time infringes a party's fundamental right to free choice of evidence and the right to be heard (**T 142/97**, OJ 2000, 358). See also **T 1231/11** (citing **T 267/06**, **T 448/07**, **T 25/08**), according to which the offered witness has to be summoned should any doubt remain.

Furthermore, pursuant to Art. 113(1) EPC each party must be allowed to comment on any evidence legitimately submitted in the proceedings. Allowing one party, even the party that originally submitted the evidence, to require unilaterally and arbitrarily that the evidence be withdrawn or **excluded** from consideration would infringe this right (**T 95/07**; cf. the case in **T 760/89**, OJ 1994, 797, concerning a return of documents filed as evidence).

As a rule, if assertions made in an unsworn witness declaration ("eidesstattliche Versicherung") remain **contested**, a request from a party to hear the witness must be **granted** before these assertions are made the basis of a decision against the contesting party. In **T 474/04** (OJ 2006, 129), the opposition division had revoked the patent in suit because the invention did not involve an inventive step over the prior use evidenced in the declaration in lieu of an oath. Since fundamental assertions made in the declaration had been contested, the author was offered as a witness. Although the appellant (patentee) had consistently demanded that the author be heard, the opposition division decided not to summon him as a witness, even though he was available. In the board's view, the appellant had effectively been prevented from making use of a **decisive piece of evidence** (decision extensively cited in **T 190/05** and more recently in **T 2659/17**).

Failure to consider evidence will normally constitute a substantial procedural violation in that it deprives a party of basic rights enshrined in Art. 117(1) and Art. 113(1) EPC (**T 1098/07**). In **T 135/96** (point 3 of the Reasons), ignoring documents (and arguments) relevant to inventive step was found to violate the party's right to be heard. The board in **T 1110/03** (OJ 2005, 302) made a similar finding where indirect evidence substantiating an allegation of fact relevant to novelty was disregarded. In **T 1536/08** the opposition division had infringed the opponent's right to be heard by completely ignoring the unambiguous offer in its notice of opposition to provide the original printed versions of crucial prior-art documents (see also chapter III.B.2.4.5 "Failure to consider evidence").

3.3.2 Parties' right to comment

In **T 838/92** the board observed that in applying the principle of free evaluation of evidence, the opposition division or the board of appeal must exercise caution when evaluating the testimony of a witness whose impartiality is in doubt, with the parties of course being given an opportunity to comment on that testimony (Art. 113(1) EPC 1973). The board was not minded to sustain the appellant's objection to consideration of court bailiffs' reports on the basis that they had been established unilaterally. Such documents recording findings of fact were merely pieces of information which could be added to the file as evidence once they had been **submitted to the parties for comment**.

In **T 909/03**, where one of the appellants had objected to the manner in which a witness had been heard, the board held that it was not necessary for a party to be given a copy of the minuted testimony before questioning a witness. During the oral proceedings the party had been given sufficient opportunity to comment on the testimony of the witness.