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## EPO HIGHEST INSTANCE REOPENS APPEAL PROCEEDINGS

The EPO body of highest instance, the Enlarged Board of Appeal (EBA), has reopened an appeal proceedings after having identified a fundamental procedural violation by the Board of Appeal (BA) handling the case. This is an exceptional decision, given that as a rule BA decisions are final, the only way to reopen appeal proceedings is to show that a fundamental procedural violation has occurred, and the standard for showing that such a violation has occurred is extremely high.

In the case in question, the BA had revoked the patent due to a finding that the patent did not disclose the invention in a manner sufficient to enable the skilled person to carry it out.

The patentee had filed a petition for review of the BA's decision, arguing that his right to be heard had been violated. The patentee's complaints were twofold. First, in its decision the BA had not given sufficient reasons why it did not accept the patentee's argument that the skilled person would have been able to carry out the invention. Second, the BA had based its decision on facts and arguments on which the parties had not been heard.

As regards the first complaint, the patentee noted that in its decision the BA had not adequately dealt with a certain argument set forth by the patentee, and had not even mentioned the evidence on which such argument was based, either in the decision's summary of facts and submissions or in the reasons therefor.

As regards the second complaint, the patentee noted that, in reaching its conclusion that the invention was not sufficiently disclosed, the BA had put forward an argument of its own which had never been discussed by the parties nor brought to the parties' attention. This meant that the BA's decision relied on an aspect on which the parties had not been heard, and which appeared for the first time in the written reasons of the BA's decision, without proper reasoning.

In its decision to reopen the appeal proceedings, the EBA first noted that the right to be heard is an important procedural right intended to ensure that no party is caught unaware by grounds and evidence used in a decision refusing his request but on which that party has not had the opportunity to comment. At the same time, the EBA emphasized that review proceedings are confined to fundamental procedural defects, and do not include a review of the correct application of substantive law (in this case, on whether the requirement of sufficient disclosure is met).

With respect to the first complaint, the EBA found that the lack of a separate discussion of certain evidence in the BA's written decision did not necessarily indicate that the BA had not taken into account the patentee's core argument in respect of which that evidence had been filed. The EBA therefore rejected the first complaint.

However, with respect to the second complaint the EBA found that either it could establish that the reasons for the BA's decision were based on facts and considerations on which the parties had had an opportunity to comment, or it could not establish that the parties' relevant submissions and arguments had been considered and fully taken into account by the BA when taking its decision. The EBA considered that any remaining doubts concerning either situation had to be solved to the affected party's benefit (in this case, the patentee). The EBA therefore accepted the second complaint and ordered the reopening of the appeal proceedings.

This decision by the EBA represents essential guidance for the EPO BAs when drafting their decisions, as well as a very important precedent for any parties that might find themselves in a similar, albeit of course exceptional, situation in the future. The decision denotes the EPO's desire to ensure that fair justice is delivered to all parties involved in proceedings before it.