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T 1553/13 – New Referral to the Enlarged Board of Appeal of the EPO

Thorsten Bausch (Hoffmann Eitle) · Thursday, March 13th, 2014

The EPO Board of Appeal 3.2.06 decided on 20 February 2014 to refer the following question to the Enlarged Board of Appeal:

“Is an appeal inadmissible or not deemed to have been filed, if both the notice of appeal had been filed and the fee for appeal had been paid after the expiry of the appeal term pursuant to Art. 108, 1st sentence EPC?”

In the opposition case leading to the referral, an employee in the representative’s firm had received one day after the issuance of the decision (25 April 2013) the registered letter notifying the representative of the decision of the Opposition Division to revoke the patent. Thirteen days after its issuance, the representative of the proprietor signed the acknowledgement of receipt enclosed with the notification and returned the same to the EPO. Evidently, the date of signature was also used by the representative for calculating the two-month appeal term because the notice of appeal was filed on 8 July 2013, and the fee for appeal paid on the same day, i.e. after the appeal term had already expired.

Referring to the German Civil Procedural Code, the representative of the Proprietor asserted that the date of the acknowledgement of receipt is the relevant date for calculating the appeal term. This argument was rejected by the Board of Appeal which sets out that the delivery proceeded in accordance with Rule 126(1) EPC. Consequently, pursuant to Rule 126(2) EPC, a registered letter is deemed to be delivered to the addressee on the tenth day following its posting, unless it failed to reach the addressee or reached the same at a later date. However, this was not the case in T 1553/13.

Studying preceding decisions, in which the fee for appeal had been paid after the expiration of the two-month term provided in Art. 108 EPC, the Board of Appeal noted that there was no uniform handling regarding the legal consequences arising from the late payment. Relying on the wording of Art. 108 EPC, 2nd sentence, the Boards had held in several decisions, starting with J 21/80, that in these circumstances, the notice of appeal shall not be deemed to have been filed. By contrast, other boards of appeal have taken the view that late payment of the fee for appeal entails the legal consequence that the appeal is deemed inadmissible (T 1289/10, T 1535/10, T 2210/10 and T 79/01).

The Board of Appeal also considers that the interpretation of Art. 108, 2nd sentence EPC is a point of law of fundamental importance, since similar formulations are found in other provisions of the EPC including Art. 94(1), 2nd sentence (Request for Examination), Art. 99(1), 2nd sentence (Opposition) and Rule 136(1), 3rd sentence (Re-Establishment of Rights). Therefore, in the view of the referring Board of Appeal, the construction of Art. 108, 2nd sentence EPC may have

consequences beyond the concrete circumstances underlying T 1553/13.

Further, the Board of Appeal states that the decision of the Enlarged Board of Appeal on the interpretation of Art. 108, 2nd sentence EPC is required to determine whether or not the fee for appeal can be reimbursed. This would only be the case if the appeal is not deemed to have been filed. If, on the other hand, the appeal is inadmissible, the fee for appeal cannot be reimbursed. It follows from decision T 1553/13 that the competent Board of Appeal tends towards the latter interpretation. This opinion is primarily substantiated by certain passages of the Travaux Préparatoires for the EPC. It remains to be seen whether this view will be endorsed by the Enlarged Board of Appeal in the final decision on the referred question.

Dr. Klemens Stratmann

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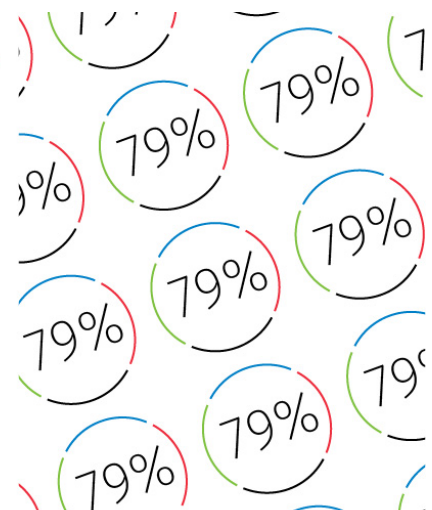
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