

Overview of the case so far

Over the past few years the EPO has made concerted efforts to reduce the pendency of Oppositions and Appeals. For Oppositions the EPO has adopted its ‘early certainty’ program to bring more clarity to the timing of procedures during an Opposition. For Appeals the Boards of Appeal have been reorganised and new Rules of Procedure have been adopted.

Unfortunately the global pandemic led to a substantial number of oral proceedings, originally scheduled to take place in 2020, to be cancelled. Although videoconference was available under a pilot program, oral proceedings could only take place with the agreement of all parties, meaning that most oral proceedings did not take place.

In response, the EPO has extended its pilot program for oral proceedings by videoconference to mandate that parties to Oppositions undertake oral proceedings by videoconference.

The Presidium of the Boards of Appeal has introduced a new rule (r.15A) into the Rules of Procedure which provide similar powers to the Boards of Appeal. Although the new rule was to take effect in April 2021, the President of the Board of Appeal announced that Boards could compel parties to attend oral proceedings by videoconference before that date.

In Board of Appeal case **T1807/15**, one of the parties objected to being compelled to attend oral proceedings by videoconference and the Board of Appeal decided to refer the following question to the Enlarged Board of Appeal:

Is the conduct of oral proceedings in the form of a videoconference compatible with the right to oral proceedings as enshrined in Article 116(1) EPC if not all of the parties to the proceedings have given their consent to the conduct of oral proceedings in the form of a videoconference?

The question, which will have significant ramifications to the conduct of parties in Appeal (and potentially Opposition) proceedings, was supposed to be debated by the Enlarged Board of Appeal on 28 May 2021. Ironically, the hearing was held by videoconference.

In the hearing on 28 May the Enlarged Board of Appeal dealt with a first controversy, namely the partiality (or otherwise) of the President of the Boards of Appeal and two other members of the Enlarged Board of Appeal. The President of the Boards of Appeal was replaced prior to the hearing (interlocutory decision of 17 May 2021), and the remaining objections were either refused or held inadmissible.

However, the main question was not actually discussed on 28 May. The Enlarged Board of Appeal accepted arguments from the appellant that its right to be heard (A.113 EPC) was likely to be violated because it was only provided with certain papers two days before the oral proceedings. Furthermore, the provision of documents in such a way was not in accordance with the Rules of Procedure of the Enlarged Board of Appeal (A.9). The fact that the submissions had been uploaded to the online register much earlier and could readily be downloaded was deemed not to be a substitute for proper and timely notification of the papers to the appellant. So, the oral proceedings were postponed until 2 July 2021.

G1/21 hearing at the EPO – Round 2

28th May 2021

Hopefully the reconvened proceedings will provide an answer to the remaining question. (interlocutory decision of 17 May 2021)