Witness testimony and hearing of the parties in writing

Written testimony – doubts on the institution

INTRODUCTION

Witness testimony and hearing of the parties in writing are matters worthy of discussion. However, they raise a lot of reasonable doubts, especially concerning the violation of the directness principle and the equity of the parties principle. Moreover, written testimony rarely speeds up the proceeding, which was supposed to be its greatest advantage. Although it was introduced into the Code of Civil Procedure as early as July 2019, it still raises important questions in legal scholarship and jurisprudence, as well as in the daily practice of courts and attorneys.

HEARING THE WITNESS OR THE PARTIES IN WRITING

The possibility of obtaining a witness's or a party's testimony in writing was introduced to the Polish Code of Civil Procedure with the addition of Article 2721 of that Code in 2019. The goal was to speed up the proceedings, which are often extended because of the absence of witnesses and other obstacles. Unfortunately, the legislator failed to indicate the statutory prerequisites specifying when the court may conduct evidence in this form, which raises many doubts and questions, especially since the institution is pretty controversial. The provision itself is highly laconic, which leads to problems with its practical application. The practitioners – the courts and the attorneys – worked out some norms that are usually applied, but they are not unified around the country. Moreover, different judges in one court may even understand them differently.

The first of those customary norms is that the court should oblige both parties, in advance to call for written testimony, to submit a list of questions to the witness within the stipulated time limit. The law does not make any regulations in this regard. Still, due to the nature of this evidence, it seems obvious that it cannot be conducted without prior questions asked by both the parties and the court. As this practice is common, some doubts about the next steps have arisen.

At this stage, the question arises whether the court can, as during the stationary witness examination under Article 155 § 2 of the Code of Civil Procedure, overrule the questions that violate the norms of questioning (inappropriate, irrelevant, etc.). Some courts examine the lists of questions and some just give them to the witness. As there are no provisions on this matter, only a local court custom is the directive here. Taking into account that all the general rules of questioning shall apply to a hearing in writing, it seems obvious that the list of questions should be carefully examined by a court, but this rarely happens. Also, the parties usually do not have any possibility to object to the other party's questions since both lists are automatically sent to a witness. The party (usually its attorney) must be very determined and active to get a chance to review a question list of the other party before it is sent to a witness who answers all the listed questions.

Another procedural issue is the right of the parties to review the content of a witness's written testimony. The legislator did not regulate this issue either, so again, different practices are emerging. Some courts serve a copy of the testimony submitted in writing to parties without a motion, while others require the parties to file a separate request for it (with the obligation to pay a fee). Of course, if one does not know the specified court custom, it is safer to submit such a request or ask the court directly about the practice in advance.

Moreover, the form of a written testimony is not stipulated as well. As a result, some witnesses prepare just one-word, laconic answers to uncomfortable questions and extensive ones to the others (usually to questions listed by a party that called for the witness), which causes the testimony to be totally

worthless. In those cases, a supplementary hearing to a trial is indispensable, leading to the whole procedure's extension.

The most problematic is the credibility of such a written testimony. Neither the court nor the parties have any possibility to verify whether the witness has prepared the testimony independently or they were assisted by others (e.g. a party). There is also no chance to ask any spontaneous questions, which – in a regular court hearing – lets the party or a court confront a witness with some facts or statements and expose an inconstancy of their testimony. The evaluation of the written testimony is thus highly limited since the court and the parties do not see the witness and cannot "read" their facial expressions while giving testimony, nor their body language.

The above doubts lead to the question of whether the written testimony of a witness or party does not violate the fundamental principles of a civil procedure, such as the directness and equality of both parties. The general rule, stipulated in Article 235 of the Code of Civil Procedure, provides that the evidentiary proceedings take place before the adjudicating court, which guarantees the court all the necessary conditions for a complex evaluation of witness testimony. Moreover, in a courtroom, both parties and the judges can react to the current witness testimony and ask spontaneous, supplementary questions to confront a witness and expose their not testifying the truth. When the witness hearing is conducted in writing, the above principles cannot be respected, so there is a question of whether it is sufficiently justified in a specific case.

It should be strongly highlighted that the parties – under the current provisions – have no right to object to the written manner of examination. It seems to be a significant omission since a similar regulation was introduced to the Polish civil procedure in 2023 on a remote examination of a witness or a party. The justification was to guarantee that the principle of directness and equity of the parties would not be violated by conducting the evidence remotely. It seems quite obvious that a written testimony brings much more risks in this area since neither the court nor the parties can see the witness testifying – not even remotely. Therefore, the parties' right to object to a remote examination should also apply to a written testimony. Unfortunately, the current law does not provide such a regulation. Thus, this is only a de lege ferrenda proposal for now.

The main goal of introducing written testimony to the Polish Code of Civil Procedure was to speed up proceedings and make them more effective. This purpose was, however, not fulfilled. Even though the idea was simple, practice has shown this is a utopic vision. In reality written testimony is rarely accepted by the parties without objections, which leads to a supplementary hearing conducted at a stationary hearing. As a result, the proceeding lasts longer. Even though it should theoretically only cover some supplementary questions, a supplementary hearing is usually a whole, regular questioning, including all the issues already addressed in the written testimony and a new, spontaneous question. All that leads to the conclusion that a witness or party hearing in writing should be rather an exception than a regular form of that evidence.

However, written testimony should be considered in certain atypical situations, for example, when the witness (party) is permanently abroad or in a bad health condition, which excludes their appearance in court (at all or for a long time). It may also be considered in repetitive cases (such as banking court cases), but not for crucial witnesses. In those situations, written testimony can truly speed up the proceeding and not cause a serious violation of the fundamental principles of a civil procedure.

The text originally appeared: Chambers and Partners, 05.06.2024