DEECP Project
Dimensions of Evidence in European Civil Procedure

„WITNESS"

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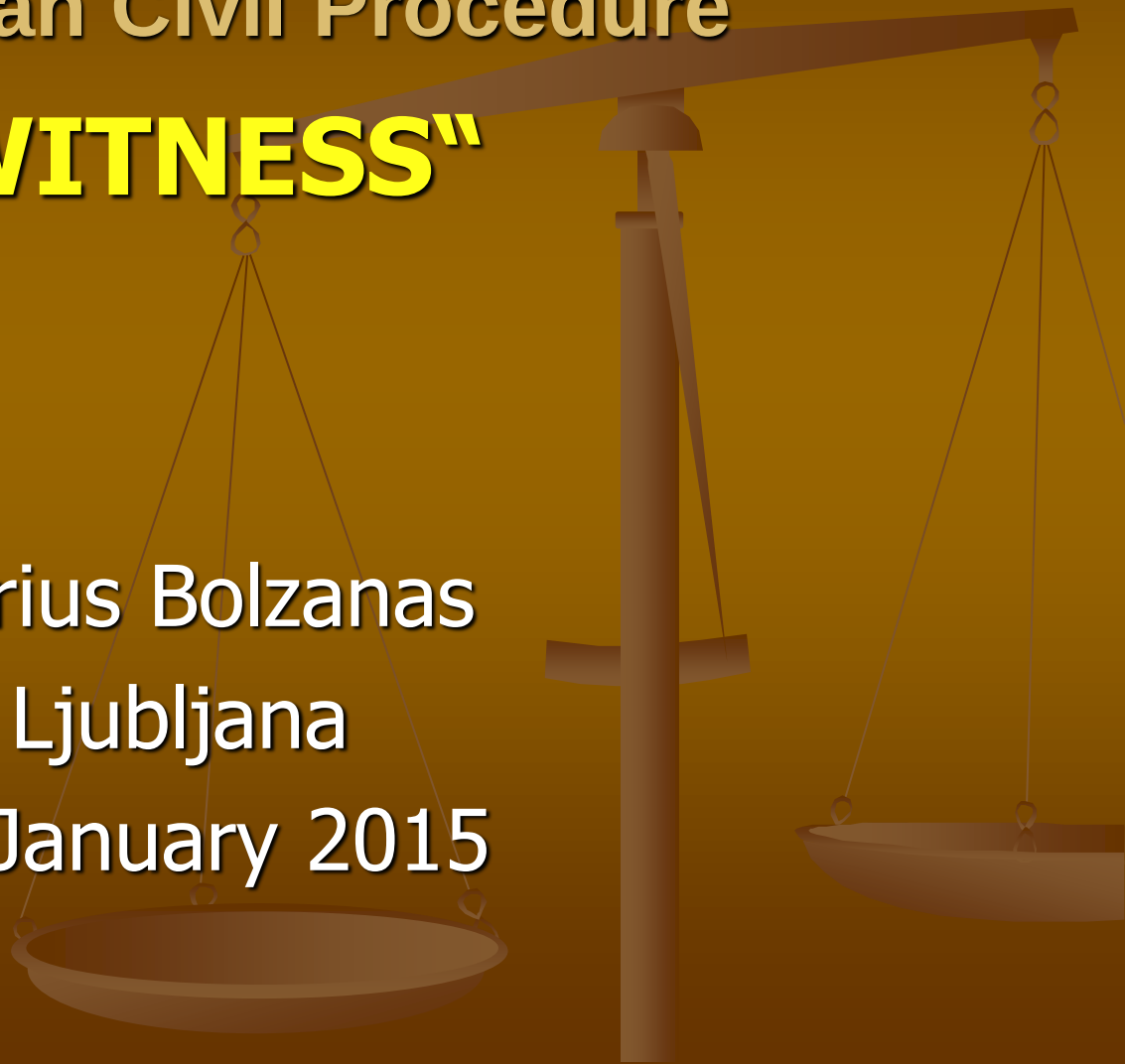
Ljubljana

16 January 2015



Terminology

WITNESS

subject

WITNESS'S TESTIMONY

mean of evidence – should be received only in oral form?

Short historical background

"Where anyone is deprived of the evidence of a witness let call him with a **l**oud voice in front of his house, on three market-days" *(**XII Roman table** 2, law 3)*

"Where parties have a dispute with reference to property before the tribunal of the Prætor, both of them shall be permitted to state their claims in the presence of witnesses" (*XII Roman table 6, law 6*)

"If anyone, after having been asked, appears either as a witness or a balance-holder, at a sale, or the execution of a will, and refuses to testify when this is required to prove the genuineness of the transaction, he shall become infamous, and cannot afterwards give evidence" *XII Roman table 7, law 11*)"

"A faithful witness deliver souls: but a deceiver tells lies" (***Bible**, Book of proverbs, 14, 25*)

"A false witness shall not be unpunished: and he that tells lies, shall not escape" (*Bible, Book of proverbs, 19, 5*)

"If a party or a witness refuses to appear before the judge to testify, it is permissible to hear them through a lay person designated by the judge or to require of them a declaration either before a notary public or in any other legitimate manner" (*Code of Canon law, art. 1528*)

Importance of witness testimonies and a place in averment system

The civil procedure rules of all the codes identifies witnesses as means of proof. In all the laws or case law rules of EU countries the types of evidence which may be admissible include oral testimony.

DIFFERENT VALUE?

Common law countries

Meaning of the word; legal tradition; jury assess evidence

Continental law countries

"Statement of a witness given *under oath* is regarded as strong evidence, while information given by the parties and others who are close to the case and who are not under an oath, is regarded as weaker evidence" (Sweden).

"There are no formal legal rules regarding the evidential value of witnesses and expert opinions, that means both are subject to the court's free assessment of evidence (Austria)

FORMS OF WITNESS

ORAL

(*the oldest form, special form for obtaining such evidence and maybe therefore so reliable*)

The witness has to produce oral testimony. A written testimony isn´t provided in contentious proceedings (*Austria*)

Under the adversarial model operating almost in all the countries the primary means by which a party proves his case is by oral evidence (*Denmark*)

Under the adversarial model operating in *Ireland*, the primary means by which a party proves his case is by oral evidence in open court at the trial before the trier of fact, the judge or jury (Ireland)

WRITTEN

(*is it written evidence and therefore has the less value?*)

Sworn written testimony in the form of an affidavit is permitted (*Ireland*)

Affidavits are documents in solemn form sworn by a witness before a Commissioner for Oaths. Untrue evidence in an affidavit is subject to the crime of perjury

Main requirements for witness

1) Disinterested

"Everyone who is not a party in the case may be heard as a witness". *(Sweden)*

2) Has data about the circumstances, significant for the case

A person has to refresh the memories of the events

3) Attain special age and mentally abled persons?

Testimony is sought from a person who is under the age of fifteen years or suffers from mental disturbance, *the court shall determine* in accordance with the circumstances whether he may be heard as a witness (*Sweden*)

There is no minimum age for either parties or witnesses to testify in court. Whether underage and mentally disabled persons are capable of testifying or not, depends on a case-by-case assessment (*Austria*).

"The court cautions a witness of at least 14 years of age against refusal to give testimony without a legal basis and giving knowingly false testimony" (*Estonia*)

If not, are these persons shall not be called as witnesses?

4) Special way of taking evidence – DIRECTLY, orally, taking an oath or in affirmation

Witnesses are required to swear "to tell the truth, the whole truth and nothing but the truth".

5) Civil (criminal) liability of the witness for the breach of the oath

AGE

-Usually in laws there is no minimum age needed for a person to be able to testify, BUT the person must understood the moral imperative of the oath

"Persons under fifteen years and mentally incapacitated person may be heard as a witness" (Sweden, Finland)

"If a witness has not yet reached the age of 16 years, or if he is not able to understand the significance of the oath (or promise to speak the truth), he will not take the oath but be admonished by the judge to tell nothing but the truth. If his testimony is used in the particular case, the judgment has to provide reasons for this" (Dutch)

"Any child can give testimony as long as the court is convinced that the child can sufficiently understand the importance to say the truth. As long as a child "understands that it is wrong to give false testimony" then that child can give testimony in a court of law.

Children can be much more truthful than adults even if they don't clearly know the difference between truth and falsehood. For this reason the court may nonetheless proceed to listen to the version of the child. The problem under the Maltese system is that no witness can give testimony if not under oath. Thus if the child clearly does not remotely comprehend the meaning of an oath then it will be difficult for the court to allow the child to give testimony" (Malta)

OATH or AFFIRMATION (1)

1. Not in each EU country witnesses must take an oath

"The witness is not required to take an oath before giving the testimony, but the court explains to the witness prior to giving the testimony the obligation of the witness to tell the truth and the grounds for refusing to testify" (Estonia)

2. Before questioning of the witness begins, the court will impress upon the witness the **duty to speak truthfully** and inform the witness that the giving of false testimony is a punishable offence (Denmark)

3. Every witness must take a solemn oath before giving testimony. Witnesses are required to swear "to tell the truth, the whole truth and nothing but the truth.

"The obligation to declare under oath can be enforced by means of forced-collection proceedings" (Austria)

OATH or AFFIRMATION (2)

4. The form of the oath depends on the individual's personal religious persuasion. A witness takes an oath on something which is binding to him. The form of the oath is usually according to the custom of those who profess the witness' faith.

"Before giving his or her testimony, the witness can choose to give an oath or an affirmation. If the witness has no religious affiliation, she or he gives an affirmation (Finland).

All witnesses either take an oath on the Holy Book appropriate to their faith or will make an affirmation to tell the truth if they have no religious belief or their faith prohibits them from taking an oath.

In Malta the majority of people are Roman Catholic and thus the majority take the oath by kissing the Holy Cross. However people of different religions are sworn according to the manner most binding on their conscience. For example people of Muslim religion take the oath by kissing the Kuran" (Malta)

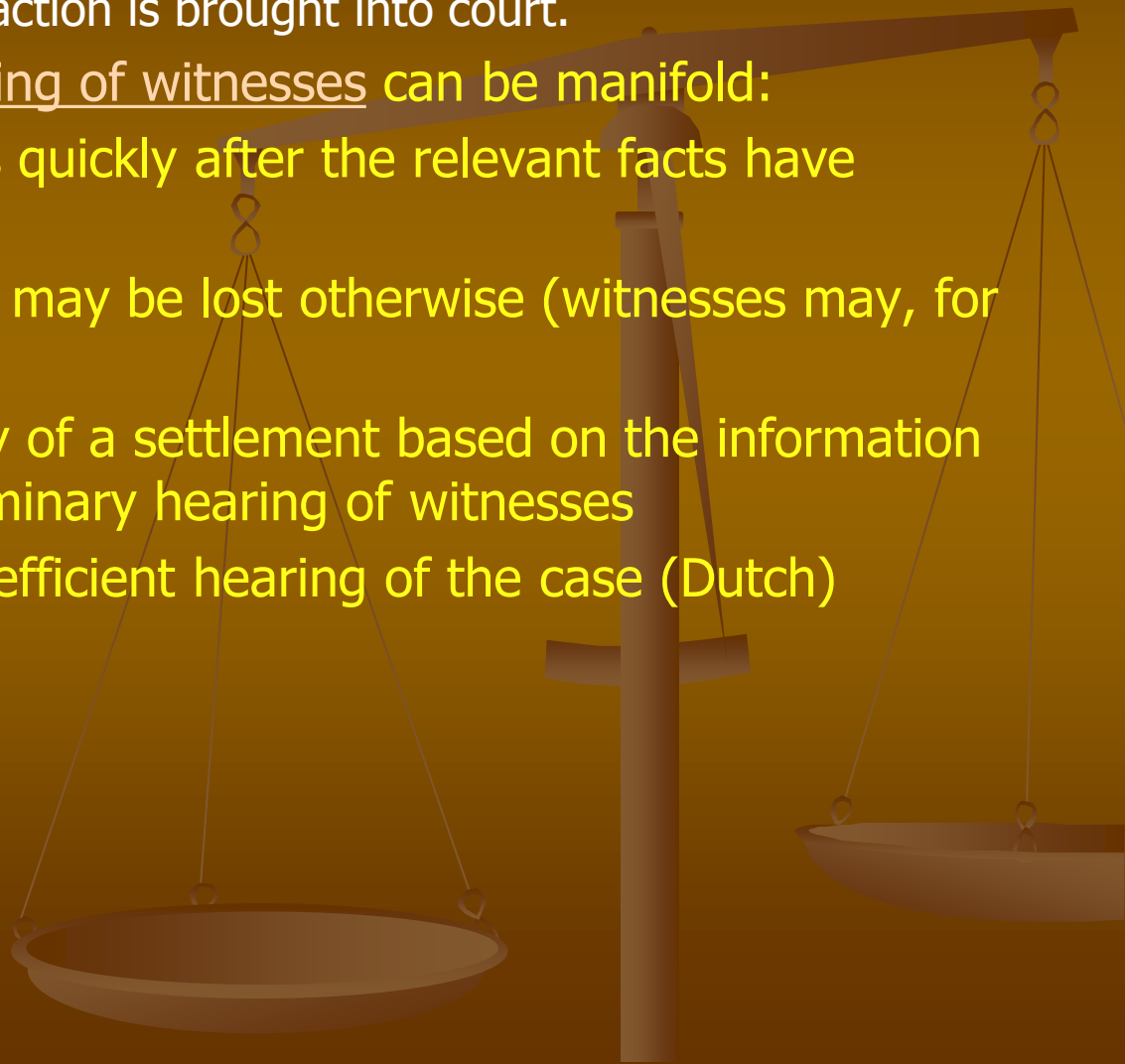
5. In continental countries witness must be under oath administered usually by a judge, while in common law countries also by a judicial assistant (Malta).

Actions in Pre trial discovery

Pre-trial discovery in the technical, common-law sense does obviously not exist in civil law countries. However, there are some means available in the procedural rules to acquire information before the action is brought into court.

The aims of a preliminary hearing of witnesses can be manifold:

1) the need to hear witnesses quickly after the relevant facts have occurred;
2) to safeguard evidence that may be lost otherwise (witnesses may, for example, die),
3) to prevent litigation by way of a settlement based on the information obtained by way of a preliminary hearing of witnesses
4) to stimulate a subsequent efficient hearing of the case (Dutch)



Summons of witness – duty of witness to appear and testify

1. Parties must state facts about which the witnesses will be examined and the identification of the witness (Slovenia)

2. **Witnesses** in proceedings **are summoned by court.** But the parties are entitled to bring witnesses to the hearing without any previous summons (Austria).

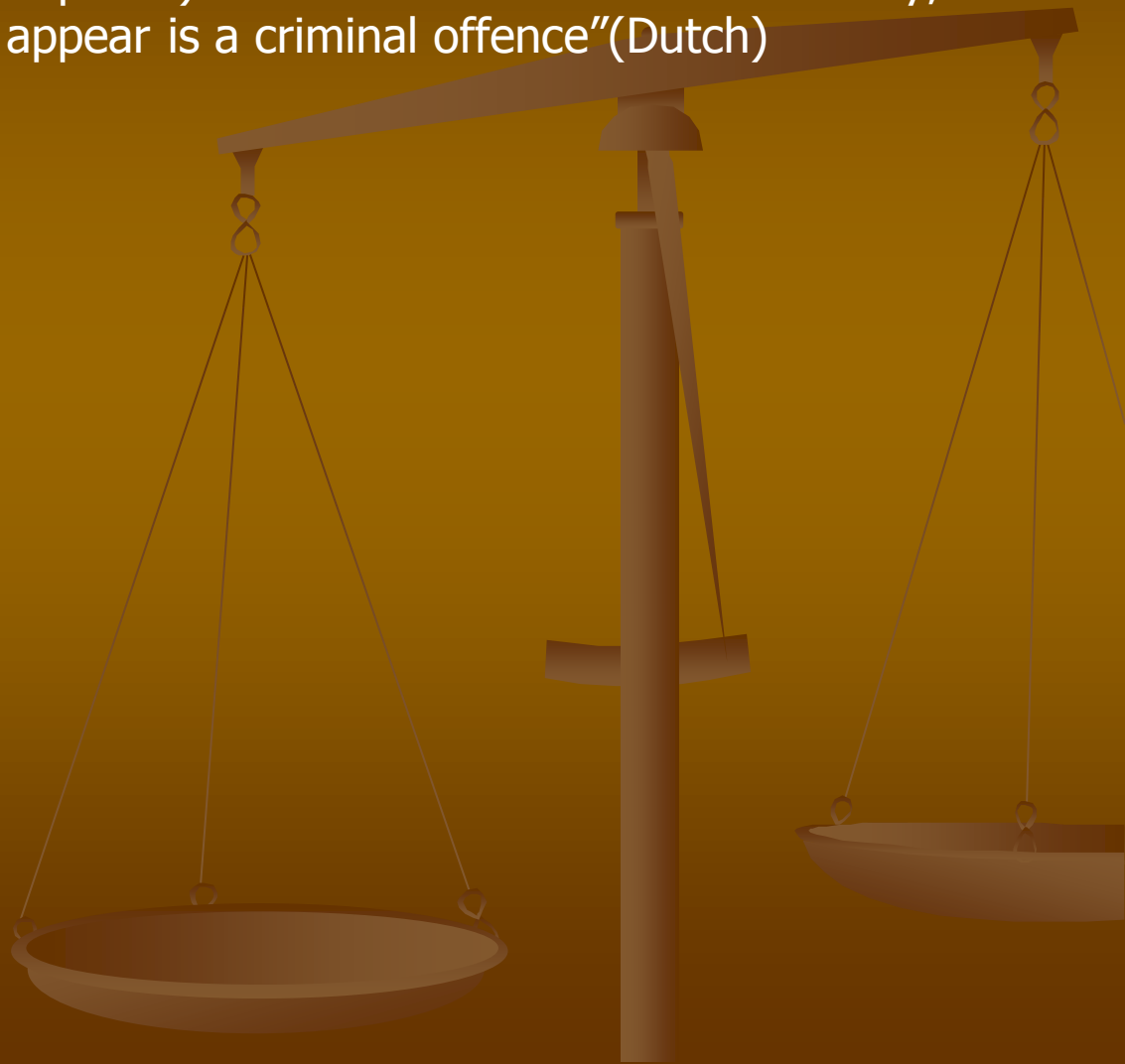
"Ordinarily in civil trials it is *for the parties to ensure* the presence of any witnesses on whom the party intends to rely" (Ireland)

Witnesses can be summoned by the court or can be called and brought to the hearing under the parties' responsibility. Parties must request to the court to summon a specific witness at the preliminary hearing in the ordinary proceedings (*juicio ordinario*) or, at oral trials (*juicio verbal*) in the time limit of three days since they are summoned for the hearing. Otherwise, the court assumes that the witness will be called and brought by the party (Spain)

"Where the attendance of a witness is required in civil proceedings the parties (usually through their solicitor) can issue a witness summons known as a *subpoena*" (Ireland), wherein the witness is to be informed, under pain of nullity, the date and time when he is to testify, before which Court, the name of the presiding Judge / Magistrate, on what he is expected to testify and what documents, if any, he is to exhibit during the same Court sitting (Malta)

Summons of witness (2)

3. Witnesses who have been summoned to court by a bailiff and who do not make a court appearance can be forced to come to court at the orders of the judge with the help of the public authorities (i.e. the police). A witness cannot refuse to testify, unless he is privileged. Refusing to appear is a criminal offence”(Dutch)



PRIVILEGE of witnesses do not testify (1)

DUTY TO TESTIFY

OBLIGATION not to reveal circumstances

(keep everything in secret)

Privilege of witnesses do not testify (2)

I. ***Private Privilege*** arises in the following situations:

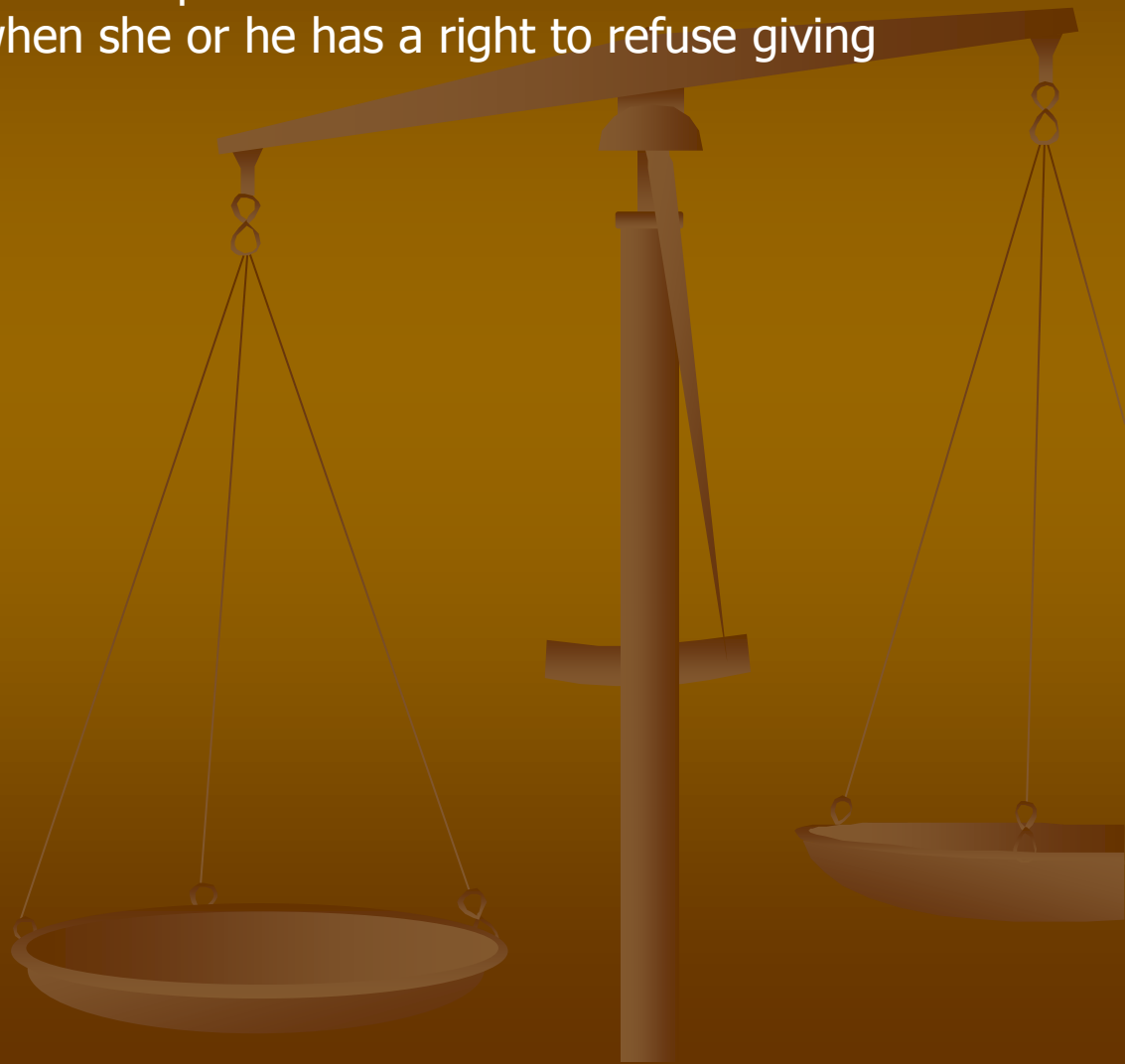
- Legal Professional Privilege - *It is a fundamental condition on which the administration of justice as a whole rests. Legal professional privilege began its life as privilege enjoyed by the layer based on consideration for his oath and honour.*
- "Without Prejudice" Communications
- The Privilege Against Self-Incrimination
- Miscellaneous Privileges
  - Marital Privacy
  - Marriage Counsellors
  - Sacredotal Privilege -priest about certain facts covered by the **secrecy of confession**
  - Journalistic Privilege - The privilege of journalists not to reveal their sources is recognized. Only in exceptional circumstances, to be invoked by the party who called the witness, the journalist is under an obligation to answer questions regarding his sources (Dutch)
  - Informer Privilege

II. ***Public interest*** privilege

- a state official about certain facts that are bound by **official secrecy**
- a person who has **diplomatic immunity** about certain facts regarding state duties

Privilege of witnesses do not testify (3)

If a witness refuses to testify she or he must come to the court to mention the grounds for the refusal and show a plausible reason for it. Mentioning the grounds for refusal and evidence on the relationship is sufficient. The court has the obligation to inform the witness when she or he has a right to refuse giving testimony.



THE RIGHT TO REFUSE TO WITNESS

The admissible grounds for the witnesses' refusal to testify:

- **I. LIABILITY - disgrace or threat of criminal liability** for the witness himself or other close persons;

PERSONAL DISADVATAGE - direct proprietary disadvantage for himself or other close persons (punishment, damages or "significant harm");

"Historically the **privilege against self-incrimination** emerged as a principle of the common law and had roots in the 17th century. As a rule the privilege against self-incrimination has the status of a constitutional right. The privilege against self-incrimination is also protected under Article 6 ECHR. Such a privelege as encompass minimum:

- A. not to be required to give evidence at his trial;
- B. the privilege enjoyed by witnesses subject to questioning in any form of proceedings not to answer questions which may tend to incriminate them.
- **II. CONFIDENTIAL MATTERS** - subject to **a state-approved obligation of confidentiality, also** present **business and art secrets** and **voting matters** in case they are legally declared secret.

EXAMINATION OF WITNESSES (1)

In common law system

If a witness is called to give his evidence in person, he will *normally confirm* as true the account given in his witness statement and then tendered to the other side to be cross-examined. This can be a very testing experience at the hands of an experienced advocate and very often the true nature of the witness's account will emerge. **The judge** should normally not intervene save to clarify any misunderstanding he may have or to clarify any aspect of the evidence. He **must NOT examine the witness himself**. This is known as "*descending into the arena*" and will be strongly condemned in any appellant court.

- The party proposing the case opens the case to the court and then calls all of his witnesses. Each witness is **examined in chief** by counsel on behalf of the party who has called the witness. The purpose of **examination in chief** is to elicit evidence in support of the version of the facts in issue advanced by that party. In examination-in-chief, leading questions are prohibited.

EXAMINATION OF WITNESSES (2)

- The witness is then **cross-examined** by counsel for the opposing party, who is free to ask leading questions.

Cross-examination of a witness is carried out by the other parties in the proceedings and has two main objectives:

(i) to elicit evidence from the witness in relation to the facts in issue which is favourable to the cross-examining party;

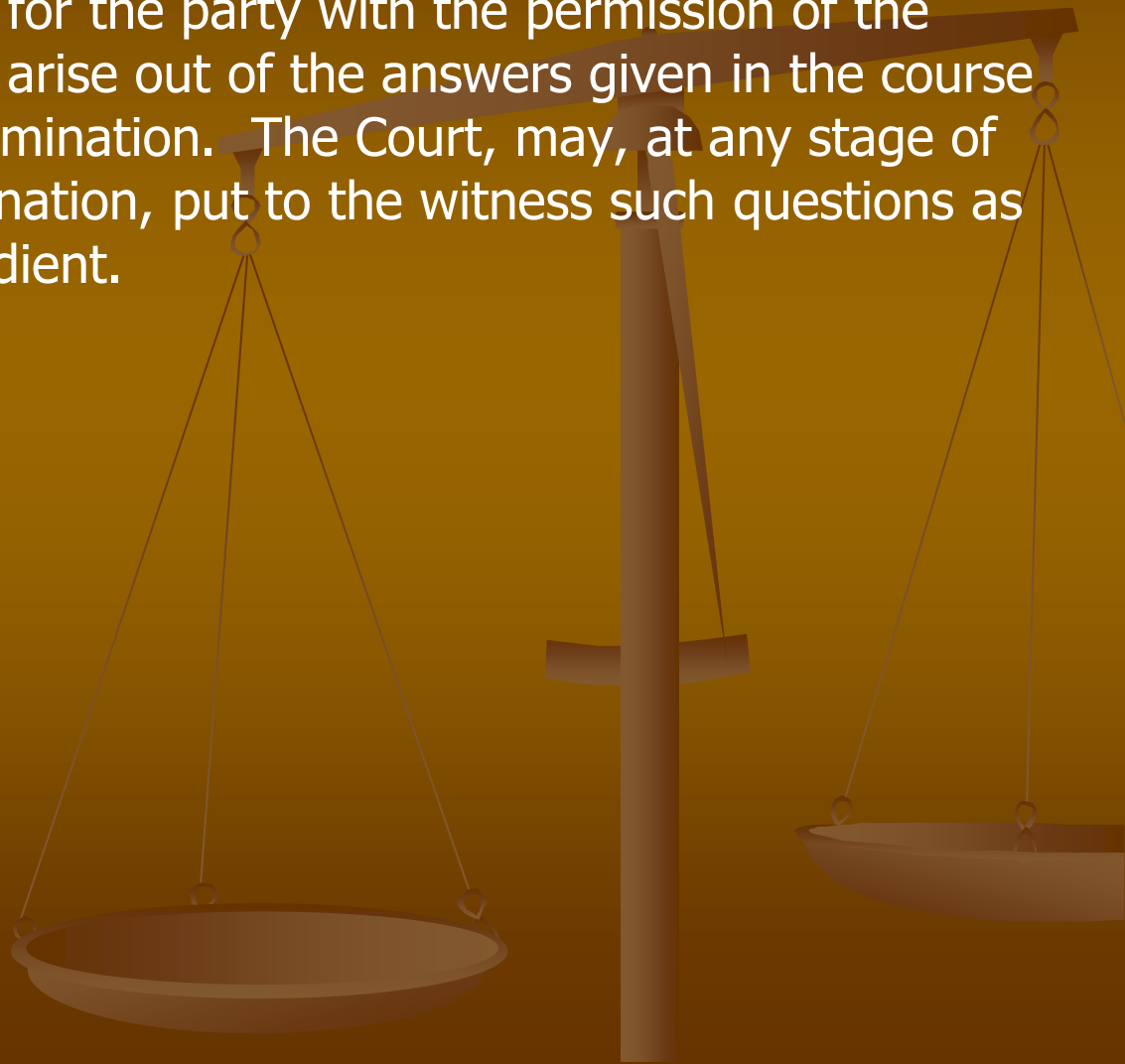
(ii) (ii) to cast doubt upon the veracity, accuracy or reliability of the evidence given by the witness.

The right to cross-examine has a constitutional basis in both civil and criminal cases

The witness is then re-examined by the lawyer of the party calling the witness. Once all of the witnesses for the proposing side have given evidence, then the witnesses for the opposing side are called. While the parties are free to choose the sequence of witnesses it is often logical to call the witnesses as to fact prior to the expert witnesses.

EXAMINATION OF WITNESSES (3)

When both the examination and cross-examination are concluded, no further questions may be put by either of the parties to this witness, but it shall be lawful for the Court, or for the party with the permission of the Court, to ask such questions as arise out of the answers given in the course of the examination or cross-examination. The Court, may, at any stage of the examination or cross-examination, put to the witness such questions as it may deem necessary or expedient.



EXAMINATION WITNESSES USING TECHNICAL INSTRUMENTS

"According to the laws of most of the EU countries the witness can ALSO be heard in a procedural conference held via technical equipment allowing the witness to be at a different place and, in Estonia, *in some circumstances* by telephone. The possibility of the participants in proceedings to ask questions from the witness must be ensured.

"When testifying via video telecommunication, the witness must appear before a court, OR before an authorized public authority OR natural or legal person. Authorisation to make video communication equipment available for use in legal proceedings is granted by the Danish Court Administration (Domstolsstyrelsen) .

However, in Dutch the law *does not provide for any possibility to hear witnesses at a distance,* either by telephone or by videoconferencing. Only when all interested parties, including the witness, would agree, teletestimony is possible (District Court Rotterdam 4 June 2009, *LJN* BJ8571).

Evidence may be received by the Court by means of a **video or other form of electronic communication** (**England and Wales**)

Practical or potential problems in cross-boarding cases

- PROBLEMS OF UNDERSTANDING THE REQUEST IN THE SAME WAY
- QUESTIONS OF DIFFERENT MENTHALITY
- COSTS