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The EPO and the Problem of the Right Speed (III) – Opposition Proceedings

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Early certainty in opposition proceedings is clearly a desirable objective, and the President's commitment to lowering the average duration of (normal) opposition proceedings to 15 months on the average deserves praise. In our experience, the new commitment has already started to result in that the summons to oral proceedings are issued sooner and that the hearings are scheduled on earlier dates than they used to be. This raise in the speed of opposition proceedings is a welcome development since it facilitates planning and helps to resolve the dispute between the parties expeditiously.

However, it must be emphasized that an overly strong focus on speed, rather than quality, is not in the interests of the parties to opposition proceedings. Quality should remain the top priority of the EPO in all of its proceedings.

In particular, I am of the opinion that the opposition divisions should be strongly encouraged by the EPO management to issue thorough decisions on **all** contentious issues, even if this may result in longer hearings and decisions in the first instance. The current practice is, unfortunately, mostly different. If, for example, an opposition division is of the view that the requests presented by the proprietor suffer from a problem under Art 123(2) EPC, it simply revokes the patent for this reason and completely abstains from issuing a decision on e.g. novelty and inventive step. Such a decision may well be an "early" one, but will not necessarily result in "certainty". This is because if the Board of Appeal comes to a different conclusion on added matter and holds that the requirements of Art 123(2) EPC are fulfilled, it will remit the case to the opposition division for further prosecution. And this will cause another 5-6 years to pass before the case is finally resolved. Such kind of "early certainty" helps no one.

Thus, in view of the fact that the Boards of Appeal understand their role as a kind of administrative court and limit their review to checking the correctness of the first instance decision, a view which is supported by Enlarged Board of Appeal and the current Rules of Procedure, I think that the Opposition Divisions should do what they can to present the Boards of Appeal with a reviewable decision on all points in dispute, so that a case can normally be concluded in two instances without a remittal.

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