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**Datasheet for the decision
of 27 September 2017**

Case Number: J 0003/17 - 3.1.01

Application Number: 14843350.1

Publication Number: 3035612

IPC: H04L12/741

Language of the proceedings: EN

Title of invention:

METHOD FOR MAKING FLOW TABLE MULTIPLE LEVELS, AND MULTI-LEVEL
FLOW TABLE PROCESSING METHOD AND DEVICE

Applicant:

ZTE Corporation

Headword:

Relevant legal provisions:

Rule 49ter.2 PCT
EPC Art. 122(1)

Keyword:

International application - restoration of right of priority
by designated Office

Decisions cited:

Catchword:



Beschwerdekammern
Boards of Appeal
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Case Number: J 0003/17 - 3.1.01

D E C I S I O N
of the Legal Board of Appeal 3.1.01
of 27 September 2017

Appellant: ZTE Corporation
(Applicant) ZTE Plaza, Keji Road South,
Hi-Tech Industrial Park, Nanshan District,
Shenzhen City,
Guangdong Province 518057 (CN)

Representative: CMS Cameron McKenna Nabarro
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Decision under appeal: **Decision of the Receiving Section of the
European Patent Office posted on
12 December 2016 refusing the request for
restoration of the right of priority claimed in
respect of European patent application
14843350.1**

Composition of the Board:

Chairwoman C. Vallet
Members: P. de Heij
S. Fernández de Córdoba

Summary of Facts and Submissions

- I. On 26 September 2014, the appellant (applicant) filed an international patent application with the Chinese patent office as receiving Office. The application claimed the priority of a Chinese patent application filed on 16 September 2013. Priority was therefore not claimed within the priority period.
- II. The appellant submitted a request for restoration of the right to priority with the receiving Office in accordance with Rule 26bis.3(b) PCT. The same request was addressed to the European Patent Office as designated Office on 15 March 2016. The request was refused by decision of the Receiving Section of 12 December 2016. The appellant filed an appeal from this decision on 10 February 2017. The appeal fee was paid on the same day.
- III. In the grounds for restoration the appellant explained as follows the events that had led to missing the deadline for filing the international application within the priority year:

The appellant used a Chinese agent, N.N., for filing PCT applications. According to instructions from the appellant, N.N. had been asked to draft the international application and file it on 22 August 2014, the priority deadline being 16 September 2014. These dates had been entered into N.N.'s electronic and paper time-limit monitoring system.

N.N. had sent a draft of the application to the appellant within these time limits. However, the member of the appellant's staff responsible had

been on a business trip and unable to look into the matter. She had instructed N.N. to postpone submission of the application until 19 September 2014. N.N. staff had recorded the new date for submission of the application in the electronic and paper monitoring system. When picking up the case to send a reminder, N.N. had discovered that the priority-right deadline had already passed.

- IV. Although restoration of the right to priority had been granted by the Chinese PCT receiving Office under the "unintentional" criterion, the EPO Receiving Section refused the request under the "due care" criterion. In essence the Receiving Section gave two reasons for its decision: 1) The appellant had not exercised all due care (in the meaning of Article 122 EPC) because its employee had given the instruction to delay submitting the application until 19 September 2014 without checking the priority deadline; 2) N.N. had not checked the new date for submission of the application against the priority deadline.
- V. The appellant however argued that all due care had been taken. The main arguments in the grounds of appeal, submitted on 11 April 2017, can be summarised as follows:

The appellant had selected a sufficiently competent representative.

The employee's error was due to the fact that the necessary information had not been available to her during her business trip. She had assumed that N.N. would warn her if she were making a mistake. N.N. was fully responsible for the prosecution of the

PCT application. The error was therefore the result of exceptional circumstances.

Specially assigned N.N. staff members monitored the time limits for all cases with the help of the electronic and paper monitoring system. This monitoring system had normally worked satisfactorily. In accordance with the employee's instructions, the new filing date, 19 September 2014, had been entered in both systems. Because of a bug that had up to then never been discovered, the electronic system had given a reminder of the filing date only, not the priority deadline date. This was to be regarded as an isolated mistake in a normally satisfactory system that had operated effectively for many years.

- VI. The appellant requested that the decision under appeal be set aside and that the priority right be restored for the application at issue in the present case.
- VII. The board summoned the appellant to oral proceedings to be held on 27 September 2017. In the accompanying communication the board expressed the preliminary view that the appeal should be dismissed.
- VIII. In a letter dated 29 August 2017 the appellant responded to the summons to oral proceedings. The appellant underlined once more its view that both its employee and its agent had taken all due care as required by Article 122(1) EPC to meet the time limit for filing the international application within the priority year.
- IX. In a letter dated 26 September 2017 the appellant informed the board that it would not be attending the

oral proceedings and requested that a decision be issued in its absence.

Reasons for the Decision

1. The appeal complies with Articles 106 to 108 and Rule 99 EPC and is therefore admissible.
2. The admissibility of the request for restoration has to be considered by applying the PCT and its Regulations, supplemented by the provisions of the EPC (Article 150(2) EPC). Applying Rule 49ter.2(b) PCT the board concludes that the request is in accordance with the requirements of this article and thus admissible as well.
3. As the appellant was absent from the oral proceedings, it is treated as relying on its written case (Rule 115(2) EPC and Article 15(3) RPBA).
4. In its communication the board expressed the following position:

In essence the Receiving Section gave two reasons for its decision. The appellant had not exercised all due care (in the meaning of Article 122 EPC) because its employee had given the instruction to delay submitting the application until 19 September 2014 without checking the deadline for claiming priority. In addition, the appellant's representative (N.N.) had not checked the new date for submission of the application against the priority deadline.

The board tends to agree with the Receiving Section. The board cannot see any exceptional circumstances that account for the mistaken instruction to N.N.. If information about the priority deadline had not been available to the employee, due care would have required not giving the instruction without inquiring whether 19 September would meet the priority deadline. The employee could not just rely on N.N. to correct any mistakes. She should have taken care to avoid the mistake. For this reason alone, the appeal seems to fail.

Clearly N.N. staff did not check the priority deadline before entering the new date for submission of the application in the monitoring system. They should have done so and the staff members involved should have been instructed accordingly. Furthermore the board is currently not inclined to accept the view that the case brought to light an isolated mistake in an otherwise satisfactory monitoring system. The system did not check whether the priority deadline might be missed. In the board's preliminary view, this is a major flaw which means the monitoring system cannot be considered to be in general satisfactory. The board is therefore inclined to dismiss the appeal.

5. In its response to the communication of 29 August 2017 the appellant did not submit any arguments to support its view that had not already been brought forward in the statement of grounds and thus considered by the board. The board therefore sees no reason to deviate from its preliminary considerations and conclusion as expressed in the communication. The appeal is to 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