VESPA / ACBSE

Verband der freiberuflichen Europäischen und Schweizer Patentanwälte

Association des conseils en brevets suisses et européens de profession libérale

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Registry of the Enlarged Board of Appeal
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Zürich, 8 April 2021

Third party statement re G 1/21

Dear Mr Michaleczek

Further to the communication of 24 March 2021 of the Enlarged Board of Appeal, please find attached hereto a statement in accordance with Article 10 of the Rules of Procedure of the Enlarged Board of Appeal by the Swiss Association of European and Swiss Patent Attorneys (VESPA).

Kind regards,

Christoph Fraefel

VESPA / ACBSE

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Third party statement

according to Art. 10 of the Rules of Procedure of the Enlarged Board of Appeal

regarding G 1/21

1 The following question has been referred to the Enlarged Board of Appeal for decision:

> 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?

2 This referral is of fundamental importance for an indefinite number of cases in proceedings before the EPO.

3 As will be explained below, the EPO's move to 'oral proceedings' by videoconference as default is based on a fundamental misconception of the *«essence of oral proceedings»*; see N 37 *et seqq.*, below. It is only based on an ill-defined *«essence of oral proceedings»* that 'oral proceedings' by videoconference could be held as *«equivalent»* to in-person oral proceedings.

4 In fact, videoconferences and in-person oral proceedings are **not** equivalent, and the inherent **differences do affect the outcome**. This has been established by a whole body of evidence-based research; see N 50 *et seqq.*, below.

5 Accordingly, VESPA considers that 'oral proceedings' by videoconference must not be imposed on unwilling parties, and the question referred to the Enlarged Board of Appeal should be answered in the negative. Exceptions might be foreseen e.g. in a state of emergency (German: *Notstand*) when otherwise access to justice would no longer be available; but such exceptions must not be taken lightly or even triggered just for convenience; they must be carefully controlled and be strictly time-limited.

1. The referring decision T 1807/15 – 3.5.02 of 12 March 2021

6 This decision is actually the first one to construe the term *«oral proceedings» lege artis*, aiming to clarify the requirements for the format of oral proceedings according to Art. 116 EPC.[1]

7 VESPA endorses the line of thinking of the referring Board, with some additional comments as follows.

1.1 Literal and systematic interpretation

8 The decision holds that a literal interpretation of *«oral proceedings»* stipulates the right of the parties to be heard at in-person oral proceedings.[2] Notably, the wording of Rule 71(2) EPC 1973 held that a summoned party **appears** (German: *«erscheint»*) before the EPO, which

[1] T 1807/15 (ECLI:EP:BA:2021:T180715.20210312), r. 5.1.2.

[2] Ibid, r. 5.7.

in the referring Board's view can only be taken to mean physical presence in an actual room, given the technology available at the time.[3]

9 This still applied at the time of the Diplomatic Conference for the EPC 2000 when videoconferencing had been available in general even in proceedings before the EPO, but the EPO explicitly required applicants to waive their right to oral proceedings in person – and the parties were still required to *«appear»* before the EPO in accordance with Rule 115(2) EPC 2000 (with identical wording as former Rule 71(2) EPC 1973).[4] The legislator apparently *«still endorsed the idea of traditional oral proceedings.»*[5]

10 Notably, the Federal Supreme Court of Switzerland had to decide on the legality of 'oral proceedings' by videoconference during the pandemic, and it deferred *inter alia* from the term *«Erscheinen»* in the Swiss Civil Procedure Code that in-person oral proceedings were mandatory (emphasis in original):[6]

> *«Dabei setzt das Gesetz die physische Anwesenheit der vorgeladenen Personen und der Gerichtsmitglieder am gleichen Ort als selbstverständlich voraus ([…]). Dies ergibt sich etwa aus den Bestimmungen, welche das* ***Erscheinen*** *an der Hauptverhandlung und daran geknüpfte Säumnisfolgen regeln ([…]).»*

11 VESPA has already referred to this decision of the Swiss Federal Supreme Court during the public consultation on Art. 15a RPBA; see the letter of 25 November 2020 (fn. 4), attached hereto for ease of reference. This reasoning of the highest court of a founding member state of the European Patent Organisation further supports the finding of the referring Board.

1.2 *Travaux préparatoires*

12 The decision holds, with reference to Art. 32 of the Vienna Convention as outlined in G 2/12,[7] that the *travaux préparatoires «serve only as supplementary sources of evidence to confirm the result of the interpretation or if no reasonable meaning can be determined by applying the general rule of interpretation.»*

13 This is not exactly what is codified in Art. 32 of the Vienna Convention.[8] It reads as follows:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.

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[3] Ibid, r. 5.4.1. Rule 71(2) EPC 1973: *«If a party […] does not appear as summoned, […].»*; <https://www.epo.org/law-practice/legal-texts/html/epc/1973/e/r71.html>
[4] Rule 115(2) EPC 2000: *«If a party […] does not appear as summoned, […].»*; <https://www.epo.org/law-practice/legal-texts/html/epc/2016/e/r115.html>
[5] Ibid, r. 5.5.
[6] 4A_180/2020, r. 3.2.
[7] G 2/12 (ECLI:EP:BA:2015:G000212.20150325), r. V.4.
[8] Vienna Convention on the Law of Treaties (1969), <https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf>. T 2320/16 puts it right (r. 1.5.8.); see fn. 17.

14 Accordingly, in addition to mere confirmation of the ordinary meaning, the *travaux préparatoires* can not only be consulted when no reasonable meaning can be determined by applying the general rule of interpretation (lit. b, second alternative), but also when the meaning is still ambiguous or obscure (lit. a).

15 Indeed, the *travaux préparatoires* of both the EPC 1973 and the EPC 2000 support the result of the literal interpretation as outlined in the referring decision.

1.3 Teleological interpretation

16 The referring decision holds (emphasis added):[9]

> *«[U]nder a teleologic assessment, videoconferences could be deemed to fulfil the purpose of providing an opportunity to present oral comments* ***as long as they gave the parties the equivalent chance to present their arguments orally as they would have at oral proceedings in the traditional form****.»*

17 The referring decision raises severe doubts as to the applicability of the teleologic approach at all in the case at hand. But if one applies the teleologic interpretation, a thorough and informed assessment of the purported 'equivalence' of videoconferencing and in-person hearings reveals that there **are** differences which are **significant**, and they actually **affect the outcome** according to evidence-based research. This must not remain unnoticed, irrespective of whether or not a teleologic interpretation is carried out or not. The differences cannot be ignored or simply defined away.[21] They are today's reality as set forth in detail below, N 50 *et seqq*.

18 The teleologic approach strikingly supports the interpretation that 'oral proceedings' are meant to be in-person.

1.4 Subsequent agreement and practice

19 The referring decision rightly holds that secondary legislation based on Rule 12c (2) EPC, i.e. Art. 15a RPBA, cannot be deemed an agreement of all contracting states, and the new EPO practice as regards the conduct of oral proceedings surely does not reflect the practice of all contracting states in terms of the interpretation of the EPC.

1.5 Dynamic interpretation

20 According to the referring Board, it can be assumed that a goal of the legislator had undoubtedly been *«high quality and efficient proceedings under the EPC.»*[10]

21 VESPA would add that there is no reason to assume that the legislator had any intention to compromise quality for the sake of efficiency. If that had been the case, other means of oral proceedings would have been brought forward already in the preparation of the EPC 1973 when one could well have conceived phone conferences or series of voice messages. No such attempt was made, not even in the preparation of the EPC 2000 when videoconferences had well been available, even at the EPO. This indicates that the legislator did not intend to compromise the quality of oral proceedings, in particular not for the sake of efficiency.

[9] Ibid, r. 5.9.1.
[10] Ibid, r. 5.11.2.

2. Further Boards of Appeal decisions re videoconferencing

22 There are only very few Boards of Appeal decisions that actually address 'oral proceedings' by videoconferences. However, two further decisions definitely need to be looked at closer.

2.1 T 1378/16 – 3.5.03 of 8 May 2020

23 'Oral proceedings' in this case were the first held by videoconference in the history of the Boards of Appeal of the EPO.[11] Contrary to the situation underlying the present referral, the sole party to the proceedings explicitly agreed to 'oral proceedings' by videoconference.[12]

24 The decision endorses the interpretation of the legal framework of the EPC that has been outlined by earlier decisions T 195/14,[13] T 932/16[14] and T 2068/14.[15] With reference to the latter, it is held (emphasis added):[16]

> *«[…] 'while a video conference does not allow such direct communication as the face-to-face meeting involved in conventional oral proceedings, it nevertheless contains the **essence of oral proceedings, namely that the board and the parties/representatives can communicate with each other simultaneously**' (see point 1.2.3 of the Reasons [of T 2068/14]).»*

25 This definition of the *«essence of oral proceedings»* is frequently referred to in recent times, but it is a fundamental misconception; see N 37 *et seqq.*, below.

26 Apart from the reference to / endorsement of this citation from prior case law, not much can be deferred from this decision – if anything at all. Neither did this decision take the long way to actually construe the concept of oral proceedings *lege artes*, nor did any of the prior decisions referred to therein.

2.2 T 2320/16 – 3.3.02 of 4 February 2021

27 This decision concerns the first case before the Boards of Appeal for which 'oral proceedings' by videoconference were held in disagreement with a party to the proceedings.[17]

28 The Board took an astonishing shortcut in defining the 'constraints' as to the form of oral proceedings.[18] It will be shown below that this definition is flawed; N 42 *et seqq*.

29 Notably, the decision holds (emphasis in original):[19]

> *«The relevant issue in the view of the board is not the identification of the differences between in-person oral proceedings and oral proceedings by videoconference per se, but concretely, the identification of a **causal relationship** between a specific*

[11] T 1378/16 (ECLI:EP:BA:2020:T137816.20200508), r. 1.1.
[12] Ibid, r. 1.5.
[13] T 0195/14 (ECLI:EP:BA:2019:T019514.20190212), r. 1.
[14] T 0932/16 (ECLI:EP:BA:2018:T093216.20181126), r. 1.1.
[15] T 2068/14 (ECLI:EP:BA:2015:T206814.20150730), r. 1.2.2.
[16] Ibid, r. 1.2.
[17] T 2320/16 (ECLI:EP:BA:2021:T232016.20210204), r. 1.4
[18] Ibid, r. 1.5.2.
[19] Ibid, r. 1.5.3, last paragraph.

difference or differences and a non-compliance with the object and purpose of oral proceedings pursuant to Article 116 EPC. The respondent in the present case did not identify any such relationship.»

30 VESPA has two issues with this. First, it was the EPO that has changed its practice in a hard move from in-person oral proceedings to videoconferencing by default, by mere definition of videoconferences as *«equivalent»*. As a matter of fairness, VESPA does not readily see the onus on the users in individual proceedings to establish that this is in conformance with the law. Users would have appreciated if the EPO had explained upfront why the differences that undisputedly exist do not matter anymore.

31 Second, and more importantly, **the differences do matter**. They do even **affect the outcome of 'oral proceedings' by videoconference**. Evidence-based research leaves no doubt about it, as will be outlined below; N 50 *et seqq.* The Board in proceedings T 2320/16 may not have been made aware of this research. But the Enlarged Board of Appeal will be in a position to make an informed decision about it.

32 The Board held that the *travaux préparatoires* regarding the EPC 1973 *«neither confirm nor contradict»* its interpretation that videoconferences would well be enshrined by the term 'oral proceedings' in Art. 116 EPC because *«it cannot be deduced from this assumption [need for travel] that oral proceedings by videoconference in its present-day form would not have been found acceptable by the legislator.»*

33 What remains unclear, though, is why the Board felt confident enough to assume that the opposite is true, i.e. that the legislator *would* have found videoconferences in its present-day form acceptable. Be that as it may, and even though the detailed reasoning of T 1378/16 appears to be more compelling, the situation is completely different for the *travaux préparatoires* regarding the EPC 2000. The decision fails to note in its analysis that even though videoconferences had already been made available by the EPO at the time, parties had to waive their right to traditional oral proceedings according to Art. 116 EPC.

34 Accordingly, it was common sense at the time of the revision of the EPC that a videoconference did not constitute oral proceedings in accordance with Art. 116 EPC. If the legislator indeed had wanted to introduce flexibility for the future to replace in-person oral proceedings by videoconferences, it would have been blatantly ignorant to not amend Art. 116 EPC or the Implementing Regulations accordingly.

35 There was no need to touch the law in this respect at the time. It had been clear that a party can waive its right to in-person oral proceedings and instead have a videoconference by its own volition. From a legislator's perspective, there was no need to even more explicitly codify oral proceedings to be in-person.

36 Notably, the Board saw *«no need […] to seek further means of interpretation.»*[20] In this Board's interpretation, this might be correct. But the issue of an ill-defined *«essence of oral proceedings»* remains (see N 42 *et seqq.*, below), which is the very basis in any assessment of the issue at hand. Had the Board attempted an informed teleologic interpretation of 'oral proceedings', it would almost inevitably have arrived at a different interpretation of the *«essence of oral proceedings»*, as outlined in the following.

[20] Ibid, r. 1.5.10.

3. The current misconception of the *«essence of oral proceedings»*

3.1 The definition endorsed by T 1378/16 – 3.5.03

i) The definition has never been reasoned

37 Neither T 1378/16 itself nor T 2068/14 (to which the former refers) gives any reasoning whatsoever as to why the *«essence of oral proceedings»* according to Art. 116 EPC is (only)

> *«[…] that the board and the parties/representatives can communicate with each other simultaneously.»*

38 Undoubtedly, this is an essential *element* of oral proceedings. It surely is a *necessary* condition for oral proceedings in accordance with Art. 116 EPC that the participants can *somehow* communicate simultaneously, but it must not be confused with / understood as a *sufficient* condition to fulfil Art. 116 EPC. The **quality** of communication matters.

39 It is not only improper to set the stage by way of a definition that has no sound scientific and/or legal basis. It also follows that any reasoning based on such a definition is unfounded.

ii) The definition is flawed

40 In-person communication and videoconferences are fundamentally different ways of communication. Even if one were to assume that in a well-functioning videoconference all participants can (somehow) *«communicate with each other simultaneously»* by way of audio and video transmission, this does in no way imply that a videoconference is equivalent to in-person oral proceedings.[21]

41 On the contrary, scientific evidence shows that the **different quality of communication actually does lead to different outcome**. Accordingly, there is more to in-person communication than just the possibility to (somehow) communicate with each other simultaneously. The definition endorsed by T 1378/16 is not only unreasoned, it is proven wrong by evidence-based research, as will be outlined in more details below; N 50 *et seqq.*

3.2 The approach taken in T 2320/16 – 3.3.02

42 This decision relies on only two criteria as so-called 'constraints' as to the form in which parties must be allowed to present their arguments in oral proceedings according to Art. 116 EPC.

i) Visibility

43 The decision holds:

> *«[A] prerequisite of oral proceedings in that the parties can see the members of the board and vice versa.»*

[21] Oral proceedings by videoconference cannot simply be defined as *«equivalent»* to oral proceedings held on the premises of the European Patent Office. See e.g. the decision of the President of the European Patent Office dated 10 November 2020 concerning the modification and extension of the pilot project for oral proceedings by videoconference before opposition divisions, <https://www.epo.org/law-practice/legal-texts/official-journal/2020/11/a121.html>, Art. 2(3).

44 It goes on to explain this (first) 'prerequisite', as follows:

> *«This distinguishes oral proceedings pursuant to Art. 116 EPC from a telephone conference in which the board members and parties are not visible to each other.»*

45 Note that this criterion reads on *any* kind of 'visibility'. It does not demand for a minimum quality of the video transmission, and it does not demand for real-time visibility. At this general level, the criterion is essentially meaningless and wholly inappropriate.

ii) Possibility for the Board to intervene

46 In addition to the first 'prerequisite', the decision further notes the following:

> *«At the same time, it must be possible for the board to interrupt or question the parties where necessary.»*

47 And, again, it goes on to explain this criterion:

> *«This distinguishes oral proceedings from an exchange by letter, fax or E-mail, where an exchange of views in real time, i.e. essentially simultaneously, is not possible.»*

48 Note that this second criterion *per se* only demands for a unilateral possibility *of the Board* – neither for an action that *a party* must be able to take, nor any kind of *simultaneous* interaction. It is only with the explanation recited above that one might assume that the Board had 'simultaneous communication' in mind, maybe similar to the earlier case-law of the Boards of Appeal discussed in chapter 3.1, above. But at the face of it, the explicit 'constraints' even fall behind the definition of the *«essence of oral proceedings»* referred to in earlier case-law of the Boards of Appeal discussed in chapter 3.1, above.

49 It will be assumed in the following that T 2320/16 did not intend to demand for even less than the definition given in T 1378/16 but rather endorses it, in view of the reference to the latter by way of a reference in brackets at the very end of r. 1.5.2.

3.3 Evidence-based research

50 Communication between humans is anything but easy to understand. Any mechanistic and overly simplistic view is bound to fail.

51 It is apparently beyond dispute that there are differences between videoconferences and in-person oral proceedings; see e.g. T 2320/16.[22] These differences must not be taken lightly, and they cannot be profoundly assessed by legally and technically trained people – neither at the EPO nor by the users who plead at oral proceedings. Psychology and communication science comes into play, and evidence-based research in these fields must not be ignored.

52 There is plenty of research on the actual consequences of the differences between videoconferences and in-person hearings.

i) Technological difficulties and the misattribution of frustration

[22] Ibid, r. 1.5.3.

53 As outlined in a recent review specifically dealing with court proceedings (emphasis added),[23]

> *«**[t]echnological glitches** happen, and research suggests that they may **subconsciously impact judges' of jurors' perception of witnesses who testify remotely**. For example, one study found that **participants misattributed technical impairments, which caused transmission delays in telephone or conferencing systems, to their conversation partners' personalities**. Participants in that study perceived their conversation partners as less friendly, less active, and less cheerful when there were transmission delays introduced in the teleconferencing system, compared to conversations without delays.[24]»*
>
> *«**[T]echnological difficulties may cause judges or jurors — improperly and subconsciously — to turn their frustration with technology against an attorney or witness who, through no fault of their own, experiences a glitch during a court proceeding.** An attorney or witness might inadvertently further irritate a frustrated judge, causing that judge to unleash a disproportionate level of anger against that unwitting attorney or witness. An even greater concern is that the judge or juror would turn their frustration against a criminal defendant, whose conviction or sentence would then be improperly and unfairly influenced. Furthermore, the risk of displaced aggression or triggered displaced aggression happening increases with lengthier proceedings — such as multi-day remote trials — where there is ample opportunity for technological issues as well as minor provocations to occur.»*

54 We may all do our best to not fall for the misattribution trap. But evidence-based research shows that it just happens, unavoidably and subconsciously.

55 There can be no doubt that the legislator in the making of Art. 116 EPC – be it the EPC 1973 or the EPC 2000 (when Art. 116 EPC remained effectively untouched) – had not taken note of or even accepted these inherent issues of videoconferences.

56 Summing up the aspect of misattribution of frustration:

Undoubtedly, the legislator had in-person hearings in mind when oral proceedings were codified in Art. 116 EPC. There is no indication whatsoever in the *travaux préparatoires* that the legislator had (explicitly or tacitly) accepted that

- **technological glitches subconsciously impact** the members' of the EPO's Examining Divisions, Opposition Divisions or Boards of Appeal **perception of remote testimony**;
- **technical impairments** which cause transmission delays be **subconsciously misattributed to** the unlucky participant's **personality**; and
- technological difficulties **subconsciously** cause member of the EPO's Examining Divisions, Opposition Divisions or Boards of Appeal to **turn** their **frustration with**

[23] Angela Chang, *Zoom Trials as the New Normal: A Cautionary Tale*, The University of Chicago Law Review Online, <https://lawreviewblog.uchicago.edu/2020/11/19/zoom-chang/>.
[24] Katrin Schoenenberg, Alexander Raake & Judith Koeppe, *Why Are You So Slow? — Misattribution of Transmission Delay to Attributes of the Conversation Partner at the Far-End*, 72 Int'l. J. Human-Computer Studies 477 (2014), <https://www.researchgate.net/publication/260609152_Why_are_you_so_slow_-_Misattribution_of_transmission_delay_to_attributes_of_the_conversation_partner_at_the_far-end> .

technology against an attorney or witness who, through no fault of their own, **experiences a glitch** during a videoconference.

ii) Zoom fatigue

57 Exhaustion from videoconferencing is a well-known phenomenon by now, as outlined in the same review (emphasis added):[23]

> *«This phenomenon, dubbed Zoom fatigue, can be explained as the combination of several factors:* ***prolonged periods of eye contact, staring at close-up faces, and intense focus; incessant self-monitoring of our own faces; efforts to make up for the lack of nonverbal cues; anxiety about potential interruptions; and frustration with technological difficulties****.[25] Although there are ways to potentially counteract these effects, the extent to which courts can adopt such mitigative practices is unclear.* ***Zoom fatigue will likely impede judges' and jurors' ability to stay focused and attorneys' ability to present the best case for their clients.****»*

58 Again, we may all try and do our best to mitigate the factors that cause Zoom fatigue. But evidence-based research shows that it just happens unavoidably. It does not make a difference whether one is allowed to request breaks or not. First, the requesting participant will again be subject to the misattribution of frustration because others are forced to have extraordinary breaks when they do not want them. Second, it appears that no breaks are actually requested due to Zoom fatigue in practice, neither by the parties nor by the EPO personnel. This does of course not mean that Zoom fatigue does not occur. Rather, people are afraid to show this sign of weakness.

59 There can be no doubt that the legislator in the making of Art. 116 EPC – be it the EPC 1973 or the EPC 2000 (when Art. 116 EPC remained effectively untouched) – had not taken note of or even accepted this inherent issue of videoconferences.

60 Summing up the aspect dubbed as Zoom fatigue:

There is no indication whatsoever in the *travaux préparatoires* that the legislator had (explicitly or tacitly) accepted that

- the **ability of members of the EPO**'s Examining Divisions, Opposition Divisions or Boards of Appeal **to stay focused**; and

- the **ability of attorneys to present the best case for their client**

be **impeded** by any second-best alternative to in-person oral proceedings.

[25] Jeremy Bailenson, *Why Zoom Meetings Can Exhaust Us: Being Gazed at By Giant Heads Can Take a Mental Toll*, Wall St. J. (Apr. 3, 2020), <https://www.wsj.com/articles/why-zoom-meetings-can-exhaust-us-11585953336>.

iii) They are not the same, and it causes different outcome

61 Most importantly, plenty of research recited in the same review has shown that the difference between videoconferences and in-person meetings actually makes a difference in substance (emphasis added):[23]

> *«Empirical research shows that "people process information differently when it is delivered via videoconference rather than when it is delivered face-to-face."*[26] ***According to cognitive theory, people using videoconferencing make judgments based more on "available heuristic cues," such as a person's general likeability, than "the quality of arguments presented by the speaker."*** *Consistent with the concept of Zoom fatigue, this is because videoconferencing requires a "higher cognitive load" than face-to-face interaction.*
>
> *There is also a solid body of research indicating that* ***"viewing a person on screen versus live" generally has a negative impact on how that person is perceived by observers, perhaps because in-person interactions are more vivid and therefore better-remembered.*** *Although there is a lack of research directly addressing the issue,* ***existing research on deception, demeanor, and social feedback suggests that videoconferencing will have a negative impact by removing important nonverbal cues.*** *[…]*
>
> *Other research suggests that* ***"even subtle changes in camera angle can affect the judgements of jurors" in the courtroom****.*[27]*»*

62 There is **no indication** whatsoever in the *travaux préparatoires* **that the legislator had** (explicitly or tacitly) accepted that any second-best alternative to in-person oral proceedings **be chosen that carries the evidence-based risk of making a difference to the outcome** of the 'oral proceedings'.

iv) Further social science research on communication by videoconference

63 A recent review of social science research on communication by videoconference concludes as follows (emphasis added):[28]

> *«****The academic scholarship on video communication in other contexts offer important insights and sound an alarm: the ability of video to achieve the same level of effective communication as in-person interactions is not possible.*** *The*

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[26] Carlos Ferran & Stephanie Watts, *Videoconferencing in the Field: A Heuristic Processing Model*, 54 Mgmt. Sci. 1565, 1565 (2008), <https://www.researchgate.net/publication/220534937_Videoconferencing_in_the_Field_A_Heuristic_Processing_Model>.

[27] Shannon Havener, *Effects of Videoconferencing on Perception in the Courtroom (A Thesis Presented in Partial Fulfillment of the Requirements for the Degree Master of Science)*, Arizona State University, May 2014, <https://perma.cc/AE9C-PCDQ>, p. 24 (with further reference to Lassiter, G. D., & Irvine, A. A. (1986), *Videotaped Confessions: The impact of camera point of view on judgments of coercion*, Journal of Applied Social Psychology, 16(3), 268-276).

[28] Lisa Bailey Vavonese, Elizabeth Ling, Rosalie Joy & Samantha Kobor, *How Video Changes the conversation: Social Science Research on Communication Over Video and Implications for the Criminal Courtroom*, NLADA, Center for Court Innovation (2020), p. 15, <https://www.courtinnovation.org/publications/video-changes-conversation-social-science-research-communication>

> *widespread use of video in criminal courts across the country was borne out of necessity during the pandemic.* ***The permanent use of video should not proceed without rigorous, in-depth research on how video may alter courtroom experiences and case outcomes. When the public health crisis subsides, we strongly recommend a return to in-person appearances for all high-stakes criminal court proceedings.****»*

64 For obvious reasons, much of the research on videoconferencing in court proceedings refers to criminal cases: Defendants have to face potentially long sentences to prison. The stakes could hardly be any higher. However, that does not mean that proceedings before the Boards of Appeal of the EPO can be taken lighter.

65 Yet another review has collected and summarized the existing scholarship on the effects of video technology in court proceedings.[29] It concludes as follows:

> *«Though video conferencing technology has been a valuable tool during the Covid-19 pandemic,* ***existing scholarship suggests reasons to be cautious about the expansion or long-term adoption of remote court proceedings. More research is necessary****, both about the potential impact of remote technology on outcomes in a diverse range of cases, as well as the advantages and disadvantages with respect to access to justice.»*

66 While the scholarship apparently unanimously suggests caution about expansion or long-term adoption of remote court proceedings, the EPO made videoconferencing mandatory even for unwilling parties. This is anything but the cautious approach that scholarship suggests. Providing the possibility of videoconferencing to those parties who are willing to do so would have been the way to go, in particular since access to justice had not been at stake in proceedings at the EPO, not even in the current pandemic times.[30]

67 The evidence-based research clearly shows that videoconferences do currently have an impact on the outcome of court proceedings. It is thus evident that videoconferences have an impact on the true *«essence of oral proceedings»* as they used to be, i.e. in-person. The current misconception of the *«essence of oral proceedings»* must be revisited, taking into account the evidence-based research on the issue.

68 Forcing videoconferences as 'oral proceedings' on unwilling parties is a major change to an essential element of the parties' right to be heard, i.e. the oral proceedings in-person as they used to be, when there is no indication at all available that the legislator had ever even thought about compromising the quality of communication of in-person interaction.

69 Restricting the right to be heard and the right to a fair trial would require legislative measures. This should not be taken lightly by way of judicial legislation, and it should not be rushed.

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[29] Alicia Bannon & Jann Adelstein, *The Impact of Video Proceedings on Fairness and Access to Justice in Court*, Brennan Center for Justice at New York University School of Law (2020), p. 12, <https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court>.

[30] T 1807/15, ibid, r. 5.11.2. Notably, the pendency e.g. in opposition cases was more than 30 months on average still around 2017, without anyone seriously complaining about access to justice being denied. Pendency had been brought down to 17 months before the Covid-19 pandemic (heading towards 15 months). This provides for more than enough buffer to carry on with only the willing parties in videoconferences, in normal and pandemic times.

70 **The question referred to the Enlarged Board of Appeal should thus be answered in the negative**.

VESPA trusts that the above is helpful in decision-making on the referral G 1/21.

Kind regards,

Christoph Fraefel
President VESPA

Annex
VESPA's letter of 25 November 2020 on Art. 15a RPBA

VESPA / ACBSE

Verband der freiberuflichen Europäischen und Schweizer Patentanwälte
Association des conseils en brevets suisses et européens de profession libérale

Derk-Jan De Groot
Chairman of the BOAC

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Zürich, 25 November 2020

User consultation on an amendment to the Rules of Procedure of the Boards of Appeal
Insertion of new Art. 15a

Dear Mr De Groot
Dear Mr Josefsson

We appreciate the opportunity to comment on the proposed insertion of new Art. 15a to the Rules of Procedure of the Boards of Appeal (RPBA).

Clearly, the current Covid-19 pandemic has been a very efficient driver of the digital transformation. Videoconferencing had to replace face-to-face meetings in any kind of businesses in recent times – which worked surprisingly well in many instances. But no videoconference comes close to the power of direct personal interaction in a face-to-face meeting. Any broadcasting technology as an intermediary between human beings impairs the *principle of direct interaction* ('Unmittelbarkeitsprinzip' in German) in oral proceedings.[1] There is more to oral proceedings than just the spoken word and a tiny, delayed and sluggish image of the person who is speaking. Remarkably, the mock oral proceedings with *Skype for Business* in opposition that is showcased on the EPO's e-learning website is a not-so-good example.[2] It actually underlines that oral proceedings by videoconference are currently no more than a second-best alternative to face-to-face oral proceedings. The obvious deficiencies of videoconferencing may occasionally be (more than) outweighed for *some* users in view of e.g. time and cost savings. But this definitely does not hold true for *all* users, in particular not in post-pandemic times.[3]

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[1] This issue was raised *inter alia* in decision 4A_180/2020 of the Swiss Supreme Court in ¶3.5, but was left undecided for the time being.
[2] See https://e-courses.epo.org/course/view.php?id=196, video embedded at the bottom of the page. There is a time shift of voice and video signals of e.g. the Chair and the proprietor's representative, and quick head moves result in a blurry video signal.
[3] In any event, the system being used for videoconferencing needs to ensure that all members of the Board and all representatives are very clearly visible at all times, to mitigate the aforementioned deficiencies to the extent possible.

The *Explanatory Remarks* hold that the EPC does not exclude oral proceedings by videoconference. But, likewise, it can also not be derived from the *Travaux Préparatoires* of the EPC that the legislator had ever thought about anything else than face-to-face oral proceedings. In Switzerland, videoconferencing *had* actually been considered in the making of the Civil Procedure Code that has been enacted in 2008 – and it has not been included in the law, for good reason.[4]

Further, it must not be overlooked that sufficient bandwidth and stability of the internet connection is not a given in all areas of the EPC contracting states. Participants from locations where the internet infrastructure is less developed are disadvantaged in oral proceedings by videoconference right from the outset.

All the above holds true for oral proceedings in general. But oral proceedings before the Boards of Appeal are special in that they are the last chance for parties to argue their cases. We feel that this last chance should not be more confined than absolutely necessary in the face of the pandemic. Oral proceedings in examination are already held by videoconference only (unless there are *«serious reasons»* for not doing so).[5] This is *not* a pilot project, but rather a regime that is apparently here to stay. In our perception, an unsuccessful applicant should at least once be given the chance to argue his case in a face-to-face hearing, i.e. before a Board of Appeal. Not only must justice be done; it should also be perceived by the parties to be done. In post-pandemic times, the parties' perception of justice being done might unnecessarily be impaired if unsuccessful parties have been deprived of the possibility to argue their case in a face-to-face hearing.

Against this background, we have the following comments on the proposed text of Article 15a RPBA:

i) Art. 15a RPBA should not be applicable in *«normal»* times

The proposed text of Art. 15a RPBA is drafted to be applicable permanently, i.e. not only during the current pandemic but also in *«normal»* times. Likewise, the *Explanatory Remarks* do not mention any limitations of applicability of Art. 15a RPBA.

We find this inappropriate. Users will appreciate the need for videoconferencing as a second-best but inevitable alternative to face-to-face oral proceedings in pandemic times when otherwise access to justice might be impaired. But the current pandemic must not trigger a once-and-for-all-and-forever move to a second-best alternative which can be chosen merely at the respective Board's discretion.

We thus suggest that applicability of Art. 15a RPBA be triggered and ended by a specific notice to be published by the EPO and the Boards of Appeal if need be, e.g. in case of a pandemic. A pandemic is declared by the WHO; in case of Covid-19, this happened on 11 March 2020.[6] Likewise, the end of a pandemic / entry into post-pandemic times is also declared by the WHO.[7] These declarations could be used as guidance. Even though local outbreaks may still occur in post-pandemic times, this could

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[4] Decision 4A_180/2020 of the Swiss Supreme Court, ¶3.3.1.
[5] Decision of the President of the EPO dated 1 April 2020; https://www.epo.org/law-practice/legal-texts/official-journal/2020/04/a39.html.
[6] WHO Director-General's opening remarks at the media briefing on COVID-19 of 11 March 2020; https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020.
[7] By way of example, see the WHO's declaration regarding H1N1 of 10 August 2010: https://www.who.int/mediacentre/news/statements/2010/h1n1_vpc_20100810/en/.

well be dealt with under the normal regime for requests for postponement of face-to-face oral proceedings.[8]

ii) The guiding principle(s) of when a videoconference is *«appropriate»* should be spelled out in Art. 15a paragraph (1) RPBA

The proposed text of Art. 15a paragraph (1) RPBA merely holds that a *«Board may decide to hold oral proceedings […] by videoconference if the Board considers it appropriate to do so, […].»* However, the guiding principles of how a Board shall exercise its discretionary power in this respect remain unclear in the Article itself; they are outlined only in the *Explanatory Remarks*, item 8. We suggest that these guiding principles be spelled out in Art. 15a paragraph (1) RPBA itself, as it is done elsewhere in the RPBA, e.g. Art. 13 paragraph (1) RPBA. We trust that this will further not only the uniform application of Art. 15a paragraph (1) by the Boards of Appeal but also the acceptance of the newly introduced discretionary power of the Boards of Appeal by the users.

iii) A party or its (only) representative shall not be forced to attend remotely based on Art. 15a paragraph (2) RPBA if others are attending in person

a) Art. 15a paragraph (2), first sentence

The proposed text of the first sentence of Art. 15a paragraph (2) RPBA is much appreciated. Someone being *allowed* to attend oral proceedings by videoconference even though the oral proceedings are scheduled as face-to-face oral proceedings provides welcomed flexibility.

We note that this aspect of Art. 15a should be applicable without limitations, i.e. also in non-pandemic times. This is in line with a resolution that has recently been adopted at the epi Council meeting of 14 November 2020:

> *«Council considers that, after the Covid-19 pandemic is over, oral proceedings should as a rule be held face-to-face but any party should be free to attend oral proceedings by videoconference, even if the other parties are attending in person.»*

b) Art. 15a paragraph (2), second sentence

According to the second sentence of Art. 15a paragraph (2) RPBA, the Chair may decide that a party, representative or accompanying person *shall* attend by videoconference.

Even though this is limited to *«exceptional cases»*, we consider this as highly problematic. Forcing a party or representative to attend by videoconference while others are free to participate in person puts the affected party in a worse position than the other parties. As a matter of fact, a remotely attending party experiences the oral proceedings through a technical filter, with all the inherent disadvantages outlined above, while the personal attendees can directly and personally interact with the members of the Board of Appeal. If such hybrid oral proceedings are held against the will of the person that is prevented from attending in person, the respective party will not appreciate this as a fair treatment.

[8] Art. 15 paragraph (2) RPBA 2020.

In item 10 of the *Explanatory Remarks*, some examples of *«exceptional cases»* are discussed. These relate to two fundamentally different situations:

- If *«one of several opponents»* is prevented from attending in person for serious reasons, we do not consider this as sufficient reason that would justify ordering only him to attend remotely. A party should not be punished for being prevented from attending, and it is beyond a party's control that proceedings involve more than one opponent. Equal treatment of the parties as well as timely conclusion of the proceedings before the Boards of Appeal could well be assured differently, i.e. by ordering *all* parties / representatives to attend remotely.

- The fact that *«one of several representatives of a party»* or *«an accompanying person»* is prevented from attending in person does not justify a postponement already under Art. 15 of the current RPBA, and undue delays can accordingly be prevented already nowadays. Under envisaged Art. 15a paragraph 2, first sentence, the affected person would be free to request participation by videoconference. There is therefore no need to *force* this person to attend remotely.

The examples in the *Explanatory Remarks* therefore cannot alleviate our concerns. The procedural right of equal treatment is deeply enshrined in the laws of most if not all member states, and it must not be weakened by way of the RPBA. The second sentence should accordingly be deleted from Art. 15a paragraph (2).

iv) Attendance of (members of) the Board of Appeal by videoconference has shaky legal basis

Attending oral proceedings by videoconference means that one is free to attend from whatever place one wishes to attend, provided there is sufficient connectivity to the internet. We consider that remote attendance of (members of) a Board of Appeal to oral proceedings from some arbitrary locations might be seen to contravene the EPC. The following has been held in G 2/09 (OJ 2020, A87, p. 29, last paragraph):

> *«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.»*

Clearly, the Boards of Appeal *«perform acts»* during oral proceedings by videoconference. Yet, it is unclear where the members of the Board that attend remotely are actually located when performing those acts. It can hardly be deemed sufficient that the *Skype for Business* or *Zoom* account that is used for videoconferencing is attributable to the EPO while the acting personnel is located at whatever other place they choose. We thus suggest that at least the Chair shall be present in person at the premises of the EPO during oral proceedings by videoconference during oral proceedings and in particular when the decision is announced. In *«normal»* times, the whole Board should convene at the premises of the EPO in any event.

v) Videoconferencing should not just be imposed on users as the *«new normal»*, but rather be appropriately incentivized

It is not only that videoconferencing is appreciated by some (not all) users, in view of time and cost savings. Likewise, the EPO has cost savings when oral proceedings are not held at its premises. We

thus suggest to consider that more voluntary use of videoconferencing be incentivized by way of e.g. structuring the appeal fee. For instance, a reduced appeal fee could be foreseen if the appellant agrees to oral proceedings by videoconference. One might also consider a regime with only a basic appeal fee falling due within the four months time limit of Art. 108 EPC, and a staggered surcharge being due based on the parties' explicit requests for oral proceedings in person or by videoconference.

We hope the above is useful in your further discussions of the proposed text of Art. 15a RPBA.

Kind regards,

Christoph Fraefel