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10EQS Answers

EUIPO
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Written Statements as Evidence

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1. Project Background, Objectives and Approach

1.1 Introduction

The admissibility and relevance to accord particular elements of evidence is a crucial question which arises in a large proportion of cases before the EUIPO. In fact, the assessment of evidence is almost always critical to the outcome of a proceeding. Some categories of evidence are more problematic than others. Written statements, when submitted as evidence, pose particular difficulties arising from the fact that the author is often interested in the outcome, and therefore potentially biased.

At a broad level, written statements can be divided into two categories (a) those drawn up following particular formal requirements defined by law and thereby benefiting from a special status and (b) mere simple statements, not drawn up in accordance with any particular formal requirements and consequently not having any special status. In national administrative or judicial proceedings, the national law will be relied upon to determine the admissibility and probative value of a written statement.

At the EUIPO this problem is exacerbated by an additional layer of complexity. This complexity comes from the fact that the parties to proceedings come from many different Member States and it is more common for opposing parties to be from different Member States than the same.

To resolve this issue, the legislature introduced Article 78(1)(f) of the European Union Trade Mark Regulation (EUTMR), under which the admissibility of a written statement should be tied to the value of that statement under the law of the country in which it was drawn up. Thus, for example, two documents identical, except for the country in which they were drawn up, will not necessarily have the same “value”. To have the same “value” the national laws concerning the drawing up of written statements must also coincide.

However, to date, the application of this article has been complicated for the EUIPO, given that the information on the relevant provisions of national law are not known, and given the number of different countries for which that information is needed. To solve this issue, this study has been commissioned to gain the relevant information

on how written statements are regulated under the national laws of the most important Member States in the sense of those whose citizens and legal entities most frequently appear as parties in proceedings before the Boards of Appeal of the EUIPO.

1.2 Project Scope, Approach & Methodology

Under Article 78(1)(f) EUTMR, “statements in writing sworn, or affirmed, or having a similar effect under the law of the State in which the statement is drawn up” are an acceptable means of giving evidence. That provision identifies three distinct types of statements:

(i) Sworn written statements

(ii) Affirmed written statements

(iii) Unsworn, non-affirmed statements having a similar effect under the law of the state in which the statement was drawn up (hereafter ‘simple statements’).

Unfortunately, the Court’s jurisprudence in this area is divergent. On the one hand, in the Salvita and Outburst judgments, the General Court found that it is necessary to consider the national rules on the effects of a written statement only if the statement has not been sworn or affirmed.

On the other hand, in its LA NANA and Crème Café judgments, the General Court held that “sworn statements which have evidential value under national legislation constitute, in principle, evidence which is admissible”. If sworn statements having evidential value under national laws are admissible, then, statements not having evidential value under national law should be inadmissible (applying the principle of *expressio unius est exclusio alterius*).

Following the second interpretation, where evidential value under national law is a precondition to admissibility in EUIPO proceedings, it is obvious that this would oblige the Office to be able to determine when a statement has evidential value under national law. This in turn would require the Office to acquaint itself with the national laws in this area, which is a task best suited for an outsourced project manned by specialist from each member state.

Moreover, when one considers the scenario of simple statements it becomes clear that some knowledge of the national laws in this area is necessary. Under Article 78 simple statements are admissible if they have a similar effect under national law as a sworn or affirmed statement. But without knowledge of the effect of sworn or affirmed statements under national law, how can the admissibility of a simple statement be determined? Moreover, there may be categories or types of sworn or affirmed statements under national law, depending on, inter alia, witnessing and formal requirements, the nature of the proceedings and the forum in which the evidence is being admitted (administrative or judicial).

In light of this, it is clear that there is a need for the Office to acquaint itself with national laws in this regard.

This project was intended to obtain a deeper understanding of the laws of the member states as regards the use of written statements as evidence in court and administrative proceedings. In this regard, the goal was to identify and explain the legislation, jurisprudence and doctrine relevant to the formal requirements, admissibility and evidentiary value of written statements.

In terms of geographical scope, the project addressed seven member states selected by EUIPO based on a statistical analysis of the most common appellant member states. Therefore, the laws of the following member states fall within the scope of the project:

- Germany
- France
- Spain
- Italy
- United Kingdom
- Poland
- Sweden

The joint-10EQS-Deloitte team enlisted a pool of eight legal experts (profiles provided in Section **Error! Reference source not found.**) across the seven selected geographies to help answer the following questions:

1) What are the necessary conditions to qualify as “sworn” or “affirmed” in each country
    a) Are the conditions the same for sworn and affirmed documents?
    b) If no, how do they differ?
    c) What are the specific conditions?
    d) Are the conditions set out in legislation or merely rules of convention?
    e) Do the conditions depend on the nature of the proceedings?
    f) Do the conditions depend on the nature of the document?

g) Are the conditions related to the structure of the document or the circumstances in which the document was signed, including witnessing of the signature?

h) Are there different “types” of sworn or affirmed documents?

2) With regard to simple statements having a similar effect

a) Is there an analogous concept under the national law of the member state?

b) In which situations could an unsigned statement have the same value as a sworn document?

c) Would simple statements be admissible as evidence at an administrative proceeding analogous to those which take place before the EUIPO?

d) Can a simple statement be a full proof, or only prima facie proof?

The responses to these questions were collected in an excel and have been summarized in this document. The raw data in the excel has been submitted as a separate deliverable.

2. State-by-State Assessment

2.1 Germany

In Germany, the conditions necessary to qualify an affidavit (*Eidesstattliche Versicherung* or *Versicherung an Eides Statt*) as "sworn" or "affirmed" is as follows:[1]

1. It must be a document containing declarations by a declarant under oath or by solemn affirmation.[2]
2. It must be the personal declaration of the signatory. Where it is prepared by a legal representative, it must be read and fully explained to the declarant before he appends his signature.
3. The information provided in the document must be the truth to the best of the declarant's knowledge.[3]
4. The declarations must be related to facts and not legal assessments.
5. It must be based on the personal knowledge of the declarant and not hearsay and it must be a declaration of knowledge rather than a declaration of will.[4]
6. It must be executed by a competent authority (Notary Public).

With respect to point 6, a competent authority is not necessarily a German authority. However, such authority must be a person whose legal authority is acceptable or recognized by German Courts or tribunals or the jurisdiction in which the affidavit originated. If the affidavit is made in Germany, it must be made before a competent German authority. The admissibility of an affidavit from another jurisdiction is solely at the discretion of the court or administrative proceedings.

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[1] Section 484(1) of the German Code of Civil Procedure (Zivilprozessrecht / ZPO) and section 27 of the Administrative Procedure Act (Verwaltungsverfahrensgesetz / VwVfG)
[2] Sections 478 and 484 of the German Civil Procedure (Zivilprozessrecht / ZPO)
[3] Section 27(3) of the Administrative Procedure Act (Verwaltungsverfahrensgesetz / VwVfG). Section 452 (2) of the German Civil Procedure (Zivilprozessrecht / ZPO), which relates to oral sworn testimony, is also applicable here.
[4] Cf: OLG Frankfurt aM Rpfleger 1982, 290, 291, KG NJW-RR 1991, 933, 934; Kirberger, Rpfleger 1975, 341, 344

The conditions are very nearly the same for both sworn and affirmed documents. The main difference under German law is that a sworn document is made under oath and an affirmed document is made by affirmation.[5]

There is no single legal provision that expressly provides for the definition and fundamentals of written statements under oath or by solemn affirmation (*Eidesstattliche Versicherung* or *Versicherung an Eides Statt*) under German law, and such statements are mainly used in preliminary proceedings and very rarely used in main proceedings. In main proceedings, oral evidence is preferred and mostly used. However, it is pertinent to state that Title 11, Administration of Oath and Affirmation, (Sections 478-484) German Code of Civil Procedure (Zivilprozessrecht/ZPO), which expressly deals with oral statements (with oath or solemn affirmation), is one of the core guiding provisions that is used in German courts and proceedings to address issues in defining the scope of written statements under oath or by solemn affirmation. In this regard, a written statement made under oath or by solemn affirmation is treated similarly to a testimony under oath or by solemn affirmation.

A written affirmed statement must be a document containing the facts affirmed to by a person who is under the obligation to swear an oath but, for reasons of faith or conscience, is unable to,[6] or where other means of establishing the truth are not available or require disproportionate expense.[7] Section 155(1) of the German Criminal Code prescribes that an affirmation in lieu of an oath shall be equivalent to an oath.

Declarations which are deliberately false are regarded under German law as an indictable offence known as perjury, with sanctions prescribed by the German Criminal Code[8] and a prescribed punishment of up to three years imprisonment.[9] In administrative proceedings, the person making an affirmation is always informed of the legal consequences under criminal law of making an incorrect or incomplete statement.[10]

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[5] See section 484 of the German Code of Civil Procedure (Zivilprozessrecht / ZPO)
[6] See section 484 (1) of the German Code of Civil Procedure (Zivilprozessrecht / ZPO)
[7] See section 27 (1-4) of the Administrative Procedure Act (Verwaltungsverfahrensgesetz / VwVfG) and section 484 of the German Code of Civil Procedure (Zivilprozessrecht / ZPO)
[8] See sections 154 and 156 of the German Criminal Code (StGB)
[9] See section 156 of the German Criminal Code (StGB)
[10] See section 92 of the Trademark Act (2016) and Section 27 of the Administrative Procedure Act (Verwaltungsverfahrensgesetz / VwVfG)

Conditions governing sworn and affirmed statements are also set out in the following laws:

- Section 478 of the German Civil Procedure (Zivilprozessrecht / ZPO) prescribes that the oath must be sworn in person by the person under obligation to so swear it.
- Section 484(1) of the German Civil Procedure (Zivilprozessrecht / ZPO) prescribes that an affirmation is equivalent to an oath, and the attention of the party who makes the affirmation is to be drawn to that fact.

Furthermore, Section 92 of the German Trademark Act (2016) prescribes that the parties must submit statements regarding factual circumstances fully and truthfully (this applies to *Eidesstattliche Versicherungen* as well as other types of statement). In this regard, the facts contained in the *Eidesstattliche Versicherung* or *Versicherung* an *Eides Statt* must be facts to which the declarant is attesting to. Where a translator is involved and the explanation is not fully understood, such documents is not considered sufficient to substantiate a conviction (ref Oberlandgericht Düsseldorf, I-20 U 144/10, IM NAMEN DES VOLKES URTEIL, 21.12.2010, 14c O 132/10LG Düsseldorf).

Sanctions are provided in the following sections of the German Criminal Code (StGB):

- Section 155(1) prescribes that an affirmation in lieu of an oath shall be equivalent to an oath.
- Section 154(1) prescribes that whosoever falsely takes an oath before a court or authority competent to administer oaths shall be liable to imprisonment of not less than one year.
- Section 156 prescribes that whosoever, before a public authority competent to administer sworn affidavits, falsely makes an affidavit or falsely testifies while referring to such an affidavit shall be liable to a fine or imprisonment not exceeding three years.

Sworn statements and statements affirmed in writing are normally only accepted in administrative proceedings and by judges in preliminary proceedings in the German lower courts, usually at the Landgericht (district courts). It is usually not allowed in the main proceedings as the judges prefer oral evidence at this point.

Depending on the nature of the proceedings and circumstances, a declarant who makes a false statement under oath or by affirmation may be availed the opportunity

to correct his false testimony in time. However, if this has caused a legal disadvantage, or a complaint or investigation has been initiated, such correction will not be allowed.[11]

In administrative proceedings, the written records in relation to an affirmation must contain the names of the witnesses. The written record shall be read to the person making the affirmation for his or her approval. The fact that these things have been done should be noted and signed by the person making the affirmation.[12]

In the case of an affidavit made on behalf of a company, the legal representative of the company at the time of submission of the affidavit is usually the person authorized to sign the affidavit, and this is usually the Managing Director. However, a designated person such as an executive director can also be authorized.[13]

Sonstige Erklärungen are declarations or explanations which are usually found in the supplementary part of a document. It can also be found in the annex, addendum or addition to a document. A *Sonstige Erklärung* can exist in the form of an additional declaration in the annex, a further explanation of certain clauses or even in the form of additional required or requisite information.

The *Eidesstattliche Versicherung* is a document which consists of declarations made in the main part of a document. The declarations must be deemed accurate and factual, and made in such a way that there should not be any need for supplementary declarations or explanations. This is what distinguishes it from the *Sonstige Erklärung*.

What the Eidesstattliche Versicherung and the Sonstige Erklärung have in common is that when such declarations are false and used to support a claim in Court, this can give rise to criminal liabilities under the provisions of Section 154 and 156 of the German Criminal Code (StGB).

Generally, a simple statement, such as a written statement under oath or solemn affirmation, will not have the same evidential weight as one under oath or solemn affirmation at first look. Also, they are generally not acceptable in Court.

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[11] See section 158 of the German Criminal Code (StGB)
[12] See section 27(5) of the Administrative Procedure Act (Verwaltungsverfahrensgesetz / VwVfG)
[13] See: BGH, BGH BB 1961, 190, NJW-RR 2007, 185, Senate; judgment of 28.4.2005 - I- 2 U 44/04; judgment of 7.10.2004 - I- 2 U 41/04; and Münch Komm / Krüger, 6th edition, 2012.

A simple copy of an affidavit is not a tenable document in legal proceedings. This position is supported by the Hamburg Higher Regional Court which stated that "an affidavit submitted only in copy has a very low power of conviction…"[14]

An assessed document that is credibly substantiated has the value of full proof before the court or administration, in so far as it conforms to the standards for admissibility of evidence.[15] However, simple statements are generally only *prima facie* proof in German courts and administrative proceedings, i.e. they are legally rebuttable presumptions.

Generally, documents must be submitted in the language of the court, i.e. German.[16] However, there have been a few exceptions where documents have been allowed in English. The admission of documents without translation is at the discretion of the court.[17] In practice, it is advised that documents are translated and the translated copy certified by a notary public before submission. Note that before the end of January 2018, there will be an English-speaking Chamber for Commercial Matters in Frankfurt in which the language of the court will be English.[18]

In Germany, the principle of investigation applies to administrative proceedings at the Deutsches Patent und Markenamt (German Patent and Trademark Office) and proceedings before the Federal Patent Court, which also adjudicates on trademark matters. This means that the court is not limited to taking only simple statements submitted by the parties into consideration.[19] Rather, the Court must investigate the statements *ex officio* within the framework of the application submitted.

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[14] See Hamburg Higher Regional Court Decision of 20.7.2015, Ref: 5U 56/15

[15] See sections 288 and 920(2) of the German Civil Procedure (Zivilprozessrecht / ZPO) and section 67 of the German Criminal Code (StGB)

[16] Section 23 of the Administrative Procedure Act (Verwaltungsverfahrensgesetz / VwVfG) and Section 184 of the Courts Constitution Act

[17] Schulte, PatG, 6th ed., § 126 Rdn 11 mwN), (https://openjur.de/u/245243.html)

[18] See http://www.loc.gov/law/foreign-news/article/germany-regional-court-of-frankfurt-establishes-english-speaking-chamber-for-commercial-matters/

[19] See section 73 of the Trademark Act (2016), the World Trademark Review 2017/2018 (Cohauz & Florack, Germany) and the following links:
https://www.bundespatentgericht.de/cms/media/Oeffentlichkeitsarbeit/Veroeffentlichungen/Informationsbroschueren/infobroschuere_en.pdf (page 15)
https://www.lexology.com/library/detail.aspx?g=4673e5fe-2d73-4627-a610-8f7d6d4ebcb1
http://limegreenip.hoganlovells.com/article/127/preliminary-injunctions-preliminary-injunctions-germany

On the basis of comparability between European Patent Office (EPO) and European Union Intellectual Property Office (EUIPO) proceedings, in general, simple statements should be considered admissible in proceedings before the EUIPO. However, the probative value depends on the circumstances of each case. For example, in one instance a statement by an employee of one of the parties to a proceeding was regarded as sufficient evidence.[20]

Provisions of the German Trademark Act (2016) which are of relevance to sworn and affirmed statements have been considered in the following matters:

Oberlandesgericht Düsseldorf, I-20 U 144/10, IM NAMEN DES VOLKES URTEIL, 21.12.2010, 14c O 132/10LG Düsseldorf [21]

Landgereicht Dusseldorf, judgement of 28.01.2015, 2a O 250/14 [22]

Provisions of the Administrative Procedure Act (Verwaltungsverfahrensgesetz / VwVfG) which are of relevance to sworn and affirmed statements have been considered in the following matter:

Bundespatentgereicht, decision date 26.07.2017, Mark 302011043337 [23]

Provisions of the German Code of Civil Procedure (Zivilprozessrecht / ZPO) which are of relevance to sworn and affirmed statements have been considered in the following matters:

Hamburg Higher Regional Court, decision of 20.07.2015-5U 56/15 [24]

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[20] See K. K. Toshiba v. Vacuumschmelze and N. V. Philips Gloeilampenfabrieken (case law identifier: ECLI:EP:BA:1989:T016287.19890608) and the following links:
http://www.epo.org/law-practice/legal-texts/html/caselaw/2016/e/clr_iii_g_4_2_1.htm
http://www.epo.org/law-practice/legal-texts/html/caselaw/2016/e/clr_iii_g_2_3.htm

[21] https://beck-online.beck.de/Rechtsprechung/29335 (Judgment of 21.12.2010 - I-20 U 144/10 | ZPO § 263 | ZPO § 269 | ZPO § 920 | ZPO § 935 | ZPO § 940, Date of receipt: 07.10.2011, BeckRS 2011, 22570)

[22] https://openjur.de/u/765687.html

[23] http://juris.bundespatentgericht.de/cgi-bin/rechtsprechung/list.py?Gericht=bpatg&Art=en&sid=ff77ada81cd35344598ee40571d5d5da (Aktenzeichen 29 Z (pat) 528/16

[24] https://beck-online.beck.de/Rechtsprechung/29335 (Decision of 20.07.2015 - 5 U 56/15 | GGV Article 10 | GGV Article 19 | GGV Article 4 | GGV Article 89 | GGV Article 90. Date of receipt: 27.10.2016 BeckRS 2016, 18471)

Landgericht Dusseldorf, decision of 05.06.2015, 2a O 89/15 [25]

2.2 France

In French civil procedure, there is no such thing as a "sworn" or "affirmed" statement. The concept which is most similar is the "attestation sur l'honneur". (Note that there is also the "déclaration sous serment" which will be covered separately.) The following translations of "attestation sur l'honneur" into English are possible, and in fact used by EU institutions: "declaration on one's honor" [26] and "sworn statement".[27] The French legal system favours the first translation, as a "sworn" statement may imply certain mandatory conditions for it to be effective (e.g. presence of a notary or a witness), whereas in France the form and content of an "attestation sur l'honneur" are not regulated by law.[28] More precisely, the formal requirements as to the form and content of the declaration may or may not be specified in each individual instance by decrees, circulars or other legislative instruments, with the result that there is no coherent approach.

The "attestation sur l'honneur" is not a formal means of proof in civil procedural law. It is used in a number of administrative formalities/procedures, or in court proceedings specifically mandated by procedural rules, such as:

- affirmation that someone resides with the author of the "attestation";
- affirmation that certain monetary sums have been received;
- affirmation of a party's "means, incomes, assets and ways of living" in divorce proceedings;[29]
- affirmation of the absence of parental relations between persons wishing to enter into a civil union (PACS) or communal living;[30]
- affirmation of a candidate for membership in a Chamber of Commerce;[31]
- affirmation of the absence of any bank accounts;[32]

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[25] https://app.darts-ip.com/darts-web/client/case-results.jsf
[26] See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:269:0001:0038:EN:PDF (English), section 4.3.1
[27] See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:269:0001:0038:FR:PDF (English) and http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:127:0028:0031:EN:PDF (French), section 7-1
[28] As confirmed by the French Cour de Cassation in its Judgment No. 02-13.214 (First Civil Chamber) dated March 22, 2005
[29] Article 272 of the French Civil Code and Article 1075-1 of the French Code of Civil Procedure
[30] Articles 515-2 and 515-7-1 of the French Civil Code and Point 1.2.2 of the Circular of May 10, 2017
[31] Article R 713-9 of the Code

- affirmation that a person will abide by the fundamental principles of French society (and of non-polygamy), required to obtain a residency permit in France;[33]
- affirmation that a person is being fully taken care of by another person, required for certain insurance purposes;[34]
- affirmation that a person is not forbidden to possess and carry firearms, required for the issuance of a hunting license;[35] and
- affirmation of the accuracy of financial information provided to the tax authorities.

In other words, French law requires "attestations sur l'honneur" in a number of fact-specific instances, in which no other means of proof is available, or as an additional means of confirming the veracity of documentary evidence submitted.

French law contains provisions which relate to sanctions with respect to the making of false statements, although there is arguably no coherent approach as to the sanctions for inaccurate or false "attestations sur l'honneur". For example, Article 441-7 of the French Penal Code ("CP") sets a penalty of one year's imprisonment and a fine of EUR 15,000 for: (i) drafting a statement containing materially inaccurate facts; (ii) forging a statement; or (iii) using an inaccurate or forged statement. The French Cour de Cassation clarified that for Article 441-7 CP to be triggered, a statement must bear the signature of its author.[36] Article 434-15 of the CP sets a penalty of three years' imprisonment and a fine of EUR 45,000 for inducing a party to make a false statement in the course of proceedings. This penalty does not exclude civil liability for any damage that an inaccurate or forged statement may have caused to the opposing party.

For relevant case law, see the decision of the Criminal Chamber of the Court of Cassation No. 99-83.224, dated March 15, 2000.

There are no conditions relating to the presence of a witness on signing an "attestation". The only conditions as to the structure or form of the statement are that it must contain: (i) the name, date of birth, place of birth, domicile and occupation of the author; (ii) his/her family relation, affiliation, relation of subordination,

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[32] Decree of December 18, 2008 on banking system accessibility, Annex, Article 2
[33] Articles R 314-1 and R 313-20 of the French Code of Entry and Residency of Foreigners
[34] Article R 251-3 of the French Family Code
[35] Article L 423-6 of the French Code of Environment
[36] Decision No. 99-83.224 of March 15, 2000

collaboration or common interests with the parties to the dispute; (iii) an express stipulation that the statement is made to be produced in a court of law, and that the author is aware of the criminal penalties for any false statements; (iv) a date and the author's own signature; and (v) an original or a copy of the author's official identification document containing his or her signature.[37]

Note that a failure to comply with the above requirements does not automatically invalidate the declaration. According to case law, it is for the court to establish whether statements not in conformity with Article 202 of the CPC should be considered as evidence.[38]

As to the content of the statement, it must contain an account of facts which the author has witnessed or personally observed.[39] It remains an unsettled question in French doctrine as to what evidentiary value, if any, should be given to an account of facts that the author of the testimony has not witnessed personally (e.g. double hearsay).

As to the author of the statement, French law sets out the following limitations: (i) a criminal conviction leads to the forfeiture of civic and civil rights, including the right to make any statement in court other than a simple declaration[40]; and (ii) family descendants may never be heard on grievances raised by spouses in divorce or judicial separation matters.

According to case law, it is for the court to determine the evidentiary value of a statement, based on the judge's conviction.[41] However, French doctrine overwhelmingly supports the position that testimonial proof (e.g. a statement) is inferior in evidentiary value to documentary proof.

In addition to the "attestation sur l'honneur", there is also the "déclaration sous serment", which may be translated as a "declaration under oath".[42] This is sporadically employed in French law, and specifically in the French Code of Public

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[37] Article 202 of the CPC
[38] Decision of the 1st Civil Chamber of the Court of Cassation No. 77-11.051, dated June 6, 1978; Decision of the 2nd Civil Chamber of the Court of Cassation No. 78-11.518, dated July 11, 1979; Decision of the Social Chamber of the Court of Cassation No. 79-40.001, dated April 24, 1980; and Decision of the 1st Civil Chamber of the Court of Cassation No. 02-20.652, dated December 14, 2004
[39] Article 202 of the CPC
[40] Article 205 of the CPC and Article 131-26 of the CP
[41] Decision of the 2nd Civil Chamber of the Court of Cassation No. 89-21.841, dated April 15, 1991
[42] As used in the government-endorsed English translation of the French Civil Code, Article 160

Procurement (Code des Marchés Publics). This code is a result of the implementation by France of the EU procurement Directive 2004/17/EC, and therefore includes a number of imported terms and concepts that may not be otherwise found, used or defined in French law. Please also note that as with the Directive, the Code is limited in scope and covers procurement contracts entered into by the French state, its administrative public bodies, local governments and local public bodies.

The Code refers to the "déclaration sous serment" in Articles 46(II) and 224(II), which deal with the documents that a candidate for the public procurement procedure must furnish, and, with respect specifically to these "déclarations", is limited to candidates domiciled outside of France. In other words, such "déclarations" are not, *per se*, used in France. This is further confirmed by the January 2013 notice by the Legal Affairs Department ("Direction des Affaires Juridiques") under the French Ministry for Economy and Finance and the Ministry of the Civil Service, to the effect that the "déclarations sous serment" under Article 46(II) of the Code "may not take the form of an 'attestation sur l'honneur' drafted by the author himself" and "must be effected before an authorized third party, respecting a certain degree of formality."

The only other French legal text in which the term "déclaration sous serment" is used is the French Civil Code, in the part dealing with the marriage of minors when the required consent of parents cannot be obtained.[43] There are no indications elsewhere in the Civil Code as to what form this "déclaration sous serment" should take or what particular procedure it should follow.

French case law confirms that the term "déclaration sous serment" is used by French courts either within the context of the Code of Public Procurement, or to refer to affidavits/sworn statements made outside of France.[44]

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[43] Book I, Part V, Chapter I, Articles 149, 150 and 160

[44] See: the Decision of the Administrative Court of Appeals of Versailles No. 08VE02505, dated October 22, 2009 and Decision of the same Court No. 09VE00435, dated September 2, 2010 (referring to affidavits from Indian local government authorities); the Decision of the Administrative Court of Appeals of Paris No. 08PA02372, dated February 11, 2010 (referring to an affidavit from the UK); the Decision of the Court of Appeal of Aix-en-Provence (2nd Commercial Chamber), dated October 26, 2001 (referring to an affidavit made before a New York court); and the Decision of the Court of Appeal of Paris No. 12/14238, dated March 13, 2014 (referring to an affidavit made before an Irish court).

2.3 Spain

In Spanish civil or procedural law there is no such thing as a “sworn” or “affirmed” document or statement, even though some administrative regulations still require “sworn statements” as part of the documentation to be provided for administrative and bureaucratic purposes. The most similar concept to the “sworn” or “affirmed” statement is a notarial statement deed, in which a person’s statement is collected by a notary. The only applicable condition is that the person must appear in person before the notary, who has to verify the identity and capacity of the person as well as the legal or conferred empowerment to act on behalf of a legal entity (where applicable).[45] There is no need for a witness because, according to Spanish Law, the notary publicly attests the truthfulness of the identity, date, power of attorney, etc., of the person who makes the statement.

A notarial statement deed has the status of “public document” and falsifying such an official document is an offence under the Spanish Crime Code. Sanctions including imprisonment and fines apply to the following types of forgery:

- Altering any of the essential elements or requisites of a document.
- Simulating all or part of a document, so as to mislead concerning its authenticity.
- Claiming intervention in an act by persons who were not party to it, or attributing to those who intervened declarations or statements other than those they made.

However, Article 392.1 of the Spanish Crime Code excludes sanctions for the forgery of ‘untruthful narration of the facts’.[46]

Simple statements are also recognized by Spanish courts and refer to any other type of document or item of evidence.[47] Unaffirmed statements and sworn statements are both considered as simple documents or items of evidence by Spanish courts. Spanish civil procedural law only makes a distinction between public and private documents. Public documents are considered as full proof of the circumstances verified by the notary public or attesting official (date, identity of the person, etc.), but never for the content of a statement made by a private person. The documents

[45] Articles 1216 to 1224 of the Spanish Civil Code. STS (Section 1) No 708/2009 October 27
[46] See Articles 390-394 of the Spanish Criminal Code
[47] Article 299 of Spanish Civil Procedural Law

assessed within a court proceeding are considered as full proof only between the parties who participated in it (i.e. *inter partes*, not *erga omnes*).

According to the Spanish Civil Procedural Law, a simple statement is only *prima facie* proof and not full proof, as is the case with any other document or item of evidence. However, Article 326 of the Spanish Civil Procedural Law provides that in the event that a private document is not challenged by the counterparty, it is regarded as full proof. However, this refers only to the authorship and date, and not to the truthfulness or plausibility of the rest of the document. The principle of free appraisal of evidence applies, so, as stated in the Outburst case, to prove the veracity of a statement the respective parties must complement written statements (whether simple, sworn or affirmed) with any other evidence that proves the truthfulness of its content.

According to Spanish law, simple statements do not meet the requirements of article 97.1(f) of the EUTMR.

2.4 Italy

In Italy, there is no difference between a "sworn" document or statement and an "affirmed" document or statement. Documents and statements can only be affirmed,[48] as Italian law does not provide for swearing an oath. The declarant makes an "affirmed" document or statement ("atto di notorietà", "atto notorio" or "dichiarazione giurata") by signing a formal declaration in front of certain authorities[49] and in front of two or more witnesses (they must be at least 18 years of age and they must be independent). "Affirmed" statements can contain any facts that have legal effect according to the law and any statements which are not contrary to any law. An "affirmed" document or statement is considered to be a public document. Therefore, being a public document, it is regarded as "full evidence" pursuant to Articles 2699 and 2700 of the Civil Code. Pursuant to Article 2700 of the Civil Code, a public document is "full evidence"[50] until proven otherwise.[51] In particular, it is considered as full evidence that the document was released by the declarant and that the facts provided under the statement are well known to both the declarant and the witness. It does not constitute evidence about the veracity of the facts set out in the statement. "Affirmed" documents and statements are rarely used these days as they have generally been replaced by "simple" statements.

There is no general legislation which governs "affirmed" statements, but there are criminal penalties for making untrue "affirmed" statements. In particular, under Article 483 of the Italian Criminal Code,[52] any person who provides an untrue statement to a public officer in a public act regarding the facts that the statement sets out to certify can receive a prison sentence of up to 2 years.

"Simple" or "unaffirmed" statements ("Dichiarazione Sostitutiva di Atto di Notorietà") can be signed in lieu of "affirmed" statements ("Atto di Notorietà"). This possibility was introduced by Decree of the President of the Republic, No. 445/2000 in order to facilitate administrative proceedings. Pursuant to Article 47 of the decree, some "affirmed" documents or statements can be replaced by a simple statement

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[48] Article 5 of the Royal Decree 9 October 1922, n. 1366; Article 1 of Paragraph 2 of the Law 16 February 1913, n. 89; Article 2699 of the Civil Code enacted by Royal Decree 16 March 1942, n. 262

[49] A clerk, pursuant to Article 5 of the Royal Decree 9 October 1922, No. 1366 or a Public Notary pursuant to Article 1 of paragraph 2 of the Law 16 February 1913, No. 89

[50] "Full evidence" means that the judge does not have the discretionary power to assess the evidentiary value of the document, and that such value is pre-determined by law.

[51] By a special proceeding called a "querela di falso" (which aims to demonstrate that a document has been falsified).

[52] Enacted by Royal Decree 19 October 1930, No. 1398, and subsequent amendments

("Dichiarazione Sostitutiva di Atto di Notorietà") signed by the declarant. The content of the statement can only refer to certain personal information about the declarant or facts directly known by the declarant regarding himself or herself or third parties that are unknown by the public administration (used to certify those which are not expressly indicated in Article 46 of the decree[53]). By using this type of statement, it is also possible to declare that a document is a faithful copy of the original in cases of documents registered and issued by the public administration, publications, tax documents which are in the hands of private persons. This type of statement cannot refer to future intentions of the declarant. These statements are made only for the purpose of being presented to the public administration or to the concessionaire of public services. On the basis of Article 3 of the decree, the declarant can only be an Italian, an EU individual, a juridical person (legal entity) or a foreign individual residing legally in Italy, in order for the personal information and facts to be certified by Italian public entities.[54] These statements are signed in front of a clerk or are provided to the public administration officers or concessionaires of public services already signed, together with a copy of the declarant's identity card (Article 38 of the decree). There are criminal sanctions for making a false statement of this kind.[55]

Unaffirmed statements have the same value as affirmed statements in the cases set out in the Decree of the President of the Republic No. 445/2000 in the relationship between the public administration and the private person only, as these statements are signed in lieu of affirmed statements ("Atto di notorietà"). Before the Court (either in a civil or an administrative proceeding), a simple or unaffirmed statement (Dichiarazione Sostitutiva di Atto di Notorietà) is not evidence.

Before the public administration, pursuant to Article 47 paragraph 3 of the decree, and for administrative purposes between the person and the administration, these documents must be used to certify certain personal information or facts (i.e. those not expressly indicated under Article 46 of the same decree).

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[53] Under Article 46 of the Decree No. 445/2000, the certificates to be provided by the public administration can be replaced by a self-declaration ("Dichiarazioni sostitutive di certificazioni"). They are provided with the same modalities as the "Dichiarazione sostitutiva di atto di notorietà". This article provides a specific list of the personal information and facts that can be certified by a "Dichiarazioni sostitutive di certificazioni" (e.g. date and place of birth, domicile, citizenship, professional qualifications, employment status and student status).

[54] Otherwise, if the personal information and facts cannot be certified by the Italian authorities, statements can be made on the basis of the execution of an international convention between Italy and the concerned foreign country.

[55] Articles 3, 38, 47 and 76 of Decree of the President of the Republic, No. 445/2000, and Article 483 of the Italian Criminal Code enacted by Royal Decree 19 October 1930, No. 1398, and subsequent amendments

However, a simple or unaffirmed statement is neither a full proof nor a *prima facie* proof in a civil or administrative legal proceeding. In judgment 12065/2014, the Joined Chambers of the Civil Court of Cassation ruled that an unaffirmed statement does not constitute full evidence, as such a statement only has effect in front of the public administration and administrative proceedings. However, in the event that the statement is submitted in a legal proceeding, the judge can assess the behaviour of the party against whom the statement is enforced, assessing specifically whether this party objects and, if the party does, the degree of specificity of such objection, which must be closely related and in proportion to the degree of specificity of the content of the unaffirmed statement. (Pursuant to Article 115 of the Civil Procedural Code, the judge can also base his or her decision on the facts which were not specifically objected to).

With respect to sanctions, the Criminal Court of Cassation,[56] as well as the Joined Chambers of the Criminal Court of Cassation[57] and the Criminal Court of Cassation[58], ruled that the "Dichiarazione sostitutiva di Atto di Notorietà" is a public document and Article 483 of the Criminal Code is applicable. The Criminal Court of Frosinone imposed a suspended two-month prison sentence for a breach of this article[59] and in another case the Trento Court of Appeal confirmed the sanction of a four-month prison sentence imposed by a lower court (later reduced to a suspended two-month sentence).[60]

2.5 United Kingdom

An affidavit is a written statement made by an individual which is verified by oath or by solemn declaration. The manner of administration of oaths and affirmations is regulated by the Oaths Act 1978 (applicable in England, Wales, Northern Ireland and Scotland). However, according to section 4 of the Oaths Act, the manner of administration is not a necessary condition to qualify an oath or affirmation as sworn or affirmed. This was confirmed in R v Kemble [1990] 3 All ER 116.

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[56] Judgment No. 25927 dated 24/05/2017
[57] Judgment No. 6/1999
[58] Judgments No. 19361/2006, 20570/2006, 5365/2007 and 4970/2012
[59] Criminal Court of Frossinone (first instance), judgment dated 03.07.2017
[60] Court of Appeal of Trento, judgment dated 31.05.2017

In England and Wales, the requirements for the form and content of an affidavit are set out in detail in PD32.[61] For instance, the heading must be in the form set out in PD32.3. If practicable, the affidavit must be in the deponent's own words, and the affidavit should be printed on good quality paper. It must disclose which statements are made from the deponent's own knowledge and which are matters of information and belief, as well as the source of the information or belief. The jurat clause, which is a statement at the end of the affidavit which authenticates it, must be signed by all of the deponents and completed and signed by the person before whom the affidavit was sworn.

According to Section 5 of the Commissioners for Oaths Act 1889 (applicable to England, Wales, Northern Ireland and Scotland) the jurat also must include the address of the place where the oath is administered and the date on which it is sworn.
However, it was held in Haederle v Thomas [2016] EWHC 3498 (Ch) that a failure to comply with any of the requirements might make an affidavit defective, but the court still has the discretion to admit a defective affidavit. Thus, the necessary condition is that it is evidence given by a deponent which is sworn or affirmed to be true, rather than merely stated to be true.[62]

The provisions and rules relating to oaths in affidavits also apply to affirmations with the exception of the change to the wording at the beginning of the affidavit and in the jurat, where the word "sworn" is replaced with the word "affirmed". Where a person objects to swearing an oath, whether for religious or other reasons, they may make an affirmation instead. Similarly, where it is not reasonably practicable to administer an oath without inconvenience or delay (for example, because the appropriate holy book is not at hand), the person may be permitted or even required to affirm (section 5, Oaths Act 1978). An affirmation has the same force and effect as an oath (section 5(4), Oaths Act 1978).

Conditions for the formation of these documents are not set out in an act or a statutory instrument. For England and Wales, the conditions are set out in a supplemental protocol document titled Practice Direction 32, which supplements Part 32 of The Civil Procedure Rules 1998. The conditions in PD 32 are related to the

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[61] Practice Direction 32 - Evidence, which supplements Part 32 of The Civil Procedure Rules 1998
[62] See: The Commissioners for Oaths Act 1889; The Oaths Act 1978; Practice Direction 32 - Evidence, which supplements Part 32 of The Civil Procedure Rules 1998 (applicable to England and Wales); Haederle v Thomas [2016] EWHC 3498 (Ch); and R v Kemble [1990] 3 All ER 116

structure of the document and to the circumstances in which the document was signed. For example: the structure of the heading of the document in PD 32.3; the body of the affidavit in PD 32.4; the jurat in PD 32.5; the format of the affidavits in PD 32.6; and those who may administer oaths and take affidavits in PD 32.9. In Scotland, affidavits are not dealt with by the RWSA 1995 but by common law. Individual courts may have guidance available on the use of affidavits.

Although the conditions are not set out in legislation and there are no associated sanctions, knowingly swearing a false affidavit can be qualified as both perjury and contempt of court. Sanctions are imprisonment or a fine or both.[63]

The Statutory Declarations Act 1835 (applicable to England, Wales, Northern Ireland and Scotland) provides for the use of declarations in place of oaths and affirmations in certain specified circumstances. These include:

- Where the Treasury substitutes a statutory declaration in cases relating to customs and excise revenues (section 2).
- By the Bank of England in cases relating to the transfer of stock (section 14).
- To prove the due execution of any will or codicil, deed or instrument in writing (section 16).
- Certain statutes and legislative provisions which require statements about particular matters to be verified by statutory declaration. It is not practical to list all of these situations, but they include:
    - Under section 89 of the Insolvency Act 1986 (applicable to England, Wales, Northern Ireland and Scotland), a majority of the directors of a company can make a statutory declaration of solvency to the effect that, having made a full inquiry into the company's affairs, they are satisfied that the company will be able to pay its debts in full, together with any interest, within a specified period not exceeding 12 months from the commencement of the winding up. This is necessary for a members' voluntary wind-up of a company.
    - Other insolvency-related situations, such as where a qualifying charge-holder wishes to appoint an administrator out of court. They must file with the court a notice of appointment which must include a statutory declaration confirming certain matters.[64]

[63] See: Practice Direction 32, which supplements Part 32 of The Civil Procedure Rules 1998; Perjury Act 1911; Hydropool Hot Tubs Ltd v Roberjot and a company - [2011] All ER (D) 106 (Feb); Requirements of Writing (Scotland) Act 1995; and https://www.scotcourts.gov.uk/home/commercial-court/guidance-on-use-signed-witness-statements-or-affidavits

[64] Rule 3.17 of the Insolvency (England and Wales) Rules 2016

- Where a landlord and a tenant wish to enter into an agreement to surrender an existing business tenancy at a future date, they must follow one of two procedures in order for the agreement to be valid and effective: the advance notice procedure or the statutory declaration procedure. The latter involves the tenant making a statutory declaration confirming that he or she accepts the consequences of entering into the agreement. There is a similar procedure for contracting out of security of tenure.
- Under the Land Registration Act 2002 (applicable to England and Wales), an application for adverse possession of registered land may be supported by a statutory declaration.

There are several situations in which statutory declarations are usually used, although there is no legislative requirement, such as when a person is changing his or her name. A statutory declaration is *prima facie* proof as it can be rebutted.[65]

Section 7 of the Statutory Declarations Act 1835 (applicable to England, Wales, Northern Ireland and Scotland) provides that nothing in the act affects the requirement of an oath, affirmation or affidavit in any judicial proceedings in court. Under Section 2 of the act, a statutory declaration can have the same effect as the oath or solemn declaration, which suggests that it has the same evidentiary value.

As statutory declarations have the same effect as sworn or affirmed statements (in certain circumstances) they can be an acceptable means of giving evidence in proceedings before EUIPO under Article 97(1)(f) of the EUTMR.

Unless challenged, 'Witness Statements' have the same status as evidence given by a witness in oral evidence in court, though they are commonly used in 'paper-based' proceedings such as decisions before tribunals. 'Witness Statements' are also mentioned in Rule 64 of the Trade Mark Rules 2008. Mistruths in a witness statement are not subject to the rules on perjury or the sanctions set out in the Statutory Declarations Act. They are, however, covered by other provisions of the general law, specifically the UK criminal offence of attempting to pervert the course of justice.

The governing legislation and the respective case law includes:

- The Oaths Act 1978, s 1(3) (see R v Kemble [1990] 3 All ER 116)

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[65] See Hedworth v Jenwise Limited [1994] Lexis Citation 1626

- The Civil Procedure Rules 1998, RSC Order 45 (see Hydropool Hot Tubs Ltd v Roberjot and a company [2011] All ER (D) 106 (Feb))
- Hedworth v Jenwise Limited [1994] Lexis Citation 1626
- The Civil Procedure Rules 1998, Part 32.16 (see Haederle v Thomas [2016] EWHC 3498 (Ch))

2.6 Poland

Polish procedural law has not traditionally included the concepts of 'sworn' or 'affirmed' documents. However, provisions relating to an affirmed statement can now be found in the Code of Civil Procedure and in the Code of Administrative Procedure (implementing provision 97(1)(f) of the EUTMR).

The Code of Civil Procedure (KPC) allows for various means of evidence, in particular evidence from documents. The main distinction made is between a public document (i.e. a document issued by a public authority) and a private document (statement). While a public document is evidence of what it states, a private document is evidence of the fact that the signatory made such a statement.[66] An oral statement made by a witness before a court has the characteristics of a sworn statement. Witnesses are warned that they are expected to tell the truth and that making an untrue statement before the court is a criminal offence.

Following an entry into force of an EU Regulation (No 1896/2006) on 12 December 2006, which created a European order for payment procedure; a special procedure in such matters was introduced in the Code of Civil Procedure. This is the only instance of a written sworn statement in the Polish procedure (Art. 505(25) § 1 of the Code of Civil Procedure.

Under the Code of Civil Procedure (505 (25) § 1 of KPC), a witness must give a written statement if the court so decides, and the witness is obliged to submit the statement in court by the deadline set by the court. This is the only instance in which Polish law allows the use of a written statement instead of a verbal explanation.

Polish Intellectual Property Law doesn't include regulations such as in EUTMR, so the Code of Administrative Procedure (KPA) is applied in such proceedings. This act sets out the possibility of using a simple written statement but lacks details. Article 70

[66] See the Code of Civil Procedure (KPC), Articles 244 and 245

of the KPA allows the inclusion of a written statement of a witness, party or other person, but does not set out any conditions for the formation of such a statement. A public administration office may allow the inclusion of a written statement signed by the person, and other documents relevant to the case.

In accordance with Article 75 § 2 of the Code of Administrative Procedure, when the law does not require the official confirmation of certain facts or legal status by means of a certificate of the competent administrative authority, a sworn statement from a party may be admitted. Under Article 75, everything that can clarify the issue may be considered as proof, e.g. testimonies, documents, etc.

Finally, with respect to the Code of Criminal Procedure (KPK), Article 453 states that a written statement should be read in court,[67] but the KPK does not regulate the form of such statements and it is assumed that they must be personally signed.[68] A person called to give a written statement as a witness should be notified about the right to refuse to give testimony and the criminal responsibility for giving false testimony.[69] Such documents must be signed by a witness and are generally used in administrative matters.

Providing false testimony is subject to criminal sanction under article 233 (§ 1.) of the Polish Criminal Code, where written testimony that is itself untrue, or conceals the truth, is subject to imprisonment for between 6 months and 8 years.

Due to the need to informalize and speed up small claims procedures, deviations from the general rules of evidence are possible. It should be noted that the decision of the court regarding the rules of evidence depends on the form in which it will conduct the evidentiary proceedings. The court has the right to use the general rules and hear statements or receive them in writing using the European Small Claims Procedure. The judge's experience will be used to determine whether a deviation from the basic rules and the principles of oral evidence is justified by the circumstances of the case.

Generally, it is possible that a civil court will allow a simple written statement as proof, but in Polish civil proceedings, the rule of immediacy and the verbal rule exclude the possibility of admitting evidence in the form of a written witness

[67] Article 394 of the KPK shall apply
[68] General rules of the Civil Code and Code of Civil Procedure will be applied
[69] See Article 266 § 1 of the Code of Civil Procedure

statement (whether by parties or expert witnesses). The court will always prefer to receive an oral statement in relation to a document, unless the document is strictly in the form provided by law (written, electronic, dated, signature certified by a notary public, etc.) For example, if a person wants to buy a house, he or she must sign a contract in notarial form. It is not possible to take evidence from another document or a verbal explanation by a witness in the absence of a notarial form of such an agreement.[70]

2.7 Sweden

The Swedish legal system does not include the concept of “sworn” or “affirmed” statements or documents, and there are therefore no statutory conditions regarding the qualification of a document or statement as “sworn” or “affirmed”.

Swedish courts adhere to the fundamental principles of freedom of proof and freedom of evaluation of evidence. This is illustrated by the Swedish Code of Judicial Procedure (1942:740) Chapter 35, Section 1, where it is stated that the court shall, based on everything that has been presented, decide which facts have been proven.

A statement, sworn or not, is never full proof but its authenticity and evidentiary value are evaluated by the court.

For example, it is common to use statements from trade organizations in court cases in Sweden. The organizations sign their statements without any formalities. The content of such a statement is normally considered to be strong evidence (people are expected to tell the truth).

Either the court or a party to the proceedings may request that a witness should appear before the court to make an oral statement. The court will generally (at least in the first instance) conduct oral proceedings where the relevant people are heard and questioned under oath.

For a party, it is voluntary to be heard under oath. If the party decides to be heard under oath, and makes a false statement, he is committing a criminal act.

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[70] See Article 73 of the KC

3. Annexes

3.1 Primary Research Sources

Initials	Experience	Region	Years' Experience
MR	Wide experience in a global legal advice both domestic or international Specialties: Global legal advice to private clients, personal or corporate income tax, domestic and international investments planning, real estate planning, businesses planning, family inheritance or donations planning, or marital crisis planning	Spain	20+
NC	International business law with more than 15 years' experience in company formation, contracts, litigation and ADR (arbitration and mediation) in Italy and abroad.	Italy	15+
OE	Corporate and Commercial Legal Practitioner with extensive experience in Corporate Governance and Management Administration.	Germany	15
SA	Specialised in international arbitration and has acted in proceedings conducted under the Arbitration Rules of the International Court of Arbitration of the International Chamber of Commerce Centre (ICC), International Centre for Settlement of Investment Disputes (ICSID) as well as in ad hoc proceedings, including under the UNCITRAL Rules.	France	10+
MC	Legal consultant with more than 10 years of experience in law, specializing in legal and policy analysis and report drafting primarily in relation to EU environmental acquis implementation as well as other areas of law and policy	UK	10+
MO	Legal services: civil law, commercial law, partnership and corporation law, administrative law and family law	Poland	15+
FS	Litigation and arbitration work in the field of dispute resolution.	Sweden	10+
GM	Consultant with 25 years' professional experience in advising C-suite executives and senior management. Has advised on acquisitions in the $0.5-10 million range. Experienced in a broad range of research methods and analytical tools to produce key insights, valuations and strategies delivered via highly professional presentations.	UK	25+

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