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**Datasheet for the interlocutory decision
of 12 March 2021**

Case Number: T 1807/15 - 3.5.02

Application Number: 04758381.0

Publication Number: 1609239

IPC: H03F1/02

Language of the proceedings: EN

Title of invention:

Doherty Amplifier with Output Hybrid Coupler

Patent Proprietor:

Andrew AG

Opponent:

Rohde & Schwarz GmbH & Co KG

Headword:

Oral proceedings in the form of a videoconference

Relevant legal provisions:

EPC Art. 112(1)(a), 113(1), 116, 33(1)(b), 18(2), 23(4),
19(2), 164(2)
EPC R. 12c(2), 115(2), 117, 118
RPBA 2020 Art. 15(3)
EPC 1973 Art. 16, 17
EPC 1973 R. 71
Vienna Convention on the Law of Treaties (1969) Art. 31, Art.
32
Art.6(1) European Convention on Human Rights
§ 128a ZPO (German Code of Civil Procedure)
Art.8 Regulation (EC) No. 861/2007

Keyword:

Referral to the Enlarged Board of Appeal - point of law of
fundamental importance
Oral proceedings - format - videoconference - right to be
heard in oral proceedings
Right to in-person oral proceedings

Decisions cited:

G 0001/97, G 0002/07, G 0003/08, G 0001/12, G 0002/12,
G 0002/19, G 0003/19, T 1012/03, T 0689/05, T 0677/08,
T 1500/10, T 2068/14, T 1378/16

Catchword:

The following question is referred to the Enlarged Board of
Appeal for decision:

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?



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Case Number: T 1807/15 - 3.5.02

I N T E R L O C U T O R Y D E C I S I O N
of Technical Board of Appeal 3.5.02
of 12 March 2021

Appellant: Rohde & Schwarz GmbH & Co KG
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted on
7 August 2015 concerning maintenance of the
European Patent No. 1609239 in amended form.

Composition of the Board:

Chairman R. Lord
Members: W. Ungler
F. Giesen

Summary of Facts and Submissions

- I. The appeal of the opponent (appellant) is directed against the decision of the opposition division concerning the maintenance of European patent number 1 609 239 in amended form on the basis of the main request filed during the oral proceedings of 19 May 2015.
- II. By communication dated 24 January 2020 the parties were summoned to (in-person) oral proceedings scheduled for 3 June 2020.
- III. With letter dated 5 May 2020 the respondent (patent proprietor) requested that the oral proceedings be postponed due to the COVID-19 pandemic.
- IV. By communication dated 18 May 2020 the Board informed the parties that the oral proceedings had been rescheduled for 8 February 2021.
- V. With letter dated 8 January 2021 the respondent requested that the oral proceedings be postponed due to the COVID-19 pandemic and in particular in view of the restrictions on travel between the United Kingdom and Germany. Furthermore, the respondent pointed out that the oral proceedings were not suitable for a videoconference, in particular since simultaneous interpretation would be required.
- VI. In response to the respondent's request for oral proceedings to be postponed in view of the travel restrictions, the parties were informed by communication dated 20 January 2021 that the oral

proceedings scheduled for 8 February would be held by videoconference (VICO).

- VII. In a communication dated 13 January 2021 the registrar of the Board provided information to the parties regarding technical details of the videoconference system and requested the parties to provide contact details for use in the videoconference. The appellant responded to that communication by letter of 20 January 2021. At the end of that letter the appellant also included a statement that he agreed with the respondent concerning the unsuitability of the case for oral proceedings by videoconference. Since this letter was indicated as being a reply to the registrar's communication on technical matters, it was not brought to the attention of the Board. Moreover, as was indicated in the communication of 13 January 2021, the part of the reply containing contact details, which also included the above-noted statement, was not placed in the public part of the file.
- VIII. Oral proceedings in the form of a videoconference took place on 8 February 2021, i.e. without the parties' consent.
- IX. During the oral proceedings the appellant requested as an auxiliary measure that the following question be referred to the Enlarged Board of Appeal: "Hiermit stellen wir den Hilfs-Antrag, der Grossen Beschwerdekammer die Frage zur Entscheidung vorzulegen, ob eine mündliche Verhandlung nach Art. 116 EPC durch eine Video Konferenz ersetzt werden kann, wenn die Parteien dem nicht zustimmen." (Translation by the Board: "*We thus make the auxiliary request that the question be referred to the Enlarged Board of Appeal for decision as to whether oral proceedings under*

Article 116 EPC can be replaced by a videoconference without the parties' consent?").

- X. In support of its request for referral the appellant argued that the holding of oral proceedings in the form of a videoconference was not compatible with Articles 116 and 113(1) EPC.

The appellant raised the general point of law of whether conducting oral proceedings in the form of a videoconference was compatible with Article 116(1) EPC. With reference to Article 15a RPBA (Rules of Procedure of the Boards of Appeal) the appellant pointed out that a lower-ranking provision of the RPBA could not change the content of a higher-ranking provision of the EPC, i.e. Article 116 EPC. Any change in that regard would have required an amendment to Article 116 EPC, i.e. a revision of the EPC by a Diplomatic Conference. The appellant concluded that Article 15a RPBA was *ultra vires*. The concept underlying Article 116(1) EPC was that the parties involved have the right to be physically present in a courtroom so that the Board members could get an immediate personal impression of the pleading parties. For instance, in the German Code of Civil Procedure (*Zivilprozessordnung*, ZPO) this principle was known as the "principle of immediacy" (*Grundsatz der Unmittelbarkeit*). Under Article 125 EPC such principles of procedural law generally recognised in the Contracting States should be taken into account. Furthermore, in traditional oral proceedings the pleading party could gauge whether its presentation was being understood on the basis of the Board members' gestures and facial expressions. These immediate impressions and feedback were lost - or at least limited - in videoconferencing, thus also affecting the right to be heard. As to the principle of

public oral proceedings the appellant disputed that the public had proper access to the videoconference, as required by Article 116 EPC.

In addition the appellant noted that the right to be heard could be affected by an unstable or interrupted Internet connection. Furthermore videoconferences provided only limited possibilities to draw sketches (usually done on whiteboards) in order to illustrate complex technical matters.

- XI. Before dealing with the substantive issues of the case the Board considered it reasonable in order to avoid any procedural violation to seek clarification of the legal situation by referring a point of law to the Enlarged Board of Appeal.
- XII. With letter dated 8 March 2021 the appellant withdrew the auxiliary request for referral of a question to the Enlarged Board of Appeal, but explicitly maintained its remaining requests.
- XIII. For the sake of completeness, the Board notes that on 5 March 2021 it received a letter from the President of the European Patent Institute, the letter having the heading "Third party observations relating to EP04758381.0 (T1807/15-3.5.02)". This letter cannot however be considered to represent third party observations within the meaning of Article 115 EPC, since it did not relate to patentability. Since the EPC makes no further provisions for third party observations, this letter has not been taken into account for the present decision.

Reasons for the Decision

1. Under Article 112(1)(a) EPC, to ensure uniform application of the law, or if a point of law of fundamental importance arises, a Board of Appeal shall, during proceedings on a case and either of its own motion or following a request from a party to the Appeal, refer any question to the Enlarged Board of Appeal if it considers that a decision is required for the above purposes.

2. According to the case law of the Enlarged Board, a point of law is of fundamental importance if the answer to it goes beyond the individual case at issue and will be relevant in a potentially large number of cases (G 1/12, Reasons, point 11).
 - 2.1 In the Board's view it appears self-evident that the point of law addressed in the question below is of fundamental importance for an indefinite number of cases. Oral proceedings before the Boards of Appeal began to be held by videoconference in response to the coronavirus pandemic. In 2020 videoconferences were held only with the consent of all parties to the proceedings. On 15 December 2020, however, the following information was provided on the EPO's website, in a communication headed "Oral proceedings before the Boards of Appeal - continuation of the measures adopted due to the coronavirus (COVID-19) pandemic and revised practice on oral proceedings by VICO" (see <https://www.epo.org/law-practice/case-law-appeals/communications/2020/20201215.html>): *"From 1 January 2021 boards may conduct oral proceedings by VICO even without the agreement of the parties concerned, as has now been made clear in the new Article 15a RPBA adopted by the Boards of Appeal*

Committee. Since the new provision merely clarifies an existing possibility, boards may adapt their practice as regards dispensing with the need to obtain the agreement of the parties concerned even before the date of its entry into force." The entry into force of Article 15a RPBA is still subject to approval by the Administrative Council (see Article 23(4), second sentence, EPC).

2.2 Therefore, conducting oral proceedings by videoconference without the consent of the parties to the proceedings might become standard practice before the Boards of Appeal in the future, and thus applies to an indefinite number of appeal cases in which summons to oral proceedings have already been issued or will have to be issued. Furthermore, according to the aforementioned communication, the holding of a videoconference without the consent of the parties involved was deemed to be an option which had already been available under the existing legislation, i.e. before the entry into force of new Article 15a RPBA. As such, irrespective of the future entry into force of new Article 15a RPBA, the referred question arises in all cases in which Boards have to decide about the conduct, and thus also the format, of oral proceedings. Conducting oral proceedings in a legally incorrect format would amount to a substantial procedural deficiency which could affect the validity of the final decision.

2.3 Furthermore, a decision on that point of law is also required for the case at hand since the parties will have to be summoned to oral proceedings once more after the Enlarged Board of Appeal has handed down its decision on the referral. The referring Board would thus also have to decide about the format of that oral

proceedings. To counter the potential objection that the decision to hold a videoconference is discretionary, meaning that the Board is not obliged to opt for that format in the specific proceedings, the Board notes that, in view of previous objections raised, it sees no reason not to use a videoconference as long as the Enlarged Board of Appeal considers the format to be in line with Article 116 EPC.

2.4 Since the above conclusions concerning the necessity for a referral to the Enlarged Board of Appeal are not contingent on the auxiliary request for such a referral by the appellant, the withdrawal of that request subsequent to the oral proceedings (see paragraph XII. above) has no consequences for this decision, in particular since the appellant did not withdraw its objection to the holding of the oral proceedings by video conference. The Board notes that also the respondent did not withdraw its objection as regards the conduct of oral proceedings in form of a videoconference.

3. Remarks as to the phrasing of the question

3.1 During the oral proceedings before the referring Board the appellant attacked the system of holding oral proceedings by videoconference per se, arguing that it was not compatible with the concept of oral proceedings as provided for in Article 116 EPC. Moreover, the appellant expressed its concerns about the specific practice of holding oral proceedings in the form of a videoconference without the consent of the parties to the proceedings.

3.2 As to its first line of argument the appellant pointed out that the crucial point for oral proceedings within

the meaning of Article 116 EPC was the physical presence of the parties to the proceedings before the entire Board in one courtroom (this term is used in the following irrespective of the administrative or judicial character of the proceedings). This concept allowed both the parties and the Board to get an immediate personal impression of each other. In particular the pleading party could get immediate feedback from the Board members' gestures and facial expressions and could realise whether its arguments have been understood. Depending on that feedback the party could react by elaborating further on its oral submissions. The appellant concluded that videoconferences were deficient in that regard and thus incompatible with Article 116 EPC.

- 3.3 The Board agrees with the appellant's submissions as far as the characterisation of the traditional concept of oral proceedings is concerned. However, the Board sees no need to seek clarification of whether the use of videoconferences in general is compatible with Article 116 EPC. That being said, there are various practices in place which need to be considered. According to the general practice of the Boards from May 2020 until the end of 2020, the consent of the parties to the proceedings was taken as a precondition for conducting oral proceedings in the form of a videoconference. The referring Board has no doubt that this practice is compatible with Article 116 EPC, for the following reasons.

Under Article 116(1) EPC, oral proceedings are to take place either at the instance of the European Patent Office if it considers this to be expedient or at the request of any party to the proceedings. Where oral proceedings are scheduled at a party's request, the

requesting party may later choose not to attend for whatever reason, for instance by withdrawing its request for oral proceedings and relying on its written submissions. Even if the responsible EPO department considered oral proceedings to be expedient, a party may still choose (for whatever reason) not to attend oral proceedings. Furthermore, non-attendance at oral proceedings does not necessarily mean that the party concerned would lose their case. The EPC does not provide for any such legal sanction. On the contrary, according to established case law the responsible department has to consider the non-attending party's written submissions when taking its final decision (for appeal proceedings, explicitly provided for in Article 15(3) RPBA). There may be procedural disadvantages, for instance as regards an apportionment of costs or as regards any reimbursement of the appeal fee (see T 1500/10), but this does not have any effect on the general concept of Article 116(1) EPC. Therefore, Article 116(1) EPC provides a right to oral proceedings which the parties to the proceedings can choose to exercise or waive.

- 3.4 Since a party may even waive its right to oral proceedings, it can be concluded *a fortiori* that conducting oral proceedings in the form of a videoconference is compatible with Article 116 EPC if all parties to the proceedings haven given their consent to that format (*argumentum a maiore ad minus*). In that context it is noted that the waiving of the right to a public hearing under Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms is also accepted in the jurisprudence of the European Court of Human Rights (e.g. *Håkansson and Sturesson v. Sweden* of 21 February 1990, No. 11855/85, paragraph 66).

- 3.5 Consequently, the Board considers it appropriate to restrict the question to be referred to the situation in which the parties involved have not given their consent to oral proceedings in the form of a videoconference. The Board's further remarks in this decision have been based on this understanding, even where not explicitly stated.
- 3.6 The issue of whether holding a videoconference without the parties' consent is consistent with Article 116 EPC is generally applicable to first-instance proceedings too. At this juncture, reference is made in particular to the decisions of the President of the EPO of 10 November 2020 and 17 December 2020 (see Decision of the President of the EPO dated 10 November 2020 concerning the modification and extension of the pilot project for oral proceedings by videoconference before opposition divisions, OJ EPO 2020, A121; Decision of the President of the EPO dated 17 December 2020 concerning oral proceedings by videoconference before examining divisions, OJ EPO 2020, A134). Pursuant to these decisions, oral proceedings can be held before the examining and opposition divisions even without the parties' consent (see Article 2 of each decision). Hence, the question to be referred has not been limited only to oral proceedings before the Boards of Appeal.
- 3.7 In this context, the Board would like to note that it has specifically not included the issue of compatibility with Article 113(1) EPC in the question to be referred, because it considers the issue of compatibility with Article 116(1) EPC to be of primary nature. In the Board's view, the right under Article 113(1) EPC covers the right to be heard at oral proceedings that satisfy the requirements under

Article 116 EPC. The question is thus whether Article 116 EPC stipulates requirements for the format of those proceedings and, if so, what these requirements are. If holding a videoconference without the parties' consent is found not to be compatible with these requirements, the right to be heard would arguably also be infringed, because of the deficiencies in the format of the proceedings. In the referring Board's opinion, therefore, the issue of violating the right to be heard is tied to that of whether a videoconference satisfies the requirements of Article 116 EPC for oral proceedings. The Board considers it essential to answer this question because it affects the parties' fundamental procedural rights.

4. Preliminary remarks

4.1 With regard to the appellant's argument that holding oral proceedings by videoconference would violate the right to be heard and the right to a fair trial in view of the instabilities of the technology, the Board makes the following comments.

4.1.1 It cannot be denied that network instability in particular may restrict or even prevent access to the relevant videoconferencing platforms, potentially resulting in the video and audio transmission being unsatisfactory or even failing entirely. It also appears to be evident that if this occurred, the right to be heard of the party experiencing the transmission problems would possibly be infringed. For the Board, however, this does not mean that the right to be heard generally precludes the use of videoconferencing technology. As far as the referring Board can see, it is standard Board practice to ask all parties at the start of the oral proceedings to report any

transmission faults immediately so that the Chair can take appropriate remedial action as the leader of the proceedings. This includes interrupting the oral proceedings to give the affected party the chance to reconnect, or adjourning them if a satisfactory connection cannot be established. Conducting proceedings accordingly can thus considerably reduce the risk of the right to be heard being violated. If technical problems meant that the right to be heard was still violated in isolated cases, the parties to the appeal proceedings may raise an objection under Rule 106 EPC and may file a petition under Article 112a(2) (c) EPC. Parties in first-instance proceedings have the possibility to lodge an appeal due to procedural violations.

- 4.1.2 The risk of the right to be heard being violated in first-instance proceedings is also mitigated through a similar approach. Article 7 of the Decision of the President of the EPO dated 10 November 2020 (*supra*) reads as follows: *"If technical problems preventing the oral proceedings by videoconference from being conducted in accordance with the parties' rights under Articles 113 and 116 EPC cannot be overcome during the videoconference, the opposition division will issue a new summons to oral proceedings."* A similar procedure is foreseen for oral proceedings by videoconference before examining divisions (see Article 4 of the Decision of the President of the EPO dated 17 December 2020, *supra*).
- 4.1.3 It goes without saying that the risk of the right to be heard being violated because of technical problems cannot be precluded in all cases. It can, however, be significantly reduced by remaining observant throughout the proceedings. In the Board's view, running

videoconferences using a technology that generally functions properly is compatible with both the right to be heard and the right to a fair trial. It is for these reasons that the Board does not consider it appropriate to focus the question to be referred on the wider issue of whether using video technology for oral proceedings is generally consistent with Article 113(1) EPC.

4.2 The appellant also asserted that the principle of public proceedings, as provided for in Article 116(4) EPC, was incompatible with holding oral proceedings in the form of a videoconference. However, the Board does not agree. Even though legislators undoubtedly envisaged members of the public watching the proceedings in a courtroom, the purpose of this principle is to ensure public oversight of the administration of justice. Since the EPO provides appropriate tools to ensure that the public can follow the proceedings (see Article 5 of the Decision of the President of the EPO dated 10 November 2020), the Board has no concerns regarding violations of the principle of public proceedings. It should also be noted that the appellant's objection that oral submissions during a videoconference were not equivalent to those at in-person proceedings does not apply to members of the public.

5. Construing the term "oral proceedings" in Article 116 EPC

5.1 Case law of the Boards of Appeal

5.1.1 Under established EPO practice, oral proceedings were mainly held in person, with videoconferences being held only at a party's request, so that the meaning of the

term "oral proceedings" has barely been discussed in the case law. In T 677/08, the Board held that the right to oral proceedings also encompassed the right to appear in person before the examining division in order to discuss the case (see Reasons, point 4.3). The context of this finding, however, was that the examining division had refused a request for a videoconference, so that the point being made was to stress that there was no entitlement to a videoconference and that the decision in that respect was at the discretion of the division.

In addition, the issue of the correct location for holding oral proceedings (Munich, The Hague, Haar) has been raised numerous times. In this respect, the Boards held that the right to be heard also encompassed the right to present comments at the correct location, i.e. that the oral proceedings are held at the correct place (see T 1012/03, Reasons, point 25; T 689/05, Reasons, point 5.1; differentiating: G 2/19, Reasons C.IV.1). However, when reading these decisions it needs to be borne in mind that the revised EPC no longer stated that the Receiving Section and Search Division were located in The Hague, as had been explicitly stipulated in Articles 16 and 17 EPC 1973. The question addressed in those decisions was thus whether the respective stipulated (actual) locations of the oral proceedings complied with the geographical stipulations under the EPC. In the Board's opinion, however, this cannot be taken to mean that the Boards considered it necessary, in view of Article 116 EPC, to have an actual courtroom and the physical presence of people.

In T 2068/14, the examining division did not grant the applicant's request for a videoconference. According to the Board in that case, oral proceedings have

traditionally been understood as the physical presence of a party or its representative before the Board. Holding oral proceedings as a videoconference was not expressly provided for in the EPC, its implementing regulations or the RPBA, but nor was it excluded. Moreover, a videoconference and oral proceedings in the traditional format were equivalent. As to the equivalence of a videoconference and traditional oral proceedings, the Board stated the following (Reasons, point 1.2.3): *"In the Board's view, while a video conference does not allow such direct communication as the face-to-face meeting involved in conventional oral proceedings, it nevertheless contains the essence of oral proceedings, namely that the Board and the parties/representatives can communicate with each other simultaneously. Thus each party's case can be presented to the Board in real time, and the Board can put questions to the parties/representatives."*

In T 1378/16 the Board held oral proceedings as a videoconference with the appellant's consent. In its general comments on the use of videoconferences the Board came to the conclusion that such oral proceedings were compatible with Article 116 EPC. In point 1.3 of the Reasons the Board found that *"oral proceedings held by videoconference are not excluded by the EPC and fulfil the requirements for holding oral proceedings within the meaning of Article 116 EPC. The EPC only requires that the public character of the proceedings be ensured (Article 116(4) EPC). The form in which the parties present orally their arguments - with or without physical presence - is not predetermined by Article 116 EPC."*

- 5.1.2 The issue of whether Article 116 EPC stipulates requirements for the format of oral proceedings and, if

so, what they are, does not appear to have been properly clarified in the case law. In the Board's view, just because the EPC has not explicitly defined the format of oral proceedings does not necessarily mean that the term "oral proceedings" in Article 116 EPC should be construed so broadly as to encompass videoconferences (see point 5.4 below).

5.2 The Enlarged Board of Appeal has on numerous occasions held that the principles of Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("Vienna Convention") should be borne in mind when interpreting the EPC (see G 3/19, Reasons, point XIV.1, with further references).

5.3 According to Article 31(1) of the Vienna Convention, a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. In this regard, Article 32 of the Vienna Convention stipulates recourse to supplementary means of interpretation, including the preparatory work ("travaux préparatoires") of the treaty, when the interpretation leads to a result which is manifestly absurd or unreasonable. The aim of any interpretation must be to determine the term's authentic meaning (see G 3/19, Reasons, point XIV.2).

5.4 Literal and systematic interpretation

5.4.1 Analysing the term "oral proceedings" semantically in isolation from any context would, in the Board's opinion, lead to a very broad interpretation that would also encompass entirely informal discussions. Pursuant to the aforementioned provisions of the Vienna Convention, however, the term should be interpreted in

the context of Article 116 EPC and associated provisions of the EPC. Article 116 EPC itself defines the EPO departments before which oral proceedings take place. These departments' duties are generally defined in Articles 16 to 22 EPC and then fleshed out in further Articles of the EPC. Taking these Articles together, it follows that Article 116 EPC relates to administrative and judicial proceedings governed by the rule of law (see G 3/08, Reasons, point 7.2.1). The EPC does not contain any explicit provision on the format of oral proceedings, yet this, in the Board's opinion, does not necessarily imply that the term "oral proceedings" in Article 116 EPC should be construed so broadly as to encompass videoconferences. To ascertain the authentic meaning of this term, it needs to be borne in mind that when the EPC was drawn up there were no suitable technical options for adequately replacing traditional oral proceedings. Therefore, in the absence of any technical alternatives, oral proceedings inevitably came to mean in-person proceedings, i.e. proceedings that were (generally) open to the public and which the parties attended in person in a courtroom before the responsible department to present oral arguments. As such, the legislator of the EPC 1973 had absolutely no reason to further define the format of the oral proceedings, as this was specified by the very term "oral proceedings". The notion that Article 116 EPC does not stipulate any format for oral proceedings is, in the Board's view, based solely on retrospective considerations. The issue of the "format" of oral proceedings only actually arises at a time when technologies become available that could possibly replace the traditional format. This interpretation is also supported by the wording of Rule 71(2) EPC 1973, which concerns a summoned party "appearing" before the EPO (*"If a party who has been duly summoned to oral*

proceedings before the European Patent Office does not appear as summoned, the proceedings may continue without him."; emphasis added by the Board). Given the technology available at that time, "appearing" can indeed only be taken to mean physical presence in an actual room.

- 5.5 In the Board's view, there are also no indications that the meaning of this term changed when the EPC was revised in 2000. The wording of Article 116 EPC 1973 remained the same, save for some minor editorial amendments. The wording of Rule 115(2) EPC (the content of which matches Rule 71(2) EPC 1973) continues to state that a summoned party "appears" before the EPO (*"If a party duly summoned to oral proceedings before the European Patent Office does not appear as summoned, the proceedings may continue without that party.*"; emphasis added by the Board). If the legislators had wished to consider other technical options, a clarification to this effect would likely have been added to Article 116 EPC or to the Implementing Regulations. The EPO first implemented the concept of holding oral proceedings in the form of a videoconference already in 1998, i.e. before the Diplomatic Conference for the revision of the EPC (see "Information concerning interviews and oral proceedings to be held as a video conference", OJ EPO 1997, 572). Subsequently, interviews and oral proceedings before the examining division could be held as a videoconference at the applicant's request. For this request to be granted, however, the applicant had to submit a declaration waiving its right to traditional oral proceedings. The EPO suggested the following wording to applicants: *"The applicant renounces in advance and irrevocably his right to oral proceedings being held in the traditional form at the EPO premises*

on the same subject after the requested video conference."

In the Board's view, this EPO notice demonstrated the thinking at that time and at the time of the Diplomatic Conference in 2000, i.e. that videoconferences did not meet the statutory requirements for oral proceedings under Article 116 EPC and applicants thus had to waive their right to traditional oral proceedings held on EPO premises. The fact that the wording of Article 116 EPC has remained substantially the same despite the immediacy of the issue of using videoconferencing technology at the EPO can be considered a sign that the legislator responsible for the EPC 2000 still endorsed the idea of traditional oral proceedings.

5.6 For completeness, it should be noted that the EPO maintained the requirement to submit a declaration as mentioned above until 2006; it did not rescind it until the notice entitled "Updated information concerning interviews and oral proceedings to be held as a video-conference" (OJ 2006, 585), which also stated that *"Oral proceedings held by video-conference are equivalent to oral proceedings held in the traditional manner on the premises of the EPO."* Nonetheless, the EPO upheld the principle that videoconferences still had to be requested and thus could only be held with the applicant's consent.

5.7 In view of the above literal interpretation it appears that Article 116 EPC stipulates the right of the parties to be heard at in-person oral proceedings. Thus, if this interpretation were to be endorsed, the consequence might well be that holding oral proceedings in the form of a videoconference without the parties'

consent would be considered to be incompatible with Article 116 EPC.

5.8 *Travaux préparatoires*

- 5.8.1 The preparatory work ("*travaux préparatoires*") and the circumstances of the conclusion of the EPC serve only as supplementary sources of evidence to confirm the result of the interpretation or if no reasonable meaning can be determined by applying the general rule of interpretation (Article 32 Vienna Convention; cf. G 2/12, point V.4 of the Reasons).
- 5.8.2 The referring Board did not find any passage in the *travaux préparatoires* addressing explicitly the form in which oral proceedings should take place, except for the public character of oral proceedings which was regarded as a central topic. The absence of such discussion appears to support the result of the literal and systematic interpretation that the term "oral proceedings" was the common legal term for the (traditional) in-person oral proceedings. In view of that common understanding there was obviously no need for any further explanation in that regard. Nevertheless there are preparatory documents which could be of interest in that context.
- 5.8.3 Originally, there was a distinction between a "hearing" and "oral proceedings". A hearing was meant to take place before the examining division, i.e. on the administrative level, and the term "oral proceedings" was used for the appeal procedure, i.e. for the judicial level (cf. comments of K. Haertel dated 2 August 1961, "Bemerkungen zu dem ersten Arbeitsentwurf eines Abkommens über ein europäisches Patentrecht, Artikel 61 bis 90", Zu Artikel 75 a; EFTA 4/67, points

83, 102 and 111). Later on, the terminology changed temporarily. There was a separate Article foreseen dedicated to "hearings" before the Boards of Appeal, which was based on the Rules of Procedure of the Court of Justice of the European Communities (cf. BR/59 e/70; BR/60 e/70) using the same expression. However, that term was later on replaced by "the more general expression "oral proceedings"" throughout the First Preliminary Draft Convention (cf. BR/84 e/71, point 34). This expression was meant to be "more general" as it was then used for administrative and judicial proceedings.

- 5.8.4 According to Articles 18(2) and 19(2) EPC oral proceedings shall be *before* the respective division *itself*. According to point 42 of the Report of the Working Party I of the Inter-Governmental Conference (BR/89 e/71 (Annex II) by introducing this wording "it was made clear that in the event of oral proceedings (Article 139) the applicant is to be heard not by the member of the Examining Division processing the application but always by the Examining Division *itself*" (emphasis added by the Board). The same wording was used in the then Article 55a with regard to the Opposition Division. Thus, this expression merely aims to clarify that oral proceedings should take place before the respective division, i.e. in its full composition, and not only before an entrusted member of the division as mentioned in the preceding sentence of Articles 18(2) and 19(2) EPC. These provisions therefore do not contain an explicit requirement for the conduct of oral proceedings in the form of in-person proceedings, although they appear to be based on that understanding.

- 5.8.5 At the third meeting of the Patents Working Party held at Munich from 13 to 23 June 1962 the issue of whether oral proceedings before the Board of Appeal should be made obligatory was discussed. However, the idea of making such oral proceedings obligatory was discarded in view of the travel costs/efforts for the parties (cf. document IV/6514/61-D, page 83). It follows that the discussion was based on the idea of in-person proceedings, without having taken into account the possibility of using a videoconference.
- 5.8.6 This understanding emerges also from the suggestion of a delegation that the minutes of oral proceedings should contain details of the place and date of the proceedings (cf. M/PR/I, point 2343).
- 5.8.7 In view of the above it appears that the *travaux préparatoires* support the result of the literal interpretation.
- 5.9 Teleological interpretation
- 5.9.1 Under Article 31(1) of the Vienna Convention, however, it is also possible to apply a teleological interpretation, under which it would be necessary to determine the reason why the EPO holds oral proceeding. In doing so, it is important to remember that the right to oral proceedings forms part of the right to be heard enshrined in Article 113(1) EPC. The purpose of these provisions is to ensure that the parties are given sufficient opportunity to present their case. Since proceedings under the EPC are primarily designed as written proceedings, Article 116 EPC ensures that parties that have submitted a written case are also given the chance to present their case orally at oral proceedings. This being the case, any format of oral

proceedings that can achieve this aim properly would be acceptable. Under a teleological assessment, therefore, videoconferences could be deemed to fulfil the purpose of providing an opportunity to present oral comments as long as they gave the parties the equivalent chance to present their arguments orally as they would have at oral proceedings in the traditional form. It is precisely this point, however, which leads to the appellant's objection that presenting an oral case in a videoconference specifically does not offer the same opportunities as doing so at traditional proceedings. In particular, the appellant asserted that the pleading party in a videoconference cannot gauge how members of the Board react to their comments - or at least cannot do so to the same extent. At traditional oral proceedings, pleading parties can use the Board members' gestures and facial expressions to assess whether their arguments have been understood or whether they need further explanation. Moreover, complex technical subject-matter cannot be explained by drawing sketches on a whiteboard, as is common in traditional oral proceedings. The appellant therefore challenges the notion that a videoconference is equivalent to traditional proceedings. In the appellant's view, these are fundamental objections, i.e. they apply even when there are no issues with the audio and video quality.

- 5.9.2 In the Board's opinion, it is common understanding to also use the teleological interpretation method in the area of international law in order to bring the interpretation of terms into line with societal developments and commonly accepted standards in the Contracting States. In that regard reference is made - for instance - to the European Court of Human Rights stating with regard to the European Convention of Human Rights that it is "a living instrument ... which must be

interpreted in the light of present-day conditions" (cf. *Tyrer vs. The United Kingdom* of 25 April 1978, No. 5856/72, para 31).

5.9.3 In the present case, however, it is doubtful whether this method is applicable, for various reasons. Firstly, the literal interpretation appears to give an unambiguous result, meaning that there is no need for any further interpretation. In this context, in G 1/97 (see Reasons, point 3(b), first paragraph) the Enlarged Board of Appeal stated that codified legal systems such as the EPC present limits to judges' development of the law through case law: "*In a codified legal system such as the EPC, the judge cannot simply decide, as the need arises, to substitute himself for the legislator, who remains the primary source of law. He may certainly find occasion to fill lacunae in the law, in particular where situations arise for which the legislator has omitted to provide.*" Thus, a line must be drawn between judicial interpretation and "judicial legislation". It should also be borne in mind that the interpretation relates to the parties' fundamental procedural rights, i.e. the right to be heard and the right to a fair trial. Restricting these key rights which are anchored in the Articles of the Convention would appear to require legislative measures.

Secondly, a further crucial question is whether societal developments in the Contracting States can indeed justify adapting the interpretation of the term "oral proceedings". The use and societal acceptance of videoconferencing technology have evidently significantly increased during the coronavirus pandemic. The appellant has stressed that these changes in member states' authorities and judicial systems do not go as far as holding videoconferences against the

will of the parties to the proceedings or without their consent, not even in the exceptional circumstances of the coronavirus pandemic. In this regard, the appellant referred, by way of example, to the principle of immediacy of proceedings ("Grundsatz der Unmittelbarkeit") applicable in German civil procedure. It should be noted here that the use of video technology is governed in section 128a of the German Code of Civil Procedure (Zivilprozessordnung), which stipulates that courts can order proceedings to be held in the form of a videoconference. However, the court itself must sit in a courtroom, and the parties (or their representatives) are entitled to appear in the courtroom (see *Mantz/Spoenle, Corona-Pandemie: Die Verhandlung per Videokonferenz nach § 128a ZPO als Alternative zur Präsenzverhandlung*, MDR 2020, 637 et seq.; with further references). Therefore, if a party objects to oral proceedings being held using videoconferencing technology, the court cannot force the party to use that format.

As regards European Community legislation the following is noted: Article 8 of Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure provides for oral proceedings in the form of a videoconference. The aim of this regulation, however, is to simplify proceedings for small claims in cross-border matters (these proceedings are primarily designed to be written proceedings). In view of these very specific circumstances this cannot be taken to be evidence of widespread acceptance of videoconferencing technology for oral proceedings (let alone without the consent of the parties). On the contrary, it appears that that format is generally regarded as an

extraordinary means which must be explicitly foreseen by the legislator and needs further justification.

5.10 Subsequent agreement or practice

- 5.10.1 Under Article 31(3)(a) and (b) of the Vienna Convention, account is to be taken of any subsequent agreement between the parties regarding the interpretation of the treaty or its application, and of any subsequent practice in the application of the treaty which establishes agreement of the parties regarding its interpretation.

The Board is unaware of any subsequent agreements among all contracting states that could affect the interpretation of Article 116 EPC. While the Administrative Council did introduce an amendment to Rules 117 and 118 EPC, which entered into force on 1 January 2021, these amendments merely concern the possibility of taking evidence via videoconference and do not provide any option to hold oral proceedings as a videoconference without the parties' consent. For the referring Board, the aim behind these changes is merely to enable access to advances in videoconferencing for the purpose of taking evidence.

In the Notice from the EPO dated 15 December 2020, it was pointed out that the Boards of Appeal Committee had approved a new Article 15a RPBA clarifying that the Boards of Appeal could decide to hold oral proceedings as videoconferences. The entry into force of Article 15a RPBA is still subject to approval by the Administrative Council (see Article 23(4), second sentence, EPC). Thus the Board does not consider it appropriate to provide detailed comments on that provision. However, given the legal nature of the RPBA

as secondary legislation based on Rule 12c(2) EPC, it appears doubtful whether approval of that provision could indeed be construed as the agreement of all Contracting States on the interpretation of the EPC. Whether this legislative measure could be deemed an agreement of *all* contracting states would also depend on the states' voting choices.

Furthermore, in the Board's opinion, the new EPO practice as regards the conduct of oral proceedings cannot be deemed to reflect the practice of all contracting states in terms of the interpretation of the EPC.

5.11 Dynamic interpretation

5.11.1 In opinion G 3/19, the Enlarged Board of Appeal introduced the dynamic interpretation method as follows: *"This method of interpretation could come into play where considerations have arisen since the Convention was signed which might give reason to believe that a literal interpretation of the provision's wording would conflict with the legislator's aims. It might thus lead to a result which diverges from the wording of the law."* (G 3/19, Reasons, point XXII)

5.11.2 The Board interprets this approach to mean in particular that societal, technological and legislative developments might give rise to a dynamic interpretation of terms. In the case at hand, the term to be interpreted is "oral proceedings". According to the linguistic analysis this term meant the traditional "in-person" proceedings. A dynamic interpretation would thus be appropriate if the term's literal meaning would conflict with the legislator's goals, one of which is

undoubtedly high-quality and efficient proceedings under the EPC. It cannot be denied that the coronavirus pandemic has made holding oral proceedings more difficult, leading to the postponement of a considerable number of oral proceedings. It is however open to debate, whether this could justify dynamically interpreting the term and restricting procedural rights. Lastly, at no point in time did the administration of justice come to a complete halt. To the contrary, it was possible for a significant number of oral proceedings to be held, once technical and practical arrangements had been made for them to be held by videoconference (with the parties' consent).

- 5.11.3 In G 3/19, the Enlarged Board of Appeal held that legislative measures might give rise to a dynamic interpretation of provisions in the EPC. In this opinion, the previous interpretation of Article 53(b) EPC was rescinded in view of the legislative intention of the Contracting States represented in the Administrative Council with the introduction of Rule 28(2) EPC (see G 3/19, Reasons, point XXVI.7).
- 5.11.4 With the entry into force of new Article 15a RPBA, therefore, the question would be whether this new provision could justify re-interpretating the term "oral proceedings" in Article 116 EPC. The legislative intention behind the new RPBA Article could justify a dynamic interpretation since it conflicts with the original aim of Article 116 EPC, i.e. establishing a right to present oral arguments at an in-person oral proceedings. In this respect, however, the issue is whether secondary legislation based on Rule 12c(2) EPC could lead to restrictions of procedural rights enshrined in the Convention. In that regard it is to be noted that the purpose of the RPBA was originally meant

to be to govern the details of the proceedings before the Boards of Appeal "insofar as they do not affect the rights or obligations of any person concerned in the proceedings .. and which could easily be revised .." (cf. BR/90 e/71, page 104; BR/91 e/71, point 31; BR/125 e/71, point 178). This concept might have changed by legislative practice over decades, but the question remains as to whether fundamental procedural rights could be restricted by secondary legislation. In that regard, the appellant referred to Article 164(2) EPC, which was to be taken as a limitation of the legislative powers of the Administrative Council (cf. G 2/07, Reasons, point 2.2).

- 5.11.5 Furthermore, G 3/19 seems to be based on a different starting point, since the Administrative Council was empowered to bring the Convention in line with European Community legislation under Article 33(1)(b) EPC (cf. G 3/19, Reasons, point XXV.3.2). In the present case there is no such legislation. Thus, it appears doubtful whether secondary legislation might be a valid ground for a dynamic interpretation limiting procedural rights anchored in the Convention.

Order

For these reasons it is decided that:

The following question is referred to the Enlarged Board of Appeal for decision pursuant to Article 112(1)(a) EPC:

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 Registrar:

The Chairman:



U. Bultmann

R. Lord

Decision electronically authenticated