VIII. DISCIPLINARY BOARD OF APPEAL

1. Introduction

Professional representation of natural or legal persons in proceedings established by the EPC may only be undertaken by professional representatives whose names appear on a list maintained for this purpose by the EPO (Art. 134(1) EPC). Any natural person may be entered on the list, provided that he has passed the European qualifying examination (Art. 134(2)(c) EPC). Under Art. 134(7) EPC, legal practitioners from the contracting states are also entitled to act as representatives, subject to the conditions specified therein.

All persons on the list of professional representatives are members of the *epi* (Art. 5 of the Regulation on the establishment of an institute of professional representatives; latest version: OJ 1997, 350) and subject to the Regulation on discipline for professional representatives (RDR; OJ 1978, 91) adopted by the Administrative Council of the European Patent Organisation and the Code of Professional Conduct (latest version: OJ 1999, 537) adopted by the *epi*. The bodies which rule on infringements of the rules of professional conduct are: the *epi* Disciplinary Committee, the EPO Disciplinary Board, and the Disciplinary Board of Appeal (DBA) (see Art. 5 RDR). Under Art. 8 RDR, the DBA hears appeals against decisions of the *epi* Disciplinary Committee and the EPO Disciplinary Board.

The European qualifying examination (EQE) is governed in particular by the Regulation on the EQE (REE 1994, OJ 1994, 7), as amended by Administrative Council decision of 8.6.2000 (OJ 2000, 320), and the Regulation's implementing provisions (OJ 1998, 364). Under Art. 27 REE, the DBA hears appeals against decisions of the EQE Examination Board and Secretariat. The Regulation on the EQE has been frequently amended. The version which entered into force on 1.5.1991 (REE 1991, published in OJ 1991, 79) made comprehensive reference to the previous amendments made. The current version (REE 1994, OJ 1994, 7) entered into force on 1.5.1994. However, Art. 14, 15, 24(2) and 28(1) have been applied since 10.12.1993. By decision of 8.6.2000, the Administrative Council amended Art. 27(2) and (3) REE (regarding appeals in connection with the EQE) (OJ 2000, 320). For such cases, the DBA now comprises two legally qualified members of the EPO and a professional representative. The new provisions implementing the REE 1994 took effect on 1.7.1998 (OJ 1998, 364), replacing those previously in force (OJ 1994, 595; OJ 1995, 652). Despite these changes, DBA case law on the reviewability of Examination Board decisions continues to apply.

2. European qualifying examination

2.1 Drawing up the examination procedure

In **D 3/89** (OJ 1991, 257) it was stated that the validity of the examination procedure drawn up by the Administrative Council or by the Examination Board on its behalf could be scrutinised by the DBA only to a very limited extent, since the relevant bodies had discretionary powers in drawing up such procedures. As long as the legislative organ and subsidiary bodies had not misused their discretionary powers, the DBA could apply the

provisions concerning examinations only to the case in point. (see also **D 1/81,** OJ 1982, 250, **D 5/89**, OJ 1991, 210, **D 11/99** of 17.11.1999).

2.2 Conditions for enrolment

The requirements of Art. 7(1) REE 1991 are now contained in Art. 10(2) REE 1994. The substance has not changed, so the case law on Art. 7 REE 1991 remains authoritative.

According to **D 4/86** (OJ 1988, 26), for the condition stipulated in Art. 7(1)(b)(i) REE 1991 to be met, the trainee must have completed his training period under conditions likely to ensure that he has actually assisted a professional representative by constantly taking part in activities pertaining to patent application procedures of which the representative is in fact in charge.

According to **D 3/89** (OJ 1991, 257) equivalent scientific or technical knowledge within the meaning of Art. 7 (1) (a) REE 1991, second alternative, may be demonstrated not only by an additional period of three years spent working in a range of activities pertaining to patent matters but also by relevant experience in another appropriate field (e.g. research).

D 14/93 (OJ 1997, 561) ruled that the training period required for EQE enrolment pursuant to Art. 7(1)(b) REE 1991 could not be served with a legal practitioner whose name did not appear on the list of professional representatives, even if the said practitioner was a patent attorney under national law (see Art. 134(7) EPC). The appellant argued that for Art. 7 REE 1991 not to allow the training period to be served under a legal practitioner's supervision infringed the principle enshrined in Art. 134(7) EPC of equal treatment of legal practitioners and professional representatives (Art. 134(1) EPC). The board took a different view: the activities referred to in Art. 7(1)(b) REE presupposed the scientific or technical knowledge required with a view to activities pertaining to European patent applications and patents; persons training EQE candidates needed to possess such knowledge, and legal practitioners did not normally do so.

D 25/96 (OJ 1998, 45) ruled that the period of professional activity required for EQE enrolment pursuant to Art. 10(2)(a) REE 1994 could not be served with a self-employed German patent agent who was not on the list of professional representatives.

2.3 Power of review in examination matters

Under Art. 27(1) REE 1994, an appeal lies from decisions of the Examination Board only on grounds of infringement of the Regulation or of any provision relating to its application.

In **D 1/92** (OJ 1993, 357) the appellant claimed that the examiners' assessment of his work was defective. The DBA pointed out that its review of Examination Board decisions was in principle limited to establishing whether they infringed the REE, its implementing provisions or higher-ranking law.

The DBA therefore concluded that its functions did **not** include reconsidering the examination procedure **on its merits**. It could only consider serious and obvious mistakes by an examiner

marking a candidate's papers where the contested decision of the Examination Board was based on such a mistake. Furthermore, the alleged mistake had to be so obvious that it could be established without re-opening the entire marking procedure. Any further claims regarding alleged defects in the assessment of candidates' work fell outside the DBA's jurisdiction, since value judgments were not subject to judicial review (see also **D 6/92** (OJ 1993, 361)).

In **D 6/98**, the DBA added that these conditions are in line with those for correcting errors under R. 89 EPC, ie particularly in the case of errors of transcription or calculation in the marking. Under Art. 27(1) REE, the DBA is not empowered to reopen the assessment procedure (**D 15/97**). The DBA is not intended to be a department of second instance empowered to examine whether the marks awarded for a candidate's examination are justified on their merits or correct, and thus to superimpose its own value judgment on that of the Examination Board (**D 20/96**).

2.4 Examination conditions

In **D 2/95** the DBA found against an appellant alleging discrimination; the fact that certain other candidates had been allowed to use normal as opposed to copy paper for the examination was not in breach of the provisions governing its conduct. Some candidates might find copy paper more awkward, but others might well prefer it. Nor did other arguments along similar lines - eg that too little time was allowed for the papers, or that candidates whose mother tongue was not an EPO official language were at a disadvantage and should therefore be given more time than the others - convince the DBA that the relevant provisions had been infringed (**D 11/00**).

In **D 1/94** (OJ 1996, 468) it did however rule that a translation error might constitute a violation of Art. 11(3) REE 1991 [= Art. 15(3) REE 1994] since this provision assumed that the translation from the language selected by the candidate into one of the EPO official languages was totally correct. In its decision, the Examination Board therefore had to give reasons why the translation errors were not found to be serious.

In **D 14/95** the appellant's arguments centred on an alleged infringement of the principle of equal treatment. It had been infringed because he, as a specialist in biochemistry, had been placed at a disadvantage in Paper C (taken from mechanical engineering) compared with a specialist in that field. This explained the marking "slightly inadequate" awarded him for Paper C. The board found against any breach of equal treatment: the appellant's position was no different from that of any other candidate whose specialist field did not happen to be used in the paper as set. True, the examination procedure did in effect involve a certain "inequality". The Examination Board set a limited number of papers, and therefore had to make a choice amongst the different technical fields. So there would always be candidates who happened to be more specialised than others in the particular field selected. This however was inherent in any general examination, and thus did not constitute arbitrary unequal treatment. Furthermore, Paper C was less concerned with testing specialist technical knowledge than the ability to draft a notice of opposition to a European patent.

In **D 9/96** a candidate again alleged unequal treatment, this time in connection with the language rules under Art. 15 REE 1994. The board conceded that not all candidates were

treated equally since not all of them received examination papers in their mother tongue. However, it had to be taken into account in this context that the differentiation referred to above was a direct consequence of the linguistic regime of the EPC itself. According to Art. 14(1) EPC the official languages of the EPO were English, French and German. Each professional representative was inevitably confronted with documents and notifications in one of the three official languages of the EPO. Thus, any professional representative had to be expected, in the public interest and the interest of his clients, to understand at least one of the official languages of the EPO and to be able to work on documents and notifications drafted in this language.

The background to several appeals (**D 10/97, D 15/97, D 17/97** and **D 5/97**) against Examination Board decisions failing candidates in Paper D of the 1996 EQE was that some (but not all) of the copies of the paper given to candidates did not contain Question 11. The Examination Board therefore automatically gave all candidates full marks for Question 11. On this point, the DBA reaffirmed **D 14/95**, ie that equal treatment did not have to be absolute, provided the nature and extent of any unequal treatment was justifiable in the circumstances. It would be wrong in law, however, if the examination conditions put certain candidates at a disadvantage for no good reason. The Examination Board had compensated the affected candidates in a way which appeared entirely appropriate given the circumstances. This necessarily involved a certain unequal treatment, which however was limited in its extent and acceptable in this special situation. In particular, it ensured that no candidate was worse off than if his answer had been marked objectively. So, in the DBA's view, the way in which the Examination Board had corrected the error was appropriate to the circumstances and did not constitute unlawfully unequal treatment.

In several decisions the DBA has pointed out that under point 7 of the Instructions to candidates concerning the conduct of the examination (OJ 1995, 145) and point 7 of the Instructions to invigilators (OJ 1995, 153), complaints filed in due time and form are heard by the Examination Board. In such cases, the Examination Board is in principle obliged to inform the complainant of its provisional opinion and give him an opportunity to comment. Failure to do so is an infringement of generally recognised principles of procedural law (Art. 125 EPC), notably the right to be heard (Art. 113(1)EPC) (**D 17/96, D 2/97, D 2/99, D 3/99**).

2.5 Substantiation of EQE decisions

At issue in **D 12/97** (OJ 1999, 566) was whether EQE Examination Board decisions informing candidates that they have failed the examination have to be reasoned. The DBA pointed out that the Regulation on the European qualifying examination (REE) did not require such decisions to be reasoned. R. 9(2) of the implementing provisions to the REE stipulated only that unsuccessful candidates be sent their answers and the marking sheets.

The board also found the appellant's constitutional arguments - that substantiation of such decisions was a generally recognised principle of procedural law within the meaning of Art. 125 EPC - to be unfounded. For this to be so, it had to be shown that substantiation of such decisions was required in the EPC contracting states.

2.6 Borderline cases

Borderline case assessments of candidates' fitness to practise as professional representatives before the European Patent Office are not possible under the 1994 Regulation on the European Qualifying Examination, REE 1994, and its implementing provisions (IP). Art. 17(1) REE 1994 is exhaustive. In accordance with this a candidate must pass each examination paper in order to pass the European qualifying examination as a whole. The only exception was laid down in R. 10 IP 1994, which by virtue of Art. 17(1) REE 1994 was also exhaustive and applicable only to candidates sitting the examination for the first time (**D 8/96** (OJ 1998, 302).

Appellants who have failed the EQE frequently cite the principle laid down in **D 1/93** (OJ 1995, 227), namely that in borderline cases where a resitting candidate has failed one of the papers the Examination Board has to analyse the results obtained in all the papers, taking into account not only the grades obtained but also their arithmetical sum, the nature of the papers, and the results obtained in each part of the papers. In several decisions (**D 2/96, D 4/96, D 2/97, D 3/97, D 18/97, D 8/98**) the DBA confirmed, citing **D 8/96**, that the introduction of Art. 17(1) REE 1994 did away with the right to any such overall analysis. The position now is that candidates resitting part of the examination have to pass each paper, so the principles of **D 1/93** can no longer apply.

3. Disciplinary matters

3.1 Disciplinary measures

According to **D 5/86** (OJ 1989, 210), an infringement of the rules of professional conduct must be established to the satisfaction of the disciplinary body before it can impose a disciplinary measure. Absolute certainty is not required, but a degree of probability which in human experience verges on certainty. A disciplinary measure cannot be imposed if there is reasonable doubt as to whether the infringement has occurred.

In **D 11/91** of 14.9.1994 (OJ 1995, 721) the EPO Disciplinary Board had ordered the deletion of the appellant from the list of professional representatives for an indefinite period. In his appeal, the appellant contested the disciplinary measure and held that the procedure before the DBA did not comply with the provisions of the European Convention for the Protection of Human Rights, in particular because the DBA had been established not by national law but by the Administrative Council of the EPO, the disciplinary bodies did not constitute an independent court, the DBA was not a national authority, and its decisions could not be referred to a higher court of appeal.

The DBA decided that the European Convention for the Protection of Human Rights contained provisions which expressed general principles of law common to the member states of the EPO. As such these provisions should be considered part of the legal system of this Organisation and should be observed by all its departments. This therefore applied to Art. 13, which guaranteed the protection by the judiciary of the rights of the individual. The "national authority" mentioned in this article was clearly meant to be understood as a competent authority in accordance with the law of the state concerned. However, in ratifying

the Munich Convention, the contracting states accepted a transfer of prerogatives whereby professional representatives before the EPO became subject to the same set of professional regulations, controlled by a central body whose decisions are open to effective remedy before a body of second instance whose independence is guaranteed by the rules governing its composition. The drafting of these regulations and the establishment of these bodies was thus consistent with general principles of law, in particular those expressed in the European Convention for the Protection of Human Rights.

As far as the disciplinary measure was concerned, the board took the view that in order to ensure that the penalty was proportionate to the seriousness of the charges and that the maxim according to which penalties should not be arbitrary but fixed or predetermined was respected, Art. 4(1)(e) RDR (Regulation on discipline for professional representatives) should be understood as meaning "for a period not defined by the text", that is for a discretionary period to be decided by the competent disciplinary body which, in its decision, should fix the said period and give reasons for its choice.

In **D 20/99** (OJ 2002, 19) it was stated that national anmesty laws were inapplicable in disciplinary proceedings before international authorities.

In the case in point the misuse of corporate assets constituted unfair distortion of competition among colleagues and hence a breach of the code of conduct of professional representatives before the EPO.

3.2 Appealability of decisions in disciplinary matters

In **D 15/95** (OJ 1998, 297) the board ruled that a Discipinary Committee decision dismissing a complaint was a decision in the legal sense only as regards the persons referred to in Art. 8(2) RDR, and only they could appeal against it. Thus the person who made the complaint had no right of appeal. Review on appeal was limited to safeguarding the rights of the "accused", ie the "professional representative concerned" within the meaning of the RDR (see also **D 1/98**). In **D 28/97** and **D 24/99** the DBA added that the purpose of disciplinary proceedings was not for individuals to pursue their interests vis-à-vis others (although these might be affected in individual cases) but rather to serve the public interest in orderly and proper exercise of professional representation before the EPO. Any claims by individuals arising from a representative's infringement of the rules of professional conduct are exclusively a matter for the competent (civil) courts.

4. Code of Professional Conduct

The general principles for this are laid down in the Code of Professional Conduct (new version published in OJ 1999, 537). Point 1 of the Code refers in turn, as regards the general requirements for *epi* members, to the RDR (OJ 1978, 91).

4.1 General professional obligations

In **D 16/95** the board ruled that although drafting and filing translations and paying fees in the national phase in a contracting state were not directly related to grant, opposition or appeal

proceedings, such activities were still covered by Art. 1 RDR. They were, after all, activities in connection with a European patent (see Art. 65 EPC and Art. 141 EPC) and as such part of a professional representative's job. Regarding them as covered by Art. 1 RDR was also justified by the fact that it was difficult for outsiders (eg persons commissioned to translate patent specifications) to distinguish between those of a representative's activities which were directly related to grant, opposition or appeal proceedings and those which were not. Since national-phase-related activities were thus covered by Art. 1 RDR, reprehensible conduct in connection with them constituted a breach of a representative's general professional obligations under that provision.

4.2 Professional secrecy

In **D 11/91** of 18.5.1993 (OJ 1994, 401), the appellant had requested the removal of various documents placed on file by the complainant. The appellant argued that his request was justified because, inter alia, their inclusion contravened the rule of confidentiality to which professional representatives were subject. The documents were items of correspondence between the complainant and the disciplinary bodies and correspondence pertaining to an opposition case.

The board decided that the professional secrecy referred to in Art. 2 RDR set limits to the disciplinary bodies' powers of investigation and to the obligation under Art. 18 RDR that a professional representative before the EPO supply all relevant information. However, the mere obligation of confidentiality deriving from the principle enshrined in Part I RDR could not be invoked to resist a request under Art. 18 RDR.

4.3 Advertising

In the new Code of Conduct for professional representatives (OJ 1999, 537), the ban on advertising in point 2 of the old Code was replaced by a new rule (point 2(a)) whereby advertising is generally permitted provided it is true and objective. **D 12/88** (OJ 1991, 591), in which the DBA ruled on the ban on advertising the services of a patent agency, is thus superseded.

IX. THE EPO ACTING AS A PCT AUTHORITY

A. Introduction

1. New structure of the EPC provisions relating to international applications under the PCT

By decision of the Administrative Council of 13.10.1999 which entered into force on 1.03.2000 (OJ 1999, 660 ff and 696 ff), the EPC Implementing Regulations relating to PCT-applications have been amended. A new Part IX has been inserted in the Implementing Regulations which encompasses former R. 104 to 104c EPC plus a number of new provisions. A much clearer system of consecutive numbers (R. 104 to 112 EPC) has also been adopted. Former R. 105 to 106a EPC were deleted because the respective regulations for a transitional period were no longer relevant.

2. New time limits for the European phase entry of an international application - (Rule 107(1) EPC)

Under Art. 22(3) PCT or Art. 39(1)(b) PCT, the EPC may lay down longer time limits for European phase entry than the standard PCT ones of 20 and 30 months. For the European phase entry of an international application, R. 107(1) EPC in its version in force up to 1.1.2002 prescribed two different time limits, running from the date of filing or priority: 31 months for the EPO as elected Office (PCT Chapter II) and 21 months for the EPO as designated Office (PCT Chapter I).

By decision of the Administrative Council of the European Patent Organisation dated 28 June 2001 the EPO has now harmonised both the time limits under R. 107(1) EPC at 31 months.The amendment entered into force on 2 January 2002 and applies to all international applications for which, on that date, the acts prescribed under R. 107(1) EPC have not yet been validly performed and where the time limit for doing so under R. 107(1) EPC in its former form had not yet expired (OJ 2001, 373).

B. Competence of the boards of appeal in proceedings under the PCT

Under Art. 154(3) EPC and Art. 155(3) EPC, the function, or competence, conferred by R. 40.2(c) PCT and R. 68.3(c) PCT has been devolved to the EPO's boards of appeal. This function relates solely to the examination of protests against an invitation to pay an additional fee owing to lack of unity.

In **J 20/89** (OJ 1991, 375) the board had to decide whether, during the international phase of a PCT application, it had jurisdiction to examine decisions taken by the EPO acting in its capacity as an International Preliminary Examining Authority (IPEA) within the meaning of Chapter II of the Patent Cooperation Treaty (see Art. 150 EPC and Art. 155 EPC). It noted that the PCT did not contain any provisions for appeal or petition during the international

phase. Save as was provided in R. 40.2(c) PCT and R. 68.3(c) PCT, there was nothing in that Treaty, or in the Regulations under it, providing for appeal during the international phase in proceedings before the Authority acting as ISA or as IPEA. Applicants are not, however, entirely deprived of legal safeguards during the international phase. All PCT Authorities in fact accept and duly consider any request for reconsideration of an earlier decision taken during the international phase, although this is not expressly provided for in the PCT. Furthermore, a designated or elected Office can, during the national phase, review a decision taken during the international phase by an ISA or an IPEA.

The board observed that under Art. 150(3) EPC an international application for which the EPO acts as designated Office or elected Office is deemed to be a European patent application. Consequently, there was no obstacle to making use of appeal procedures provided for under the EPC to supplement the provisions of the PCT in such cases (see Art. 150(2) EPC). However, if the EPO was neither receiving Office nor designated Office nor elected Office, but was acting solely **as ISA or IPEA**, the application of Art. 150(2) EPC should be limited, as far as the appeal procedure is concerned, to supplementing the express provisions of PCT R. 40.2(c) PCT and R. 68.3(c) PCT, which relate only to the examination by boards or other special instances of ISAs or IPEAs of protests against the charging of additional fees. Thus the board came to the conclusion that during the international phase of a PCT application, the boards of appeal of the EPO have no jurisdiction to examine appeals against decisions taken by the EPO acting **solely** in the capacity of IPEA within the meaning of Chapter II of the PCT.

In **J 15/91** (OJ 1994, 296) the applicant filed an international patent application with the EPO and paid the international preliminary examination fee but failed to submit a demand for international preliminary examination within the time limit, laid down in Art. 39(1)(a) PCT, of 19 months from the date of priority. The EPO, acting as IPEA, notified the applicant that fee payment could not be accepted as a substitute for observing the prescribed time limit. This being so, the applicant was not entitled to benefit from the provisions for postponing entry into the regional phase until 30 months from the date of priority.

The aim of the requests made by the applicant in his appeal against this notification was to obtain a decision to the effect that he had filed his demand for international preliminary examination in due time. The appellant argued that the board of appeal did have jurisdiction in the case, because, unlike in case **J 20/89** (above), where it was acting solely as an IPEA, the EPO had also previously acted as receiving Office. The decision of the Legal Board of Appeal was based on the principle that the EPO was bound solely by the provisions of the PCT, the Regulations under the PCT and the relevant agreement between WIPO and the European Patent Organisation (OJ 1987, 515), where the EPO was acting, **in the international phase** of the PCT procedure, in the capacity of an international authority under the PCT. This followed, with regard to proceedings before the IPEA, from Art. 34(1) PCT. To this extent, therefore, the EPC did not apply. Apart from allowing for protests against an invitation by the ISA (or by the IPEA) to pay additional search fees in cases where the requirements for unity of invention had not been met, the PCT made no provision for appeal during the international phase. Furthermore, the board took the view that even if, as in the present case, the EPO had acted as receiving Office, there were no grounds for supposing that its boards of appeal had any jurisdiction. International preliminary examination by the

IPEA was a separate procedure which had to be distinguished from proceedings before the receiving Office and the ISA. Under Art. 31(3) PCT, the demand for international preliminary examination had to be made separately from the international application, and Art. 31(6)(a) PCT stipulated that the demand had to be submitted to the competent IPEA, not the receiving Office. Although the EPO might well perform all the various functions involved in the international phase of the PCT proceedings, the distinction between the procedures still applied. Thus, it was decided that EPO appeal boards had no jurisdiction to examine appeals against the EPO acting in its capacity as an IPEA. The Legal Board of Appeal thereby upheld its previous decision **J 20/89**.

In **J 14/98** the applicant had contended that the EPC Contracting States had been elected under Art. 39 PCT and that, therefore, the thirty-one (instead of the twenty-one) month period under R. 104b(1) EPC applied in the case at issue. In fact, a demand for international preliminary examination (PCT chapter II demand) was filed in due time but, owing to a series of errors including a wrong application number in the demand, it went astray in the US Patent Office (USPTO) acting as International Preliminary Examination Authority (IPEA) under the PCT.

The board noted that under the provisions of the PCT it was the Office acting as IPEA (here the USPTO) which was responsible for deciding on the question of whether a PCT chapter II demand complies with the formal requirements laid down in the PCT (see Art. 34 PCT in combination with R. 60.1 PCT, in particular R. 60.1 (c) PCT). Thu, the board made it clear that neither the EPO (if not acting as IPEA) nor the boards of appeal had jurisdiction concerning PCT chapter II demands (**J 20/89**, OJ 1991, 375). The question of whether or not the effects of Art. 39(1)(a) PCT applied in the proceedings before the EPO was therefore to be decided on the basis of the conclusions of the IPEA responsible for the application. The same was true if the IPEA (here the USPTO) acted under the orders of a final decision of a court (here the CAFC) binding on it. In any case the Legal Board could not question the jurisdiction of the CAFC in the those circumstances. Nor could the board review the decision of the CAFC as to the merits.

The board held that the finding in the CAFC decision that the PCT chapter II demand which had been validly filed in due time constituted the factual basis for the further proceedings before the EPO in its capacity as designated or elected Office. The board noted that as far as decisions of the EPO in connection with the entry of PCT applications into the regional phase were concerned, the jurisdiction of the boards of appeal clearly derived from Art. 150(3) EPC in combination with R. 104b EPC and R. 104c EPC (versions prior to the revision of 1998). Thus, in these circumstances, the Legal Board of Appeal had jurisdiction to examine the decision of the Receiving Section of the EPO.

C. The EPO acting as ISA

1. PCT search guidelines binding on the ISA

In decisions **G 1/89** and **G 2/89** (OJ 1991, 155 and 166) the Enlarged Board of Appeal decided that the EPO in its function as an ISA may, pursuant to Art. 17(3)(a) PCT, request

a further search fee where the international application is considered to lack unity of invention a posteriori.

According to Art. 2 of the Agreement between the European Patent Organisation and WIPO (latest version dated 1.10.1997 (OJ 1998, 85) the EPO must, in carrying out international searches, be guided by the PCT Search Guidelines. This Agreement is based on Art. 154 EPC and Art. 16 PCT and is therefore binding on the EPO, including the boards of appeal when exercising their special functions under the PCT in accordance with Art. 154(3) EPC. The PCT Search Guidelines contain a direct reference to the consideration of unity of invention by the ISA on an a posteriori basis, ie after an assessment of the claims with regard to novelty and inventive step in relation to the prior art. Only in the case of a conflict between the guidelines and the PCT itself does the latter prevail as higher-ranking law. The Enlarged Board, however, could not see such a divergence and therefore concluded that the PCT Search Guidelines should be applied as a matter of principle when examining for non-unity of an application a posteriori.

2. Protest procedure

If the international application does not comply with the requirement of unity of invention, the ISA must invite the applicant to pay additional search fees within a time limit fixed by the ISA (Art. 17(3)(a) PCT, R. 40.3 PCT). The applicant may pay the additional fee under protest and thereby initiate a review of the justification for the invitation (R. 40.2(c) PCT).

2.1 Substantiation of invitation

Under R. 40.1 PCT, the ISA must specify the **reasons** for which the application is not considered as complying with the requirement of unity of invention. According to established case law the specification of reasons in an invitation to pay additional fees is an **essential requirement** and an invitation is not legally effective unless reasons are given to substantiate lack of unity (**W 4/85** and **W 7/86** (OJ 1987, 63 and 67), **W 9/86** (OJ 1987, 459), **W 7/85** (OJ 1988, 211)).

Decision **W 4/85** (OJ 1987, 63) stated the minimum requirement for adequate substantiation. According to that decision, the basic considerations behind the finding that the invention lacked unity must be set out in a **logical sequence** to enable the applicant and the appeal body to check this finding (see also **W 2/93**, **W 2/95**); only in **straightforward cases** might it be sufficient just to list the relevant subject-matters, provided the list made it perfectly clear that the application did not relate to a single general inventive concept (as, for example, in **W 7/92**). Also, in **W 7/86** (OJ 1987, 67), **W 33/90, W 50/90,W 16/91, W 32/91, W 43/91** and **W 9/92**, it was pointed out that listing the inventions which in the ISA's view the application contained was sufficient reasoning only in exceptional cases.

In **G 1/89** and **G 2/89** the Enlarged Board of Appeal noted that the consideration by an ISA of the requirement of unity of invention should, of course, always be made with a view to giving the applicant fair treatment and that the charging of additional fees under Art. 17(3)(a) PCT should be made only in **clear cases**. In particular, in view of the fact that such consideration under the PCT was being made without the applicant having had an

opportunity to comment, the ISA should exercise restraint in the assessment of novelty and inventive step and in borderline cases preferably refrain from considering an application as not complying with the requirement of unity of invention on the ground of lack of novelty or inventive step (see **W 34/89, W 23/92**).

In **W 26/91** the board concluded that the ISA had contravened the principles laid down by the Enlarged Board of Appeal in **G 1/89** and **G 2/89**. The mere citation of three documents without any analysis of what was disclosed and the undifferentiated allegation that with regard to these documents there was no novelty or inventive step could not be considered as fair treatment (see also **W 3/92**, **W 3/96**). If a lack of inventive step is not immediately apparent, in case of doubt unity should be assumed (see **W 23/89** and **W 51/90**).

In **W 3/93** (OJ 1994, 931) the ISA did not base its objection of lack of unity on the prior art referred to in the application or established during the search. It was therefore an "a priori" objection within the meaning of Chapter VII, 9 of the PCT Search Guidelines. In the board's view the grounds for this objection as stated in the invitation to pay contained virtually nothing more than a repetition of the substance of R. 13.1 PCT in different words. However, as the applicant in the present case was nevertheless able to make a substantive response, the board could accept the reasoned statement as sufficient on this occasion (confirmed in **W 4/94** (OJ 1996, 73)). Thus, the only issue to be examined was whether, considering the reasons stated by the ISA and the submissions made in support of the protest, retaining the additional fees was justified. The board found that it could not investigate **ex officio** whether an objection of lack of unity would have been justified for reasons other than those given, for example after taking into consideration the documents found during the search or addressing in depth the objectively resolved technical problem. Accordingly, the objection of lack of unity could be raised again on different grounds in the event of subsequent proceedings under PCT Chapter II (confirmed in **W 8/93** and **W 11/94**) (see also **W 4/94** below).

In **W 14/92** the board ruled that it had to be clear to the applicant whether the lack of unity objection was a priori or a posteriori.

In **W 11/89** (OJ 1993, 225) and **W 10/92**, the boards came to the conclusion that an invitation to pay additional search fees had also to contain an exposition of the problem solved by the invention, unless it was perfectly clear that the technical facts listed in the invitation could not reasonably be subsumed under an overall problem; if that exposition was lacking, the invitation was not legally effective and any additional search fees paid should be reimbursed (see also **W 8/94**). The determination of the technical problem underlying the invention was a mandatory precondition for the assessment of unity of invention, that is to say, whether or not the subject-matter claimed as the solution to such a problem represented a single general inventive concept. The disregarding of this principle was considered to be in itself sufficient justification for reimbursement of the additional search fees (see also **W 14/89**, **W 6/91** and **W 3/92**). **W 50/91**, **W 52/91** and **W 22/92** held that where the lack of unity objection was a priori, the technical problem was to be defined only on the basis of the description, not the prior art. According to **W 59/90** and **W 14/91**, in a posteriori cases, details of the technical problem were required to be given both before and after a document which caused lack of novelty and gave rise to lack of

unity was found.

In **W 18/92** the board found as regards inventive step that there was no indication in the invitation from the ISA as to which document represented the closest prior art, what the problem to be solved was in the light of the closest prior art, and whether all five documents had been combined together to arrive at the finding of lack of inventive step, or only some of them.

In **W 31/88** (OJ 1990, 134) the board held that consideration of the clarity and conciseness of claims by the ISA was limited to whether they could be sufficiently understood to permit a meaningful search to be carried out (Art. 17(2)(a)(ii) PCT). Under the PCT the ISA was not competent to consider whether the requirements of Art. 6 PCT (in particular clarity and conciseness of claims) had been met. According to Art. 17 PCT, clarity of claims for the purposes of a meaningful search was a separate question from that of unity of invention. An alleged lack of clarity in a claim could not be used as a reason for an objection based on lack of unity.

In **W 3/94** (OJ 1995, 775) the board pointed out that Annex B, Part 1(f) of the Administrative Instructions under the PCT (PCT Gazette No. 15/1992, in force since 1.7.1992) contained specific criteria for assessing the unity of "Markush" claims. These guidelines pointed out that the question of unity of invention must be reconsidered if at least one "Markush" alternative was not novel, but that reconsideration did not necessarily imply that an objection of lack of unity would be raised (see Annex B, Part 1(f), (v)). The requirement of R. 40.1 PCT, whereby the invitation had to be reasoned, would thus be met only if it indicated why the criteria mentioned in Annex B, Part 1(f)(i), (B)(2) of the Administrative Instructions under the PCT had not been fulfilled. This was particularly the case where the unity of alternatives "of a similar nature" in a Markush claim was contested on the basis that they did not share a significant structural element. In the present case there were no facts from which a lack of unity was so manifestly clear that more detailed reasons could be dispensed with.

In **W 7/99** the board said the purpose of the protest procedure under R. 40.2(c) PCT was to review whether the invitation to pay was substantively justified, so the sole issue was whether, given the grounds set out by the ISA and the arguments submitted in the protest, additional search fees should be retained. So the board could not consider, of its own motion, whether a lack-of-unity objection might be justified for other reasons than those given, eg after considering the documents found in the search or looking in detail at the technical problem objectively solved. The board noted in this connection that "further relevant material" in the form of WPIL abstracts annexed to the ISA's reasoned request for additional fees. The board said that merely naming or listing possibly relevant additional literature, or simply referring to prior art mentioned in the application's description, without in any way analysing the implications of that literature or prior art for unity purposes, could not be considered an implicit a posteriori objection.

In **W 11/99** (OJ 2000, 186) the board observed that in Guidelines C-III-7.6 is stated that, although lack of unity should be raised in clear cases, it should not be raised on the basis of a narrow, literal or academic interpretation of the relevant provisions. This follows the

Guidelines for Examination in the EPO with regard to the requirement of Art. 82 EPC (see Guidelines C-III, 7.7). In the opinion of the board, the narrow interpretation of the relevant provisions on which the request for payment was obviously based is incompatible with this guideline too, as it results in subject-matters which contribute to the solution of one and the same technical problem and therefore belong together (see also **W 11/89**, OJ 1993, 225, Reasons, 4.1) being deemed to lack unity.

2.2 Substantiation of protest

R. 40.2(c) PCT enables the applicant to pay the additional fee under protest, "that is, accompanied by a reasoned statement to the effect that the international application complies with the requirement of unity of invention ...". If the applicant decides to pay the additional fee under protest, therefore, it must be accompanied by a statement setting out the reasons for the protest. Since under Art. 17(3)(a) PCT and R. 40.3 PCT this fee has to be paid within a specified time limit it follows that the statement must also be submitted within the same time limit.

In **W 4/87** (OJ 1988, 425) the board held that fees for additional inventions (see Art. 17(3)(a) PCT) paid within the prescribed time limit (obliging the EPO as International Searching Authority to draw up the international Search Report on those parts of the international application concerned with the said inventions) could not be refunded if the statement of grounds supporting the protest under R. 40.2(c) PCT was submitted late.

In **W 8/89**, **W 60/90**, **W 57/91** and **W 16/92** the board emphasised that an applicant who wished to pay the additional search fee under protest must submit a reasoned statement. A protest without sufficient reasoning would be rejected as inadmissible - without substantive examination by the board as to whether the invitation of the ISA had been properly reasoned. The reasoning must contain verifiable grounds indicating why the applicant considered unity of invention to be present. A mere statement to the effect that the international application met the unity requirement did not constitute a reasoned statement within the meaning of R. 40.2(c) PCT. Very brief statements of grounds would suffice only in exceptional cases (see **W 48/90**).

In **W 41/91** the board found that it was clear from the applicant's submissions that he disagreed with the ISA on one concrete point. To this extent, the applicant's response sufficed to meet the requirement of a reasoned statement under R. 40.2(c) PCT. The board stated that according to the established jurisprudence of the boards of appeal of the EPO, the substance and not the form of a submission was to be considered (see **J 24/82**, OJ 1984, 467).

In **W 16/99**, the board said the ISA's reasoning in its request for additional fees (Form PCT/ISA/206) indicated that citation (1) in the international search report suggested a lack of novelty or inventive step in Claim 1 of the international application. The applicant had not disputed this, but merely referred to statements in the description about advantages of the invention which did not take the cited prior art into account. He had said nothing about the identical or corresponding special technical features in which the contribution of the various solutions should be seen, especially with regard to citation (1). The board saw no

reason to doubt the ISA's position on the disclosure in citation (1), and so concluded that the request for payment of four additional fees was in line with Art. 17(3)(a) PCT and R. 40.1 PCT.

2.3 Review of protests by a review panel

Where additional fees have been paid under protest, an EPO review panel will review whether the invitation to pay these fees was justified. The review panel consists of the head of the directorate from which the invitation was issued, an examiner with special expertise in unity of invention and, normally, the examiner who issued the invitation.

If the review panel finds that the invitation was justified, it will inform the applicant accordingly and invite him to pay a fee for the examination of the protest by the board of appeal ("protest fee") if he wishes the protest to be referred to the board of appeal for decision. The protest fee must be paid within a time limit of one month from the date of notification of the result of the review. If the protest fee is not paid in due time, the protest will be considered withdrawn. If the board of appeal finds that the protest was justified, the additional fee(s) and the protest fee will be refunded.

For details see the Decision of the President of the EPO dated 25.8.1992 and the Notice from the EPO dated 26.8.1992 (OJ 1992, 547).

2.4 Review of protest by a board

2.4.1 Additional reasons given by the review panel

In **W 11/93** the EPO, acting as ISA, had issued an invitation to pay three additional search fees, which the applicants paid under protest. The board found that the ISA's invitation under R. 40.1 PCT was invalid owing to lack of (sufficient) reasons. Under the new R. 40.2(e) PCT in conjunction with R. 104a(3) EPC (now R. 105(3) EPC), the ISA must carry out a review of the protest. The board also considered whether the reasons accompanying the "result of the review" might not be considered as making good the lack of reasons in the case of the invitation. In its decision, the board thoroughly scrutinised the **purpose and structure** of the new R. 40.2(e) PCT and considered whether, when notifying the results of the review in the event of the invitation's being upheld, there was any need at all to supply further reasons. It pointed out that prior review of the protest by the ISA was comparable to interlocutory revision under Art. 109 EPC in the case of an appeal (see also **W 4/94**, OJ 1996, 73). Furthermore, R. 40 PCT had been revised for reasons of general procedural economy. It would run counter to that object were the ISA to give **additional reasons** in the event of the invitation to pay's being upheld. With this decision, the board confirmed the case law developed in **W 4/93** (OJ 1994, 939).

In **W 5/94** the board held that in its examination of the protest against the invitation to pay an additional search fee, the board must not take into consideration any new reasons brought forward in the ISA's review of the justification for the invitation (R. 40.2 (c)(d)(e) PCT), particularly because any such new reasons could not have been considered by the applicant in his protest against the invitation and because the board's task, by letter of the

law (R. 40.2(c) PCT, second sentence), was limited to the examination of "the protest" (see also **W 12/93**).

In **W 3/96** the board noted that, according to the case law concerning the analogous procedure for international preliminary examination (R. 68.3(e) PCT), new reasons may not be added when the result of the review is communicated (**W 4/93**, OJ 1994, 939). In this case, too, the subsequently presented reasons were not to be taken into account when assessing whether the invitation under R. 40.1 PCT was sufficiently substantiated and whether the protest was justified. The crucial issue was not whether the invitation could have been clearly substantiated, but whether clear reasons had in fact been given in the invitation under R. 40.1 PCT. The absence of such reasons meant that the invitation to pay failed to meet the requirements of R. 40.1 PCT and therefore offered no basis for refusing to reimburse the additional search fees which had been paid under protest.

2.4.2 Amendment of claims

In **W 3/91** the board held that the request for amendment of the claims could not be considered in the proceedings before it, because according to Art. 19(1) PCT any amendments of the claims after receipt of the International Search Report could only be filed with the International Bureau within a prescribed time limit. This left no room for the ISA or the board to accept amendments. However, the board believed that the request for amendment, ie that six certain probes should be deleted from claim 3, could be understood as a declaration that no search for these particular probes should be carried out by the ISA. The board considered this request to be in an auxiliary relationship to the request for a full refund of the fees.

In **W 3/94** (OJ 1995, 775) it was pointed out, with regard to the applicants' new claim 1 that the board had no power to examine unity on the basis of this new claim. The board's powers derived from Art. 154(3) EPC in conjunction with R. 40.2(c) PCT, which provided for the board to examine the protest. This, of course, it could only do on the basis of the documents available when the ISA issued its invitation to pay the additional search fees, as there was no provision for amendments during proceedings before the ISA. The replacement sheet could at best be regarded as indicating that the ISA should no longer search certain subject-matter. This was confirmed in **W 6/94**, where the board found that the invitation by the ISA to pay additional fees as well as the examination of the protest by the board under R. 40.2(c) PCT had to be based on the claims as originally filed. There was no opportunity for the applicant to amend the claim in the international phase until he had received the complete international search report (Art. 19(1) PCT).

2.4.3 Devolutive effect of protests

In **W 53/91** the EPO as ISA - applying the former protest procedure - invited the applicant to pay an additional search fee on 30.5.1991, followed on 1.10.1991 by a second invitation intended to replace the first one - against which the applicant had meanwhile (on 20.6.1991) filed a protest. He duly filed a protest against the second invitation too, and this the board was now hearing. The board's first ruling was that the provisions and principles of the EPC applied mutatis mutandis in protest proceedings, which therefore also had a

suspensive and devolutive effect. The department of first instance had no power to amend, replace or cancel its own decision once that decision had been appealed. Noting this, the board also ordered that the search fee paid under protest be reimbursed.

In **W 1/97** (OJ 1999, 33) the board held that successive invitations to pay additional search fees could have the consequence that the question of unity of invention became pending at several instances at the same time. This would be in conflict with basic principles of procedural law which also applied in protest cases. Once a protest was filed, the EPO acting as ISA remained competent only for the prior review of the justification of the invitation already issued (R. 40.1(e) PCT). It was not entitled to raise the question of non-unity a second or even further times in the same search procedure. The board observed that this would be detrimental to the right of a party to have one and the same case decided in one set of proceedings, as well as his right not to be forced to seek legal redress in respect of the same case in several proceedings. It would also disregard the fact that the position to be taken by the board of appeal in its decision on the protest might become prejudicial for any further finding of non-unity.

2.5 Missed time limit for filing the protest

Art. 48(2) PCT requires every PCT contracting state to excuse, as far as that state is concerned, for reasons admitted under its national law, any delay in meeting any time limit, and allows such a state, so far as it is concerned, to excuse such delays for other reasons.

In **W 3/93** (OJ 1994, 931), the protest was first rejected as inadmissible by the board on the ground that it was filed too late, whereupon the applicant applied for re-establishment of rights. The board found that by analogy with the principles developed by the Enlarged Board of Appeal in decision **G 1/83** (OJ 1985, 60, reasons, 5 and 6) for interpreting the EPC, Art. 48(2) PCT should be construed to mean that in the event of a delay in meeting the time limit laid down in R. 40.3 PCT the same legal remedies are available as in the case of failure to observe other comparable time limits under the PCT or EPC (see also **W 4/87** (OJ 1988, 425, reasons, 7)). Thus, the provisions of Art. 122 EPC were applicable. As the communication notifying the appellant that the application did not meet the requirements of unity required an answer within thirty days of its date, but was not itself posted until one month **after** that date, it was clearly not possible for the appellant to comply with the time limit. The application for re-establishment was therefore granted. The board found that re-establishment of rights restores the legal situation to that existing prior to the decision which declared the protest inadmissible, ie it destroys the legal validity of the decision, which accordingly need not be set aside or amended.

D. The EPO acting as IPEA

1. Protest procedure

The requirement of unity of invention under the PCT applies equally to the procedure before the ISA and to the procedure before the IPEA according to Art. 17(3)(a) PCT and

Art. 34(3)(a) PCT, which is in conformity with the procedural separation of search and examination. Thus, the requirement of unity of invention under the PCT must in principle be judged by the same objective criteria by both the ISA and the IPEA (**G 1/89** and **G 2/89,** OJ 1991, 155 and 166). Under Art. 155(3) EPC the boards of appeal are responsible for deciding on a protest made by an applicant against an additional fee charged by the EPO, acting as IPEA, under the provisions of Art. 34(3)(a) PCT.

1.1 General issues

In **W 6/99** (OJ 2001, 196) the board ruled that the EPO, under the binding guidelines for international preliminary examination, could issue an invitation under R. 68.2 PCT only if the applicant failed to overcome the a posteriori non-unity objection raised by the IPEA in the first communication from the examining division. A desire to expedite proceedings by issuing the first such communication together with the invitation under R. 68.2 PCT could not justify departing from the procedure laid down in applicants' interests or make up for the lack of at least one first written opinion under R. 66.2 PCT prior to the invitation under Art. 34(3)(a) PCT in conjunction with R. 68.2 PCT (see also **W 13/99**).

1.2 Substantiation of invitation

In **W 2/93** the board noted that the invitation of the IPEA could not be considered as containing an acceptable reasoned statement setting out the grounds for the invitation. The reasons relied on were still those that the ISA had put forward in the invitation to pay additional fees issued pursuant to Art. 17(3)(a) PCT and R. 40.1 PCT. The applicant, in the light of the international search report, had submitted to the International Bureau of WIPO an amendment and the statement under Art. 19(1) PCT, and filed two replacement sheets as required by R. 46.5(a) PCT. It was clear that claim 1 before the IPEA was different from the one considered by the ISA. The board stated that, in these circumstances, an invitation relying on the same reasons as those which had been put forward by the ISA in its invitation could not be considered to fulfil the obligation to specify reasons laid down in R. 68.2 PCT.

In **W 4/94** (OJ 1996, 73) the board felt compelled, given the paucity of the IPEA's remarks, to comment on the issue of the obligation to specify reasons, even though the applicants had not expressly referred to this in their protest. The IPEA had established lack of unity with reference to three documents, ie a posteriori, and had maintained its finding unamended after review. Although the relevant remarks were not fully in accord with the PCT Preliminary Examination Guidelines, Chapter VI, 5.5 and 5.7 with reference to Chapter III, 7, the fact that in their protest the applicants had commented on an objection as to the novelty of the subject-matter of the invention according to claim 1 implied that the IPEA's remarks were understandable and not just mere assertion, and as a result the minimum criterion of the obligation under R. 68.2 PCT to provide justification could be seen as fulfilled. The board did not consider the obligation to be infringed if the determinative reason for the decision was identifiable, even though the reasons could be seen as insufficient or incorrect. In the board's opinion, EPO board of appeal case law adhered to this principle. A comparable approach could also be seen in decisions on protests, such as in **W 3/93** (OJ 1994, 931, reasons, 2.1).

In **W 12/94** the board noted that the reasoning given by the IPEA did no more than identify the content of the two sets of claims. However, the board stated that in a case as simple as the one in question, any further useful amplification of the reasoning was hardly possible. The board found the reasoning given by the IPEA sufficient.

1.3 Substantiation of protest

In **W 9/94** the EPO, acting as IPEA, informed the applicant that the application did not comply with the requirement of unity of invention for the reasons indicated. The sole argument in the statement accompanying the protest was to the effect that the contents of the claims were already contained in the original claims and therefore the set of claims had already been searched. The board observed that the appellant did not address the point at issue, and since the fact that the claims in question were searched cannot, on its own, constitute a reason for contesting a finding of lack of unity of invention by the IPEA, it followed that a protest statement which relied solely on pointing out this fact could not qualify as a reasoned statement for the purposes of R. 68.3(c) PCT. The same held true for the argument, which might be implicit in the protest statement, that the unitary character of the claims in question could be inferred from the fact that the ISA did not request an additional search fee. The board held that the decision of the ISA was not binding on the IPEA (see **G 2/89**, OJ 1991, 166, reasons, 8.1 to 8.2), and noted that in the matter of a finding of lack of unity of invention, both the ISA and the IPEA exercised discretion in borderline cases on whether or not to issue an invitation under Art. 17(3)(a) PCT or Art. 34(3)(a) PCT respectively. Because of the difference between the tasks of search and examination, it might in appropriate cases be proper for this discretion to be exercised differently by the respective authorities in relation to a given group of inventions. Thus a group of inventions might sometimes be searchable in full within the bounds of a normal case, while the examination of novelty, inventive step, industrial applicability, excluded subject-matter and clarity for each of the inventions might involve a cumulative effort well beyond such bounds.

In **W 4/93** (OJ 1994, 939) the board took the view that the applicant's right to communicate orally with the IPEA (Art. 34(2)(a) PCT) did not include the right to formal oral proceedings. The board added that an informal interview under R. 66.6 PCT usually served no purpose in protest proceedings under R. 68.3(c) PCT.

In **W 12/94** the board noted that the protest did not contain any reasoning but had to be read in the context of a letter in which the applicant's representative had set out its reasoning on the issue of unity, namely that as the search could be conducted without the effort justifying an additional fee, there was inherent unity. The board decided that in these circumstances the reasoning in the earlier letter had to be regarded as implicitly contained in the second, which dealt with exactly the same issue. It found that though the reasoning was totally unconvincing, it was nonetheless sufficient to qualify as "a reasoned statement" within the meaning of R. 68.3(c) PCT. The protest was therefore admissible.

In **W 2/00** the board found that the applicant had not given proper reasons for his protest, as required by R. 68.3 PCT. Under R. 68.3(c) PCT, the protest had to be accompanied by a reasoned statement to the effect that the application complied with the requirement of

unity or that the amount of the required additional fee was excessive. According to the boards' case law, this meant that an applicant who believed that his application did not lack unity had to give specific reasons showing why he took that view (**W 16/92**, OJ 1994, 237). The appellant's letter contained no such reasons. It merely indicated his belief that the application did not lack unity. The board took the view that even if the words "we maintain our opinion" were taken to refer implicitly to some reason(s) given earlier, they did not amount to a reasoned statement within the meaning of R. 68.3(c) PCT.

1.4 Composition of a review panel

In **W 4/95** the applicants, in accordance with the PCT Preliminary Examination Guidelines (March 1993), Chapter VI, 5.7, filed a "reasoned statement" under R. 68.3(c) PCT after receiving the result of the preliminary examination. In particular, the applicants objected to the composition of the board responsible for examining the protest under the latter rule, on the grounds that one of its members was the examiner who had issued the opinion which was the subject of the original protest; under R. 68.3(d) PCT, this was not permissible. The board explained that R. 68.3(d) PCT referred to the examination of the protest itself and not to the "prior review" procedure mentioned in R. 68.3(e) PCT. Paragraph (d) specifically referred to the three-member board mentioned in paragraph (c). Under Art. 155(3) EPC in conjunction with Art. 34(3)(a) PCT, this body was the board of appeal for the EPO acting as IPEA. Neither the PCT nor its Implementing Regulations contained any provision as to who should carry out the prior review mentioned in paragraph (e). However, Chapter VI, 5.7, of the PCT Preliminary Examination Guidelines indicated that the review was not to be entrusted solely to the examiner responsible for the preliminary examination, although that examiner was allowed to sit on the three-member board.

1.5 Review of protests

W 4/93 (OJ 1994, 939) dealt for the first time with the new procedure for reviewing protests against invitations to pay additional fees for the international preliminary examination in the case of lack of unity of the invention. The board decided that the examination stipulated in R. 68.3(e) PCT of the justification for charging an additional fee should only be carried out on the basis of grounds stated in the invitation to pay the additional fee and that the facts and arguments submitted by the applicant in his grounds of protest should also be included. This **precluded the subsequent inclusion** of new grounds and evidence when communicating the result of this review. The board had to confine itself in its decision to examining the protest and the invitation to pay (confirmed in **W 11/93**).

In **W 4/94** (OJ 1996, 73), regarding the extent of the notification of the result of the review under R. 68.3(e) PCT, the board noted that the wording of the rule, in contrast to the "invitation to restrict or pay" in R. 68.2 PCT, first sentence, stipulated only that a result be notified and did not expressly mention any obligation to give reasons. The corresponding PCT Preliminary Examination Guidelines on implementing this rule in Chapter VI, 5.7, also stipulated a technical reasoned statement only where the review produced a negative result, ie where the facts in the invitation under R. 68.2 PCT were not confirmed. The board therefore took the view that, where the review body reached the conclusion that the

arguments put forward in the protest did not necessitate any further discussion on the technical and/or patent law issues involved, ie did not lead to any new assessment of the facts, the phrase "... doit indiquer les raisons techniques de ce résultat ..." or "... will give a technical reasoning of that result" did not mean that it is automatically incorrect merely to refer back to the reasons given in form PCT/IPEA/405. The review under R. 68.3(e) PCT could also be compared with interlocutory revision in accordance with Art. 109 EPC, which did not stipulate any separate obligation to provide justification.

1.6 Additional fees - partial reimbursement

In **W 4/95** the EPO, acting as IPEA, had issued an invitation under Art. 34(3)(a) PCT and R. 68.2 PCT. The applicants had filed a protest, claiming that the amount of the requested additional fee was too high. Under R. 68.3(c) PCT, second sentence, the "total or partial reimbursement of the additional fee" could be ordered if the protest was found to be justified (see also the German wording and the French version, which deviates from the English by referring to "des taxes additionnelles"). In the applicants' view, this constituted a basis for paying back only a fraction of a single fee.

The board explained that Art. 34(3)(a) PCT and R. 68.2 PCT referred to several fees. The reason for this was that an application failing to comply with the requirement for unity of invention could cover more than one additional invention (see PCT Preliminary Examination Guidelines, Chapter VI, 5.5). Moreover, R. 68 PCT referred to Art. 34(3)(a) PCT; since both passages were clearly concerned with the same fees, R. 68.3 PCT had to be brought into accord with Art. 34 PCT and R. 68.2 PCT. In the board's view, therefore, a "partial reimbursement" should be taken to mean a reimbursement of some additional fees (but not all of them). A "partial reimbursement" could only be made if at least two additional fees had been paid. The reimbursement of a fraction of a single fee was not provided for under the PCT.

E. The EPO as designated or elected Office

The EPO may be a "designated Office" or an "elected Office" for an international application made under the Patent Cooperation Treaty (PCT). The application is then deemed to be a European application (Euro-PCT application) for the purposes of the EPC. In the case of Euro-PCT applications the provisions of the PCT apply in addition to those of the EPC, and where there is conflict between them, the provisions of the PCT prevail.

In **J 26/87** (OJ 1989, 329) the international application had been published by the International Bureau without mentioning Italy as designated state. The question to be decided by the board was whether or not Italy was designated in the international application, i.e. whether or not the appellant had informed the receiving Office (the Australian Patent Office) in the international application that he wished to obtain a European Patent for (inter alia) Italy. The board noted that the answer to this question depended entirely upon the proper interpretation of the "request for grant" form (Form PCT/RO/101). The Receiving Section had held that Italy was not requested as a

designated State in this form. The board came to the conclusion that if, on the proper interpretation of the request for grant of an international application, an applicant has designated an EPO contracting state for which the PCT is in force, the EPO is bound by the provisions of Art. 153 EPC to act as the designated Office for that contracting state, even if the international application has been published by the International Bureau without mentioning that contracting state as a designated state.

In **J 7/93** the International Bureau did not inform the EPO of its election as an IPEA within the 21-month time limit under R. 104b(1) EPC. At the end of this period the EPO therefore issued a communication pursuant to R. 85a EPC requesting payment of the fees to be paid under R. 104b EPC, unaware that the extended time limit of 31 months under Chapter II PCT was applicable. However, the fees were not paid within the 31-month time limit and a request for re-establishment of rights was filed. In the meantime, the EPO had issued a notification pursuant to R. 69(1) EPC indicating that the application was deemed to be withdrawn. This notification again referred to the 21-month time limit, the EPO still being unaware of its election. The Receiving Section went on to reject the request for re-establishment on the ground that re-establishment was excluded under Art. 122(5) EPC in respect of the time limits for paying fees pursuant to R. 104b(1)(b)(c) EPC (following **G 3/91** (OJ 1993, 8)). The board held that the communication pursuant to R. 85a EPC and the notification pursuant to R. 69(1) EPC were legally non-existent because they could not be based on any provision in the EPC or the PCT. Thus, the reasons for which the party refrained from acting upon them were irrelevant as the communications could have no legal effect to the party's detriment. Further, according to R. 85a EPC, the fees could still be paid with a surcharge within a period of grace of one month of notification of the failure to observe the time limit. As no such communication had been sent and the party had paid the fees and the surcharge, the proceedings for re-establishment were not necessary. The fact that the EPO continued the proceedings for, and finally refused, re-establishment of rights without taking into account the fact that these proceedings were unnecessary from the very beginning amounted to a substantial procedural violation.

A decision of an **examining division** of 5 June 1984 (OJ 1984, 565) pursuant to Art. 153(2) EPC in conjunction with Art. 25 PCT and Art. 24(2) PCT concerned the authority of a designated Office under Art. 24(2) PCT to maintain the effect of an international application. The applicant had missed the time limit for filing the authorisation for the representative set by the Japanese Patent Office acting as receiving Office.

The EPO, acting as designated Office, excused the non-observance of time limits which had been set by the receiving Office for the correction of formal deficiencies in accordance with Art. 14(1)(b) PCT in conjunction with R. 26.2 PCT (Art. 24(2) PCT and Art. 48(2)(a) PCT). The examining division found that the time limit under R. 26.2 PCT was to be compared with time limits set by the EPO under Art. 121 EPC and granted re-establishment of rights according to Art. 122 EPC in respect of the time limit under Art. 121(2) EPC.

In **J 3/94** the applicant **designated** in an international application under the heading "Regional Patent" the European patent and under the heading "National Patent" five contracting states to the PCT, including the EPC contracting states Germany and the

United Kingdom. However, in the demand for international preliminary examination, which was filed with the EPO in its capacity as IPEA, only the five PCT member states were **elected**; under the heading "Regional Patent" there was no cross indicating the European patent. The applicant subsequently submitted that the failure to elect the EPO resulted from a mistake when the demand for international preliminary examination was filed. He argued, however, that the time limit under R. 104b EPC had actually been observed because the election of contracting states to the EPC under the heading "National Patent" (GB and DE) also had the consequence that the EPO became an elected Office even if no cross was placed in the box for indicating the European patent. The applicant submitted that his actions were sufficient to cause the EPO to be deemed an elected Office by operation of law.

The board pointed out that Art. 31(4)(a) PCT, last sentence, stipulated that an election could relate only to contracting states already designated under Art. 4 PCT. With regard to a state providing for national and regional patents, this meant that an election concerning the national grant procedure was only possible if there was a designation indicating that the applicant wished to obtain a national patent. Likewise, an election concerning the regional grant procedure was only possible if there was a designation indicating that the applicant wished to obtain a regional patent. Since each type of election had effects on different grant proceedings, it appeared that the declaration to use the results of the international preliminary examination in national grant proceedings was different from the declaration to use them in European grant proceedings. The board found that the correspondence of designations and elections, as laid down in Art. 31(4)(a) PCT, last sentence, applied two principles: first, an election could not cover a designation which was not made when the application was filed and, second, it was up to the applicant for which office he intended to use the results of the international preliminary examination. The validity of the election had to be decided by the authorities concerned during the international phase in order to give effect to the election and had to be assessed on a uniform basis by the authorities concerned. This was apparently in agreement with the consistent practice under the PCT. The EPO as elected or designated Office is fully competent to interpret applications appointing it to act in these capacities. Accordingly, the Office is not bound by the interpretation of the receiving Office or of the International Bureau (**J 26/87** (OJ 1989, 329), **J 19/93**).

In **J 4/94** the board had to consider whether the EPO was competent to interpret the applicant's demand for international preliminary examination differently from the United Kingdom Patent Office acting as IPEA. The board conceded that the demand was addressed to the IPEA, which was the competent body for dealing with it. However, the board referred to **J 26/87** (OJ 1989, 329), in which it was decided that the interpretation of the request for grant form by the receiving Office and International Bureau was not binding on the EPO in its function as designated Office. The valid designation put the matter within the competence of the EPO as designated Office (Art. 2(xiii) PCT and Art. 153(1) EPC). In deciding on the present case, the board deviated from the interpretation by the IPEA. It found that there was a defect in the demand, which the applicant should have been invited under R. 60 PCT to correct. It held that a clear deviation by the IPEA from the intention expressed in the demand was not binding on the EPO. It was, therefore, possible for the EPO to regard itself as a validly elected Office. The consequence of this

was that under R. 104b(1) EPC the time limit of 31 months applied.

In **J 19/93** the board held that the designation of states in the PCT request form for the purpose of obtaining a European patent could only be corrected if expressly requested, and if it was proved that an error had been made by the applicant.

In **J 17/99** the EP designation in an international application had not been confirmed within fifteen months as from the priority date as required by R. 4.9(c) PCT. It was therefore to be deemed withdrawn by the applicant at the end of that period (R. 4.9(b)(ii) PCT and Art. 24(1)(i) PCT). Consequently, the international application's effects under Art. 11(3) PCT - ie those of a European filing - ended on that date.

The board pointed out that the designated Office was not bound by the views or actions of the authorities involved in the application's international phase. On the contrary, in exercising that discretion in the present case the EPO had to apply the same rules and principles as for identical or comparable situations arising with direct European applications. This non-discriminatory approach was not only a fundamental principle of the PCT itself (see, for example, Art. 26 PCT and Art. 48(2)(a) PCT) but also a direct consequence of Art. 150(3) EPC. It followed from this that the fairly strict approach taken by the Legal Board of Appeal to correcting designations also applied to Euro-PCT applications - see also **J 3/81** (OJ 1982, 100) with its ruling that Euro-PCT applicants could not claim, under Art. 26 PCT, broader rights than those available under the EPC to EP applicants. **J 3/81** laid down that if a mistake was made in designating states in a European or Euro-PCT application, then a request to correct it by adding a further designation must generally be refused, in the public interest, if made too late for a notice about it to be added to the application as published. This general rule applied to a Euro-PCT application even if its publication by the International Bureau necessarily preceded the date on which the applicant could ask the EPO to correct it. It followed that the request for correction under Art. 24(2) PCT in conjunction with R. 88 EPC could not be allowed.

X. INSTITUTIONAL MATTERS

The Presidents of the German Patent Office (GPO) and the EPO entered into an Administrative Agreement on 29.6.1981 concerning the filing of documents and payments (OJ 1981, 381). According to Art. 1 of this Agreement, documents and payments filed with the GPO, but addressed to or intended for the EPO, are treated as if they had been received by the EPO on the day of actual receipt by the GPO.

In **G 5/88, G 7/88** and **G 8/88** (OJ 1991, 137) the Enlarged Board of Appeal considered the validity of this Administrative Agreement. The board reached the conclusion that the power of the President of the EPO to enter into such agreements could not be derived from Art. 5(3) EPC, which states that he represents the European Patent Organisation; the President's capacity to represent the European Patent Organisation was merely one of his functions. The extent of the President's power to enter into agreements was rather to be derived from other provisions of the EPC, in this case Art. 10(2)(a) EPC, according to which the President must take all necessary steps to ensure the functioning of the EPO.

It was held that an agreement concerning the treatment of misdirected documents involved a necessary step to ensure the functioning of the EPO for the following reason: the misdirection of papers led to the risk of loss of rights, as a result of failure to meet a time limit, caused by the late receipt of documents. The Administrative Agreement between the EPO and GPO was therefore found to be valid to the extent that the possibility of confusion regarding the filing offices of both Offices actually existed; this potential for confusion existed in Munich.

However, as far as the EPO sub-office in Berlin was concerned, there was no basis for such a regulation until 1.7.1989. Before this date the sub-office in Berlin was not a filing office, nor was a letter-box installed. As far as documents and payments which reached the EPO via the GPO's office in Berlin were concerned the Administrative Agreement was invalid. However, the Enlarged Board of Appeal applied the principle of good faith in favour of the opponent, who had filed a notice of opposition against a European patent via the Berlin office of the GPO, relying on the Agreement published in the Official Journal.

The same danger of confusion has existed in Berlin as in Munich since the opening of the EPO's Berlin filing office on 1.7.1989. On 13.10.1989, the Administrative Agreement between the Presidents of the two Patent Offices was adapted to the new situation (see OJ 1991, 187).

In **T 485/89** (OJ 1993, 214), the board held that a notice of opposition filed by fax at the GPO in Munich on the last day of the opposition period and forwarded to the EPO the next day was admissible; the opposition fee had already been paid some days earlier. Oppositions filed within the prescribed time by fax at the GPO in Munich while intended for the EPO were covered by the Administrative Agreement of 29.6.1981 and should be treated by the EPO as if it had received them directly, irrespective of whether or not they had been wrongly delivered.

In 1994, in accordance with Art. 33(1)(b) EPC, the Administrative Council amended R. 71 EPC by adding further provisions to R. 71a EPC, inter alia to the effect that a communication must be issued by the EPO at the same time as a summons to oral proceedings is issued (OJ 1995, 409). In contrast to this requirement of R. 71a(1) EPC, Art. 11(2) RPBA leaves it to the discretion of the boards of appeal whether or not to send a communication with such a summons. In **G 6/95** (OJ 1996, 649) the Enlarged Board held that R. 71a(1) EPC did not apply to the boards of appeal. This interpretation of R. 71a(1) EPC with regard to the boards was based on the consideration that Art. 23(4) EPC and Art. 33(1)(b) EPC provided two distinct and separate sources of legislative competence or power.

The Enlarged Board pointed out that Art. 23(4) EPC states that the RPBA "shall be adopted in accordance with the provisions of the Implementing Regulations". In the view of the Enlarged Board this was clearly directed to the mechanism set out in R. 11 EPC, which states that the authority referred to in R. 10(2) EPC (the "Praesidium") "shall adopt" the RPBA. The Enlarged Board concluded that the power under Art. 23(4) EPC to amend the RPBA belonged to the Praesidium of the boards of appeal, subject to the approval of the Administrative Council. Considered in the light of the principle of judicial independence, which Art. 23(3) EPC embodied, the mechanism for adopting the RPBA through the Praesidium of the Boards of Appeal pursuant to Art. 23(4) EPC acquired its full value and showed that the above principle extended to the procedure which was either preparatory to or otherwise related to the making of such decisions.

The Enlarged Board further stated that, according to Art. 33(1)(b) EPC, the Administrative Council was competent to amend the Implementing Regulations. There were obviously limits to the exercise of its powers, however. The Administrative Council was not entitled to amend the Implementing Regulations in such a way that the effect of an amended rule would be in conflict with the EPC itself (Art. 164(2) EPC). The Enlarged Board held that according to the proper interpretation of R. 71a(1) EPC, its mandatory procedural requirements were applicable to the first-instance departments of the EPO, but were not applicable to the boards of appeal. If R. 71a(1) EPC were to be interpreted as applying to all departments of the EPO, including the boards of appeal, its effect would be directly contradictory to and in conflict with the effect of Art. 11(2) RPBA which was adopted pursuant to Art. 23(4) EPC as the emanation of the independence of the boards of appeal. However, the Administrative Council must be presumed to know the limits of its own power. It was therefore reasonable to assume that the Administrative Council did not intend to amend R. 71 EPC so as to provide a conflict with a Rule of Procedure of the Boards of Appeal which it had itself previously approved.

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