP, Rule 18(2).

²⁵ ELI-UNIDROIT MERCIP, p. 75.

²⁶ *Loc. cit.*

The court's dispositions and obligations prescribed in Rule 18 are further confirmed in Rule 115. First and foremost, as a norm, it is provided that 'witness evidence should be received orally.'²⁷In case the court allows the witness statements to initially be submitted in writing, the other parties have to be supplied with such evidence in advance of the hearing where the witness will give oral evidence.²⁸ This provision encapsulates the fundamental principle '*audiatur et altera pars*' according to which the parties must have an equal opportunity to be heard and their arguments considered under the law.²⁹ This principle may also entail direct examination of evidence,³⁰ hence, the importance of the oral statement of the witness.

3. COMPARATIVE OVERVIEW OF THE WRITTEN WITNESS STATEMENTS

Without doubt, each country aims at developing a legal system founded on the principles of the rule of law which enables the parties to efficiently pursue justice through the courts. In an effort to obtain that aim, the countries undertake different approaches which are under the influence of their historical, cultural and societal backgrounds. The comparative overview is essential in making assessments about the advantages and disadvantages of a particular legal solution and determining the best practices. For the purposes of the paper, an overview of the presence or absence of the written witness evidence will be made in several countries, with focus on the legislative regulations which introduced written witness statements in their civil procedure.

Generally, written witness statements are characteristic for the common law system, hence, the European countries that belong to the civil law system did not originally prescribe them in their legislations. The greatest influence was made by the Austrian civil procedural law, as it proved to be authoritative and exemplary for a long period of time. In that regard, the first country of observation will be Austria. Found in the constitution, the principle of orality is definitely one of the fundamental principles of the Austrian civil procedural

²⁷ ELI-UNIDROIT MERC, Rule 115(1).

²⁸ *Loc. cit.*

²⁹ Fellmeth, A. X.; Horwitz, M., *Guide to Latin in International Law*, 1 ed., Oxford University Press, 2009; "May the other side also be heard.", p. 41.

³⁰ Zabłocka, M., U ŻRÓDEŁ ZASADY 'AUDIATUR ET ALTERA PARS', *Zeszyty Prawnicze*, 16(4), 2017, p. 5–10.

law.³¹ Therefore, as a consequence of the principle of orality and directness, the parties do not exchange written evidence from witnesses prior to trial.³² Witnesses have to give their statements orally, since written testimony is not admissible before the Austrian courts.³³ The admission of such testimony would be contrary to the principle of immediacy and would constitute a substantial defect of the proceedings.³⁴ In sum, witnesses are obliged to appear, to testify orally, and to swear an oath.³⁵

However, comparative practice shows the increased tendency of introducing written witness statements as a substitute for the oral examination for achieving higher efficiency. One of the countries which incorporated the possibility of submitting written witness statements is Germany. The German Code of Civil Procedure³⁶ is based on combination of the oral and written form of the proceedings. Primarily, the principle of orality is accepted as a general rule.³⁷ However, when the public interest in an accelerated process outweighs the advantages of oral proceedings, the German Code of Civil Procedure departs from the principle of orality.³⁸ An interesting example in that regard is Section 377(3) which gives the court discretion to decide whether the evidence may be answered in writing, taking into consideration the nature of the content of the question and the characteristics of the personality of the witness.³⁹ However, such action bears the risk that the court might not obtain “authentic impression of

³¹Nunner-Krautgasser, B.; Anzenberger, P., *Evidence in Civil Law – Austria, Lex localis*, Book series Law & society, Maribor: Institute for Local Self-Government and Public Procurement, 2015, p. 5.

³²Oblin, K.; Neuburger, P., Q&A: conducting litigation in Austria, 2022, <https://www.lexology.com/library/detail.aspx?g=c001f3a8-dbb4-4e1d-868f-10abbb4708ca>, 29 April, 2024.

³³Bielez, H.; Krepil, P.; Peschek, E., *Litigation & Dispute Resolution Laws and Regulations Austria 2024*, <https://iclg.com/practice-areas/litigation-and-dispute-resolution-laws-and-regulations/austria>, 29 April, 2024.

³⁴Nunner-Krautgasser, Anzenberger, P., *op. cit.* note 32, p. 31.

³⁵*Ibid.*, p. 25.

³⁶ Code of Civil Procedure as promulgated on 5 December 2005 (Bundesgesetzblatt (BGBl., Federal Law Gazette) I page 3202; 2006 I page 431; 2007 I page 1781), last amended by Article 1 of the Act dated 10 October 2013 (Federal Law Gazette I page 3786) and Book 10 last amended by Article 1 of the Act of 5 October 2021 (Federal Law Gazette I, p. 4607) (hereinafter: German Code of Civil Procedure).

³⁷ German Code of Civil Procedure, Section 128(1): “The parties shall submit their arguments regarding the legal dispute to the court of decision orally.”

³⁸ In some cases, it is up to the parties to choose the form (see: Section 128 of the German Code of Civil Procedure - Principle of oral argument; proceedings conducted in writing), in other cases the written form is obligatory (see: Section 251a, Section 307(2), Section 331(3), Section 331 of the German Code of Civil Procedure) - Wolf, C.; Zeibig, N., *Evidence in Civil Law - Germany, Lex localis*, Book series Law & society, Maribor: Institute for Local Self-Government and Public Procurement, 2015, p. 15.

³⁹Section 377(3) German Code of Civil Procedure.

the witness”.⁴⁰ For that reason, it has to be put into the witness’s attention that he may be summoned to be examined as a witness in order to “further clear up the question regarding which evidence is to be taken”.⁴¹ On the other hand, the parties are also entitled to ask the court to summon the witness in order to exercise their right to ask questions.⁴² Therefore, it can be concluded that written witness statements are not commonly used in German civil procedure,⁴³ even though the possibility exists. An interesting observation is that the effort to alleviate proof through restricted exceptions is a result of the German law’s rational formalism.⁴⁴ While these exceptions may guarantee legal certainty and equal application of the law, their application is limited due to the fact that such alleviations of proof are often based on judge-made concepts, rather than explicit law provisions.⁴⁵

From historical point of view, it seems that the Dutch civil procedure has always been more focused on documentary evidence.⁴⁶ It is even becoming more common to submit a written witness statement, which was traditionally mostly given orally.⁴⁷ This opportunity has its own advantages, especially when dealing with cross-border matters.⁴⁸ In this regard, a question may rise on the classification of the written witness statement: whether it is a witness evidence or documentary evidence. In the statutory sense, “witness evidence” refers only to oral statements given under oath before a court.⁴⁹ Therefore, the statement in writing submitted by a party which contains depositions of a witness should be

⁴⁰ Wolf; Zeibig, *op. cit.* note 39, p. 42.

⁴¹ *Loc. cit.*

⁴² Section 397 of the German Code of Civil Procedure.

⁴³ Although, “in interim relief proceedings, the parties may additionally rely on affidavits (i.e., a written witness statement given under penalty of criminal liability)” - Schrader, M.; Schmidt, J.; Wachtel, S.; Nettlau, H.; Peitzmeier, F.; Dietrich, M., *Introduction to German Civil Procedure 3: How Evidence in a German Civil Litigation Works*, German Law Series, 2023, p. 4, 5.

⁴⁴ Scherpe, J. C., *Alleviations of Proof in German and English Civil Evidence*, The Rabel Journal of Comparative and International Private Law, Bd. 80, H. 4, Oktober 2016, p. 888-925, p. 921.

⁴⁵ *Loc. cit.*

⁴⁶ Meerdink, E., In review: court procedure in Netherlands, 2022, <https://www.lexology.com/library/detail.aspx?g=c5b5b499-f150-42a9-aad9-e23bba430ae1>, 29 April, 2024.

⁴⁷ Borrius, Y.; Jager, C.; Buziau, E.; Balkema, M., *Litigation: The Netherlands*, The Legal 500 Country Comparative Guides, Legalease, 2023, p. 6.

⁴⁸ Roosjen, R., Examination of witnesses in the Netherlands, <https://www.maak-law.com/examination-of-witnesses-in-the-netherlands/>, 29 April, 2024.

⁴⁹ Driessen, G.; Saïd, N., *Rules of Evidence (Civil Proceedings) in the Netherlands: Overview*, Thomson Reuters, 2023, p. 6.

regarded as documentary (written) evidence.⁵⁰ Nonetheless, the judge will order an oral hearing if the party requests it or if the judge orders it *ex officio*.⁵¹

Similarly, perhaps even more prominently, the French civil procedure is marked by a strong preference of the written form and the tendency to avoid factual situations which are difficult to evaluate.⁵² The use of written statements was established in practice far before the New Code of Civil Procedure gave them an official legal framework.⁵³ Therefore, it is standard practice for parties to submit written statements by witnesses (“certificates” or “*attestations de témoins*”) as evidence.⁵⁴ The certificates can be “produced by the parties or at the request of the judge”.⁵⁵ The French Code of Civil Procedure prescribes the requirements of a valid certificate,⁵⁶ however, the failure to comply with the requirements does not by default mean its invalidation. It is up to the court to decide whether the written statements which are not in conformity with the prescribed content should be considered as evidence.⁵⁷ In any case, the judge can always hear the author of the certificate by way of an investigation.⁵⁸ It is important to point out

⁵⁰ van Rhee, C. H., *Evidence in civil procedure in the Netherlands: Tradition and Modernity, Evidence in Contemporary Civil Procedure Fundamental Issues in a Comparative Perspective*, Intersentia, Cambridge, Antwerp, Portland, 2015, p. 275; Roosjen, R., *Evidence in Dutch Civil Law*, 2023, <https://www.maak-law.com/evidence-in-dutch-civil-law/>, 29 April, 2024.

⁵¹ Art. 166. Dutch Code of Civil Procedure, <https://www.wipo.int/wipolex/en/text/228264>, 29 April, 2024.

⁵² Beardsley, J., *Proof of Fact in French Civil Procedure*, The American Journal of Comparative Law, Vol. 34, No. 3, Oxford University Press, 1986, p. 459.

⁵³ Oudin, M., *Evidence in Civil Law – France*, Lex localis, Book series Law & society, Maribor: Institute for Local Self-Government and Public Procurement, 2015, p. 35; Code de procédure civile available on the French law official website, Legifrance: https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070716/LEGISCTA00006149656/#LEGISCTA000006149656, 29 April, 2024, (hereinafter: French Code on Civil Procedure).

⁵⁴ Laude, O., Renard, B., Rigaud, C., *Litigation & Dispute Resolution Laws and Regulations France 2024*, <https://iclg.com/practice-areas/litigation-and-dispute-resolution-laws-and-regulations/france>, 29 April, 2024.

⁵⁵ French Code on Civil Procedure, Article 200; It is interesting to point out that the French law official website has provided “*model attestation de témoin N° 11527*03*”: https://www.formulaires.service-public.fr/gf/cerfa_11527.do, 29 April, 2024.

⁵⁶ Art. 202. of the French Code on Civil Procedure

⁵⁷ Deloitte Touche Tohmatsu Limited, *Written Statements as Evidence Final Report*, European Union Intellectual Property Office, https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/about_euipo/boards_of_appeal/studies/Written_Statements_as_evidence_en.pdf, 29 April, 2024; Oudin, M., op. cit. note 54, p. 35, 36.

⁵⁸ Art. 203 of the French Code on Civil Procedure

the role of the *huissiers*, known as “professional witnesses” which, *inter alia*, can prepare written witness statements (“*constats*”).⁵⁹

In Italy, the implementation of the “Cartabia reform” significantly altered civil justice, with the aim of making the proceedings more efficient and less costly. The constant use of electronic means and the need for digitalization are definitely among the main contributors to the reform. Now, for example, the judge can order the holding of the hearing by means of remote audio-visual⁶⁰ or to replace it by the filing of written notes⁶¹ provided that some specific conditions are satisfied. This novelty can be regarded as a string of enhancement of the principle of written form. Nonetheless, regarding the written form of the witness statements, Article 257-bis is crucial. Under this article, it is provided that the judge may, with agreement of the parties, order the taking of testimonial by requiring the witness to provide, in writing and in fixed deadline, the answers of the questions on which he has to be examined. The witness has to answer each question, sign the deposition with his authenticated signature on each side of the testimony sheet and send it in a sealed envelope. Authentication can be carried out by a notary or any other public official, otherwise, the testimony will be tainted by nullity.⁶² This provision is introduced as a result of Law 69/2009, on the basis of the institute “affidavit” which is well-established in the Anglo-Saxon system.⁶³ However, it has to be highlighted that normally, witnesses give their testimonies orally.⁶⁴

Serbia is a compelling example from the ex-Yugoslavian countries which implemented the written witness statements in their civil procedure in 2011. The legislator provided that, in addition to oral testimony, as a classic means of evidence, and instead of the direct hearing of witness in the proceedings, documents containing the statement of a person who has a sensory knowledge of disputed legal matters which are subject of proof can be used in a form of a

⁵⁹ “The constat is a (usually written) report relating “a certain number of [factual elements] likely to lead to legal consequences” in order to preserve them as evidence.” - Emerson, W. R., *The French Constat: Discovering More Efficient Discovery*, Boston University International Law Journal, Vol. 36, No. 1, 2018, p. 2.

⁶⁰ Article 127(3) of the Italian Civil Procedure Code 2023, <https://www.brocardi.it/codice-di-procedura-civile/>, 29 April, 2024.

⁶¹ Article 127*bis* and 127*ter* of the Italian Civil Procedure Code

⁶² Explanation of the art. 257 *bis* Code of Civil Procedure, https://www.brocardi.it/codice-di-procedura-civile/libro-secondo/titolo-i/capo-ii/sezione-iii/art257bis.html?utm_source=internal&utm_medium=link&utm_campaign=articolo&utm_content=nav_art_succ_top, 29 April, 2024.

⁶³ *Loc. cit.*

⁶⁴ Michele, S., Evidence in civil proceedings in Italy, <https://www.lexology.com/library/detail.aspx?g=b352ecc3-2741-41b5-becf-9ed7526118ec>, 29 April, 2024.

written statement, audio recording or optical recording.⁶⁵ The written statement of the witness must be certified in court or by a person exercising public authority.⁶⁶ However, the probative value of such document is significantly reduced since the court is unable to directly examine the witness credibility, thus, the witness is not at disposal to the opponent for cross-examination.⁶⁷ Consequently, even though these provisions were implemented for speeding up the procedure and reducing the costs, written witness statements are used as an exception to the adversarial principle of oral witness examination.⁶⁸

Written proceedings are gradually characterizing the Polish civil procedure.⁶⁹ Poland is an example of a country which incorporated the written witness statements in its legislation in the recent past. In 2019, the legislator introduced the possibility of taking evidence from witness examination in writing during the trial.⁷⁰ Namely, if the court decides, the witness shall testify in writing, by taking and signing an oath. The witness has an obligation to submit the text of the testimony to the court within the time limit set by the court.⁷¹ This is the only instance in which witnesses are allowed to submit their statements in writing.⁷² Previously, the written witness statements were only provided for in the European Small Claims Procedure, therefore, their introduction to civil procedure can be regarded as extension of the use of the already existing

⁶⁵Article 245(2) of the Serbian Code of Civil Procedure, ("Official Gazette of RS", no. 72/2011, 49/2013 - US decision, 74/2013 - US decision, 55/2014, 87/2018, 18/2020 and 10/2023 - other laws) (hereinafter: Serbian Code of Civil Procedure)

⁶⁶Article 245(2) of the Serbian Code of Civil Procedure

See also: Law on Public Records, ("Official Gazette of RS", no. 31/2011, 85/2012, 19/2013, 55/2014 - other laws, 93/2014 - other laws, 121/2014, 6/2015 and 106/2015), Article 88(1): "In the form of a notary's record ... a notary public can: ... 2) under the conditions stipulated in the law governing civil proceedings, within the framework of the legal aid procedure, hear a witness whose testimony is required or will be required in non-litigation or administrative proceedings".

⁶⁷Petković, I.; Stepanović, D., *Written statements of witnesses in civil and arbitration proceedings*, JPM Partners, Delta House, 2023, p. 5.

⁶⁸*Ibid*; Marosiuk, L., Stanković, N., Pendjer, S., Q&A: conducting litigation in Serbia, <https://www.lexology.com/library/detail.aspx?g=11a5cb35-3df4-4bf3-97ba-f81b762952f9>, 29 April, 2024.

⁶⁹Góra-Błaszczkowska, A., Oral and Written Proceedings in Polish Civil Procedure, <https://www.uv.es/coloquio/coloquio/comunicaciones/pi1gora.pdf>, 29 April, 2024.

⁷⁰Biała, M., Evidence from witness testimony in court proceedings in practice, Wolters Kluwer, OpenLEX, <https://sip.lex.pl/komentarze-i-publikacje/komentarze-praktyczne/dowod-z-zeznan-swiaodka-w-postepowaniu-sadowym-w-470139435>, 29 April, 2024.

⁷¹Art. 271¹ Polish Code of Civil Procedure, [https://sip.lex.pl/akty-prawne/dzu-dziennik-ustaw/kodeks-postepowania-cywilnego-16786199?unitId=art\(271\(1\)\)](https://sip.lex.pl/akty-prawne/dzu-dziennik-ustaw/kodeks-postepowania-cywilnego-16786199?unitId=art(271(1))), 29 April, 2024.

⁷²"Exception applies to mute and deaf people, cf. Art. 271 § 2 of the Code of Civil Procedure" - Rafał, L., *Written Witness Testimony*, Scientific Journal of Bielsko-Biala School of Finance and Law, 2022, nr 4, s. 26-29, bibliogr. 22 poz. Zeszyty Naukowe / Wyższa Szkoła Finansów i Prawa w Bielsku Białej, p. 26.

institute.⁷³ Even though they are used as exception, there is no doubt that the written testimonies are incarnation of the principle of written form. The most recent amendments of the Polish Code of Civil Procedure⁷⁴ demonstrate another way of evolution of both of the written and oral form: on one hand, electronic service of documents by an ICT service is enabled,⁷⁵ which presents the evolution of the written form – from paper based to electronic form. On the other hand, remote meetings are allowed by using technical devices enabling it to be held remotely,⁷⁶ which represents evolution on the oral form of the proceeding.

In England, until the beginning of the 1980s, the “gold standard” was that witnesses gave oral testimony and were examined directly before the court.⁷⁷ Written witness statements started being used in the 1990s and nowadays, their use became general practice in the English courts.⁷⁸ The Civil Procedure Rules⁷⁹ provide that any fact which needs to be proved by witnesses as means of evidence can be proved at trial, by their oral evidence in public and at any other hearing, by their evidence in writing.⁸⁰ A written witness statement is defined as “written statement signed by a person which contains the evidence which that person would be allowed to give orally.”⁸¹ It has to contain a statement of truth by the witness in their own language that they believe the facts in it are true.⁸² Therefore, the intention of the written statements is for the parties to become familiar with the content in order to expedite the proceedings. From 2021, witness statements are subject to additional requirements provided in the

⁷³*Ibid.*, p. 26.

⁷⁴ In March 2024, another set of amendments to the Polish Code of Civil Procedure entered into force, introduced by the Act of 7 July 2023 amending the Polish Code of Civil Procedure.

⁷⁵ Article 131¹, Article 131^{1a}. Polish Code of Civil Procedure

⁷⁶ Article 151(2) of the Polish Code of Civil Procedure

⁷⁷ Hawthorne, M., New English court witness statement rules have positive early effect, 2022, <https://www.pinsentmasons.com/out-law/analysis/new-english-court-witness-statement-rules-have-positive-early-effect>, 29 April, 2024; Rubino-Sammartano, M., Witness Statements: A Useful Tool or an Obstacle?, 2020, <https://littletonchambers.com/articles-webinars/witness-statements-a-useful-tool-or-an-obstacle/>, 29 April, 2024.

⁷⁸*Ibid.*

⁷⁹ Civil Procedure Rules, Part 32 – Evidence, Rule 32.2, <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part32#32.4>, 29 April, 2024, (hereinafter: Civil Procedure Rules).

⁸⁰ Part 32 – Evidence, Rule 32.2. of the Civil Procedure Rules

⁸¹ Rule 32.4. of the Civil Procedure Rules

⁸² Practice Direction 32 (hereinafter: PD32), https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part32/pd_part32#fn13 29 April, 2024; Rule 20: ‘I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.’, Rule 20.2.

Practice Direction 57.⁸³ The goal of PD57 “is to eradicate the improper use of witness statements as vehicles for narrative, commentary and argument”.⁸⁴ Furthermore, a distinction has to be drawn between a witness statement and an affidavit, even though they are often used interchangeably in common vocabulary. The affidavit is understood as a written, sworn statement of evidence.⁸⁵ Instead of statement of truth, it contains a jurat, which is a clause at the foot of an affidavit that authenticates it by showing when, where and before whom the actual oath was sworn or affirmed.⁸⁶

The conclusion that can be drawn is that written witness statements are an overwhelming trend reflected in the European civil procedural systems. Each country has undertaken different approach in regulating this matter, thus, their cultural and legal background are immensely important in the process of drafting and implementing the provisions.

4. THE NORTH MACEDONIAN PERSPECTIVE ON (WRITTEN) WITNESS STATEMENTS

The perspective of North Macedonia on the written witness statements can be regarded from two points of view: the current regulation of the witness statements in North Macedonia and the written witness statements with the new Macedonian Law on Civil Procedure.

4.1. The current regulation of the witness statements in North Macedonia

In North Macedonia, currently, written witness statements are inadmissible as evidence. The Macedonian Law on Civil Procedure,⁸⁷ diligently tailored after the Austrian example, prescribes orality as dominant principle by stating that “the court decides on the claim, as a rule, on the basis of an oral, direct and public hearing.” The provision demonstrates that the principle of orality is accepted as

⁸³ PRACTICE DIRECTION 57AC (hereinafter: PD57), <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-57a-business-and-property-courts/practice-direction-57ac-trial-witness-statements-in-the-business-and-property-courts#6>, 29 April, 2024

⁸⁴ *Mansion Place Limited v Fox Industrial Services Limited*, Case No: HT-2021-000033, [2021] EWHC 2747 (TCC), 199 Con LR 124, para. 37.

⁸⁵ Civil Procedure Rules - Glossary, available at the Official Ministry of Justice website, <https://www.justice.gov.uk/courts/procedure-rules/civil/glossary>, 29 April, 2024.

⁸⁶ para. 5.1.PD32

⁸⁷ Law on Civil Procedure (Official Gazette, No. 79/2005; 110/2008; 83/2009; 116/2010; 124/2015) (hereinafter Macedonian Law on Civil Procedure).

rule and the principle of written form is accepted as an exception. This is followed by the rule that the parties can take procedural actions in writing outside the hearing or orally at the hearing, provided that explicit form in which the procedural action can be taken is not provided by law.⁸⁸

Undoubtedly, the procedural actions can be taken orally or in writing. It is a question of choosing a working method in the procedure, and this, as can be concluded, is done between orality and writing as forms in which procedural actions can be performed.⁸⁹ However, having in regard the complexity of the procedure, none of these principles can be accepted to an extreme extent. For that reason, the Macedonian Law on Civil Procedure accepts both principles in combination – principle of orality is represented in the first-degree procedure, while principle of written form is characteristic for the procedure for legal remedies; principle of orality is fully accepted on the main hearing, while the principle of written form is highlighted in the preliminary procedure; in higher instances, principle of orality is enshrined as exception – if the Appellate court decides to schedule a hearing. Therefore, the witnesses in the Macedonian civil procedure are orthodoxly regarded as means of evidence which are archetypes of the principle of orality. This is confirmed by the legislative language used in the Macedonian Law on Civil Procedure, the lack of explicit provisions for written witness statements and the absence of court practice.

In the provisions which refer to the witnesses, the legislator operates with the phrase “to be heard as a witness”.⁹⁰ That is due to the fact that the only way in which witnesses can testify is orally, by direct examination by the court. There are some exceptions. Firstly, if the witness is deaf, he will be asked questions in writing and if he is mute, he will be asked to answer in writing. If the hearing cannot be conducted in this way, an interpreter will be called.⁹¹ If the court, contrary to the provisions of this law, refused the request of the party in the proceedings to provide an interpreter, and the party appeals, that will constitute a substantial violation of the provisions of the civil procedure.⁹² Secondly, the witnesses who, due to old age, illness or serious physical defects, cannot attend the summons, will be heard in their apartment or in the place where they are located.⁹³ The hearing may be conducted through a requested judge as well.⁹⁴ In any case, the judge who is conducting the hearing must respect the party's right

⁸⁸Article 13 of the Macedonian Law on Civil Procedure

⁸⁹ Georgievski, S., *op. cit.* note 5, p. 90.

⁹⁰ See: Articles 220-234 of the Macedonian Law on Civil Procedure

⁹¹Article 230(2) of the Macedonian Law on Civil Procedure

⁹²Article 343(2) point 8 of the Macedonian Law on Civil Procedure

⁹³Article 227(2) of the Macedonian Law on Civil Procedure

⁹⁴ See: Article 119(4), Article 210 of the Macedonian Law on Civil Procedure

to ask questions of witnesses. Otherwise, that will constitute a substantial violation of the provisions of the civil procedure.⁹⁵ In the first exception, the witness statements are taken in written form, but only because of the witnesses' inability to be taken orally, thus, they are taken directly at the moment when the hearing is being conducted. However, the parties and witnesses were not obliged to submit the written form before the hearing and subsequently, the opposing parties and their representatives were not previously familiar with the content of the statements. For that reason, it cannot be argued that written witness statements are accepted in Macedonian civil procedure in such situations. In the second exception, the principle of orality is preserved by the right of the parties or their representatives to directly ask questions of the witness.⁹⁶ The only obligation which the party proposing a certain person to be heard has is to designate what he should testify about, to state his first and last name, occupation and place of residence.⁹⁷ It can be observed that the party that proposes the witness only states the legally relevant facts on which the witness is going to testify,⁹⁸ without revealing the whole content of the statement or sending it in a written form.

The legal weight of the form in which the procedural actions are taken is perceived through the consequences of its violation. Therefore, some points should be noted. Primarily, the obligation to testify is a civil duty which has to be respected, because in contrary, the court may order that the witness be brought compulsorily and bear the costs of bringing him, and may also to punish him with a fine in accordance with law.⁹⁹ Considering that the infringements of the oral form of the procedural actions constitute substantial violations of the provisions of the civil procedure, it can be concluded that the legislator puts immense value to this principle.¹⁰⁰

⁹⁵Article 343(2) point 16 of the Macedonian Law on Civil Procedure

⁹⁶Article 287 of the Macedonian Law on Civil Procedure

⁹⁷Article 226 of the Macedonian Law on Civil Procedure

⁹⁸Janevski, A.; Zoroska-Kamilovska, T., *Civil Procedural Law*, 1st Book, Second Revised and Supplemented Edition, Skopje, 2012, p. 332.

⁹⁹Article 233(1) of the Macedonian Law on Civil Procedure,

¹⁰⁰ See: article 343 of the Macedonian Law on Civil Procedure: "(2) A substantial violation of the provisions of the civil procedure always exists, if: 1) the court was constituted irregularly, or if a judge or a lay judge who did not participate in the main hearing in accordance with Article 301 of this law participated in the rendering of the verdict, or if a person who did not have the capacity of a judge or a lay judge participated in the rendering of the verdict; ... 7) a party has not been given the opportunity to argue before the court due to illegal actions, and especially by missing service of documents; ... 8) contrary to the provisions of this law, the court refused the request of the party in the proceedings to provide an interpreter, and the party is complaining about that; 9) the court rendered a verdict without a main hearing, and was obliged to hold a main hearing; ... 16) contrary to the provisions of articles 244 and 287 of this law, the court violated the right of a party to ask questions of the opposing party, witnesses and experts"

4.2. The written witness statements with the new Macedonian Law on Civil Procedure

Having in regard the emerging trend of incorporating written witness statements in civil procedural jurisdictions and the need of expediting the proceedings, witness statements are subject to changes in the proposal of the new Macedonian Law on Civil Procedure. At the moment of writing the paper the new Macedonian Law on Civil Procedure is still pending in Parliament, even though it passed the stage of public debate. However, it is important to highlight that it introduces novelties regarding witness evidence by integrating written witness evidence in the Macedonian civil procedure. For that purpose, the expecting novelties will be previewed.

Namely, the newly inserted part “Written witness statements” contains the provisions regulating the matter. The legislator begins by providing that the court may decide instead of a hearing, to read the written statement submitted in accordance with the law. Nonetheless, the court must hear the witness if one of the parties requests a hearing. However, if the court evaluates that the hearing of the witness did not contribute to establishing the decisive facts, the party which requested such hearing will have to bear all the costs connected to it. From this nomotechnique of the legislator, it remains unclear whether the parties or witnesses must submit written statements together with the other documents of the case or whether they can decide if they would like to submit such statements in addition to the other documents.

Furthermore, it is provided that the party may submit written statement confirmed by a qualified electronic signature¹⁰¹ of the proposed witness or a handwritten signature certified by a notary, upon summons or with the consent of the court. In case the court calls the party to submit a written statement from the witness it proposed, but the it does not do so, the court will take the evidence by hearing the proposed witness, only if the party makes it probable that the attempt to secure a written statement from the witness was unsuccessful. There are some important remarks that can be concluded from these legal solutions. First, the use of electronic signature is enshrined by equating its probative value with the probative value of the handwritten signature certified by a notary, which is a step towards digitalization made by the Macedonian legislator. Second, even though the signature can be certified by a notary, this does not by any mean add another

¹⁰¹ A difference has to be drawn between “electronic signature” and “qualified electronic signature”, see Article 3(1) points 18 and 29 from the Law on Electronic Documents, Electronic Identification and Confidential Services, (Official Gazette, 101/2019; 275/2019).

(new) authority to notaries as trustees of the court.¹⁰² Third, if the court or the opposing party requests written statement and such statement is not provided, the witness will lose the right to appear and testify before the court. This is stipulated in order to avoid any possible dilatory tactics on behalf of the parties, their representatives or the witnesses.

The court may also directly call the person who has been proposed as a witness to give a written statement or answer certain questions, especially if, considering the substance of the questions or the person who has been proposed as a witness, it considers that this way of reporting the facts is enough. In the subpoena, the court must warn the witness that he may be called to testify in court even if he gives a written statement. By providing this, the legislator balances between the oral and the written form in the civil proceedings.

It can be summed that according to the proposed draft of the Macedonian Law on Civil Procedure, it would be up to the parties' discretion whether they would submit written witness statement or not. If the party submits such statement, the court can decide whether it is necessary to hear the witness at a hearing or not, but, if the opposing party requests oral hearing, then the witness is obliged to testify orally. On the other hand, if a party does not submit written witness statements of the proposed witness, the court or the opposing party may request a such statement. In such circumstances, the party must submit a written statement, otherwise, the possibility of the proposed witness to testify orally on a hearing will be lost. Then, the oral hearing will be possible by exception – only if the party demonstrates that the attempt to obtain a written statement from the witness was unsuccessful. Overall, the provisions are presentation of a blend of the inquisitorial and adversarial principles as well.

The aim of the legislator, without doubt, is to enhance the current civil procedural rules by implementing novelties which may not be regarded as typical for the civil law system. However, following the ELI-UNIDROIT MERCIP whose goal is to take the best European practices,¹⁰³ the new Macedonian Law on Civil Procedure includes the possibility of submitting written witness statements in order to expedite the proceedings. It would also help the opposing parties to prepare for the witness testimony and the oral examination of the witness (if such examination is ordered). While the legislator makes a step towards digitalization by allowing written witness statements to be signed by a qualified electronic signature, it is silent on the possibility of giving evidence

¹⁰² That is the case in Serbia, see Part 3 of the paper "COMPARATIVE OVERVIEW OF THE WRITTEN WITNESS STATEMENTS".

¹⁰³ See: Part 2 of the paper "REFLECTIONS OF THE ELI-UNIDROIT MODEL RULES OF CIVIL PROCEDURE".

through video link or other electronic means which is an emerging trend in some European countries.¹⁰⁴ Some questions rise even before the rules enter into force. For example, what if the witness's oral statement is contradictory to his written statement? Will the written witness statement be taken into consideration even if the witness refuses to come? What if the witness dies after submitting his written statement - what will the evidentiary value be? What if the opposing party opposes the authenticity of the qualified electronic signature? What if both of the parties submit written witness statements and only one of them is invited to testify – will the equality of arms be infringed? Of course, it is reasonable that questions will be raised in practice after the law enters into force. However, without entering into speculation, it is expected that the courts will rely on their ability to evaluate the means of evidence. In other words, when in doubt, Macedonian courts always rely on free judicial evaluation. The extent of their freedom in regards to the written witness statements is yet to be seen.

5. ADVANTAGES AND DISADVANTAGES OF THE WRITTEN WITNESS STATEMENTS

The odyssey of the ever-lasting question continues: are the written witness statements more reliable evidence or is the witness's demeanor on the oral hearing the best way to evaluate the statement? There is no straight forward answer. It is certain that the blurring of the boundaries between the common law and civil law traditions have developed new practices within the courtroom.¹⁰⁵ However, it is important to reflect on both the advantages and disadvantages of the written witness evidence.

The main purpose of the written witness evidence is to shorten the duration of the main hearing. The submission of the written statements will enable the opposing parties and their representatives to familiarize themselves with the content of the statements. Such submission can be regarded as the ground for cross-examination because of which the parties and the representatives can prepare better. This is important because when a party suggests a witness to be heard, even though the matter of the testimony is stated, the judge and the opposing party are not familiar with the content of the statement that will be

¹⁰⁴ For example, Italy or Poland, see Part 3 of the paper "COMPARATIVE OVERVIEW OF THE WRITTEN WITNESS STATEMENTS" or England, see Civil Procedure Rules, Rule 32.3: "The court may allow a witness to give evidence through a video link or by other means."

¹⁰⁵ Gabrieli, A.; Alberstein, M., *Conflict Resolution Procedures Within the Courtroom: Between the Adversarial and Inquisitorial Traditions*, Volume 33 of Bar-Ilan Law Studies, Journal of the Faculty of Law, 2022, p. 89.

given. This means that an oral hearing has to be appointed, which could be subject to procedural abuse and, in any case, makes the main hearing lengthier and implies higher costs. But, for example, if the written witness statements are submitted in the preliminary stage, the judge will have insight into the statements and will be able to more easily determine whether a witness should be examined. If couple of witnesses are suggested, the judge may evaluate whether some statements match and evaluate if a witness does not necessarily need to be examined at an oral hearing. In general, the uncertainty of the content of the statement is minimized, the parties and the representatives have an opportunity to prepare better, the procedure is more concentrated on the preliminary stage which by default means less costs and the judge gets a better overall picture of the facts of the case. At the same time, the principle of equality of arms is preserved, as both of the parties have rights to submit written witness statements, thus, in most of the jurisdictions, they can require oral hearing in spite of the written statement in which case it is mandatory.

In order for the written witness statement to fulfill its purpose, it should be a true representation of what the witness perceived through his senses. However, in order to gain more value, a common practice for the lawyers or the other designated authorities is to draft them.¹⁰⁶ The risk of drafting a witness statement is the over-formalization of the process and deriving from the original statement of the witness. These concerns were raised by Lord Woolf in his report "Access to Justice"¹⁰⁷ where he stated: "Witness statements have ceased to be the authentic account of the lay witness; instead, they have become an elaborate, costly branch of legal drafting".¹⁰⁸ Of course, the silver lining is that despite the written statement, the law usually provides an opportunity for the witness to be invited to an oral hearing.

Having in regard that a trial relationship is made between the witness and the judge in the process of giving testimony, it has to be pointed out that such relationship is not only legal, but it is also psychological.¹⁰⁹ Therefore, can the demeanor of the witness be evaluated correctly if it is not directly perceived? However, the assessment of the witness's demeanor is a double-sided coin. On one side, the judge has the opportunity to draw conclusions on the credibility of the witness, based on his body language and oral expression. On

¹⁰⁶ From the given examples, the *huissiers* in France or the notary in Serbia, see Part 3 of the paper "COMPARATIVE OVERVIEW OF THE WRITTEN WITNESS STATEMENTS"

¹⁰⁷ Lord Woolf, *Access to Justice: Final Report*, 1996, para. 55.

¹⁰⁸ *Ibid.*

¹⁰⁹ "Acerebral communication with procedural compliance." - Pocora, M., Pocora, M. S., *Psychological Approach of Witness and Judicial Testimony*, AGORA International Journal of Juridical Sciences, No. 2 (2013), p. 172.

the flip side of the coin, the judicial assumption may despair from the cognitive reality due to multiple factors, such as his physical appearance, social status or additional features that could either distinguish them from the decisionmaker or make them more similar.¹¹⁰

It would be absurd to suggest that one of the forms is better than the other, especially if the differentiation in the legal traditions of the states is taken into consideration. Without a doubt, it is of immense importance that the provisions are drafted carefully by balancing the oral and the written form. However, the role of the judge is crucial because he determines the evidentiary value of the means of evidence, hence, the (written) witness statements.

6. CONCLUSION

It is only natural for the parties and their representatives to aspire to have expressive input in the decisions that affect them.¹¹¹ New judicial practices have been developed due to the reciprocal stimulation between the old legal traditions of the common law and civil law system.¹¹² However, the pursuit of truth in the modern legal systems is followed by incomparable challenges. In the wave of technological advancement, the legislators increasingly put focus on expediting the proceedings especially by strengthening the principle of written form of the proceedings. At the same time, in the words of the European Court of Human Rights: “*justice has not only to be done, it has to be seen, to be done*”.¹¹³ Therefore, the odyssey of the written witness statements continues, guided by a strong European tendency toward favoring the written form of the proceedings. While the advantages of the written statements are evident, the possible challenges that they could impose remain unprecedented. What is certain is that the written witness statements will be a subject undergoing intense study in future with the implementation of the new Macedonian Law on Civil Procedure shaped by the ELI-UNIDROIT MERCIP.

¹¹⁰ Spotswood, E., *Live Hearings and Paper Trials*, Florida State University College of Law, 38 FLA. ST. U. L. REV. 827, 2011, p. 882.

¹¹¹ *Ibid.*, p. 881.

¹¹² Gabrieli, Alberstein, *op. cit.* note 107, p. 153.

¹¹³ Judgment of the European Court of Human Rights, Application no. 71615/01, Case of Mežnarić v. Croatia, 15 July 2005.

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