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**D E C I S I O N**  
**of 29 September 2004**

**Case Number:** J 0006/03 - 3.1.1

**Application Number:** 00301180.6

**Publication Number:** 1106269

**IPC:** B08B 9/093

**Language of the proceedings:** EN

**Title of invention:**  
Tank cleaning apparatus

**Applicant/Respondent:**  
Heath, Robert A.

**Third Party/Appellant:**  
Matrix Service Inc.  
Matrix Service Company

**Headword:**  
Suspension of proceedings/HEATH

**Relevant legal provisions:**  
EPC Art. 60(1)-(3), 61(1), 117(1), 131, 167(2)  
EPC R. 13(1)(2), 14, 16  
Protocol on jurisdiction and the recognition of decisions in  
respect of the right to the grant of a European patent  
Art. 2-11

**Keyword:**  
"Suspension under Rule 13 EPC (no)"

**Decisions cited:**  
G 0003/92, J 0007/96

**Catchword:**  
-



Case Number: J 0006/03 - 3.1.1

**D E C I S I O N**  
of the Legal Board of Appeal 3.1.1  
of 29 September 2004

**Third Party/Appellant:** Matrix Service Inc.  
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**Decision under appeal:** Decision of the Receiving Section of the  
European Patent Office dated 16 July 2002  
refusing the request for suspension of the  
proceedings for grant of the European patent  
application No. 00301180.6.

**Composition of the Board:**

**Chairman:** J-C. Saisset  
**Members:** M-B. Tardo-Dino  
S. M. Hoffmann

## Summary of Facts and Submissions

- I. European patent application No. 00 301 180.6 was filed with the European Patent Office on 16 February 2000 on behalf of the applicant. The following Contracting States were designated: AT, BE, CH, DE, DK, ES, FR, GB, GR, IE, IT, LI, LU, MC, NL, PT, SE, FI and CY.
- II. By fax letter dated 13 December 2001 the appellants as a third party requested suspension of the proceedings for grant of the European patent application No. 00 301 180.6 under Rule 13(1) EPC on the grounds that proceedings against the applicant (and other defendants) for the purposes of seeking a judgment that the third party is entitled to the grant to the European patent had been initiated before the Canadian Superior Court of Justice of Ontario on 13 November 2001. A copy of the complaint pending before the Canadian Court of Justice was enclosed. The complaint concerned *inter alia* the invention which is subject-matter of applicant's present European patent application, and was mainly based on (purported) reasons of violation of the appellants' rights under a Share Purchase Agreement, a Non-Competition Agreement and a Conflict of Interest Acknowledgement and on the fact that the plaintiffs (i.e. the appellants) were the former employers of the applicant who sold his company before his employment to the plaintiffs. As regards their claim to the entitlement to grant of the European patent the appellants referred particularly to claim No. 1(n) of their complaint before the Canadian Court which reads as follows:

"...an order requiring the defendants to assign to the plaintiffs any and all right, title and interest they own in the patent applications and any other related or corresponding patents or applications, and in the alleged inventions disclosed therein."

III. The Legal Division rejected the request for suspension of the examination proceedings on European patent application No. 00 301 180.6 by its decision issued on 16 July 2002. The Legal Division took the view that under Rule 13 EPC it was not sufficient that the appellants had initiated the proceedings before the Canadian Superior Court of Justice of Ontario. It was stated that the *"Protocol on Jurisdiction and the Recognition of Decisions in Respect of the Right to the Grant of the European Patent"* (hereinafter referred to as the "Protocol") as an integral part of the European Patent Convention allotted exclusive jurisdiction to decide claims to entitlement to the right to the grant of a European patent only to one of the courts of the Contracting States of the European Patent Convention determined by the system of jurisdiction set out in Articles 2 to 8 of this Protocol. Without this system of jurisdiction and recognition, an individual case concerning the entitlement to a European patent application could be referred to more than one national court leading to the issue of conflicting decisions. It would then be impossible for the EPO to recognise both decisions. The Protocol was intended to avoid such difficulties and would ascertain on the one hand that one and only one court has jurisdiction to decide on such claims and on the other hand that the recognition of such a decision is automatic and as of right. As in the present case both the applicant and the appellants

had neither domicile nor a place of business in a Contracting State, Article 6 of the Protocol on Recognition provided for exclusive jurisdiction of the German courts to the extent that no other rules on jurisdiction applied. The Legal Division admitted that it would be possible for a court of a non-Contracting State to hear the matter but the decision rendered by this court would not be automatically recognised by all Contracting States which were designated in the application. Therefore a jurisdiction of a Canadian court could not be inferred from the Protocol on Recognition. The Legal Division considered the fact that Rule 13 EPC was an implementing provision to Article 61 EPC and that this Article had to be interpreted in the light of the provisions of Article 61 EPC which explicitly referred to the Protocol on Recognition. Therefore, the Legal Division concluded that only actions initiated before a competent jurisdiction as determined under the Protocol could lead to the suspension of the proceedings according to Rule 13 EPC.

- IV. On 16 September 2002 the appellants lodged an appeal against the decision of the Legal Division having paid the appeal fee on 11 January 2002.

In the grounds of appeal, filed with the EPO on 14 November 2002 the appellants submitted that Article 60(1) EPC stipulated that "if the inventor is an employee the right to the European patent shall be determined in accordance with the law of the State in which the employee is mainly employed". The appellants invoked that their Canadian law suit was based on the fact that the subject matter of the application arose

under circumstances where the applicant was a senior management employee of the appellants and had executed a "Conflicts of Interest Acknowledgement" in which he agreed that any discovery, invention or improvement that related to the business of the appellants would be the exclusive property of the appellants. The appellants submitted that they had an office located in Sarnia, Ontario (Canada) to which the applicant was attached and that both the appellants and the applicant were located in Ontario (Canada) so that the Canadian Superior Court of Justice of Ontario was competent to decide ownership of the subject invention. The appellants concluded that on the basis of these facts the Canadian Court was competent to determine the right to the European patent. The appellants backed up their opinion by referring to the European Patents Handbook 10.2.6 (paragraph 4) in which it was stated: "Although the Protocol on Recognition sets out in detail how the national court is selected, it seems that it would also be possible for a non-European court to hear the matter, for example, as part of proceedings in a US court concerning the global rights of two US parties".

- V. By communication dated 17 February 2003 the applicant was informed on the appeal but he did not file any submission.
  
- VI. The appellants requested a stay of proceedings under Rule 13(1) EPC in respect of European Patent application No. 00 301 180.6.

## Reasons for the Decision

### *Admissibility*

1. The appeal complies with the formal requirements of Articles 106 to 108 and Rules 1(1) and 64 EPC. It is therefore admissible.
2. The reasoning of the appealed decision is essentially based on the conclusion that Rule 13 EPC has to be considered as an implementing provision to Article 61 EPC which explicitly refers to the Protocol on Recognition providing for a closed system of jurisdiction and recognition. A jurisdiction of a Canadian court could not be inferred from the Protocol.
3. The Board agrees with the first instance that suspension of the proceedings in the present case cannot be granted in view of the legal system of the EPC but the Board holds that the case needs further explanations with respect to the complicated relationship between Rule 13, Article 61 EPC and the Protocol. Particularly, the reasons of the decision of the first instance seem not to be convincing - or at least incomplete - in respect of why the reference to the Protocol under Article 61(1) EPC excludes the recognition of a decision of a third State.
4. The decision under appeal seems to be completely in line with the decision of the Enlarged Board of Appeal dated 13 June 1994 (cf. G 3/92, EPO OJ 007, 1994, point 3.3) where it was stated that "... a claim to the right to grant of a European patent can only be decided before a court of the appropriate Contracting State;

this is the only forum in which a lawful applicant may commence proceedings to establish his right".

5. However, it must be noted that decision G 3/92 was based on facts different from the present case since subject-matter of those proceedings was a decision of the UK comptroller of 6 March 1990 which was final within the meaning of Article 61(1) EPC and which had to be recognised on the basis of the Protocol whereas the present case is concerned with proceedings before the Canadian Superior Court of Justice of Ontario i.e. of a non-Contracting State. Thus, decision G 3/92 does not apply to the present case.

6. The appellants' request could only be justified under Rule 13(1) EPC which stipulates that "*If a third party provides proof to the European Patent Office that he has opened proceedings against the applicant for the purpose of seeking a judgment that he is entitled to the grant of the European patent, the European Patent Office shall stay the proceedings for grant...*".

In the Board's view, claim No. 1(n) of the plaint before the Canadian Court of Ontario can be considered to be a claim to the entitlement to the grant of a European patent according to the requirements under Rule 13(1) EPC.

7. The mere wording of Rule 13 EPC taken in isolation seems to refer to proceedings against the unlawful applicant before any national court because it does not stipulate expressly restriction to proceedings before the courts of the Contracting States.



However, "Rule 13 EPC must be considered in the context of the European Patent Convention as a whole, including, in particular, Article 61 EPC and Rule 14 EPC" (cf. J 7/96, reasons point 2.2, OJ EPO 1999, 443) and, consistently, has to be considered to be the implementing regulations in respect of principles laid down by Articles 60 and 61 EPC. Thus, Rule 13 EPC is expected to apply in the same area and under the same conditions and restrictions as the implemented Article 61(1) EPC. Therefore, the Board wishes to clarify in the following at first the legal system under Articles 60 and 61(1) EPC.

8. Article 60(1) and (2) EPC concern the substantive right to the grant of a European patent but it would be wrong to infer from these provisions which court should be competent to decide on a dispute about the entitlement to the grant of the European patent. As a rule, it is not possible to make inferences directly from applicable substantive law to the procedural law which has to be applied in a special case. Therefore, the Board does not agree with the appellants' view that if, according to Article 60(1) EPC, the right to the European patent has to be determined in accordance with the law of the State in which the employee is mainly employed, their request under Rule 13 EPC for a stay of the application proceedings could be justified by a law suit pending before the Canadian Court of Justice as a competent court.
  
9. The procedural aspects of a dispute about the entitlement to a European patent before the EPO are governed by Articles 60(3) and 61 EPC. The main procedural principle about a disputed right to a

European patent is laid down in Article 60(3) where it is stated that "*for purposes of proceedings before the European Patent Office, the applicant shall be deemed to be entitled to exercise the right to the European patent*". This legal fiction is intended to ensure that the European Patent Office is not obliged to examine the different varying national laws which may have to be applied under Article 60(1) EPC. The corollary of this main principle is that the rights of the person who is substantively entitled to the grant of a European patent shall not be taken into account by the EPO during the examining proceedings. This strict procedural principle laid down by Article 60(3) EPC is only modified by the provisions of Article 61 EPC which assigns specific and limited procedural rights before the EPO to a person entitled under Article 60(1) EPC.

10. Article 61(1) EPC constitutes a modification of the principle laid down in Article 60(3) EPC on condition that the decision fulfils one of the three requirements provided for by Article 61(1) EPC, namely "decision given in a Contracting State" (first possibility) or "decision recognised by a Contracting State" (second possibility)" or "decision has to be recognised on the basis of the Protocol on Recognition annexed to this Convention" (third possibility)".

In other words, the procedural rights of a person before the European Patent Office other than the applicant are restricted by virtue of the Convention to the requirement that decisions defined by Article 61(1) EPC are presented.

11. The three possibilities under Article 61(1) EPC mentioned before are independent of each other and according to the wording of this provision are not mutually exclusive. This legal point was not taken into consideration by the first instance when it stated that Article 61(1) EPC refers to the Protocol.
  
12. It is obvious that the first and second possibility applies to cases where a Contracting State of the European Patent Convention has made a reservation under Article 167(2)(d) EPC implicating that it is not bound by the Protocol and the jurisdiction prescribed therein (cf. Article 1(3) Protocol).

However, according to the wording of Article 61(1) EPC, the second possibility also applies in any cases where a claimant presents a decision on his entitlement from a court of a third State, like e.g. Canada, to the EPO provided that this judgment is recognised by a Contracting State. It must be stressed that such a "recognised decision" only takes effect before the EPO for those Contracting States "*in which the decision is recognised*", but not for the other Contracting States also designated in the respective application as it is provided for under the Protocol.

As a result, there might be a geographical "split-up" of the European patent application between the claimant and the applicant in cases where the claimant fails to present the recognition of the decision for all Contracting States designated in the application. This "would be a breach in the unitary character of EPO proceedings" (van Empl, *The granting of European Patents*, Leyden 1975, No. 173) which is stipulated

under Article 118 EPC as a rule with the exception "*unless otherwise provided for in this Convention*". The same problem arises under the Protocol if one Contracting State has to implement an agreement on jurisdiction or on recognition of judgments with a (third) State not bound by the Protocol (cf. Article 11(2) Protocol). In the present case, the Board holds that there is no need to decide on the question of how a geographical "split-up" would be dealt with under Article 61(1) EPC but in the view of the Board, it is obvious that the unitary character of the EPO proceedings cannot be used as an argument to restrict the application of the second possibility under Article 61(2) to cases where a decision of a court of a Contracting State which has made reservations under Article 167(2)(d) EPC is concerned.

13. Since October 1987 no reservation under Article 167(2)(d) EPC any longer applies and all Contracting States are bound by the Protocol. The decisive question in the present case is therefore whether or not the recognition of a decision issued by a court of a third State by a Contracting State according to the second possibility under Article 61(1) EPC ("...is recognised...") is legally excluded by the fact that all Contracting States designated in the application under consideration are bound by the Protocol. In other words, does the Protocol prevent the Contracting States from recognition of decisions of courts of third States in national proceedings for recognition? If it were so, the appellant would not have any legal route to present a recognised decision issued by a court of a third State under Article 61(1), second possibility EPC. Only in this case could the

Protocol establish a legal barrier for recognition of decisions of third States as it is stated in the appealed decision.

14. As no formal exclusion of recognition of decisions of third States is specifically prescribed by the Protocol, such an exclusion could only be established by the interpretation of the jurisdiction established by Articles 2 to 6 of the Protocol as exclusive international jurisdiction not only between the members of the Convention but also with respect to third States. Only in the latter case, the lack of international jurisdiction of a court of a non-European State will be an indispensable issue concerning admissibility in national court proceedings on recognition.
  
15. The Protocol is meant to mitigate the complications created with regard to the unitary character of granting procedure before the EPO by the lack of general recognition between Contracting States of decisions on entitlement. The Protocol as a part of the EPC constitutes a so called "direct" or "double" convention which provides both for rules on jurisdiction and recognition. Therefore, it is obvious that the courts of jurisdiction provided for under Article 2 to 6 Protocol are final and exclusive as regards the relationship between the Contracting States in order to assure for all Contracting States a general and automatic recognition of a decision issued by the specific competent court. On the other hand, if no such automatic recognition with effect for other Contracting States is involved, it seems not to be convincing that the unitary character of the grant proceedings under the EPC demands an exclusive international jurisdiction

of courts prescribed by the Protocol with respect to decisions of non-European States since the Protocol itself disregards this principle by its Article 11(2).

16. The question whether or not the exclusivity of the jurisdiction provided for by the Protocol extends to an obligation for the Contracting States to respect this exclusivity in national recognition proceedings concerning decisions of courts of third States, has to be considered for the purpose of each single forum prescribed by Articles 2 to 6 Protocol.
17. In the present case, the premises under Article 2 to 5 Protocol are not fulfilled so that the international jurisdiction of the court of Ontario/Canada cannot be excluded by these provisions.
18. Article 6 Protocol reads that *"In cases where neither Articles 2 to 4 nor Article 5, paragraph 1 apply, the courts of the Federal Republic of Germany shall have exclusive jurisdiction"*.

The word "exclusive" may be interpreted in such a way that international jurisdiction of courts of third States shall not be recognised by the Contracting States. However, it is known from national procedural law that such a broad interpretation depends on the connecting factor given in the provision. Article 6 Protocol only provides a residual or auxiliary jurisdiction without any reference to specific connecting factors. Therefore, Article 6 Protocol could be interpreted as a provision which provided for a further jurisdiction in cases where otherwise a general and automatic recognition for all Contracting States

could not be achieved but not as one which generally excludes the recognition of international jurisdiction of courts of third States. This opinion is emphatically supported by legal literature (see Stauder, Münchner Gemeinschaftskommentar, Anerkennungsprotokoll, Köln 1984, Article 6, note 4 and Heath, Münchner Gemeinschaftskommentar, Europäisches Patentübereinkommen, Köln 2004, Article 61, note 61).

It seems that the first instance did not consider these opinions and took the view that Article 6 of the Protocol establishes an exclusive jurisdiction which has to be defended in national recognition proceedings with respect to decisions of courts of third States.

19. Even considering the European Convention as a whole and the Historical Documents relating to it (travaux préparatoires), the Board finds no clear indication whether or not these implications were recognised when the EPC was drafted and what purpose should prevail in view of the national delegations concerned.

However with respect to the present case, this question need not be finally decided because from the Board's point of view a restrictive application of Rule 13 EPC is required for other reasons.

20. Regarding the EPC system as a whole under Articles 60 and 61 with Rules 13 to 16, the Board states that this system is governed on the one hand by the requirement to find a balance between the conflicting interests of both the applicant and the claimant and on the other hand to provide for proceedings which can be dealt with by the EPO in a reasonable period of time without

particular knowledge of national law and furthermore with a high degree of legal certainty for the parties and for the public. Proceedings referred to in Rule 13 EPC have to be interpreted in such a way that this balance of interests remains respected.

21. The Board returns to the starting point of the first instance (see above point 2 and 7) where it was correctly stated that Rule 13 EPC has to be considered an implementing provision in respect of Article 61(1) EPC.

Rule 13 EPC grants a preliminary protection for the person entitled under Article 60(1) EPC and forms part of the procedural principles defined by Articles 60(3) and 61 EPC (see above point 8 to 10). The preliminary protection under Rule 13 concerns the initiation of proceedings which result in decisions provided for under Article 61(1) EPC. If Article 61(1) presupposes decisions which take effect on the basis of an action of a court of a Contracting State then the preliminary protection must also concern such proceedings. Having in mind the above mentioned balance of interests (see above point 20) and the fact that Article 61 EPC is an exception to the legal fiction created by Article 60(3) EPC the Board sees no convincing reasons why the preliminary protection for a person entitled under Rule 13 EPC could cover proceedings other than such which lead to the final protection under Article 61(1) EPC. Consistently, Rule 13(1) EPC refers to proceedings which result directly, i.e. generally and automatically, in decisions mentioned in Article 61(1) and does not refer to proceedings initiated before a court of a non-Contracting State. Decisions of courts



of third States are not directly recognised in one or more Contracting States because even in cases where bilateral Conventions on recognition between Contracting States and third States are in force special recognition proceedings and/or registration proceedings have to be prosecuted to obtain recognition. Whereas at the opening of proceedings concerning entitlement before a court of any Contracting State it is formally fixed and foreseeable that the final decision will establish whether or not one of the three possibilities under Article 61(1) EPC are fulfilled, such a legal certainty is not given by initiating proceedings before a court of a third State because further proceedings for recognition have to be initiated before each Contracting State designated in the European patent application in order to fulfil the second possibility under Article 61(1) EPC.

22. One might argue, that *"Rules 13 and 14 apply regardless of whether the decision on proceedings instituted stands a chance of ever being recognised in any Contracting state designated in the application"* (see van Empel, supra, note 174) because the preliminary protection of the claimant has to prevail over the interests of the applicant in continuing the grant proceedings in his own right. Then, further suspension would also have to be granted during recognition proceedings before the courts of all designated States. Interpreting Rule 13 EPC in this much broader way would unsettle the above-mentioned balance (see above point 20) between the interests of the applicant, the claimant and the public. This view does not consider that in such a case the whole procedure would become highly complicated and protracted and the claimant

would have an arbitrary discretion whether or not he pursues recognition proceedings for all or only for selected designated States whereby neither the EPO nor the applicant would be able to monitor exactly whether these proceedings are initiated and handled by the claimant with due care. It must be noted that deliberate delay in proceedings would be the main reason for the EPO to set a time limit and to order a decision on continuation of the proceedings under Rule 13(3) EPC. The EPO is obliged to safeguard the interests of the public too, which can be concluded from Rule 13(1), last sentence EPC where it is prescribed that (in the interests of the public) proceedings for grant may not be stayed before the publication of the European patent application. If Rule 13(3) EPC were interpreted to embrace complaints before courts of third States the EPO would have to be well acquainted with all these different proceedings and foreign law of third States in order to make a decision under Rule 13(3) EPC although the purpose of Articles 60 and 61 EPC clearly indicates that the EPO should not be concerned with foreign law and prognoses about the possibility in which Contracting State a decision of a court of a third State will be recognised. As regards the aforementioned complications and the restricted scope of Article 61(1) EPC the Board sees no reasons to interpret the wording of Rule 13(3) EPC broader and such as if it also referred to proceedings on entitlement to the grant of a European patent before courts of third States. If the claimant really needed preliminary protection in these cases, he could choose the jurisdiction under the Protocol leading to a decision which would be automatically recognised in all designated States (Article 9(1) Protocol). The

interests of both the public and the applicant in controlling the reasonableness of the period of suspension and the legal certainty of proceedings must also prevail over the inconvenience for the claimant to be forced to sue before a foreign court and to separate the claim for entitlement to a European patent application from other claims against the applicant in case they cannot be conjointly pursued before a court under the jurisdiction of the Protocol.

23. Some of the disadvantages mentioned before could be avoided if the EPO had the power to recognise decisions of courts of third States for all designated States concerned in its own right since no lengthy and complex proceedings before numerous courts of designated States would be needed to fulfil the requirements under Article 61(1). This opinion is advocated by some legal literature (see Heath, *supra*, and Stauder, *supra*, Article 11, notes 4 to 6). There, it is admitted that this additional competence to be conferred on the EPO could violate the rights and interests of the Contracting States but this conflict could be solved if the EPO sent a letter of enquiry to the authorities of each designated State under Article 131 EPC in conjunction with Article 117(1)(a) EPC in order to obtain their opinion in respect of the recognition of the decision by the EPO. The Board holds that this suggestion is in contradiction to the provisions of the EPC and to the clear intention of the Contracting States when the EPC was drafted.

24. When the Protocol was drawn up, it was agreed that the Protocol should not interfere more than strictly necessary in the national legislation of the

Contracting States (see doc. BR/GT I/162/72, No. 8). Allotting jurisdiction on recognition of decisions of courts of third States on entitlement to the EPO would violate the sovereign rights of the Contracting States because each European patent application has legal effect in and for the Contracting States (cf. e.g. Article 66 EPC). The Protocol as well as Article 61(1) EPC obviously imply that the competence for providing for recognition proceedings on decisions of courts of third States lies exclusively with the Contracting States and not with the EPO since Article 61(1) EPC as well as Article 7 Protocol require national proceedings. If the opposite applied, the EPO could be confronted with a decision recognised by a Contracting State although the EPO itself decided before that this decision was not to be recognised. Article 10 of the Protocol only provides for a strict limited negative competence of the EPO to refuse to recognise the validity of a national decision with respect to a general recognition on grounds of violation of the right to be heard or of incompatible decisions and cannot be used to justify a positive competence for the EPO to recognise decisions of courts of third States in its own right.

25. When the Protocol was drawn up, it was also agreed that recognition of decisions does not extend to decisions of courts of a third Country recognised in a Contracting State on the basis of a bilateral agreement (see doc. BR/219 d/72, No. 65) and on a proposal from the United Kingdom Article 10(2) was added to the Protocol. If the Contracting States would have vested any jurisdiction for recognition to the EPO, with respect to decisions of courts of third States, it

would have been discussed at this stage of negotiation and the appropriate rules on recognition would have been developed but no mention on this point can be found in the Historical Documentation relating to the European Patent Convention (travaux préparatoires) and the Protocol. Thus, the Board considers that the EPO has no jurisdiction to recognise decisions of courts of third States without the basis of an appropriate constitutive provision. This conclusion cannot be disputed on the basis that the EPO has a competence to "recognise" a transfer of a European patent application under Rule 20(1) EPC after submission of documents proving the legal transfer of the rights concerned, such transfer being based on a voluntary legal action going against the entitlement of the inventor under Article 60(1) EPC as an original right.

26. As a result, the appellants' request to stay the grant proceedings cannot be allowed because the proceedings initiated before the Canadian court in Ontario do not fulfil the requirements of Rule 13 EPC. Therefore, the appeal is to be dismissed.

**Order**

**For these reasons it is decided that:**

The appeal is dismissed

The Registrar:

The Chairman:

S. Fabiani

J-C. Saisset