

G 2/24 ~ Intervention in appeal

Dear Chair and Members of the Enlarged Board of Appeal,

The following question was referred by the Technical Board of Appeal in decision T 1286/23:

After withdrawal of all appeals, may the proceedings be continued with a third party who intervened during the appeal proceedings? In particular, may the third party acquire an appellant status corresponding to the status of a person entitled to appeal within the meaning of Article 107, first sentence, EPC?

1. By referring this question to the Enlarged Board, the Technical Board of Appeal has requested a reconsideration of G 3/04. They proposed that said decision be reversed.
2. I propose reconsidering the underlying assumption that the notice of intervention in the appeal case at hand was admissibly filed during the pending opposition appeal proceedings.¹
3. The filing of an intervention during opposition appeal is not explicitly foreseen in Article 105 EPC but was permitted by the Enlarged Board in G 1/94. The Enlarged Board considered the results of the literal interpretation method, the systematic interpretation method, and the teleological interpretation method to provide no ambiguous answer to the question of whether an intervention under Article 105 EPC can be filed during pending appeal proceedings and turned to the *travaux préparatoires*.² The Enlarged Board found the historical intent to be a decisive factor for permitting the filing of a notice of intervention during pending opposition appeal proceedings.³
4. More recently, G 3/19 held that “a particular interpretation which has been given to a legal provision can never be taken as carved in stone” (point xx of the reasons).

¹ Cf. G 1/14, in particular point 3 of the order. I do not argue that the TBA in the present case misapplied the law. Rather, it is the competence of the EBA to revisit any existing case law that the referred question assumes to be correct and which is essential for the underlying appeal. The phrasing of the question by the referring TBA does not limit the power of the EBA in this respect.

² G 1/94, points 5, 6, 7 and 8 of the reasons.

³ G 1/94, points 8 and 9 of the reasons.

5. The Legal Board held in J 6/22 that the “dynamic interpretation of the EPC, as derived from Articles 31(1) and 31(3) Vienna Convention on the Law of Treaties, must take account of developments in national and international procedural law”.⁴
6. The Legal Board also recalled in J 6/22 that “the circumstances under which the boards operate have been subject to far-reaching changes over the years, with the rising importance of the European patent system, this being particularly apparent at the time of the introduction of the Unitary Patent and when the Unified Patent Court recently opened its doors, and which has also translated into a substantial yearly number of appeals being filed and a considerable workload for the boards. Furthermore, the timely adjudication of cases has become a matter of increased interest to the stakeholders in the system, while it remains a challenge for the boards to carry out their function of effectively bringing justice to all parties within a reasonable time frame” (point 45 of the reasons).
7. In the context of intervention in appeal, these observations on the rapidly changing legal landscape have relevance.

T 1841/23 illustrates the complexities that can arise when a notice of intervention based on parallel UPC proceedings is filed during an opposition appeal, causing the Technical Board of Appeal to conclude: “Nor are opposition appeal proceedings designed to serve as a placeholder for tactical considerations in parallel proceedings for infringement” (headnote).

Reference can further be made to the significant change in the nature of the opposition appeal proceedings from a re-examination to a review in a judicial manner.⁵ This change culminated in the overhaul of the Rules of Procedure of the Boards of Appeal in 2020. It may be observed that the predecessors to Articles 12 and 13 RPBA were introduced only in 2003: the appeal proceedings were of a different nature when G 1/94 was decided.

8. It is submitted that, thus, G 1/94 can be reconsidered and that such reconsideration is, in fact, appropriate.

⁴ J 6/22, headnote point 2, with an extensive analysis in point 41 ff. of the reasons.

⁵ Compare G 1/84, point 4 of the reasons with G 8/91, point 7 of the reasons, G 9/91, point 2 of the reasons, and G 9/93, point 1 of the reasons. When G 1/94 was decided, the change had just been put in train (cf. Gori, *Zehn Jahre Rechtsprechung der Großen Beschwerdekammer im EPA*, 1996, p. 57-63, especially p. 62-63, where Gori – the chairperson in G 1/94 – describes it as a ‘flexibility’ to the then ‘established differences in the legal character of opposition appeal proceedings’). The primary object of the appeal proceedings in terms of a review of the impugned decision in a judicial manner was finally codified in the RPBA in 2020. Indeed, the critical juncture in the travaux, BR/144/71, demonstrates that after the agreement to add intervention (point 77), the possibility of intervention at the appeal stage was a separate question (point 79) which was answered in the affirmative on the ground that ‘*la procédure de recours faisant partie intégrante de la procédure d’opposition*’ - i.e. the now largely abandoned conception of appeals as a continuation of the first instance procedure that prevailed before G 8/91.

9. For the purposes of such reconsideration of G 1/94, I submit the following observations.
10. Beyond the instruction in Article 105 EPC concerning intervention in opposition, the EPO has no responsibility for affording accused infringers the possibility of challenging the validity of the European patent. This is the responsibility of the Contracting States. If G 1/94 is reversed, the situation for the accused infringer is the same as in the case that no opposition had been filed against the European patent, and the same procedures under national law for challenging the validity of the patent are open to them.

Accordingly, any constitutional or fundamental rights of an accused infringer, as a matter of national law of a contracting state,⁶ to challenge the validity of the patent are appropriately safeguarded under the national law of the state concerned (namely, on the same terms as if no opposition had been filed). Indeed, with 39 Contracting States to the EPC, it is hardly feasible to align the interpretation of Art. 105 EPC with the precise practice of individual contracting states.⁷

11. Article 14 RPBA (on intervention filed during a pending appeal) was introduced as a consequence of G 1/94, not the other way around.⁸ The RPBA can be adapted to the outcome of the present case as necessary.
12. Dealing with a notice of intervention filed during pending appeal proceedings under the system of the RPBA is not trivial.

For instance, in recent decision T 2597/22, the Board set out why the intervention effectively prematurely aborted the appeals (point 2.3 of the reasons). The Board did not discuss the inevitable delay in the disposal of the appeals of the opponent and the proprietor.⁹

In T 1841/23, the Board examined the appeal of the opponent independently of the notice of intervention (so as not to delay the decision on the opponent's appeal) and revoked the patent. However, should the Board have concluded that one of the auxiliary requests would have been admissible and allowable in view of the opponent's appeal case, the Board would have been obliged to remit for examination of the notice of intervention. The procedural situation would then have been difficult to oversee because the proprietor may wish to submit different claim amendments (vis-à-vis the claims as granted or vis-à-vis the claims held allowable by the opposition division) in view of the objections in the notice of intervention,

⁶ Viz., any such rights established under national law or a treaty other than the EPC to which the contracting state is bound.

⁷ For instance, a state may refer parties in infringement cases about national patents to intervention in national opposition procedures even during the appeal period.

⁸ See OJ 2003, pages 61-67.

⁹ Notwithstanding that any second appeal may be accelerated, the fact is that the (first) appeal procedure lasted two years without leading to a substantive appeal decision.

raising issues of broadening claim amendments vis-à-vis the set of claims identified by the Board as allowable over the opponent's appeal and as the basis for the further procedure after the remittal.¹⁰

The difficulties arise not only in the case of notices of intervention filed late in an opposition appeal procedure: even when filed in the initial stage of the appeal procedure, a notice of intervention is fundamentally directed to initiating a new opposition (Art. 105(2) EPC) instead of a review of the appealed decision in a judicial manner (Art. 12(2) RPBA).

In summary, not permitting the filing of notices of intervention in opposition appeal procedures will significantly reduce the complexity of the case law and avoid disruptions to the appeal proceedings. The rather complicated system proposed in point 3.9.4 of the referring decision can be avoided as well.

13. One of the reasons for the French proposal to include intervention in the EPC, at a late stage of the drafting, was, firstly, that intervention would “ensure a saving of time” (BR/144/71, point 75). Possibly, this refers to the efficient and prudential use of judicial capacity. As legitimate as this objective is, it is not served by disrupting appeal procedures primarily directed to an appellate review in a judicial manner. By the same token, the purpose of “*Zeit gewonnen*” respectively “*gagner du temps*” (German and French versions of point 75 of BR/144/71) is not so clearly served by delays in the appeal procedure either.¹¹ The second purpose, avoiding conflicting decisions,¹² can be understood when realising that a decision to maintain the patent (as granted or in amended form) taken in the opposition procedure with the intervener involved would become binding as *res judicata*, i.e. no longer contestable in national proceedings, under the then draft Second Convention.¹³ The current system of the EPC and UPCA is fundamentally different.

¹⁰ Fundamentally, multiple oppositions are dealt with in a single opposition procedure, Art. 99(4) EPC (see T 620/99), in which the patent can be amended in only a single text version (see Art. 118 EPC)

¹¹ Incidentally, I note that only the French version of point 76 of BR/144/71 seems correct: the proposal for intervention ‘*répondrait*’ (responds) to the wishes of the contracting states of the 2nd Convention (which in the end became the UPCA), i.e. is in line with those wishes, not ‘counter to’ as in the English version. Furthermore, the UPCA contains no equivalent to the then envisaged temporal restriction on community patent (now: unitary patent) revocation actions (then: to be heard by Revocation Divisions of the EPO, i.e. possibly by the same examiners as handling the opposition), namely during pending opposition proceedings, to which point 76 refers as one of the reasons for adding intervention to the draft EPC - a point that the referring board seems to overlook in point 3.14.2 of the reasons.

¹² Again, the French and German versions of point 75 are more precise.

¹³ In the 1973 draft Community Patent Convention, national courts heard infringement cases on European patents in the common market (i.e., the EU; note furthermore that community patents were not elective) but had to treat the patent as valid (Article 71 of the 1973 draft CPC).

14. It appears that under the approach of J 6/22, the intent of the legislator at the time of drafting the EPC 1973 is no obstacle to a reversal of G 1/94 based on the current nature of the opposition appeal procedure and a dynamic interpretation of the EPC, even more so because there was no other ground for admitting intervention specifically in opposition appeals in G 1/94 than the historical intent.

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15. The above observations are my personal views only.
16. I cited J 6/22 in the above comments without expressing any views on the correctness of the interpretation of Article 116 EPC advocated in that decision. Furthermore, the right to oral proceedings and the possibility of filing a notice of intervention during pending opposition appeal proceedings can be distinguished on numerous grounds; particularly, only the former is enshrined in the EPC itself.

Respectfully submitted,

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