Registry of the Enlarged Board of Appeal
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Amicus Curiae Statement on the Question Referred to in G 1/21

In proceedings T1807/15, the Technical Board of Appeal referred the following question to the Enlarged Board of Appeal for decision under Art. 112(1)(a) EPC:

> *"Is the conduct of Oral Proceedings in the form of a video conference compatible with the right to Oral Proceedings as enshrined in Art. 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 video conference?"*

The undersigned representatives and associations before the European Patent Office are of the opinion that the question submitted must be answered with "**No**".

Justification

Oral Proceedings under Art. 116 EPC must be distinguished from video proceedings in terms of law and legal history, as well as practice and communication technology. The phrase "Oral Proceedings in the form of a video conference" is misleading/incorrect in this respect, as it does not constitute Oral Proceedings under Art. 116 EPC.

There are two essential elements of Oral Proceedings, namely:

1. the use of spoken language as the medium of communication between the parties and the adjudicating body, and
2. the immediate nature of the communication, i.e. without any intermediary medium between the sender and the recipient, i.e. in this case the parties and the adjudicating body, as well as the public.

Element 1 also applies to video proceedings or telephone-only ("telephonic") proceedings, which are currently not permitted by the EPO, and differs from video proceedings only in the (partial) visualization of the parties involved. Element 2, on the other hand, requires a direct communication process between persons in the same room and cannot be realized through communication between spatially separated parties that is mediated by technical media.

Compared to direct communication between people, any communication mediated by technical media is a minus. Despite all of the technological advances in recent years, communication through video conferencing is still:

(a) susceptible to technical errors (those that are detectable, as well as those that are not immediately detectable), which are normally—consciously or unconsciously—to the detriment of the party on whose side they occur,
(b) inferior to face-to-face negotiation with regards to non-verbal communication, which is also very important, for example, in judging the credibility of a party's presentation, and
(c) impersonal and indirect, as technical limitations (the unavoidable distance between the position of the camera and the image of the other person), make it nearly impossible to establish eye contact with the other person.

As representatives and associations involved in various proceedings before the EPO, we agree with these statements based on our own experiences. The material presented in **VESPA's amicus curiae statement** powerfully confirms this.

The right to Oral Proceedings under Art. 116(1) EPC is a fundamental procedural right for the parties, which is not only safeguarded by the EPC itself, but also by the right to a fair trial under Art. 6(1) of the European Convention on Human Rights and Fundamental Freedoms and the ECHR-compliant constitutions of the EPC member states. Subordinate legal norms, such as Art. 15a of the Rules of Procedure of the Boards of Appeal, cannot be limited by basic principles of this kind.

This legal conception is firmly supported by the **enclosed Opinion of Prof. Dr. Dr. h.c. Ull Siegfried Broß**, who is a retired Judge of the Federal Constitutional Court, retired Judge of the Federal Court of Justice, and a longstanding member of the X. Civil Senate for Patent Law.

In principle, the parties' right to Oral Proceedings under Art. 116(1) EPC may not be encroached upon without their consent. Only the party itself may waive this right (*volenti non fit iniuria*) on the basis of its dispositional authority and in this case, for example, make use of

the option of video proceedings or mixed personal video proceedings (hybrid proceedings) with the consent of the Board of Appeal.

Similar to the Federal Court of Switzerland's decision referred to in **VESPA's amicus curiae statement** (paras.10,11), German courts may order the personal appearance of the parties in accordance with §141(1) of the Code of Civil Procedure, based on the mandatory requirement that the representatives of the parties must appear in person in order to attend Oral Proceedings.

For the reasons set out above, we do not consider the conduct of video proceedings to be compatible with the right to Oral Proceedings under Art. 116(1) EPC, unless all parties to the proceedings have given their consent. An exception to this policy is conceivable under certain circumstances, for example, during a pandemic that restricts freedom of travel in which Oral Proceedings cannot be held or cannot readily be held.

If, in this case, a Boards of Appeal orders video proceedings in order to ensure the proper administration of justice, the required consent of all three parties to the proceedings may exceptionally be substituted by the Board if one party to the proceedings refuses its consent in a lawfully abusive manner.

Encl: Expert Opinion of Prof. Dr. Dr. h.c. UII Siegfried Bloß, with Attachments and Curriculum Vitae

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Prof. Dr. Dr. h.c. Ull Siegfried Bross
Judge at the German Federal Constitutional Court ret.
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Expert Opinion on the Decision of the Administrative Council of the European Patent Organisation of 23rd March, 2021 approving an amendment to the Rules of Procedure of the Boards of Appeal (CA/D 3/21).

A. Preliminary remarks

I. Subject

On 11th December, 2020 the Committee of the Boards of Appeal amended the Rules of Procedure of the Boards of Appeal by inserting an Article 15a as follows:

"Oral proceedings by videoconference

"(1) The Board may decide to hold oral proceedings pursuant to Article 116 EPC by videoconference if the Board considers it appropriate to do so, either upon request by a party or of its own motion.

"(2) Where oral proceedings are scheduled to be held on the premises of the European Patent Office, a party, representative or accompanying person may, upon request, be allowed to attend by videoconference.

"(3) The Chairman in the particular appeal and, with the agreement of that Chair, any other member of the Board in the particular appeal may participate in the oral

proceedings by videoconference."

II. Referral G 1/21 in case T 1807/15

On this subject, the Board of Appeal referred the following question to the Enlarged Board of Appeal for a 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?"

In order to ensure access to justice and the proper functioning of the EPO, the President of the EPO has decided that oral proceedings before Examining and Opposition Divisions may continue to be held as videoconferences according to the decision of the President of the EPO in force, i.e., without the need for the parties' agreement (Notice from the EPO dated 24th March, 2021).

In the course of the oral proceedings before the referring Board, the Appellant attacked the system of holding the oral proceedings by videoconference and argued above all that this could not be reconciled with the structure of oral proceedings according to Article 116 EPC. In addition, reservations were expressed against the special practice of holding oral proceedings by videoconference without the consent of the parties to the proceedings.

Moreover, it was argued that holding oral proceedings by videoconference violated the right to be heard and the right to a fair trial in view of the technical instabilities.

Furthermore, the principle of the public nature of the proceedings, as laid down in Article 116 (4) EPC, was not compatible with the conduct of oral proceedings in the form of a videoconference. It should also be borne in mind that the problem needed to be discussed and decided by a Diplomatic Conference. The parties' fundamental procedural rights were affected, such as the right to be heard and the right to a fair trial. Those key rights were enshrined in the EHRC. This concept may have changed as a result of the legislative practice over the decades, but the question remained whether fundamental procedural rights could be restricted by secondary legislation. Any amendment to the fundamental procedural rights in this connection meant an amendment to Article 116 EPC. In this respect, the legislative powers of the Administrative Council were limited.

III. Procedure for the Opinion

An appropriate assessment of all the questions and problems involved will require a differentiated approach, first of all undertaking a separate analysis of the procedural principles applicable in proceedings before the Boards of Appeal of the EPO. It is therefore necessary to develop several lines of argument based on constitutional/democratic principles which are generally recognised by the comity of nations at present, whose individual strands can be brought together at the end of the Opinion to provide an appropriate and convincing conclusion. This — as may be noted straight away — is that there are no fundamental objections to oral proceedings in patent disputes before the Boards of Appeal of the EPO by videoconference, provided that they are held in this way with the consent of the participants and not forced on them against their clearly and unambiguously expressed will.

In this context, it must be borne in mind that oral proceedings by videoconference and ordinary oral proceedings are not only different linguistically, but in fact cannot

be equated in other respects either. It is axiomatic that the interposed medium means that the circumstances of the public and oral nature are simply not identical or even equivalent.

B. Details

1. a. Procedural law is law for the enforcement of rights. It was created in order to enable legal positions to be clarified according to rules established for that purpose and to be enforced in the event that they are valid. Procedural law is consequently ancillary law and therefore has no separate significance of its own. Procedural law is thus characterised by two levels: a higher level spanning all forms of proceedings, which is recognised in all civilised constitutional/democratic states. This has been reflected, for example, in the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 6, paragraph 1 reads:

> "Right to a fair trial
>
> "(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

Simply in view of the large number of Contracting States of the EHRC, which includes all the Member States of the EPO and is not limited to Central Europe

(e.g. Russia and Turkey, and also Ukraine), it becomes clear that the oral and public nature are essential elements of court proceedings in modern constitutional democracies, which also comply with the expectations laid down in the Declaration of Human Rights by the United Nations.

b. At the same time, Article 6, paragraph 1 EHRC points the way to the second, lower level of constitutional/democratic court proceedings. It has been generally recognised for some time that in administrative proceedings affecting the general public, it is necessary not only to ensure that the general principle applicable to administrative proceedings, namely the right for those affected to be heard, is observed, but also to enable the public to take part. That is generally known in connection with the execution of major projects such as building airports, laying out transport infrastructure on land and water and constructing power generation plants, but it also applies to drawing up land use and zoning plans.

The reason for this is firstly that an individual must not be reduced to a mere object of proceedings conducted by the State. This is a manifestation of the protection of human dignity in accordance with Articles 1 ff. EHRC and Articles 1 ff. UN Human Rights Charter. In addition, the public nature of proceedings can enable the citizens subject to state authority in a constitutional/democratic polity to monitor that authority and - at least in theory - to scrutinise the independent courts. The latter must always be aware of this and examine whether they are complying with constitutional standards and filling them with life for all parties to the proceedings in a way that lives up to the principles of constitutional democracy.

c. On the upper level spanning all forms of court proceedings, it is necessary

to ask about the structure and subject-matter of the specific proceedings concerned. These observations may be prefaced by the comment that there is no entitlement to court appeal stages. The constitutional principle of the rule of law only requires one court instance. In view of this, it is obvious that the structuring of court proceedings must provide substantial protection for human dignity and that an oral hearing is mandatory and must not be replaced by a videoconference against the will or without the consent of the parties concerned in the system of legal protection.

Constitutional democracies take this into account in a variety of ways. Obvious examples of a court decision without oral proceedings are cases concerning penalty orders and summary notices to pay fines. As in the case of a default judgment, it is in the power of those affected to obtain an oral hearing by filing the appropriate legal remedies. This arrangement of proceedings ensures respect for the status of those concerned as subjects and for their human dignity. They can participate on the basis of their own decision and can influence the arrangement of proceedings.

As far as the public nature of court proceedings is concerned, it is also important to remember that monitoring the courts while respecting the principle of democracy cannot always be ensured at every stage. In this respect, there are a number of constellations in which there is a conflict between the position of the human dignity of those concerned and the right of the public to observe. Litigation in family and tax law and some offences in criminal law (especially juvenile criminal law) may be mentioned as examples in this connection. In this respect, the constitutional/democratic legislator has to make an objective decision within the framework of the set of values defined by human and fundamental rights. Within the sphere of the protection of personality rights however, persons affected do not have the freedom to dispose freely over their position in the proceedings (e.g. no consent to state torture or the use of

a lie detector). This triggers the strict binding of the State because of its commitments regarding fundamental rights. (Impressively reflected in ECHR, 27.2.1980 No. 6903/75, ECHR-E 1, 2008, 463, No. 42, R. 53).

> For both fundamental procedural principles — oral proceedings and their public nature — it must also be taken into account in the process of determining the form taken by court proceedings that it definitely makes a difference whether the subject of the proceedings concerned is a question of law or questions of fact. In the case of the latter, a public oral hearing will predominate *a priori*.

Finally, in order to complete the overall picture of this level, it is necessary to determine how court or administrative proceedings are initiated. Here the principle of public prosecution and the principle that the parties delimit the subject matter of proceedings are decisive. If proceedings are opened on the basis of the principle of public prosecution, this happens without any need for the consent of the parties involved. The state authority takes action independently and of its own motion. The situation is different when the principle that the parties delimit the subject matter of proceedings applies: in this case, proceedings are opened and terminated on the initiative of private parties, even if this is done with the aid of state institutions.

d. Because of these characteristics, the principle of public prosecution and the principle that the parties delimit the subject matter of proceedings have “remote effects” on the form taken by proceedings. In both constellations it goes without saying that a person’s dignity must not be violated and he must not be reduced to a mere object. They are decisive for his ability to participate

in proceedings under his own responsibility. This in turn is decisively determined by the substantive legal position, especially if it is secured as a fundamental right.

This will be developed below within the constraints of the patent dispute underlying the referred question. After that, the two procedural levels will be woven together to define the effective interrelationship with their constitutional/ democratic significance in a way that does justice to the human dignity of the parties and the interests of the public, paying due attention to the requirements of patent litigation in the age of globalisation and a global pandemic. The basis will not be peculiarly German aspects or sensitivities, but rather the duties generally recognised by the comity of nations and the obligations incumbent on state authority in accordance with the civilised principles reflected in, for example, the EHRC and the United Nations Declaration of Human Rights. Finally, some findings of the German Federal Constitutional Court (BVerfG) will be recalled by way of example, which reflect these principles — on the basis of specific cases, but ultimately in a general manner — and make the obligations of the Contracting States of the EPC clear .

2. On the procedural level of a specific area of the law below this level — irrespective of whether a particular jurisdiction is seized or whether a general one with corresponding tribunals is operative — further procedural principles apply, which are orientated towards the subject-matter of the present case. It is in particular the nature of procedural law as the law enabling the enforcement of rights that makes its effect felt here.

a. The point of departure must therefore be the protection of intellectual property. Inventors' rights constitute technical copyright. This is afforded protection as

property in all constitutional democracies, as an expression of human dignity. This relationship is strikingly elaborated in a decision of the Federal Constitutional Court of the Federal Republic of Germany of 15th January, 1974 (BVerfGE 36,281). It was handed down in connection with the amended regulations on the inspection of files in the patent grant procedure. As far as one can tell, it is an early decision by the highest court and can usefully be referred to for the question at issue here. The BVerfG stated in particular (BVerfGE 36,281, pp. 290 f.):

> "An invention open to patenting has long been regarded as a legal position which — even before a patent is granted — while not yet conferring an exclusive right to the inventive idea, nevertheless already gives rise to claims to protection in the person of the inventor and can be the subject of legal transactions. This general inventor's right is a technical copyright which, even before a patent is granted, in particular confers defensive claims and claims to compensation which exist in addition to the claim — under public law — to the grant of the patent and finally the rights conferred by the patent. The right to the economic exploitation of a new idea which advances science and technology has been assigned by the legal system to the person who had that idea. He is entitled to a just reward for the exploitation of his achievement by third parties.

> "The legal position granted to the inventor in this way enjoys the protection of property laid down in the Basic Law (GG). The latter does not, however, contain any definition of property in the constitutional sense. When considering the question of what assets and rights can be regarded as property for the purposes of GG Article 14, it is therefore necessary to go back and ask about the purpose and function of the property guarantee, taking into account its importance

> in the overall structure of the constitution (BVerfGE 31,229 <239>). Starting from this fundamental view, the Federal Constitutional Court has stated with regard to general copyright law that the function of the property guarantee, namely to secure and defend, makes it necessary to regard the author's rights in his work, which qualify as assets, as "property" for the purposes of GG Article 14 and to subsume them under his protected sphere. The same applies, *mutatis mutandis*, to the technical copyright of the inventor, since there are no apparent reasons for a different constitutional assessment. It must be borne in mind here that the finished and published invention forms the basis of the right to the patent, which is implemented by the application. This right strengthens the inventor's right on the way to the monopoly right, which entitles him to exclude all others from the invention. In this connection, the regulations on the publication of the patent application serve to delimit the powers of the inventor trying to obtain a patent vis-à-vis others, who are excluded in the event that the patent is granted and exploited, and vis-à-vis possible interests of the general public in obtaining information about the state of the art."

This opinion expressed by the Federal Constitutional Court on "classic" patent rights, with the focus on the individual, as technical copyright also demonstrates the position and importance of the inventor's work for the community. Depending on its subject-matter, the technical invention has a vital importance for the State as a whole, which goes beyond the immediate sphere of its "author's" achievement. In the age of globalisation and the expansion and intensification of trade and economic relations, this is not limited to competitors on the national level, but in the context of European integration directly encompasses the 27 remaining Member States of the EU and, via the application filed with the EPO — and additionally enhanced by free trade agreements —, more or less the whole world.

b. This decision starts from the substantive constitutional basis of the protection of the invention and highlights the interests to be taken into account when enforcing (or rejecting) it procedurally. The inventor would like to obtain protection for his intellectual achievement, with the power to exclude third parties from exploiting it economically. Those third parties are entitled to ensure that only an application that satisfies the statutory requirements is able to overcome the threshold for the state protection of property. In a constitutional/democratic society, the State is obliged, in the interests of the common good, to establish the legal positions of the potential inventor and his competitors in the grant procedure by ensuring that appropriate proceedings to establish the facts pay strict attention to the positions of the parties in terms of their fundamental and human rights.

The inventor and opponents have one basic position in common: they are entitled not to be reduced to mere objects in a state procedure. All parties to proceedings opened by the State must retain their status as subjects with self-determination, and the form of the proceedings must ensure this on this lower level.

Irrespective of whether oral proceedings are held with all the parties present or by videoconference, the parties retain the ability to participate in full procedurally in accordance with their entitlements arising from their respective positions as parties. The parties can file requests, make statements, submit documents according to the principle of the production of evidence and the like. In the event that the proceedings are conducted by videoconference, it should be borne in mind that the decision on whether to uphold or reject a patent is not made according to the principle of arguments presented *intra*

partes, but that the entire proceedings are dominated by the principle of *ex officio* investigation. Because of the exceptional position of the proprietor of a granted patent, it must not depend on collaboration between the parties, the skill or inattentiveness of individual parties or other imponderabilities.

The principle of *ex officio* investigation is an expression of the public interest in a constitutionally-democratically correct "patent world". The state or public institution acting in the proceedings, such as the EPO, in effect takes on the role of seeking a remedy on behalf of the public beside the interested competitors. Considering now the problems caused by a videoconference, it becomes clear that an *ex officio* investigation may be capable of compensating for any impairments (feared or actual) that might arise in the parties' procedural ability to participate. That does not, however, alter the obligations incumbent on the state institutions vis-à-vis the parties to the proceedings under Article 6 paragraph 1 EHRC, especially to respect the human dignity of the parties to the proceedings and their comprehensive freedom to delimit the subject matter of the proceedings based on that dignity. Without the consent of the parties to the proceedings, the respect for human dignity under Article 6 paragraph 1 EHRC is clearly not achieved.

c. If we consider the position of the patent applicant or later the patent proprietor in this situation, it becomes clear that the conduct of oral proceedings in a videoconference preserves his key procedural position substantively undiminished: based on the principle that the parties delimit the subject matter of proceedings, it still remains within his power alone whether to initiate proceedings by filing an invention, to amend the application during the proceedings, to defend the patent or to terminate the proceedings.

For the position of opponents it must be borne in mind that their position is subsidiary to that of the patent proprietor in this respect, irrespective of the form in which the proceedings are conducted. While they can launch attacks against the patent, they cannot trump the patent proprietor's freedom to delimit the subject matter of the proceedings. In view of this, their procedural position bears less weight in abstract terms. Nevertheless, in the proceedings, the opponents and the patent proprietor face each other on an equal footing, because the opponents also perceive the interests of the public, notwithstanding their individual position in the proceedings.

In the light of the decision of the Federal Constitutional Court in BVerfGE 36,281 referred to in 2a. above, it is clear that no contradiction is created between this and the generally recognised inalienable procedural principles. In particular, the position of the inventor protected by human rights is not harmed. This has long been derived in substance from specific basic rights with respect to the procedural principles of effective legal protection, the right to be heard and institutionally independent courts (for the details, cf. BVerfGE 24,367, p. 401; 39,276, p. 294; 45,297, p. 322).

What is ultimately decisive is the fact that the applicant - as the potential future proprietor of a patent - and the later patent proprietor and hence the owner still has the undiminished power in procedural terms to delimit the subject matter of the proceedings, which is supported by the *ex officio* investigation. Because of the substantive deficiencies of a videoconference compared to the essence of Article 6 paragraph 1 EHRC and the inalienable legal positions arising from that for the parties to the proceedings, a videoconference may not be held against the the applicant's will in particular, since he, as the principal holder of the fundamental right, would thus be reduced to a mere object in the proceedings. This equally applies to the opponents, even if they do not directly

hold an identical position comparable to that of the applicant in terms of fundamental rights. They are nevertheless able — and hence on a par — to rely in the proceedings on their position as participants in trade and commerce and as competitors. It is thus an anticipatory effect of the protection of their own property in the event that a wrongly granted patent should constrain their economic position (also protected by GG Article 14). This applies in particular as a consequence of globalisation with its free trade agreements which, with their total number, in the meantime span the globe.

d. Since the referral by the Board of Appeal makes a reference to Article 116 EPC, it is necessary also to consider briefly the proceedings before the Examining and Opposition Divisions. According to the Notice from the European Patent Office dated 24th March, 2021 concerning the conduct of oral proceedings in examination and opposition, those proceedings are not covered by the new arrangement in Article 15 a of the Rules of Procedure.

As has already been mentioned, administrative proceedings are only subject to the principles of oral and public hearings in particularly important cases affecting third parties in addition to those directly concerned. It cannot be argued against this that a person is free at any time to enter into contact with a state authority. (Ultimately an expression of the general right of petition, cf. Article 17 Basic Law for the Federal Republic of Germany).

In the administrative proceedings before the EPO however, it is not a question of general information, but rather of a critical assessment of an invention filed or a patent granted in order to establish whether it is entitled to a monopoly position in legal transactions. It *a priori* implies that the principles of oral and public hearings should be observed. On the other hand, an entitlement to proceedings only exists with respect to a fully effective court instance.

Nevertheless, in view of the exceptional nature of a granted patent as a monopoly for the proprietor, it is certainly justified to express grave reservations if the proceedings before the Examining and Opposition Divisions continue to be held in the existing form. This is still the case even if a comprehensive court instance is still subsequently available to all those concerned, with oral hearings in public.

e. Nonetheless, it is necessary at this point also to consider a special problem that arises for both proceedings if the consent of the parties is to be regarded as a mandatory requirement for oral proceedings in the administrative procedure and before the Boards of Appeal. Irrespective of whether the proceedings are dominated primarily by the principle of public prosecution or the principle that the parties delimit the subject matter of proceedings, appropriate statutory measures must be provided to protect them against abuse. No party must be given a means, by refusing consent to a videoconference instead of oral proceedings, of instrumentalising that refusal for competition purposes or other reprehensible undertakings and of using it as a vehicle. Similarly, the applicant or patent proprietor, who enjoys very powerful protection by GG Article 14 compared to the other parties involved, must not in this way be provided with a means for delimiting the subject matter for purposes going beyond the appropriate property protection to which the invention is entitled. The tribunal must be enabled to intervene and, at the request of one of the parties to the proceedings, to hold that the law is being abused and accordingly to supplant the lacking consent to oral proceedings by videoconference. Under no circumstances, however, may the tribunal take action *ex officio* in order to impose oral proceedings by videoconference without the consent of the parties to the proceedings.

Means must then be found, therefore, to ensure that no one loses sight of the question of patentability and that the proceedings do not become “bogged

down" in sideshows. That can be avoided by stipulating that the question whether the consent to the conduct of a videoconference was rightly supplanted because of an abuse of the law can only be appealed against with the decision on the merits.

f. Since the replacement of oral proceedings by videoconferences was obviously triggered by the pandemic which has been raging since last year, it is appropriate to consider briefly whether this arrangement of proceedings should be restricted to "times of pandemics". There are a number of reasons why this should definitely not be the case:

A videoconference for the kind of proceedings at issue here, albeit only on condition of the consent of the parties to the proceedings before the EPO, is certainly appropriate in view of the internationalisation of the patent system over many years and as a result of the foundation of the EPO. It includes important interests of environmental protection, the financial burden on the parties to the proceedings caused by the need for long journeys, and difficulties in accessing the institutions making decisions in the patent grant procedure because of time differences, and also the problem of overcoming language barriers and the like.

It must also be taken into consideration that the patent grant procedure or opposition proceedings can be thrown off course if the organisation of the proceedings is made dependent on a particular event. First of all, the focus of a dispute is no longer on the application, but rather on whether the preliminary conditions have been legitimately and convincingly established. The current pandemic has made this very apparent throughout the world because of the concomitantly emerging circumstances. There is a conceivable risk of losing sight of the true purpose of the proceedings for a long time to come, so that it

becomes effectively impossible to ensure appropriate and adequate legal protection for the enforcement of fundamental rights, including the guarantee of the right to be heard.

C. Summary and conclusion

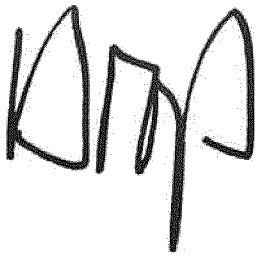
1. The essential requirement of the parties' consent in proceedings before the Boards of Appeal of the EPO is based on constitutional/democratic principles applicable in any modern civilised state, as enshrined in Article 6 paragraph 1 EHRC and also in the Declaration of Human Rights by the United Nations: man must not be reduced to a mere object by state action and in this way deprived of the inalienable human dignity to which he is entitled. Consent is based on the power of the person applying for a patent on an invention to delimit the subject matter of the proceedings. The sole means of determining this is the filing of the application. No objective assets which are not at the disposition of the individual are affected. This means that a central principle of the proceedings is satisfied in full in view of the application.

   As far as the opponents are concerned, the same applies to their position: on the one hand, as opponents, they have an independent position in the proceedings and, on the other hand, as part of a possible public, they have a position which is at their disposition. On top of all this, the principle of investigating *ex officio*, which also applies in the case of a videoconference, secures the public interest in the correct constitutional/democratic grant of a patent and also the role of the public from a different perspective.

2. In addition, it must be borne in mind that even the administrative procedure beginning with the application for an invention is made available to the public and that all interested parties can therefore monitor its development and the

course it takes and can accordingly reflect on the nature of their own participation.

Munich, 22nd April, 2021



Siegfried Bross

Enclosures

Curriculum vitae
Annex

(Translation)

Prof. Dr. Dr. h.c. Ull Siegfried Bross

Annex to the expert opinion dated 22nd April, 2021:

A survey is provided below covering selected decisions of the Federal Constitutional Court which reflect the guidelines for court proceedings under the rule of law as developed in the Expert Opinion on the basis of Article 6 paragraph 1 EHRC, which are generally accepted in the constitutional/democratic comity of nations.

1. Decision dated 9th July, 1980 — 2 BvR 701/80 — (BVerfGE 55,1, pp. 5f.) — Human dignity

   In a constitutional appeal case concerning the construction of Munich II Airport, the BVerfG stated *inter alia* that the principle of the right to be heard before a court served not only to clarify the factual basis of the decision, but also to respect human dignity. It pointed out that a particularly decisive aspect here was the fact that people in a trial were in a serious situation. The right to be heard was not only the people's basic procedural right, but also a procedural principle under objective law which was constitutive and categorically imperative for court proceedings within the meaning of the Basic Law. It ensured that people were not given "short shrift".

2. Judgment dated 24th January, 2001 — 1 BvR 2623/99 *inter alia* — (BVerfGE 103,44, pp. 63 f.) — Public and oral proceedings — Article 6 paragraph 1 EHRC

This case was concerned with the admissibility of television recordings in court hearings and at the pronouncement of decisions. In this connection, the BVerfG stated *inter alia* that the principle of public oral proceedings enshrined in the Judicature Act was an element of the principle of the rule of law. It also conformed to the general principle of the public nature of democracy. It was nonetheless possible to exclude the public partly or completely for urgent reasons of the common good, even where it was a fundamental requirement of the constitution. In particular, the principle of the public nature said nothing about the arrangements according to which the public was admitted. ……..

The public nature of courts served, first of all, to provide a procedural guarantee to protect the parties involved in the proceedings against secret courts dispensing justice outside public control. (In this connection, we may recall the secret Vehmic courts in Germany in earlier centuries). It was also felt to be an expression of the legal position of the people and their right to be informed about events in the course of a court trial, and also to allow them to monitor the state authority acting through the courts by allowing the public to gain an insight. Both aspects are encompassed by the principle of the rule of law according to the Basic Law and are also essential for democracy. At this point, the BVerfG makes an emphatic reference to Article 6 paragraph 1 EHRC. It supplemented the principle to the effect that hearings should be held before a court public and that judgment should be pronounced in public.

See also BVerfGE 119, 309, pp. 318 ff.

3. Decision dated 5th October, 1976 — 2 BvR 558/75 — (BVerfGE 42,364, pp. 369 f.) — Oral proceedings

   GG Article 103 paragraph 1 grants the parties to a trial a right to be given an opportunity to comment on the facts underlying a court decision before the decision is handed down. One means of implementing the right to be heard is the oral hearing.

4. Decision of the Court sitting in plenary session dated 30th April, 2003 — 1 PBvU 1/02 (BVerfGE 107, p. 411) — One court instance

   It is always sufficient for there to be the possibility of having an alleged violation of rights examined by court process in a single trial. This principle was already expressed in a decision dated 29th October, 1975 ruling that GG Article 19 paragraph 4 does not require appeal stages (BVerfGE 40,272, p. 274; see also BVerfGE 54, 94, p. 97).

5. Decision dated 24th April, 1979 — 1 BvR 787/78 — (BVerfGE 51,150, p. 156) — Effective legal protection derived from specific law

   Referring to its case law, the BVerfG stated that the constitutional guarantee of property not only influenced the form taken by substantive law, but also had consequences for the associated procedural law. GG Article 14 led directly to the obligation of the courts to grant effective legal protection in the event of any encroachments on that basic right. That included the right to “fair” conduct of the proceedings, which was one of the most important manifestations of the principle of the rule of law.

   For a detailed examination, see also BVerfGE 53,30, pp. 72 f.).

6. Judgment dated 19th March, 2013 — 2 BvR 2628 *inter alia*/2010 — (BVerfGE 133, 168) — Exclusion of the freedom to delimit the subject matter of the proceedings

   The principle of guilt enshrined in the Basic Law and the associated obligation to investigate the substantive truth, and the principle of fair, constitutional proceedings, the presumption of innocence and the court's obligation of neutrality rule out placing the handling of the search for truth, the subsumption under the law and the principles of sentencing at the free disposal of the parties to the proceedings and of the court (Headnote 1).

Munich, 22nd April, 2021

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