

1 Parties/Persons

Opponent/Appellant from DE

Representative for the proceedings: Law firm H. in DE;

Representative L. (with individual power of attorney) for the oral proceedings from LU.

Patent proprietor/respondent from FR

Representative for the proceedings: Association in AT;

Employee C. with General Power of Attorney for oral proceedings and Representative K. (with individual power of attorney) for oral proceedings from CH.

Board of Appeal 3.2.03

Chairman and technical member present in hearing room in Haar; legal member outside EPO premises.

2 Calendar dates

January 2021 Communication from the Registry of the Board of Appeal : Modification de la tenue de la procédure orale (visioconférence)

January 2021 Communication from the Registrar:

- i) Vous êtes prié de vous connecter à la visioconférence 15 minutes avant le début de la procédure orale, afin que l'identité et l'habilitation des participants puissent être vérifiées.
- ii) Link for the video conference using Skype.

February 2021 Day x

Arrangement of a test connection with Zoom.

February 2021 day x+2

Date of oral proceedings (fixed by summons in May 2020).

3 Procedure

3.1 Test session in February 2021 day x

The ordered test connection with the Zoom tool (sic!) was supervised by a person external to the EPO (IT service provider). The connection setup as well as the connection with Zoom worked perfectly. The respondent's representative K. argued that such a test was pointless, as the oral proceedings are scheduled using the Skype tool.

The external person noted that this happens very often, the order of a video conference by the EPO is often for the wrong tool. So, the Zoom meeting ended and a little later a link was sent for a Skype test meeting.

The connection with Skype worked perfectly right away. However, the picture of the respondent's representative K. froze approx. 3sec after the connection was established, even with further attempts. The voice transmission was fine. The test session ended with this result.

3.2 Oral proceedings in February 2021 day x+2

The language of the proceedings in this case was French. For the oral proceedings no interpreter was requested. At 08.45, all persons scheduled for the oral proceedings tried to connect to the Skype conference.

On the machine of the respondent's representative K. all participating persons could be seen with their names. The picture and sound transmission did not work with the laptop of the employee C. of the respondent.

From employee C. there was only a black box with his name temporarily visible, a sound and/or video connection could not be established.

The respondent's representative K. contacted the employee C. via e-mail and telephone. The computer of employee C. worked completely normally, even after a restart and reconnect nothing changed with regard to the Skype meeting.

After about 40 minutes of trying/advising, a decision was taken: The employee C. of the respondent participates only by voice by dialling-in via his smartphone.

Now another problem arises: Identification of the employee C.

The respondent's representative K. made the statement: YES, it is Mr. C. I know him for over 20a and on my phone the exact number assigned to him appears and I can clearly identify his voice. The employee C. has a General Power of Attorney from the respondent since approx. 6 years and the correspondence in these proceedings (examination, opposition, appeal) was conducted by the employee C. The respondent's representative K. continues: In addition, several oral proceedings have already taken place with the current composition of the parties (representative L. from LU as representative of the appellant/opponent, employee C., representative K.). In particular the opposition proceedings in this case took place with exactly the same persons of the parties. All this was not sufficient for the Board of Appeal.

Deliberation and decision:

The employee C now had to make a video call from his Smartphone to a private address of the legal member's private Smartphone and, after establishing the connection, the employee C had to show his passport. The legal member was spelling the name of the employee C. This was then sufficient for the identification of the employee C.

Late start of the oral proceedings at 09.40.

During the oral proceedings there was only one technical problem:

The respondent's representative K. wanted to share his screen for two drawings of the patent in suit supplemented with colour contours. The "share" menu was available in Skype, but could not be activated because of a permission problem. The respondent's representative K. was unable to solve this problem. Contrary to the test run, the picture of representative K. no longer froze, this as a remark for the reproducibility of test results.

The oral proceedings were interrupted at 11.00 for "délibération". Resumption of the oral proceedings at 11.15. at 11.30 announcement of the decision: The appeal is rejected.

4 Conclusions of the respondent's representative K.

4.1 The subject matter of the proceedings

The main subject-matter of the proceedings was whether the independent patent claims constituted or claimed a "problem invention".

It was agreed between the respondent's representative K. and the respondent's employee C. during the preparation in January 2021 that the lead would be with the representative K. and that the employee C. would explain technical aspects on the subject of "inventive step" in relation to the state of the art in suit.

At the oral proceedings, the respondent's representative K. was able to present all arguments - including those relating to inventive step - on his own.

No new arguments were raised with regard to the discussion of "inventive step", so that here, too, most of the counter-argumentation could be conveyed by the respondent's representative K.

4.2 Conclusion regarding the organisation of the conduct of the oral proceedings

Two persons per party are admitted; cf:

https://www.epo.org/law-practice/case-law-appeals/communications/2020/20201019_de.html
of 19 October 2020, not published in OJ

and

https://www.epo.org/law-practice/case-law-appeals/communications/2020/20201215_de.html of 15 December 2020, not published in OJ.

Representative K. strongly suggests that the two persons of a party must be in the same room: Only in this way is a consultation/agreement between the two persons reasonably feasible, a chat room is of little use.

In the case of a technical problem, it can also be assumed that the oral proceedings cannot be held without the participation of one party. However, no communication and no decision of the Boards of Appeal can be cited for this assumption of the representative K.

If the two persons of a party cannot be present at the same place (room), each of the two persons participating must be

1. be authorised to appear at the oral proceedings; and
2. be technically and legally capable of conducting the oral proceedings alone.

Accordingly, each person must be prepared in exactly the same way. Alternatively, due to technical problems that can never be ruled out, it could be considered that only one person of a party might participate in oral proceedings.

4.3 Conclusion regarding technical preparation and technical equipment

In a test, not only the video and voice transmission must be tested, but also the other functions such as screen sharing must be tested. This test has to cover all persons/devices participating in oral proceedings.

A checklist should cover the above-mentioned points, and it should also be checked which applications of a computer should be closed in order to avoid technical disruptions during the oral proceedings. A source of interference is, for example, the use of the camera by other programmes or the presence of VoIP software, even if it is only the normal telephone connection made via the computer of a participant!

Reference is made to

https://www.epo.org/applying/online-services/proceedings/technical-guidelines_de.html .

These guidelines cannot replace a checklist for conducting a test session. This checklist must be worked through by the person conducting the test session with each participating person.

4.4 Credibility of statements made by a professional representative

A statement by a professional representative on the identity of an accompanying person - be it an employee or another professional representative - is obviously not sufficient for the EPO. This blatant manifestation of mistrust (it is implied: A professional representative makes false statements about the identity of his accompanying person (sic!)) goes very far beyond the principle "trust is good, control is better".

Such a manifestation of mistrust is unacceptable for representative K. according to the technical difficulties encountered.

The provisions on the identification of participating persons in oral proceedings in the form of "attending in person" cannot be transferred tel quel to oral proceedings in the form of a video conference.

4.5 Conclusion regarding technical support for the videoconference

The technical problems encountered during the test and during the oral proceedings are not explicable for representative K:

- Freezing of the image recording during the test, normal function during the oral proceedings,

- Inactive switching of the sharing function during the oral proceedings (this function was not tested),
- Impossibility for employee C. to establish a connection with picture and sound at the beginning of the oral proceedings.

On the side of the host (ie on the side of the EPO), a technical support must be available during the oral proceedings. This person should also be able to switch off video and sound signals as a "master" during the oral proceedings and the deliberations, eg background noise.

4.6 Conclusion regarding the Skype tool used

Microsoft has discontinued the Skype tool very early (2020) at the end of July 2021. The successor product Teams from Microsoft is already widely used.

The Skype tool is only used for oral proceedings in appeal; for oral proceedings before the first instance, the EPO uses the Zoom tool.

There is no understandable reason for imposing two different solutions on the parties to the proceedings, all the more so as Skype cannot be used for much longer.

5 Considerations for the future

The representative K. is not at all against oral proceedings as a videoconference. The current pandemic demands alternatives to conduct oral proceedings in the form of "attending in person" because of the legal certainty of third parties. Video conferencing should be used for this purpose. There can be no reasonable doubt about this.

Video conferencing can in no way constitute a new standard for oral proceedings. As soon as the epidemiological situation allows, there should be a return to oral proceedings in the classic form of "attending in person".

This need was missed at the end of 2020 to create a legal basis in the new Rule 15a of the RPBA for only exceptional situations.

The use of videoconferencing must remain reserved in case of, for example, a pandemic or a massive disturbance of public order in a Contracting State, so that a trip to Munich is impossible. Similarly, the holding of an oral proceedings as a videoconference requires the express consent of all parties to the oral proceedings, with the exception of the above examples of pandemic and disturbance of public order.

Here is the wording of Rule 15a, which is to come into force on 1 April 2021, but has been "applied" since the beginning of 2021.

Rule 15a Oral proceedings by a 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 Chair 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.

Author and publisher of this experience report

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