

The Haar in the Soup

Kluwer Patent Blog

March 1, 2019

[Thorsten Bausch \(Hoffmann Eitle\)](#)

Please refer to this post as: Thorsten Bausch, 'The Haar in the Soup', Kluwer Patent Blog, March 1 2019, <http://patentblog.kluweriplaw.com/2019/03/01/the-haar-in-the-soup/>

Not much time for blogging today, but yet another referral to the Enlarged Board may deserve our attention. TBA 3.5.03 referred the following questions to the Enlarged Board, of which question 3 may have the greatest impact:

- 1. Ist im Beschwerdeverfahren das Recht auf Durchführung einer mündlichen Verhandlung gemäß Artikel 116 EPÜ eingeschränkt, wenn die Beschwerde auf den ersten Blick unzulässig ist?*
- 2. Wenn die Antwort auf Frage 1 ja ist, ist eine Beschwerde gegen den Patenterteilungsbeschluss in diesem Sinne auf den ersten Blick unzulässig, die ein Dritter im Sinne von Artikel 115 EPÜ eingelegt und damit gerechtfertigt hat, dass im Rahmen des EPÜ kein alternativer Rechtsbehelf gegen eine Entscheidung der Prüfungsabteilung gegeben ist, seine Einwendungen betreffend die angebliche Verletzung von Artikel 84 EPÜ nicht zu berücksichtigen?*
- 3. Wenn die Antwort auf eine der ersten beiden Fragen nein ist, kann die Kammer ohne Verletzung von Artikel 116 EPÜ die mündliche Verhandlung in Haar durchführen, wenn die Beschwerdeführerin diesen Standort als nicht EPÜ-konform gerügt und eine Verlegung der Verhandlung nach München beantragt hat?*

In English:

- (1) In appeal proceedings, is the right to an oral hearing under Article 116 EPC restricted if the appeal is prima facie inadmissible?*
- (2) If the answer to Question 1 is in the affirmative, is an appeal against the decision granting a patent prima facie inadmissible in this sense, which Appeal has been filed by a third party within the meaning of Article 115 EPC and which has been substantiated by arguing that there is no alternative remedy under the EPC against a decision of the Examining Division not to take into account the third party's objections concerning the alleged violation of Article 84 EPC?*
- (3) If the answer to one of the first two questions is no, can the Board hold oral proceedings in Haar without violating Article 116 EPC, if the appellant complains that this location is not in conformity with the EPC and requests that the oral proceedings be moved to Munich?*

In the Board's view, a referral of the question of the right venue of the oral proceedings (Referral Question 3) to the Enlarged Board of Appeal appears necessary according to Article 112 (1)a EPC, since the question is of fundamental importance for a large number of appeal proceedings, answering it serves to ensure a uniform application of the law, and the Board considers that a decision on this matter is necessary.

The deciding Board placed much reliance on earlier decisions T 1012/03 and T 689/05, according to which the right to be heard in oral proceedings includes, as a subset of the right to be heard, not only the right to be heard at all, but also the right to be able to present the arguments in the right venue. The right venue is not automatically the seat of the European Patent Organisation referred to in Article 6 (1) EPC, but regularly the venue referred to in Article 6(2) EPC, at which the department responsible for the proceedings within the meaning of Article 15 EPC of the European Patent Convention is located, provided that the venue of the department must be compatible with the European Patent Convention. (T 1012/03, reasons no. 41 et seq.; T 689/05, Reasons no. 5.3).

In the referring Board's view, the decision on the question will essentially depend on whether the President of the European Patent Office or the Administrative Council of the European Patent Organization, who empowered the President to rent the new office building and thus approved the relocation of the Boards of Appeal in the municipality of Haar, either had the power to relocate departments of the Office within the meaning of Article 15 EPC also outside the locations mentioned in the EPC (Art 6(2)) including the Centralisation Protocol (Section I(3)a)), or whether Article 6(2) of the EPC is to be interpreted as meaning that "Munich" is not the city of that name, but rather the greater Munich area. The referring Board clearly favours a strict interpretation of "Munich".

The Board added that it is unaware of the exact reasoning, by which the President in 2016 expressed the view that a relocation of the Boards of Appeal in a place outside Munich's city limits are in accordance with the EPC; it has therefore not yet formed an own final opinion on this question, but apparently found it sufficiently debatable and relevant so as to refer it to the Enlarged Board.

In my own view, this is quite an interesting and remarkable development. I have always queried why the Boards had to move out of the Isar building at all and never believed the official excuse that this might help to increase the appearance of the Boards' independence. Anyway, the hearing rooms are still there, but do not seem to be used much. Will the Boards return one day? Stay tuned!