

Meissner Bolte P.O. Box 860624 81633 München, Germany

Registry of the Enlarged Board of Appeal
Attn. Mr. Nicolas Michaleczek
Richard-Reitzner-Allee 8
85540 Haar
Germany

EBAamicuscuriae@epo.org

Meissner Bolte
Patentanwälte Rechtsanwälte
Partnerschaft mbB
Widenmayerstraße 47
80538 München, Germany
T +49 89 21 21 86 0
F +49 89 21 21 86 70
E mail@mb.de

Patentanwälte
European Patent Attorneys
European Trade Mark Attorneys
European Design Attorneys
Rechtsanwälte | Lawyers

ANSPRECHPARTNER | CONTACT
Tilman Pfrang, LL.M.

IHR ZEICHEN | YOUR REF.

UNSER ZEICHEN | OUR REF.
M/PF-VARIA

DATUM | DATE
May 12, 2021

Amicus Curiae Brief
Referral pending before the Enlarged Board of Appeal in G 1/21

I. Introduction

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?

- [1] We appreciate the clarity and conciseness of the referred question focusing on Art 116 (1), 1st sentence, 2nd clause EPC by mentioning the “right to oral proceedings” under consideration of the consent of the parties. The decision focuses on the addressee of Art. 116 (1), 1st sentence, 2nd alternative EPC, i.e. a party to proceedings before the EPO or the Boards, and not the department dealing with the case (whose corresponding right is defined in Art 116 (1), 1st sentence, 1st alternative EPC).
- [2] In our opinion, answering the referred question with YES would allow the personal preferences of the members of the department dealing with the case to be decisive and not the personal preferences of the party.



- [3] If the answer were to be YES, the department could hold ViCo proceedings merely because the members of the department prefer working from home, perhaps far away from the location of the EPO to which they are assigned. Members of another department could decide to have in-person proceedings, because they live close to their EPO location and/or because they do not like ViCo proceedings for intensive and long discussions.
- [4] It may also be desirable for the EPO's or the Board's management to ease the work and life of their employees. It may also be desirable to reduce the backlog as quickly as possible, which may, indeed, please the general public. In the future, the management of the EPO or the Boards may wish to increase the trust of (potential) users of the system by "allowing" personal contact between the members of the respective departments and the parties more frequently. However, also the general public is *not* the addressee of Art 116 (2), 1st sentence, 2nd alternative (as it is, for example, in Art 115 or Art 116 (4) EPC).
- [5] In essence, Art 116 (1), 1st sentence, 2nd alternative is not about the wishes of the EPO (or its departments), the Boards or the general public. None of these is the addressee of Art 116 (1), 1st sentence, 2nd alternative, which defines a fundamental procedural right of any party to proceedings under the EPC. In our view, answering the referred question with YES would mean that the wishes of any party to EPC proceedings would be completely subordinate to the preferences of the department dealing with the case and/or the management of the EPO or the Boards.
- [6] In any event, it is our position that, in order to answer the referred question, it is necessary also to answer the question as to who should have the power to decide to what extent the right under Art 116 (1), 1st sentence, 2nd alternative is used. Should it be the party who has the right, or someone else? We believe that it is imperative to decide on the referred question with the eyes of a party to EPC proceedings and not from the perspective of the EPO, or the Boards.
- [7] Of course, any party may decide not to use the right under Art 116 (1), 1st sentence, 2nd alternative, for instance by agreeing to hold proceedings by ViCo or by agreeing to receive a decision on the basis of the written procedure or, simply, by never submitting a corresponding request. We are also well aware of the current extreme situation caused by the Covid-19 pandemic. We agree that in such extreme situations, where it is impossible safely to hold proceedings in

person, it is appropriate to use ViCo proceedings as much as possible: for instance in order to ensure that cases are not prolonged unnecessarily, despite Art 116 (1), 1st sentence, 2nd alternative EPC. However, we are also of the view that, if no such extreme situation exists, Art 116 (1), 1st sentence, 2nd alternative EPC should be applied again (to its full extent).

II. Interpretation of Art 116 EPC

1. The wording of the EPC and its implementing regulations

[8] Article 116 EPC requires (repeatedly, in each paragraph of Article 116 EPC) Oral Proceedings "before" (German: vor/ French: devant) the respective "department" of the EPO (e.g. Article 116(1) EPC: "before the same department"). The word "before" in a legal context can have - in general - two meanings. For abstract subject matter such as a "case" this means that the respective Court or Judge (or "department") is dealing with this abstract subject matter. If it is used in the context of Oral Proceedings, it means that someone is present at the place of the Court or Judge (or "department") while the case is dealt with.

[9] Therefore, the Cambridge dictionary defines "before" in this context as follows¹:

"If a legal case comes before a Law Court or a Judge, it is dealt with by them and when someone comes before a Court or Judge, they are present while the case is dealt with".

[10] To be present at a place means to be "physically there" to be "physically present". Virtual presence, on the other hand, is just a form of non-presence, i.e. absence². This is also explicitly admitted by the EPO, for example in the "Mitteilung des Europäischen Patentamts vom 17. Dezember 2020 über die Beweisaufnahme per Videokonferenz durch Prüfungs- und Einspruchsabteilungen", at least in the French and German Version (emphasis added):

*"L'inspection sera menée **comme si** la mesure d'instruction était exécutée en présence des parties".*

¹ <https://dictionary.cambridge.org/de/worterbuch/englisch/come-before-sth-sb>

² cf. Chapter 36, Section 18 of the Swedish Code of Judicial Procedure, partially translated as follows: "When a meeting is held in the absence of a party in accordance with the first paragraph, the party shall, if possible, be allowed to follow the meeting by audio transmission or audio and video transmission".



*„Die Augenscheinseinnahme wird genauso durchgeführt, **als ob** die Beweisaufnahme in Anwesenheit der Beteiligten erfolgen würde“.*

- [11] The English version uses the pleonasm “physical presence”, as invented some time ago by the EPO.
- [12] In essence, Article 116 EPC itself strongly supports a meaning that “actual” presence is required.
- [13] This is even further supported by Articles 18 and 19 of the EPC requiring that: “Oral Proceedings shall be before the [Examining/Opposition] Division itself.” (Emphasis added; German: „Die mündliche Verhandlung findet vor der [Prüfungsabteilung/Einspruchsabteilung] selbst statt.“; French: „La procédure orale se déroule devant la division [d'examen /d'opposition] elle-même.“).
- [14] This seems to also be supported by Rule 115 of the Implementing Regulations of the EPC, according to which the parties shall be summoned to Oral Proceedings under Article 116 EPC (in German: “zur mündlichen Verhandlung nach Artikel 116 werden die Beteiligten ... geladen”. In French: “La citation des parties à une procédure orale...”).
- [15] However, “Summons” or “Ladung”/citation” means that the Court (“department”) invites the parties to come to their place. Again, this appears to require actual presence (or at least it implies an invitation to be “physically” present).
- [16] Notably, Art. 116 EPC guarantees the right to Oral Proceedings even in the case that the department responsible for the application/patent agrees 100 % with the remaining requests of the party. This alone shows that the term “Oral Proceedings” is not (only) related to pure technical aspects (i.e. aiming to be an efficient closure of the proceedings) but has other and/or additional purposes (further discussed below).
- [17] No other provision in the EPC or its implementing regulation excludes the right of the parties to appear before the competent department. No provision in the EPC or its implementing regulations allows the EPO to shut their door, should the parties travel to the premises where the department is located and the Oral Proceedings take place.

[18] Conclusively, the wording of the EPC and its implementing regulations clearly support that only presence in its truest sense is meant (one may call it "physical presence" or "actual presence", or simply "presence").

2. Case law of the Enlarged Board of Appeal

[19] In G 2/19, the Enlarged Board of Appeal states in the context of Art 116 EPC (Reasons for the decision, C.IV.2., translation according to the official Journal of the EPO, 2020, A87):

"Users of the European Patent Organisation's services can legitimately expect that the European Patent Office's departments will not perform acts at whatever other place they choose."

[20] Indeed, the Board of Appeal in T 2320/16 (reason, 1.5.6) understands these findings as follows:

"In oral proceedings by videoconference, the potential for location to adversely effect [sic] the parties' rights does not arise: oral proceedings by videoconference do not take place at a specific geographical location, or alternatively, could be considered to be "located" everywhere with access to a reliable internet connection of sufficient bandwidth."

[21] We believe that such understanding is flawed. The gist of G 2/19 is obviously that a party to EPC proceedings should know where the members of the department are actually sitting during oral proceedings. Indeed, in ViCo proceedings, for example, a member of the department can sit anywhere, even at a most inappropriate place, such as far outside the combined territory of the member states of the EPO. In another example, one member of a Board of Appeal may sit in the same room as a member of the Opposition Division who dealt with the case in 1st instance. Another member of the same Board of Appeal may sit in a location where there are external circumstances which would influence the decision-making or at least the focus on the case. Remote participation by ViCo could even be regarded as the best example for members of the department acting at "whatever other place they choose" (as stated in G 2/19, see above). Assuming, according to a first scenario, that G 2/19 would see it as problematic to hold oral proceedings on a boat in the middle of the Pacific, would it, in a second scenario, be in line with G 2/19 if all the members of the

department were sitting on the same boat, making a decision there and announcing the decision from there, only because they could be heard “worldwide” via the Internet, i.e. also at the lawful locations of the EPO? Would this fulfil the “legitimate expectations” which the Enlarged Board of Appeal had in mind in G 2/19?

- [22] Another aspect relates to the question of independence of the department dealing with the case. This was raised in G 2/19 as follows (Reasons for the decision, C.IV.2., translation according to the official Journal of the EPO, 2020, A87): “Awareness that, as the judicial arm of the European Patent Office, the boards should have the same independence as national courts grew only gradually and the decision to highlight this by separating them geographically from the Office's administrative departments was likewise the result of a process which did not start until long after the Office had been set up.”
- [23] This relates to another function of oral proceedings. Oral proceedings are the only guaranteed option for the party to the proceedings to see the spatial location of the “judges” and their independence from external influences. As European Patent Attorneys we know the feeling when entering EPO premises before oral proceedings very well. You pass the entrance area, you go to the oral proceedings room and you meet your “judges” in person. You can then see and feel their independence. The option to check such independence is not possible during a ViCo. The members of the department could sit at any unsuitable location in circumstances which could potentially influence their independence (or focus on the case). The party will never know. Whilst we have a deep trust in the independence and focus of the members of the departments of the EPO (built upon hundreds of in-person oral proceedings!), it is a big difference whether you (must) assume such independence and focus or whether you can repeatedly see it, in particular in the long term.
- [24] In essence, G 2/19 strongly supports that Art 116 (1), 1st sentence, 2nd alternative implies the right to an in-person meeting with the department at its lawful location.
- 3. The case law of the Boards of Appeal**
- [25] In the following, only the common practice until December 2020 is discussed.

a) Common practice and interpretation

- [26] T 1012/03 also refers to the repeated use of "before" in paragraphs (1)-(4) of Article 116 EPC, namely "before the same department", "before the Receiving Section", "before the Receiving Section, the Examining Division and the Legal Division" and "the department before which the proceedings are taking place" (see T 1012/03, Reasons, 37). The Board in this case concludes that in the context of Oral Proceedings the word "before" implies the location ("where"), the proceedings had to be carried out, namely at least at the place where the relevant department is located. The Board of Appeal in T 1012/03 further explains that such implementation was never questioned because "it was self-evident" that the parties or their Representatives must travel to the place of the respective department.
- [27] E.g. in T 689/05 (reasons, 5.1, 5.18) it was stated that the right to Oral Proceedings pursuant to Article 116 EPC is a codified part of the procedural right to be heard under Article 113(1). This right to be heard at Oral Proceedings also includes the right of a party to present its arguments at the correct place according to the EPC provisions (see also T 1012/03, Reasons, point 25). The underlying understanding of this case law is the precise opposite of a place being defined as: *anywhere in the world except the location of the competent department*.
- [28] According to T 2068/14, Oral Proceedings under Article 116 EPC are an exception to the general rule that submissions can be received from "anywhere in the world at any time" because they involve the parties or their representatives "appearing before the board". In practice, this has traditionally been understood as the physical presence of a party or its representative before the board (reasons, T 2068/14, 1.2.3).
- [29] Similarly, in T 677/08 (Reasons, 4.3) the Board explained that according to Article 116, the party or their Representative have a right to Oral Proceedings which means "he has a right to appear **in person** before the competent department in order to discuss the case" (emphasis added).
- [30] Furthermore, in a large number of cases in 2020, i.e. in established non-disputed practice, the Boards of Appeal proposed Oral Proceedings **subject to agreement by all parties**.

[31] It can thus be readily deduced that Art 116 EPC was never seen as providing a basis for "virtual Oral Proceedings" without the parties' agreement, whilst depriving the parties' right to actual Oral Proceedings at the correct place.

b) Apparently differing opinion

[32] In T 1378/16, the Board apparently took another view, arguing that a video conference "nevertheless contains the essence of Oral Proceedings, namely that the board and the parties/representatives can communicate with each other simultaneously". Firstly, however, this remains a simple allegation without any further reasoning (e.g. not even discussing G 2/19, Reasons, C.IV.1. and C.IV.2.). Secondly, a telephone conference and/or an exchange of text messages would also contain such "essence". In consequence, breaking down the term "Oral Proceedings" to any form of "simultaneous communication" appears to unreasonably stretch the interpretation of "Oral proceedings". Thirdly, in effect, this argument speaks inherently against the legality of "forced" video conferences under Art. 116 EPC because it implies that video conferences and Oral Proceedings are not the same. Essence of lemon and a lemon are not the same.

4. Systematic interpretation

[33] Article 116 EPC is embedded in the series of Article 113-117 (within part VII - common provision, Chapter I – "common provisions governing procedure") which contains, for example the "right to be heard" or regulations which relate generally to a certain "transparency" and "achievability" of the EPO (e.g. Article 115 EPO) or the "willingness" of the EPO to deal with a case (e.g. Article 114 EPO).

[34] Not surprisingly, the Enlarged Board of Appeal sees something more than mere "orality" in Article 116 EPC, namely in particular aspects concerning the abovementioned "achievability" and "willingness" of the EPO (see G 2/19, Reasons, C.IV.1 and 2). Again, applying a systematic interpretation, fundamental principles such as the "protection of legitimate expectations" (German: "Grundsatz des Vertrauensschutzes") and a "willingness" on the part of the EPO to deal with a case are touched upon.

- [35] The systematic interpretation also supports that the attempt of a *teleological reduction* (to the "essence") of T 1378/16 must fail. In T 1378/16, the Board argued that a video conference "nevertheless contains the essence of Oral Proceedings, namely that the board and the parties/representatives can communicate with each other simultaneously". In other words, it sees Art. 116 as a mere technical requirement. However, art 116 EPC is not embedded in a series of regulations with technical character only (one would expect that in such series at least the "written procedure" should be mentioned or the "written form" be defined) but embedded in a series of regulations with another focus (as outlined in the previous paragraph).
- [36] In essence, the systematic interpretation also clearly points to a right to actual Oral Proceedings (as opposed to Oral Proceedings in absentia, e.g. by video conference or a telephone call).

5. Historical interpretation – Travaux Préparatoires

- [37] According to the travaux préparatoires, IV/6514/61-D, page 83, an optional solution for Oral Proceedings was originally intended³. This was reasoned by the large distances in the region of the EPC member states and the correspondingly large costs involved. Similarly, according to M/21, page 236, it was explained that at least two months' notice of the summons shall be given because the parties may be far away from the seat of the Patent Office and owing to the considerable amount of translation involved, the parties concerned require reasonable time for instructing their agents and for sufficient preparation for an oral hearing.⁴
- [38] This means that Oral Proceedings before the Boards of Appeal were understood to be proceedings in person. It is interesting to recall that even at that time video conferencing was technically possible and also in use (although, of course, it was not as widespread as today). It is thus clear that, at that time of preparing the EPC, it would have been a feasible solution to establish central locations (e.g. one in every member state) to discuss the case "orally" by video conference. Either way, "tele-orality" (and the supporters of a "broader" interpretation of Article 116 EPC seem to extend the meaning of this regulation even to tele-conferences) was generally known at the time.

³ [http://webserv.epo.org/projects/babylon/tpepc73.nsf/0/55EC6146E659D105C12574270047BCF4/\\$File/Art116eTPEPC1973.pdf](http://webserv.epo.org/projects/babylon/tpepc73.nsf/0/55EC6146E659D105C12574270047BCF4/$File/Art116eTPEPC1973.pdf) , see page 133 of the pdf file

⁴ <https://www.epo.org/law-practice/legal-texts/html/epc/2016/e/r115.html> , see page 16 of the pdf file



- [39] It is interesting to note that when introducing "Oral Proceedings by video conference", it was assumed that these were not in line with the requirements of Article 116 EPC because it was necessary to waive the right of Article 116 EPC when requesting "Oral Proceedings by video conference", as follows⁵: "the Applicant renounces in advance and irrevocably his right to Oral Proceedings being held in the traditional form at the EPO premises on the same subject matter after the requested video conference."
- [40] These days, such an explicit waiver is no longer requested by the EPO. There is no case law decision, however, where a party tried to obtain an actual Oral Proceedings with the argument that an agreed or even requested first "virtual Oral Proceedings" was not an exercise of the right of Article 116 EPC. Even if, one could well argue that an explicit request for a "video conference Oral Proceedings" implies a corresponding waiver to the right of actual Oral Proceedings.
- [41] In conclusion, the history of establishing the EPC and the option of video conferences shows that it was never considered that the EPO may hold "video conference Oral Proceedings" without the agreement of the parties. In all cases, Oral Proceedings have been understood as meetings "in person" before the competent body.

6. Teleological interpretation

- [42] Is it a reasonable interpretation to understand that the only purpose of Article 116 EPC is to allow the parties or their Representatives to use their voice (be it either remotely or directly)? Should orality be the only purpose, it would also be in line with Article 116 EPC to force the parties to send their "oral arguments" before the date of Oral Proceedings in writing and to forbid everything else except for reading these written arguments aloud.
- [43] Hence, one must realise that there is more implied and required. Referring in particular to the Enlarged Board of Appeal in G 2/19, a purpose is to give the parties the "feeling" of being part of a fair and just trial. A further purpose is to give the parties the opportunity to see those deciding on their case in person. In essence, the Decisions of the persons within the departments of the EPO

⁵ according to the official journal of the EPO, 12/1997, page 572 et seq.



should be "trustworthy". These aspects relate to the main purpose of Article 116 EPC and not the mere "orality" as such.

- [44] In any event, Art. 116 EPC cannot have mainly a technical purpose (such as a quick and efficient closure of the proceedings) because it guarantees the right to Oral Proceedings – upon a party's request - even in a case that the department dealing with the case agrees 100 % with the remaining requests of the party: in this regard, Art. 116 EPC is **neutral**. It may even have the consequence that a decision of the department of the EPO in line with the substantial request of the party is delayed, because the party wishes to use its procedural right under Art. 116 EPC.⁶
- [45] Also from this it follows that the attempt of a "teleological reduction" of T 1378/16 fails. In T 1378/16, the Board argued that a video conference "nevertheless contains the essence of Oral Proceedings, namely that the board and the parties/representatives can communicate with each other simultaneously". However, the department dealing with the case must still summon for Oral Proceedings if there is absolutely no necessity for exchanging *anything* in relation to the substance of the case in *any* form (simultaneously or not) – namely if the department already expressed in writing that they agree with all substantial requests of the party. Note: The request for Oral Proceedings need not be reasoned but it *could* be reasoned e.g. by: "Thank you for agreeing with my written requests. However, I as user of the EP services want to have a personal meeting with the department dealing with my invention which is vital for the survival of my family's business and livelihood".
- [46] Conclusively, the essence of Oral Proceedings is not a mere technical one, and may not be reduced to the mere possibility of simultaneous inter-party communication⁷. Also the teleological interpretation clearly points to a right to actual Oral Proceedings (as opposed to Oral Proceedings in absentia, e.g. by video conference or a telephone call).

⁶ Only as a side note: Experience shows that if the party requests Oral Proceedings, even as auxiliary request, it will in the average case receive more office actions and (intentionally or not) prolong the proceedings. So a "practice-based" counter-argument must fail.

⁷ Already Aristotle argued that it is wrong to attempt to reduce all things to mere necessity, because doing so neglects the aim, order, and final cause, which brings about these necessary conditions. Aristotle, Generation of Animals 5.8, 789a8–b15



7. The practice in the member states – Art. 125 EPC

a) The Swiss practice

[47] The practice in Switzerland is particularly instructive, insofar that in one case a court (Zürcher Handelsgericht) has actually performed a Video conference proceedings – against the will of one party – because it believed this would be in line with the Swiss code of Civil procedure (ZPO), requiring “oral” proceedings. In concrete terms, it was stated that the legislator had “no objections of a fundamental nature” (original German: “keine Einwände grundsätzlicher Art”) to videoconferencing. The ZPO had been deliberately designed according to the principle of “courage to leave loopholes” (original German: „Mut zur Lücke”)⁸.

[48] This “courage to leave loopholes”-theory was not confirmed by the higher court (Schweizer Bundesgericht)⁹. To the contrary, the higher court stated that the lower court had no legal basis to order a video conference against the will of the parties. Therefore, it could also not rely on the extraordinary situation resulting from the coronavirus pandemic.

[49] In addition, the Swiss “Bundesrat” (but notably no office, nor any court with the exception of the failed attempt reported above) was active and provided a legal basis for holding video conferences, as follows¹⁰ (emphasis added):

Art. 2 - Einsatz von Videokonferenzen

In Abweichung von Artikel 54 der Zivilprozessordnung (ZPO) können Verhandlungen mittels Videokonferenz durchgeführt werden, wenn eine der folgenden Voraussetzungen erfüllt ist:

a. Die Parteien sind damit einverstanden.

b. Eine Partei, ihre Vertreterin oder ihr Vertreter beantragt dies und macht glaubhaft, dass sie oder er zu einer Kategorie der durch das Coronavirus besonders gefährdeten Personen gehört, und es sprechen keine wichtigen Gründe gegen eine Durchführung mittels Videokonferenz.

⁸ This is by the way the only argument provided so far by the EPO as support to deny the right to actual Oral Proceedings.

⁹ <https://www.nzz.ch/schweiz/zivilprozesse-keine-verhandlungen-per-video-ohne-einverstaendnis-der-parteien-ld.1570171>

¹⁰ Verordnung über Massnahmen in der Justiz und im Verfahrensrecht im Zusammenhang mit dem Coronavirus (Covid-19-Verordnung Justiz und Verfahrensrecht) vom 16. April 2020 (Stand am 13. Oktober 2020), gestützt auf Artikel 7 des Covid-19-Gesetzes vom 25. September 2020; <https://www.admin.ch/opc/de/classified-compilation/20201084/202010130000/272.81.pdf> ;



- c. Ein Gerichtsmittglied gehört zu einer zu einer Kategorie der durch das Coronavirus besonders gefährdeten Personen, und es sprechen keine wichtigen Gründe gegen eine Durchführung mittels Videokonferenz.*
- d. Es besteht eine besondere Dringlichkeit.*

English translation:

In departure of Article 54 of the Code of Civil Procedure (CCP), hearings ***may be conducted by videoconference*** if one of the following conditions is met:

- a. The parties agree to it.*
- b. A party, his or her representative requests it and makes a credible case that he or she belongs to a category of persons particularly vulnerable to the coronavirus, and there are no important reasons against conducting it by videoconference.*
- c. A member of the court belongs to a category of persons particularly endangered by the coronavirus and there are no important reasons against conducting it by videoconference.*
- d. There is a special urgency.*

[50] In essence, the Swiss perspective is very clear in that Video conferences cannot be understood as a potential form of Oral Proceedings, this is according to the national code of civil procedure (ZPO). Moreover, no case is known where any office or court successfully deprived the parties of their right to actual Oral Proceedings with the argument that virtual Oral Proceedings *are* Oral Proceedings.

b) The Austrian practice

[51] In Austria, **the legislator within its power** was active, as follows (emphasis added)¹¹:

¹¹ Bundesgesetz betreffend Begleitmaßnahmen zu COVID-19 in der Justiz (1. COVID-19-Justiz-Begleitgesetz – 1. COVID-19-JuBG) StF: BGBl. I Nr. 16/2020 (NR: GP XXVII IA 397/A AB 112 S. 19. BR: AB 10288 S. 904.); <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20011087>



§ 3. (1) Das Gericht **kann bis zum Ablauf des 31. Dezember 2020**

1. **mit Einverständnis der Parteien** mündliche Verhandlungen und Anhörungen ohne persönliche Anwesenheit der Parteien oder ihrer Vertreter unter Verwendung geeigneter technischer Kommunikationsmittel zur Wort- und Bildübertragung durchführen sowie auf diese Weise auch ohne Vorliegen der Voraussetzungen des § 277 ZPO Beweise in der mündlichen Verhandlung oder außerhalb dieser aufnehmen und sonst der Verhandlung beizuziehende Personen teilnehmen lassen; das Einverständnis gilt als erteilt, soweit sich die Parteien nicht innerhalb einer vom Gericht festgesetzten angemessenen Frist dagegen aussprechen;
2. ohne Einverständnis der Parteien Anhörungen und mündliche Verhandlungen in Unterbringungs-, Heimaufenthalts- und Erwachsenenschutzsachen sowie in Verfahren nach dem Tuberkulosegesetz und dem Epidemiegesetz 1950, wenn sie außerhalb der von der Justizverwaltung zur Verfügung gestellten Räumlichkeiten durchzuführen wären, unter Verwendung geeigneter technischer Kommunikationsmittel zur Wort- und Bildübertragung durchführen, auf diese Weise Beweise in der mündlichen Verhandlung oder außerhalb dieser aufnehmen und sonst der Verhandlung beizuziehende Personen teilnehmen lassen.

English translation:

§ 3. (1) **Until the expiry of 31 December 2020**, the court may

1. **with the consent of the parties, conduct Oral Proceedings** and hearings without the personal presence of the parties or their representatives by using suitable technical means of communication for the transmission of words and images and, in this way, also without the prerequisites of Section 277 of the Code of Civil Procedure being met, take evidence at the Oral Proceedings or outside them and allow persons who are otherwise required to attend the proceedings to participate; the

consent shall be deemed to have been granted unless the parties object within a reasonable period of time set by the court;

2. without the consent of the parties, conduct hearings and Oral Proceedings in matters of accommodation, home residence and adult protection, as well as in proceedings under the Tuberculosis Act and the Epidemics Act 1950, if they would have to be held outside the premises provided by the administration of justice, using suitable technical means of communication for the transmission of words and images, and in this way record evidence in or outside the Oral Proceedings and have persons who are otherwise to be present at the hearing participate.

- [52] Again, video conferences were not based on the word "oral" in the Austrian code of civil procedure (ZPO). This can be derived from the specific time limit highlighted above, which makes it clear that the wording above is not a clarification but an additional provision limited in time. Moreover, no case is known where any office or court successfully deprived the parties of their right to actual Oral Proceedings with the argument that virtual Oral Proceedings *are* Oral Proceedings.

c) The German practice

- [53] In Germany, "Oral Proceedings by video conference" are not Oral Proceedings. This can clearly be derived from Sections 128 and 128a of the code of civil procedure. This is also expressed literally within the reasoning of Section 128a German Court of Civil Procedure (ZPO) where the German legislator explains ("Deutscher Bundestag Drucksache 14/6036, p.116):

- [54] *„Insoweit wird **der Grundsatz** des § 128 Absatz 1 ZPO, nachdem die Parteien über den Rechtsstreit **vor dem erkennenden Gericht mündlich verhandeln**, im Interesse der Prozess Ökonomie **durchbrochen**."* (emphasis added)

In English:

*"In this respect, the **principle** of section 128, 1 ZPO, according to which the parties **hear the dispute orally before** the recognising Court, **is broken** in the interests of procedural economy".* (emphasis added)

- [55] In essence, in Germany a video conference Oral Proceedings "breaks" ("durchbricht") the fundamental principle of Oral Proceedings.



[56] Moreover, no case is known where any office or court deprived the parties of their right to actual Oral Proceedings with the argument that virtual Oral Proceedings *are* Oral Proceedings.

d) The practice in the Netherlands

[57] Also in the Netherlands, **the legislator within its power** was active, as follows (emphasis added)¹²:

*Paragraaf 2 **Tijdelijke voorziening** inzake mondelinge behandeling in burgerlijke en bestuursrechtelijke zaken*

Artikel 2 (mondelinge behandeling in burgerlijke en bestuursrechtelijke gerechtelijke procedures)

1. Indien in verband met de uitbraak van COVID-19 in burgerlijke en bestuursrechtelijke gerechtelijke procedures het houden van een fysieke zitting niet mogelijk is, kan de mondelinge behandeling plaatsvinden door middel van een tweezijdig elektronisch communicatiemiddel.

...

Artikel 35 (inwerkingtreding en verval)

...

3. Deze wet vervalt op 1 september 2020. Het tijdstip waarop deze wet vervalt kan bij koninklijk besluit worden bepaald op een ander tijdstip, met dien verstande dat dit tijdstip ten hoogste twee maanden na het tijdstip ligt waarop de wet zou vervallen.

English translation:

Section 2 Temporary measure in respect of oral conduct of civil and administrative cases

Article 2 (oral conduct of civil and administrative court proceedings)

¹² Wet van 22 april 2020, houdende tijdelijke voorzieningen op het terrein van het Ministerie van Justitie en Veiligheid in verband met de uitbraak van COVID-19 (Tijdelijke wet COVID-19 Justitie en Veiligheid); Wet van 22 april 2020, houdende tijdelijke voorzieningen op het terrein van het Ministerie van Justitie en Veiligheid in verband met de uitbraak van COVID-19 (Tijdelijke wet COVID-19 Justitie en Veiligheid)



1.If, in connection with the outbreak of COVID-19, it is not possible to hold a physical hearing in civil and administrative legal proceedings, the oral hearing can take place by means of a two-way electronic means of communication.

...

Article 35 (entry into force and lapse)

...

3. This law will lapse on 1 September 2020. The point in time at which this law will lapse can be set at a different point in time by royal decree, provided that this point in time is in each case at most two months after the point in time at which the law would lapse.

[58] Again, video conferences cannot be based on the existing code of civil procedure. This can be derived from the definition of a "***Temporary measure***" and the requirement that ***Video conferencing is only possible "in connection with the outbreak of COVID-19"*** which makes it clear that the wording above is not a clarification but an additional provision limited in scope.

[59] Moreover, no case is known where any office or court deprived the parties of their right to actual Oral Proceedings with the argument that virtual Oral Proceedings *are* Oral Proceedings.

e) Practice in England and Wales

[60] Regarding the changes in light of COVID-19, CPR Practice Direction 51Y, made under rule 51.2 of the Civil Procedure Rules (CPR) of England and Wales, and **which ceases to have effect on the date on which the Coronavirus Act 2020 ceases to have effect**, stipulates that¹³:

"During the period in which this Direction is in force, where the court directs that proceedings are to be conducted wholly as video or audio proceedings and it is not practicable for the hearing to be broadcast in a court building, the court may direct that the hearing must take place in private where it is necessary to do so to secure the proper administration of justice."

¹³ <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51y-video-or-audio-hearings-during-coronavirus-pandemic>



[61] In essence, it is clear that even in England and Wales - as an example of a Common Law system where the courts have traditionally a great deal of freedom to develop the law - the competent Authority provided specific Regulations to allow video conferences only for a limited time period (until the "Coronavirus Act 2020 ceases to have effect").

f) Practice in Sweden

[62] According to the Swedish Code of Judicial Procedure (1942: 740)¹⁴ the main hearing is oral (Chapter 43, Section 5). As far as can be seen, this has never been understood to cover video conferences. Accordingly, explicit Regulations have been introduced in the Code of Judicial Procedure with the "More modern court proceedings" reform¹⁵. Now, certain participation by video conference is possible (e.g. Chapter 5, Section 10, Swedish Code of Judicial Procedure).

10 § *Den som ska delta i ett sammanträde inför rätten ska infinna sig i rättsalen eller där sammanträdet annars hålls.*

Om det finns skäl för det, får rätten besluta att den som ska delta i ett sammanträde ska delta genom ljudöverföring eller ljud- och bildöverföring. Rättens ordförande får besluta i frågan om den uppkommer under ett sammanträde.

...

Den som deltar i ett sammanträde genom ljudöverföring eller ljud- och bildöverföring ska anses ha inställt sig inför rätten. Lag (2019:298).

English translation:

Section 10

A person who is to attend a meeting before the court shall appear in the courtroom or where the meeting is otherwise held.

If there are reasons for it, the court may decide that the person who is to participate in a meeting shall participate by audio transmission or audio and video transmission. The President of the Court may decide on the question whether it arises during a meeting.

¹⁴ https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/rattegangsbalk-1942740_sfs-1942-740

¹⁵ FACT SHEET Ministry of Justice Ju 08.05e December 2008;

https://www.legislationline.org/download/id/3400/file/Sweden_Fact_Sheet_on_More%20Modern%20Court%20Proceedings_2008_en.pdf



...

Anyone who participates in a meeting by audio transmission or audio and video transmission shall be deemed to have appeared before the court. Lag (2019: 298) .

- [63] Specific Regulations for the use of video conferences have been introduced by the legislator. A party participating by video conference is not considered to appear before the Court but to be absent (cf. the legal fiction in the last sentence of Chapter 5, Section 10 and Chapter 36, Section 18, partially translated into English, as follows: "When a meeting is held **in the absence of a party** in accordance with the first paragraph, the **party shall, if possible, be allowed to follow the meeting by audio transmission or audio and video transmission**").
- [64] In Swedish Law, video conferences have been explicitly allowed by the legislator (other than in the EPC). On the other hand, no case is known where any office or court deprived the parties of their right to actual Oral Proceedings with the argument that virtual Oral Proceedings are to be understood as the same as Oral Proceedings.

g) Practice in Turkey

- [65] Recently amended Civil Procedural Law No. 6100, article 149, allows hearings to be conducted through voice and image transmission. Specifically, the court may **allow** each of the parties to attend the hearing and carry out procedural actions by transmitting audio and video at the same time.

6100 HUKUK MUHAKEMELERİ KANUNU

MADDE 149

(1) Mahkeme, taraflardan birinin talebi üzerine talep eden tarafın veya vekilinin, aynı anda ses ve görüntü nakledilmesi yoluyla buldukları yerden duruşmaya katılmalarına ve usul işlemleri yapabilmelerine karar verebilir.

...

(3) Mahkeme, tarafların üzerinde serbestçe tasarruf edemeyecekleri davave işlerde ilgililerin, aynı anda ses ve görüntü nakledilmesi yoluyla buldukları yerden dinlenilmesine resen karar verebilir.

...

English translation (emphasis added):

6100 LAW OF CIVIL PROCEDURES (TURKEY)

ARTICLE 149

*(1) The court, **upon the request of one of the parties**, may decide that the requesting party or its attorney can attend the hearing from where they are located and carry out procedural proceedings by simultaneously transmitting audio and video.*

...

(3) The court may decide ex officio, in cases and affairs that the parties cannot freely dispose of, to listen to those concerned from where they are, by transmitting audio and video at the same time.

...

[66] In general, in Turkey the parties and their representatives cannot be forced to video conferences against their will (with the explicit exception of *ARTICLE 149 (3)*)

[67] There is no indication that Oral Proceedings have ever been considered to “automatically” cover video conferences. Moreover, no case is known where any office or court deprived the parties of their right to actual Oral Proceedings with the argument that virtual Oral Proceedings *are* Oral Proceedings.

h) Practice in the remaining Member States and Conclusion

[68] The results of a survey on national practice in the Contracting States regarding virtual court proceedings, recently carried out by epi among the members of its Litigation Committee and the members of the drafting group of epi’s amicus curiae brief¹⁶, shows that – with the exception of the failed attempt reported

¹⁶ [http://documents.epo.org/projects/babylon/eponet.nsf/0/ADB57BBEC920D3C4C12586C60025CF9A/\\$File/epi%20_G1-21_20210427.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/ADB57BBEC920D3C4C12586C60025CF9A/$File/epi%20_G1-21_20210427.pdf), page 48, last paragraph



above in Switzerland - none of the Contracting States for which answers were received by 26 April 2021 (i.e., in at least 32 of the 38 Contracting States) has ever conducted court proceedings by videoconference without the consent of the parties and without an explicit legal basis in the national law, i.e., merely on the ground that the term "oral proceedings" or "hearing" also covers videoconference proceedings.

- [69] Furthermore, no case is known in which a court of the European Union conducted hearings as a videoconference, rather than as an in-person hearing, without the consent of the parties and without legal basis.
- [70] In summary, there does not seem to be **one single case** in the territory of the Contracting States of the EPC in which a court conducted Oral Proceedings as a videoconference rather than as an in-person hearing, unless there was a legal basis in the national law explicitly allowing for virtual oral proceedings.

8. European perspective

a) The CJEU perspective

- [71] The CJEU informed the public as follows¹⁷:

If it is not possible for a party's representative to travel to Luxembourg to attend a hearing before the General Court owing to the health crisis and measures taken by the national authorities, he or she may lodge, by way of a specific emergency measure, a reasoned request to participate in the hearing via video conference link.

- [72] It is thus clear that the CJEU also does not seem to depart from the concept of Oral Proceedings as proceedings before the court (i.e. at the place of the court). It is only foreseen – with limited scope relating to the COVID-19 crisis - to allow the representatives "to participate in the hearing via video conference link"¹⁸.

b) The UPC perspective

- [73] The UPCA understands "video conferencing" as a form of "electronic procedure" (cf. Art. 44 UPCA) and obviously not for "Oral Proceedings" (defined in Art 52 UPCA). Consequently, the UPCA RoP (draft) are clear in that a "video conference"

¹⁷ https://curia.europa.eu/jcms/jcms/p1_3012067/en/; 18. Dec. 2020

¹⁸ rather similar to section 128a German code of civil procedure



is an alternative to an “oral hearing” (Rule 264) and is an alternative to a “conference [...] held in Court” (Rule 105, No. 1 and 2).

[74] This also shows that the UPCA agreement and its Rules of Procedure do not understand video conferences as a potential form of Oral Proceedings/oral hearings.

c) Regulation (EC) No 861/2007 establishing a European Small Claims Procedure

[75] The regulation (EC) No 861/2007 creates a simplified and fast-track written procedure for handling cases involving small cross-border claims¹⁹. The regulation explicitly allows that the court or tribunal may hold an oral hearing through video conference or other communication technology if the technical means are available. In essence, the EU legislator explicitly accepts oral hearing by video conference for small claims (German: “Bagatelle”). There are no similar provisions for any case which is not a small claims case. Therefore, it appears that the EU legislator does not see video conference as being equivalent to actual Oral Proceedings or even naturally derivable from an “oral hearing” or “Oral Proceedings”.

9. Customary law (Gewohnheitsrecht)

[76] For more than 20 years, the users of the EPO services have been informed about the possibility of “Oral Proceedings by video conference” and they have been repeatedly reminded that their agreement or corresponding request is necessary. Since early 2020, the Boards of Appeal (in more than 50 cases) have suggested “Oral Proceedings by video conference” if the parties agree. No Case is known where the Boards of Appeal informed the party/parties that such agreement would not be necessary. Hence, standard practice is the exact opposite to the allegation in the explanatory remarks to draft Art 15a RPBA, stating²⁰ (footnotes added):

“As outlined above, proposed new Article 15a RPBA clarifies the practice²¹ of the Boards of Appeal since May 2020 of conducting Oral Proceedings by

¹⁹ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l16028&from=DE> ; <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32007R0861&from=DE>

²⁰ [http://documents.epo.org/projects/babylon/eponet.nsf/0/ABB07FC3026814D7C125863F004CF531/\\$File/boac-16-20_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/ABB07FC3026814D7C125863F004CF531/$File/boac-16-20_en.pdf), online on Dec 18, 2020

²¹ Note, practice so far: *VidCo only with agreement*



videoconference. Therefore, the Boards of Appeal may adapt their practice²² before the date of entry into force."

[77] Apart from the fact that a clarification of a practice by changing the practice does not make sense: the common practice can and should be considered as customary law. The Applicant filing his/her application two years ago could trust that he/she has the right to actual Oral Proceedings and that "virtual Oral Proceedings" as replacement for actual Oral Proceedings will only be performed if he/she agrees.

10. Potential limitations?

a) The pandemic

[78] We are well aware of the current extreme situation caused by the Covid-19 pandemic. We agree that, in such extreme situations, where it is impossible to safely hold proceedings in person, it is appropriate to use ViCo proceedings as much as possible, for instance in order to ensure that cases are not prolonged unnecessarily, despite Art 116 (1), 1st sentence, 2nd alternative EPC. However, we are also of the view that, if no such extreme situation exists, Art 116 (1), 1st sentence, 2nd alternative EPC should be applied again. It is our position that recourse to videoconferencing might be justifiable in such a case of a long-lasting force majeure event, where the attendance of traditional oral proceedings is practically impossible for a substantial period of time.

[79] In the following we will not discuss an absolutely exceptional situation, such as the present pandemic, in which different standards must naturally apply. Rather, we will look at the extent to which various stated (or even merely theoretical) advantages actually apply in general in such normal times.

b) Procedural efficiency and speed of proceedings in normal times

[80] It is often argued that videoconferences would promote procedural efficiency. The opposite is true, very clearly if one considers Oral Proceedings in isolation, but also if looking at the overall proceedings.

[81] The first question is which format is "procedurally efficient", once the oral proceedings has begun. In this context, everything speaks for actual Oral Proceedings and against a video conference. Experience shows that actual Oral

²² Note: VidCo also without agreement!; Question: What is a practice adapting to itself?



Proceedings practically never have to be terminated prematurely (at least we are not aware of one single case - a health-related emergency, for example, would be conceivable, but would also have the same effect in the video conference). For technical reasons alone, the actual oral hearing is superior to the video conference - at least as soon as it has begun, which is what matters (cf. point 2.2.4 of the reasons of decision T 328/16, according to which oral proceedings serve "first and foremost" ("zuvörderst [sic]") to ensure that the case is ready for decision ("entscheidungsreif") at the end of the - scheduled **and commenced** - oral proceedings. It therefore marks the procedural end of an otherwise essentially written procedure.

- [82] Another inherent (a priori) weaknesses of videoconferencing is also detrimental in relation to procedural efficiency. For example, at least in first instance proceedings (e.g. opposition proceedings), the opponent must always be allowed to present evidence supporting a public prior use (e.g. found on the eve of the oral proceedings, but that is not even the point) - insofar as the opponent has not already been entirely successful with other facts and arguments. In the case of many conceivable (also practice-relevant) public prior uses, the opposition division can only perform the - at least in 1st instance proceedings obligatory (cf. Art. 114(1) and (2) EPC) - assessment of the *prima facie* relevance of the facts and evidence by inspection of the actual product. Whereas, in the case of a videoconference this must naturally lead to stopping the same and scheduling of (new) Oral Proceedings, the actual Oral Proceedings can be continued and presumably also brought to a conclusion, at least in most cases.
- [83] In essence, if looking at Oral Proceedings in isolation - which is the correct perspective from our point of view because the right to Oral proceedings does not depend on the situation in the written proceedings - procedural efficiency speaks clearly for having an actual Oral Proceedings.
- [84] Even if – for the sake of argument - one does not consider Oral Proceedings in isolation, the result is not different. Whilst during the pandemic it seems plausible (and from our point of view it does not need specific proof for that) that Oral Proceedings have to be cancelled with higher probability than videoconferences, this is not true for "normal" times (at least it is not necessarily plausible, so that this would have to be proven if restricting the rights of the party involved).

- [85] If in "normal times" Oral Proceedings have to be adjourned in advance, this is usually because one of the participants develops health problems. However, if one of the participants is not able to travel due to health problems, she/he will in most cases not be able to participate in a strenuous videoconference either (which would at least not be recommendable). In this respect, not much difference is to be expected here. What, possibly (at least on average, but not necessarily in the concrete case), has to be taken into account to the disadvantage of actual Oral Proceedings are potential problems with travelling. That parties which are resident in the territory of the European Patent Convention or their representatives cannot travel for a longer period of time, practically never occurs. As far as we remember, one could think here, for example, of the Eyjafjallajökull ash cloud, which made travelling difficult – however not practically impossible - for a limited territory of the EPC member states and only for some days. On the other hand, technology required for video conferences is also not 100% reliable – and very probably less reliable than public transport.
- [86] Moreover, whether or not oral hearings are procedurally efficient in this sense (in terms of the need for adjournment) depends heavily on where the party, or its representative, is located. If, for example, a patent proprietor and an opponent both domiciled in Rijswijk (The Hague) are summoned to Oral Proceedings "before" an opposition division located in Rijswijk, the procedural efficiency (for this case) would clearly argue in favour of allowing actual Oral Proceedings. However, it does not seem reasonable that the legislator would have wanted, from the point of view of procedural efficiency, that in those constellations in which procedural efficiency clearly speaks in favour of an actual Oral Proceedings, a video conference is nevertheless held (just because the competent opposition division wants this). Now, one might think that the Opposition Division could exercise their discretion – in the above explained case - to the effect that the parties should not be forced to hold a video conference. However, one would then have to ask whether this could be reconciled with the principle of fairness if, for example, two other parties facing each other in opposition proceedings both also wish to have Oral Proceedings, but are "unlucky" in that they do not have a residence near the location of the opposition division.

- [87] It would also be difficult to understand that in constellations, where everything speaks in favour of an actual Oral Proceedings, the parties are forced into a format that is inferior in every respect (out of solidarity with other potential parties which are, however, not involved in the case at stake?).
- [88] As a result, it seems clear that reasons of "procedural efficiency" do not argue for videoconferences **but against them**. This applies clearly to the Oral Proceedings (once commenced) as such, regardless of where the parties and their representatives are located. However, this also applies if looking to the overall proceedings, at least in normal times.
- [89] Closely linked to the above is certainly the question of the extent to which one or the other format is more likely to bring the proceedings to a speedy conclusion (which is certainly desirable in principle). Here again, once the oral proceedings have begun, the video conference will have a significantly higher risk in each individual case of not being able to be concluded with a decision, but another (real) Oral Proceedings will be necessary.
- [90] Again, it seems more ambivalent for the entire proceedings (in general), but it can probably be assumed that in some constellations a video conference is "riskier" in this respect and in some constellations an "oral hearing".
- [91] However, it must also be taken into account that the referred question is about whether a video conference is conducted against the will of the parties. Thus, even if all the parties are against holding a videoconference, the question is whether it can be held (or not). While it may not be possible to simply dismiss a certain interest of the public, it also seems questionable not to give proper weight to a potential inherent consent of the party to expose itself to a certain risk of prolonging the proceedings. Since this risk seems to be extremely low anyway (as said, the probability that an oral hearing cannot take place in normal times due to travel difficulties should be extremely minor) it does not make the overall proceedings significantly more "expensive" for the European Patent Office.
- [92] All in all, it is certainly admissible and arguably also necessary to consider aspects of procedural efficiency and speed of proceedings. However, then, taking into account the concrete circumstances at hand, which means that one has to distinguish between an extreme situation, in particular a pandemic with

massive travel restrictions, and periods without such (significant) travel restrictions.

c) Principle of fairness

- [93] There is no doubt that locating part of the EPO in Rijswijk discriminates a party located in Scheveningen over a party located in Rijswijk. Such discrimination is inherent in the establishment of any court (or office), where Oral Proceedings take place. Also, such discrimination is based on the wording of the EPC and was considered (see above) when drafting the EPC.
- [94] However, the videoconference format is also discriminatory. A first party who can afford expensive software and hardware (e.g. because it can distribute the costs therefor among several shoulders) has an advantage over a second party with average equipment. The first party has for example a better chance to communicate non-verbal expressions compared with the second party. The voice of the first party will be understood better and more clearly than the voice of the second party, etc.
- [95] Another first party may be very experienced with usage of videoconference software, whilst another second party may consume 90 % of its concentration for controlling and using the software. It must be said that also in actual Oral Proceedings there can be a first party being more experienced in "talking" than another party. However, as long as it can be safely assumed that a large part of the population of the EPC member states has few or even no experience with usage of video conference software, the discrimination inherent in this format is on another scale.
- [96] Still another second party may live in a region with non-satisfactory internet connection. It would be naïve to assume that corresponding interruptions and acoustic problems would not be (subconsciously, in the least) to the disadvantage of such second person.
- [97] In essence, the principle of fairness speaks more for actual Oral Proceedings.

d) Environmental aspects

- [98] Future generations have rights, too. The status quo in the member states of the EPC is, however, that travelling in normal times is allowed. It is allowed for visiting a friend - and it is not forbidden if the friend could also be visited

virtually. It is allowed for doing "small" or "big" business, even if the business could be done also virtually. Hence, as long as travelling in normal times is not restricted in general, it would appear awkward to do so in the context of Oral Proceedings at the EPO, recalling that Art 116 (1) 1st sentence 2nd alternative enshrines a right (and freedom of choice!) of the party.

- [99] Also, referring again to a case where all parties and the Opposition Division of the case is sitting in Rijswijk, it would be much more environmentally friendly, if the persons involved meet in person instead of streaming video feeds for 8 hours. Hence, videoconferences are not more environmental in an absolute sense. However, if they are not, would it be fair, if the parties of another case located far away from Rijswijk are against a videoconference and are, nonetheless, forced to it only because they are so unlucky to have their residence far away?

11. Final remark on the video conference format chosen by the Enlarged Board of Appeal in the present proceedings

- [100] In our view, the question referred to the Enlarged Board of Appeal cannot be answered in the form of a videoconference against the will of the party, for purely logical reasons.
- [101] For example, extensive evidence has been presented in VESPA's amicus curiae brief showing that videoconferencing can influence the outcome of a case. If the Enlarged Board of Appeal now answered "YES" to the referred question, it could be that the Enlarged Board of Appeal only judged incorrectly because of the choice of the format. In other words: In our view, it seems **logically impossible to decide lawfully on the legality of a format by using precisely the format put up for examination**. This would be comparable to a case in which the hypothetical question would be whether the departments of the European Patent Office can compel the party to be represented by only one representative in Oral Proceedings, and the Enlarged Board of Appeal conducts an oral Proceedings precisely on this legal question and admits only one representative.

III. Conclusion

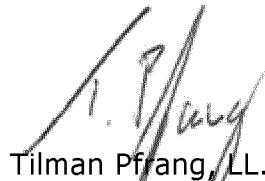
- [102] We believe the above facts and arguments speak for an interpretation of Article 116 EPC that always allows a party to be actually present at the place of the

department dealing with their case and that an interpretation which excludes this right of said party is not legally justified.

[103] In particular, we do not believe that Art 116 (1) 1st sentence 2nd alternative contains any room for discretion on the side of the department dealing with the case. If this were seen differently, for example also Art 75 EPC should contain discretion on the side of the EPO to accept filings of new patent applications only once a week and/or only between 9:00 and 12:00 a.m. (maybe for reasons of efficiency?). In the least this does not seem to be "excluded" by the wording of Art 75 EPC.

[104] It is our position that recourse to videoconferencing might be justifiable only under specific exceptional circumstances, where the attendance of traditional oral proceedings is practically impossible for a substantial period of time - for example in a long-lasting force majeure event like the current pandemic.

Yours faithfully,



Tilman Pfrang, LL.M.
European Patent Attorney

MB

