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**Referral G 1/21 (“Oral proceedings by videoconference”)
Amicus Curiae Brief (Statement by third party pursuant to Article 10 of the Rules of
Procedure of the Enlarged Board of Appeal)**

Dear Sirs,

By interlocutory decision of 12 March 2021 (T 1807/15), Technical Board of Appeal 3.5.02 has referred the following question to the Enlarged Board of Appeal for decision pursuant to Article 112(1)(a) EPC:

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?

This questions must be answered on the basis of a legal analysis, which the Enlarged Board of Appeal will not need my help for.

But I think there is also a factual (empirical) background to that question, which my personal experience as a professional representative (European Patent Attorney) may help to shed some light on.

It seems to me that at the core of the above question is whether “videoconferences could be deemed to fulfil the purpose of providing an opportunity to present oral comments as long as they gave the parties the equivalent chance to present their arguments orally as they would have at oral proceedings in the traditional form” (cf. point 5.9.1 of the reasons for the referring decision).

Such equivalence has been called into question on the grounds that oral proceedings by videoconference have some “deficiencies” compared to in-person oral proceedings.

The potential deficiencies mentioned in the referring decision are the following (listed in the order in which they appear in the decision, summarizing and slightly paraphrasing various parts of the decision):

- (a) Oral proceedings by videoconference may be unsuitable when simultaneous interpretation is required.
- (b) The Board members and pleading parties may not be able to get an immediate personal impression of each other. Thus, the pleading party may not be able to gauge whether its presentation is being understood on the basis of the Board members’ gestures and facial expressions (loss of immediate impressions and feedback, depending on which the party could react by elaborating further on its oral submissions).
- (c) The public may not have proper access to the videoconference.
- (d) The right to be heard could be affected by an unstable or interrupted internet connection; network instability may restrict or even prevent access to the relevant videoconferencing platforms, potentially resulting in the video and audio transmission being unsatisfactory or even failing entirely.
- (e) Videoconferences provide only limited possibilities to draw sketches (usually done on whiteboards) in order to illustrate complex technical matters.

I would like to provide my personal experience as to whether such deficiencies actually exist or not.

I have been a professional representative (European patent attorney in private practice) since 2004 and have represented clients in 142 oral proceedings before Examining Divisions (32 cases), Opposition Divisions (73 cases) and Boards of Appeal (37 cases, of which 5 *ex parte* cases and 32 *inter partes* cases).

The last **five** of these oral proceedings (since November 2020) were conducted by videoconference (three before Opposition Divisions and two before Boards of Appeal in *inter partes* cases). Based on my overall experience in oral proceedings before the European Patent Office, I have the following comments on the above alleged deficiencies:

- (a) An alleged unsuitability of oral proceedings by videoconference in cases where simultaneous interpretation is used is mentioned (without further explanation) only at point V of the Summary of Facts and Submissions in the referring decision.

In two of the oral proceedings conducted by videoconference that I attended, simultaneous interpretation was used (with members of the party that I represented listening to the simultaneous interpretation). There were no problems in this regard, and it is not at all evident to me why simultaneous interpretation should somehow make it difficult to conduct oral proceedings by videoconference.

- (b) Of course, I fully agree that it is very important that the Board members and pleading parties are able to get an immediate personal impression of each other and, in particular, that the pleading party is able to gauge whether its presentation is being understood on the basis of the Board members' gestures and facial expressions.

(I would also observe that, in practice, such "gestures and facial expressions" are – and perhaps should be – quite limited and that the important "feedback" as to whether what is being presented is actually understood comes mainly from the comments made and questions asked by the Board members.)

In my practical experience, this important requirement was **in no way compromised** by the proceedings being conducted by videoconference. In my opinion, with a well-functioning audio and video connection, it is quite possible to obtain immediate impressions and feedback.

In my view, the concern that there could be a deficiency in this regard is rather theoretical and does not seem to be substantiated by concrete facts or explanations.

- (c) In two of the aforementioned five oral proceedings by videoconference, several employees of the party I represented attended the proceedings not as members of the party, i.e. persons accompanying the professional representative who would have been recorded in the minutes, but as members of the public. There were no problems in this regard.

- (d) In the five oral proceedings by videoconference that I attended, there were no significant technical problems regarding the stability of the connection. This was also true for persons attending the proceedings from the United States and from Japan who, in both cases, could follow the oral proceedings without difficulty (while relying on simultaneous interpretation).

In two of the aforementioned five oral proceedings, there were brief interruptions to the audio connection (due to equipment failure at the parties' end). However, these could quickly be resolved and I do not consider the risk of such interruptions as a significant deficiency.

Of course, where such an interruption occurs, it will be essential (and a matter of course) that the proceedings can only be continued once the full connection has been re-established and that no party must be disadvantaged by having lost the connection. In my view, the practice of the Opposition Divisions to expressly ask the parties at the end of the oral proceedings whether these were conducted in a technically satisfactory manner is appropriate and sufficient in this regard.

- (e) Regarding the "possibilities to draw sketches" (e.g. on whiteboards), I would observe that, in my experience (as a European patent attorney working mainly in the chemical field), the use of presentational aids such as whiteboards during oral proceedings is not actually common at all. In fact, I have difficulty to remember an occasion, in all of the oral proceedings I attended in person, where this was done. (However, I realize that the situation may be somewhat different in technical fields other than the one I am active in.) In any case, I note that videoconferencing platforms actually allow graphic material to be presented by the speaker by way of what is referred to as

“desktop sharing”. Furthermore, I would observe that it will normally be possible to refer to drawings and other graphic material that is on the record and that it is also possible, during oral proceedings by videoconference, to submit new documents by e-mail, as I have done in one of the aforementioned five cases without any difficulty.

Therefore, in my opinion, the impossibility to use a whiteboard or similar presentational aid during oral proceedings by videoconference does not constitute a significant “deficiency”.

In view of the above experience, **I see no actual deficiencies in oral proceedings being conducted by videoconference** that would compromise the function of oral proceedings to provide an opportunity to present oral comments in a manner equivalent to oral proceedings in the traditional form. Rather I consider oral proceedings by videoconference to be fully equivalent to oral proceedings being conducted in person.

Therefore, I would have no objection to the question before the Enlarged Board of Appeal being answered in the affirmative.

Yours sincerely,

Claus Beckmann