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EPO REOPENS APPEAL PROCEEDINGS AFTER FAILED POSTAL DELIVERY

The Enlarged Board of Appeal (EBA), the highest body responsible for reviewing the decisions of the European Patent Office (EPO), has now issued an exceptional decision to reopen appeal proceedings following a fundamental procedural violation that took place during those proceedings.

The decision is exceptional because it is only in the rarest of cases that the EBA actually finds that a fundamental procedural violation has taken place during proceedings before the Boards of Appeal (BoA). The vast majority of such requests (called “petitions for review”) are rejected by the EBA.

In this case, the EPO Opposition Division (OD) had rejected an opposition filed against a European patent. The opponent had filed an appeal against the OD decision. The BoA had sent the patent proprietor three communications, namely: a communication forwarding the opponent’s notice of appeal, a communication forwarding the grounds of appeal and setting a deadline for the reply to the appeal, and a further communication forwarding a supplementary brief filed by the opponent.

Since the patent proprietor did not respond to the appeal, the BoA did not see the need to summon the parties to attend oral proceedings, and issued a decision revoking the patent.

It was only when the BoA decision was notified to the patent proprietor that the proprietor actually became aware that an appeal had been filed against the OD decision. In fact, the earlier three communications from the BoA to the patent proprietor had been sent as registered letters without advice of delivery, and the patent proprietor said that they had not received any of these communications (unlike the BoA decision, which had been sent by registered letter with advice of delivery).

The patent proprietor therefore filed a petition for review with the EBA, asking for the appeal proceedings to be reopened in view of the violation of the fundamental procedural right to be heard that had resulted from the failed notification of the above communications.

In its decision on the petition for review, the EBA recalled that, in the event of any dispute, it is incumbent on the EPO to establish that the letter has reached its destination. In the present case, the EPO was not able to establish that the above three communications had in fact reached the patent proprietor. In addition, and more importantly, the EBA noted that although the opponent’s notice of appeal, grounds of appeal and supplementary brief were all available in the online file history for the case, “parties must be able to rely on the EPO complying with the relevant provisions of the EPC and ... their representatives have no duty to monitor the proceedings themselves by regularly inspecting the electronic file.”

The EBA therefore decided to reopen the appeal proceedings.

The EBA’s finding regarding the online file history is important for defining the legal role of the EP online file histories. In fact, only communications actually notified by the EPO, either by registered letter with advice of delivery or via official electronic means (which, at present, do not include traditional emails), have legal value. By contrast, the data and documents available in the EPO online file history, while undoubtedly very helpful for the applicants, patent proprietors, the opponents, any interested third parties and the European patent attorneys involved, are purely for information purposes and are neither legally binding nor sufficient to trigger any duties on the side of the parties to the proceedings. The EBA decision therefore sets a clear boundary of legal certainty, which is always in the interest of all users of the EPO system.