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**Datasheet for the decision
of 14 December 2017**

Case Number: J 0013/16 - 3.1.01

Application Number: 12785451.1

Publication Number: 2989319

IPC: F03B13/10

Language of the proceedings: EN

Title of invention:
HYDROMOTIVE MACHINE

Applicant:
Obermeyer, Henry

Headword:

Relevant legal provisions:

EPC Art. 87(1), 122, 150(2), 153(2)

EPC R. 136, 115(2)

PCT Art. 11(3), Art. 48(2), R. 26bis.3, R. 49ter.2, R. 82bis.2

PLT Art. 13(2), R. 14(4), (5) of the Regulations of the PLT

RPBA Art. 15(3), 15(5), 15(6)

Keyword:

Restoration of the right of priority under the PCT (no)
Re-establishment of rights (no)
Legitimate expectations (no)

Decisions cited:

G 0005/88, G 0003/91, G 0005/93, G 0002/97, J 0003/87,
J 0014/94

Catchword:

1. If, in the international phase, a receiving Office (RO) has restored a right of priority under the "unintentional" criterion of Rule 26*bis*.3(a)(ii) PCT, the restoration is not effective in proceedings before the EPO acting as designated Office, since the EPO applies the "due care" criterion (Rule 49*ter*.1(b) PCT). In such cases, within the period specified in Rule 49*ter*.2(b)(i) PCT, the applicant must file a (new) request for restoration of a right of priority under Rule 49*ter*.2 PCT with the EPO acting as designated Office. For the purposes of Rule 49*ter*.2 PCT, the request filed with the RO under Rule 26*bis*.3(b) PCT cannot be taken into account in the proceedings before the EPO acting as designated Office. (See points 3.2 and 3.3 of the Reasons)

2. In proceedings before the EPO, re-establishment of rights under Article 122 EPC is ruled out in respect of the period under Rule 49*ter*.2(b)(i) PCT for filing a request for restoration of a right of priority. (See points 4.3 to 4.10 of the Reasons)



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Case Number: J 0013/16 - 3.1.01

D E C I S I O N
of the Legal Board of Appeal 3.1.01
of 14 December 2017

Appellant: Obermeyer, Henry
(Applicant) 303 West County Road 74
Wellington, Colorado 80549 (US)

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Decision under appeal: **Decision of the Receiving Section of the
European Patent Office posted on 3 February 2016
concerning restoration of the right of priority.**

Composition of the Board:

Chairwoman C. Vallet
Members: T. Karamanli
I. Beckedorf

Summary of Facts and Submissions

I. International application No. PCT/US2002/046827, published as WO 2012/159125, on which the present European patent application is based, was filed on 15 July 2012 with the USPTO as receiving Office (RO). It claimed the priority of US patent application No. 61/519,041 filed on 16 May 2011.

II. Since priority was not claimed within the period of twelve months from the date of filing of the priority application, the appellant submitted a request for restoration of the right of priority with the RO in accordance with Rule 26bis.3(b) PCT. The RO granted this request in accordance with the "unintentional" criterion.

III. The Receiving Section of the European Patent Office (EPO) issued a communication (EPO Form 1201) dated 27 September 2013, notifying the applicant the following (see point 7, entitled "Restoration of priority right"):

"Where the international application contains a priority claim to an earlier application and it has been filed within two months from the expiration of the 12-month priority period, a request for restoration before the EPO as designated Office (R. 49ter.2 PCT) applies under the following circumstances:

a) ...

b) ...

c) Positive decision by the RO based on the unintentionality criterion."

The last paragraph of point 7 of said communication reads: *"For a request to be admissible, it must be filed and the requisite fee must be paid (R. 49ter.2(b) (iii) and R. 49ter.2(d) PCT) within one month from the applicable time limit under Article 22 PCT for entering the regional phase (R. 49ter.2(b) (i) PCT). The request for restoration also needs to state the reasons for the failure to file the international application within the priority period (Rule 49ter.2(b) (ii) PCT)."*

- IV. The request for entry into the European phase was filed on 13 December 2013. The time limit for requesting restoration of the right of priority laid down by Rule 49ter.2(b) (i) PCT expired on 13 January 2014 without any request being filed by the applicant.
- V. On 10 June 2014 the Receiving Section sent a communication informing the applicant that his European patent application did not enjoy priority with respect to the priority claimed in the international application because the decision by the RO to restore the right of priority based on the criterion of unintentionality had no effect before the EPO (Rule 49ter.1(b) PCT) and no valid request under Rule 49ter.2 PCT had been filed.
- VI. By reply dated 7 August 2014, the applicant submitted in respect of the requirements to be met that *"the applicant lost rights "in spite of all due care required by the circumstances having been taken, was unable to observe a time limit" such as to permit reestablishment of rights under Article 122 EPC"*. He also explained the circumstances surrounding the failure to file the international application within one year of the filing date of the earlier US application. He finally stated: *"It is submitted that*

once these circumstances are understood, it is clear that the applicant did take all responsible case [sic] and that his priority should be re-established under Article 122 EPC."

- VII. By communication dated 24 September 2014, the Receiving Section maintained its opinion and further stated that a request for re-establishment of rights could not be considered as *"a valid means of redress in reply to the Noting loss of rights pursuant to Rule 112(1) EPC dated 10 June 2014"*.
- VIII. By reply dated 29 October 2014, the applicant maintained his request for re-establishment of rights under Article 122 EPC dated 7 August 2014 and requested an appealable decision.
- IX. By a further communication dated 6 July 2015, the Receiving Section maintained the position stated in its previous communication dated 24 September 2014.
- X. By letter dated 3 September 2015, the applicant maintained his request for re-establishment of rights under Article 122 EPC. He argued that the loss of a right of priority and consequently a right to restore priority was clearly *"the loss of any other right or means of redress"* as set out in Article 122(1) EPC. He submitted:

"The relevant regulations are set out in Rule 136 which provides that claims for recognition of priority must be filed within two months of the Convention year. This was done in the present case. We did not do so in the correct manner and that led to a loss of a right. That error is one which should be remediable under Article 122."

He asked the Receiving Section to re-consider its opinion and in the alternative requested an appealable decision.

- XI. By a further communication dated 23 October 2015, the Receiving Section maintained its arguments and invited the applicant to submit comments and to inform the EPO whether the request for a decision was upheld.
- XII. The applicant submitted further arguments by his letter dated 23 December 2015. He essentially argued that the issue to be addressed was whether failure to provide the EPO with information showing that due care had been taken within the time limit set out in Rule 49ter.2(b) (i) PCT resulted in the loss of a right that could be remedied under Article 122 EPC. He took the view that it could if the circumstances set out in Article 122 EPC had been met. He again requested an appealable decision.
- XIII. In the decision under appeal, the Receiving Section held as follows:
- "(A) The international filing date does not lie within the twelve months priority period (Article 87(1) EPC) and thus the application does not enjoy the right of priority.*
- (B) The request dated 7 August 2014 to review the loss of rights and to allow the applicant to submit a new request for restoration of priority is to be refused."*
- XIV. On 31 March 2016 the appellant filed a notice of appeal against the decision of the Receiving Section. The appeal fee was paid on the same date. The statement

setting out the grounds of appeal was filed on 1 June 2016.

- XV. In its communication under Article 15(1) RPBA accompanying the summons to oral proceedings, the Board noted that, from the statement setting out the grounds of appeal, it understood the appellant to be essentially requesting that the decision under appeal be set aside and that, pursuant to Article 122 EPC, his request for re-establishment of rights in respect of the period specified in Rule 49ter.2(b)(i) PCT for requesting restoration of the right of priority be granted.

The Board also expressed its preliminary and non-binding opinion that, in the light of the applicable PCT and EPC provisions and the relevant jurisprudence, in proceedings before the EPO, re-establishment of rights under Article 122 EPC appeared to be ruled out in respect of the period under Rule 49ter.2(b)(i) PCT for filing a request for restoration of the right of priority. The Board also indicated that, even if Article 122 EPC were applicable in the present case, the request for re-establishment might not succeed on its merits. The appellant's request for re-establishment in respect of the period under Rule 49ter.2(b)(i) PCT for requesting restoration seemed not to comply inter alia with the requirements of Rule 136(1), third sentence, EPC, because the prescribed fee for re-establishment had not been paid. Moreover, the requirements of Rule 136(2), second sentence, EPC seemed not to be met because the omitted act (payment of the fee for requesting restoration of the right of priority under Rule 49ter.2 PCT) seemed not to have been completed either.

XVI. In a letter dated 13 November 2017, the appellant filed comments in reply to the Board's communication.

XVII. The Board held oral proceedings on 14 December 2017 in the absence of the duly summoned appellant as announced by letter dated 13 December 2017.

XVIII. The appellant's arguments made in writing, as far as they are relevant to this decision, may be summarised as follows:

(a) He was entitled to be heard in respect of his argument that he lost rights "in spite of all due care required by the circumstances having been taken" because he had been unable to observe a time limit. He had provided an explanation showing that due care had been taken in this matter, as set out in his letter dated 7 August 2014. The failure to provide to the EPO information that due care had been taken within the time limit set out in Rule 49ter.2(b)(i) PCT itself resulted in a loss of rights which could be remedied under Article 122 EPC. There was no provision in the EPC that indicated that the right to seek restoration of priority was something which could not be remedied under Article 122 EPC. The decision under appeal seemed to substitute PCT rules for the requirements of Article 122 EPC.

Rule 136 EPC referred to Article 87 EPC stating that to be consistent with the provisions of the Patent Law Treaty the term for requesting restoration of priority expired two months after the end of the normal Convention year. In his view, the failure to exercise the right for restoration of priority envisaged in Article 87 EPC was in

itself a right which could be remedied under Article 122 EPC if the circumstances of that provision were met.

There was also no direct conflict with the PCT in applying Article 122(5) EPC in the present case. There were differences between the situation in decision G 5/93 and the present case. In the present case a request for restoration had been filed in the international phase. The PCT provided that a decision made by the RO on the basis of an unintentional failure to meet the time limit was not binding on an office, such as the EPO, that used the "all due care" standard. That did not mean that the request which had been made was a nullity. The request should have been treated by the EPO as a defective request that could be corrected. With that being the case, Article 122 EPC properly applied. The first notice given of the defect in the request was the notice issued by the EPO on 10 June 2014. He responded to this within two months by letter dated 7 August 2014.

The intention of his appeal was not that a PCT applicant should be in a better position than an EPC applicant would be. He was not seeking to apply restitution to a missed time limit for seeking restitution. Rather, he was looking for correction of a defective submission.

- (b) The refusal to review the loss of rights was inequitable and was a breach of the rules of natural justice, i.e. a breach of the duty to act fairly insofar as he was concerned. This required that there had to be a determination of whether the applicant had taken all due care but was unable to

observe a time limit. It was unfair to penalise the applicant because of the manner of submission of the request for restoration.

Reasons for the Decision

1. The appeal complies with Articles 106 to 108 and Rule 99 EPC and is therefore admissible.

2. *Absence of the appellant at the oral proceedings*

As announced in advance, the duly summoned appellant did not attend the oral proceedings. The proceedings were however continued without the appellant in accordance with Rule 115(2) EPC.

According to Article 15(3) RPBA, a board "*shall not be obliged to delay any step in the proceedings, including its decision, by reason only of the absence at the oral proceedings of any party duly summoned who may then be treated as relying only on its written case*".

As a consequence, in spite of the absence of the appellant, the Board was in a position to decide at the conclusion of the oral proceedings relying only on the appellant's written submissions (Article 15(3), (5) and (6) RPBA).

3. *Restoration of the right of priority claimed in the present application*

3.1 An international application for which the EPO acts as designated Office and which has been accorded an international filing date is equivalent to a regular European application and is referred to as "Euro-PCT

application" (Article 11(3) PCT and Article 153(2) EPC). However, this principle of equal treatment between a regular European application and a Euro-PCT application has to be applied in the light of Article 150(2) EPC. This provision stipulates that international applications filed under the PCT may be subject to proceedings before the EPO (first sentence) and that in such proceedings, the provisions of the PCT and its Regulations are to be applied, supplemented by the provisions of the EPC (second sentence). However, in the case of conflict, the provisions of the PCT and its Regulations prevail over the provisions of the EPC (Article 150(2), third sentence EPC).

3.2 Where the international application was not filed within the period of 12 months from the date of filing of the priority application, Rule 26bis.3 PCT stipulates that the applicant may file a request for restoration of the right of priority up to two months after expiry of the priority period.

In the international phase, restoration of the right of priority can be granted under both the "due care" and "unintentional" criteria (Rule 26bis.3(a)). This means that the receiving Office (RO) ascertains whether the failure to file the international application within the priority period

- occurred in spite of due care required by the circumstances having been taken ("due care" criterion), or
- was unintentional ("unintentional" criterion).

Rule 49ter.1 PCT foresees in its paragraph (a) that, where the RO has restored a right of priority under the "due care" criterion, that restoration must, subject to

its paragraph (c), be effective in each designated State. However, in accordance with Rule 49ter.1(b) PCT), a decision by a RO to restore a right of priority based on the "unintentional" criterion is effective only in those designated States the applicable laws of which provide for restoration of the right of priority based on that criterion or on a criterion which, from the viewpoint of applicants, is more favorable than that criterion.

For the procedure before the EPO as designated Office, this means that, if the right of priority was restored by the RO under the "due care" criterion, the EPO will, in principle, recognise the decision of the RO.

If, as in the present case, the RO has restored the right of priority under the "unintentional" criterion, the restoration is not effective in proceedings before EPO acting as designated Office, since the EPO applies the "due care" criterion (which corresponds to the criterion referred to in Article 122(1) EPC).

In this case, however, Rule 49ter.2 PCT applies. The remedy of Rule 49ter.2 PCT has not been implemented in the EPC, and is directly applicable to Euro-PCT applications in proceedings before the EPO acting as designated Office. Accordingly, an applicant still has the possibility to have his right of priority restored in proceedings before the EPO. For that purpose, the applicant must file **a (new) request for restoration of the right of priority** with the EPO. Such request is only admissible under Rule 49ter.2(b) and (d) PCT if it was filed within one month from the applicable time limit under Article 22 PCT for entering the regional phase, it contains the reasons for the failure to file the international application within the priority

period, and the further requisite fee for restoration is paid.

3.3 As a consequence, in the present case the restoration of the right of priority decided by the USTPO, acting as RO, is not effective before the EPO. Contrary to the appellant's view, his request filed with the RO under Rule 26*bis*.3(b) PCT cannot be taken into account in the present proceedings for the purposes of Rule 49*ter*.2 PCT. As set out above, he should have filed a new request for restoration of the right of priority under Rule 49*ter*.2 PCT. However, it is undisputed that the applicant failed to file such request within the prescribed period, which expired on 13 January 2014. Therefore, the Board concludes that point A of the contested decision was justified.

4. *Re-establishment of rights under Article 122 EPC*

4.1 According to Article 122(1) EPC, an applicant can have his rights re-established upon request if, in spite of all due care required by the circumstances having been taken, he was unable to observe a time limit vis-à-vis the EPO if the non-observance of this time limit has the direct consequence of causing the refusal of the European patent application or of a request, or the deeming of the application to have been withdrawn, or the revocation of the European patent, or the loss of any other right or means of redress.

4.2 It follows clearly from the foregoing that the legislator has provided only for re-establishment of rights under Article 122 EPC to remedy the non-observance of a time limit vis-à-vis the EPO. Article 122 EPC is an exceptional means of remedy, not a usual means of correcting any deficiency in a request.

Therefore, the Board cannot share the appellant's view that the request which he filed with the RO in accordance with Rule 26*bis*.3(b) PCT should be treated by the EPO as a defective request that could be corrected under Article 122 EPC. Contrary to the appellant's view, the request which he filed with the RO cannot be taken into account in the present proceedings before the EPO, either for the purposes of Rule 49*ter*.2 PCT or for the purposes of Article 122 and Rule 136 EPC. Thus, the appellant's argument that he filed a request for "recognition of priority" within the two-month period under Rule 136 EPC but only in an incorrect manner and that that error was one which should be remediable under Article 122 EPC must fail.

- 4.3 However, in the present case, the appellant failed to observe the period under Rule 49*ter*.2(b) (i) PCT for filing a request for restoration of the right of priority with the EPO. Therefore, the question arises whether he can have his right of priority re-established following the failure to observe this time limit vis-à-vis the EPO.
- 4.4 Article 48(2) (a) PCT requires a Contracting State to excuse, for reasons admitted under its national law, any delay in meeting any time limit. Rule 82*bis*.2 PCT specifies that the provisions under national law referred to in Article 48(2) PCT include provisions which provide for reinstatement of rights, restoration, restitutio in integrum or further processing in spite of non-compliance with a time limit, and any other provision providing for the extension of time limits or for excusing delays in meeting time limits.

It follows from these provisions that an applicant of a Euro-PCT application who has not carried out a certain

procedural act within the time limit prescribed in the PCT can take advantage of the relevant provisions of the EPC concerning re-establishment of rights in all cases where the direct European applicant may invoke them if he fails to observe the relevant time limit. For this reason, the provisions of Article 122 EPC, which relate to the possibility of re-establishment of rights if a time limit has not been respected, should apply to Euro-PCT applicants to the same extent as they apply to "direct" European applicants (see decisions G 3/91, OJ EPO 1993, 8, point 1.4 of the Reasons, and G 5/93, OJ EPO 1994, 447, point 1.1.3 of the Reasons).

4.5 Article 122 and Rule 136 EPC provide for the possibility of re-establishment of rights in respect of the priority period under Article 87(1) EPC. A request for re-establishment in respect of the priority period must be filed within two months of expiry of that period (Rule 136(1), second sentence, EPC). If, however, an applicant of a direct European application fails to observe this two-month period for filing a request for re-establishment in respect of the priority period, re-establishment in respect of the period for requesting re-establishment is expressly ruled out (Article 122(4) and Rule 136(3) EPC).

4.6 Re-establishment of rights in respect of the priority period under Article 122 and Rule 136 EPC for a European application and restoration of the right of priority under Rule 49^{ter.2} PCT for an international application are counterparts of one another, because these provisions were introduced in the EPC and the PCT, respectively, to reflect the provisions of Article 13(2) PLT and Rule 14(4) and (5) of the Regulations of the PLT. Consequently, the period for filing a request for re-establishment under Article 122 EPC is directly

comparable to the period for filing a request for restoration of the right of priority under Rule 49ter.2 PCT, even if they differ in terms of duration. Therefore, because re-establishment of rights is excluded under Article 122(4) and Rule 136(3) EPC for direct European applicants in the event of failure to observe the period for filing a request for re-establishment in respect of the priority period under Rule 136(1), second sentence, EPC, the provision of Article 48(2)(a) PCT does not oblige the EPO to give to the Euro-PCT applicant the possibility to be re-established in respect of the period for filing a request for restoration of the right of priority under Rule 49ter.2 PCT.

- 4.7 Even if there is no such obligation under Article 48(2)(a) PCT in the present case, the EPO could still offer the possibility of re-establishment in respect of the time limit for filing a request for restoration under Rule 49ter.2 PCT for other reasons, in accordance with Article 48(2)(b) PCT. Such a reason could be that neither Article 122(4) EPC nor Rule 136(3) EPC expressly mentions the period for requesting restoration of the right of priority (see also decisions G 3/91 and G 5/93). However, the exclusion from re-establishment of rights of the period for requesting re-establishment under Article 122(4) and Rule 136(3) EPC extends to certain time limits for Euro-PCT applications, even if the latter are not explicitly mentioned there (see also decisions G 3/91, point 1.5 ff. of the Reasons, and G 5/93, point 1.1.5 ff. of the Reasons). According to these decisions of the Enlarged Board of Appeal, it is decisive that the "legal nature" of the relevant time limits under the EPC and the PCT is in essence identical. These decisions also state that certain time limits for Euro-

PCT applicants and certain time limits for direct European applicants do not differ in their legal nature, if they have an equivalent function, which make both time limits identical. The Enlarged Board of Appeal also took the view that the different duration of the time limits under the EPC and the PCT do not alter the fact that they are "perfectly comparable" or affect their equivalent legal nature.

- 4.8 In view of the above principles, the period under Rule 49ter.2(b)(i) PCT for requesting restoration of the right of priority for an international application is essentially identical to the period for requesting re-establishment of rights in respect of the priority period under Article 122 and Rule 136 EPC and that therefore these periods do not differ in their legal nature and are equivalent in function.

The reasons for this are as follows:

- (c) Both the PCT and the EPC introduced the possibility for the applicant to request restoration and re-establishment of the priority right, respectively, in the event of failure to comply with the priority period in order to reflect the provisions of Article 13(2) of the Patent Law Treaty (PLT) 2000 (which entered into force on 28 April 2005) and of Rule 14(4) and (5) of the Regulations of the PLT 2000 (which entered into force on 1 January 2006).
- (d) Further requirements for requesting re-establishment in respect of the priority period under Article 122 and Rule 136 EPC and further requirements for requesting restoration of the right of priority under Rule 49ter.2 PCT are the same, for example:

- (i) requirement to have filed the subsequent application within two months after expiry of the priority period;
- (ii) requirement of due care, as applied by the EPO;
- (iii) payment of the fee for requesting re-establishment in respect of the priority period under Rule 136 EPC and the fee for requesting restoration of the right of priority under Rule 49ter.2(b)(iii) and (d) PCT, which in both cases is the same amount (Article 2.13 RFees);
- (iv) statement of the grounds for the failure to file the subsequent application within the priority period.

4.9 The above systematic interpretation of the relevant provisions under the PCT and the EPC leads to the conclusion that the respective periods for filing a request for restoration and for re-establishment of the right of priority appear to be equivalent in function, and therefore should be treated equally. Indeed, it would be inconsistent with the well-established principle of equal treatment between direct European applicants and Euro-PCT applicants if Euro-PCT applicants could be re-established in respect of the period under Rule 49ter.2(b)(i) PCT for filing a request for restoration of the right of priority when, for direct European applicants, re-establishment is ruled out in respect of the period for requesting re-establishment under Article 122(4) and Rule 136(3) EPC.

4.10 It follows from the above that, in proceedings before the EPO, re-establishment of rights under Article 122 EPC is ruled out in respect of the period under Rule

49ter.2(b) (i) PCT for filing a request for restoration of right of priority.

5. *Protection of legitimate expectations*

5.1 The appellant submitted that the EPO's refusal to review the loss of his priority right and his request for restoration of it was inequitable and a breach of the rules of natural justice, i.e. a breach of the duty to act fairly insofar as he was concerned.

5.2 It is well established that the principle of protection of legitimate expectations applies in proceedings before the EPO (e.g. decisions of the Enlarged Board of Appeal G 5/88, OJ EPO 1991, 137, point 3.2 of the Reasons; G 2/97, OJ EPO 1999, 123). Users of the European patent system are to be protected in their legitimate expectations and are not to be disadvantaged by conduct of the EPO which was misleading or erroneous (J 3/87, OJ EPO 1989, 3; J 14/94, OJ EPO 1995, 824). This principle also requires the EPO to warn the applicant of any loss of rights if such warning can be expected in good faith, provided that the deficiency can be easily identified by the EPO. It further requires that communications addressed to applicants must be clear and unambiguous, i.e. drafted in such a way as to rule out misunderstandings on the part of a reasonable addressee.

According to decision G 2/97 of the Enlarged Board of Appeal, it is also incumbent on the users of the European patent system who are parties to proceedings before the EPO to act in good faith. They are responsible for taking all necessary steps to avoid a loss of rights. There is also no justification for the suggestion that the principle of good faith imposes on

the EPO an obligation to warn a party of deficiencies falling under the party's own responsibility.

5.3 In the present case, the EPO in its capacity as designated Office had to apply the relevant PCT and EPC provisions as set out above. In the Board's view, there was nothing in the conduct of the EPO which could reasonably have given rise to a belief on the appellant's part that he could be given more time for filing his request for restoration of the right of priority under Rule 49*ter*.2 PCT or that his request filed with the RO under Rule 26*bis*.3(b) PCT could be taken into account in the present proceedings before the EPO and be remediable under Article 122 EPC. Nor was there any indication that the EPO would determine whether the appellant had taken all due care but was unable to observe the relevant time limit for claiming priority within the period of twelve months from the date of filing of the priority application. The Board also fails to see that any of the several communications from the Receiving Section of the EPO (see points III, V, VII, IX and XI above) contained information which could have misled the appellant into failing to act and thereby losing his right of priority. Indeed, in the light of the above, the information which the appellant received from the EPO was not erroneous; it was perfectly correct.

Furthermore, the appellant's responsibility for fulfilling the conditions for a request for restoration of the right of priority under Rule 49*ter*.2 PCT cannot be transferred to the EPO acting as designated Office. It follows from the above that the appellant, who had received all the necessary information for a request for restoration of the right of priority by the communication from the Receiving Section (EPO Form

1201) dated 27 September 2013 (see point III above), should have been aware that he had to file a further request for restoration of the right of priority no later than 13 January 2014, i.e. one month after the application's entry into the regional phase. It was the appellant's own responsibility to take all the necessary steps to avoid a loss of rights regarding his claimed priority. It is established jurisprudence of the Boards of Appeal that the applicant as a party to proceedings before the EPO, and, even more so, his professional representative are expected to know the relevant provisions of the PCT and the EPC, even if these provisions are intricate.

Finally, there is nothing on file which implies that the EPO should have warned the appellant of an impending loss of his right of priority following non-compliance with the requirements of Rule 49ter.2 PCT.

5.4 Accordingly, the Board sees nothing in the conduct of the EPO which could be considered "*as a breach of duty to act fairly insofar as the appellant was concerned*", as submitted by the appellant. Hence, there can be no legitimate expectation on the part of the appellant that his request for restoration of his right of priority, which he filed under Rule 26bis.3(b) PCT in the international phase, would be taken into account in the proceedings before the EPO or that his right of priority would be restored by the EPO.

6. Conclusion on the allowability of the appeal

In view of the above, the appellant's request is unallowable and, consequently, his appeal must be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairwoman:



C. Eickhoff

C. Vallet

Decision electronically authenticated