

c) Statutory declarations and hearing witnesses

One object of producing written statements – which are an admissible form of evidence – is to avoid having to call those who made them as witnesses (T.674/91; see, however, T.474/04, in which it was held that the department of first instance ought to have heard the person who had made the written declaration in question, *infra* in this chapter III.G.2.5.3).

If the Receiving Section had considered the circumstances described in the witness statement very unlikely, it ought to have heard the witness personally in order to evaluate her credibility (J.10/04).

d) Ranking of means of evidence

The board in T.918/11 (prior use – long-ago events) considered that the opposition division's approach, that documents are of a more conclusive evidentiary value than witnesses, had no basis in the EPC, Art. 117 EPC containing **no ranking** of the means of evidence listed in it. The board was also of the opinion that the application of the standard of proof "beyond reasonable doubt" did not justify disregarding the testimonies.

See also T.1710/12 in chapter III.G.2.3; see also in this chapter III.G.4.2.1.

e) Hearing a witness before a national court

Under Rule 120 EPC, any party, witness or expert summoned to appear before the EPO can request authorisation to be heard by a competent court in the state in which they are resident (see, for example, T.582/90 and, by contrast, T.827/99, in which the witness's hearing by a national court was considered unnecessary).

In T.1043/93 a notarial statement by Italian witnesses duly summoned but not present was produced on the day of the oral proceedings before the board, with their age cited as the excuse for their failing to appear. The board observed that their age had already been known to the party and that the witnesses had not requested to be heard by the competent court of their country of residence (R.72(2)(c) EPC 1973, now R.118(2)(d) EPC).

In T.1551/14, the issue of the credibility of the witness, one of the appellant's employees, was critical since the points made by the witness in a statutory declaration regarding the new auxiliary request were of major importance for its patentability and had previously only been supported by that statutory declaration. For the board, this issue could only be settled by hearing the witness again, if necessary under oath before a national court (R.119 and 120(2) EPC). The case was remitted with an order to hear the witness in question.

Art. 131(2) EPC provides the basis for evidence to be taken by national courts or other competent authorities of contracting states (see also R.118(2)(d) EPC, R.120 EPC, R.150 EPC, and Guidelines E-IV, 3 – March 2022 version).