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Case G1/21: EBA gives no clarity about videoconferencing

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In its much-awaited decision in case G 1/21, the Enlarged Board of Appeal (EBA) of the EPO has evaded to answer the high-profile question whether videoconferencing against the will of (one of) the parties is compatible with the right to oral proceedings.

Last March (case T 1807/15), a technical board of the EPO had referred the question to the Enlarged Board of Appeal, the highest judicial authority under the European Patent Convention (EPC). It was: "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 case has drawn a lot of attention. Many law firms, lawyers associations and companies argue that it is incompatible with the EPC that oral proceedings by videoconference can be imposed by EPO Boards even if the parties don't want it, as a new Article 15a of the Rules of Procedure of the Boards of Appeal (RPBA) provides. The Article entered into force on 1 April 2021.

No less than 47 amicus curiae briefs were filed in case G 1/21 (see this earlier post), many of them criticizing Article 15a RPBA and also the hasty way a 'new normal' was introduced by the EPO management without clear explanation. Oral proceedings by videoconference have become much more common due to the Covid-19 pandemic, but this doesn't mean a general rule allowing the EPO to impose videoconferences can be introduced, they argue.

Some also questioned the impartiality of the EBA, as its chairman Carl Josefsson and other members were involved in the introduction of the very Article 15a they had to decide upon. By interlocutory decision of 17 May 2021, Josefsson and another member of the EBA were replaced.

In today's decision, the EBA circumvented the fundamental question of the compatibility of article 15a with article 116(1) EPC, and restricted itself to a decision concerning a situation of oral proceedings during a 'general emergency'. In a press release it stated:

"In G 1/21 the Enlarged Board of Appeal limited the scope of its answer to the more broadly formulated question referred by Technical Board 3.5.02, by confining its order to oral proceedings that are held during a period of general emergency impairing the parties' possibilities to attend in-person oral proceedings at the EPO premises and moreover are conducted specifically before the Boards of Appeal.

Accordingly, in its order the Enlarged Board did not address the question whether oral proceedings by videoconference may be held without the consent of the parties in the absence of a period of general emergency. Nor did the order address the question whether oral proceedings by videoconference may be held without the consent of the parties in examination or opposition proceedings before the EPO's departments of first instance."

And this more restricted question was answered in the affirmative:

"During a general emergency impairing the parties' possibilities to attend in-person oral proceedings at the EPO premises, the conduct of oral proceedings before the boards of appeal in the form of a videoconference is compatible with the EPC even 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 decision means the 'hot potato' and the uncertainty are still there. One wonders why the EBA, whose main task is to ensure the uniform application of the EPC, chose to restrict its judgment instead of grasping the opportunity to create clarity about this important issue. In its press release, the EBA said that the "reasons for the decision will be issued in writing in due course and will subsequently be publicly available in the decisions database of the Boards of Appeal".

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