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**Datasheet for the decision
of 3 September 2021**

Case Number: J 0007/20 - 3.1.01

Application Number: 09701716.4

Publication Number: 2140072

IPC: E03F5/04

Language of the proceedings: EN

Title of invention:
DRAIN WITH ADJUSTING FRAME

Applicant:
Easy Sanitary Solutions B.V.

Opponents:
Group Nivelles NV
Kessel AG

Headword:

Relevant legal provisions:

EPC Art. 21(1), 106(1), 112a, 113(1), 121, 122, 125, 134a(1),
134(5)
EPC R. 115(2), 134(5), 142, 154(2) (a)
RPEBA Art. 14(4)
RPBA 2020 Art. 15(3)
RPBA 2007 Art. 15(3)
Vienna Convention on the Law of Treaties (1969) Art. 31(1),
Art. 32
Convention for the Protection of Human Rights and Fundamental
Freedoms (1950) Art. 6(1)

Keyword:

Legal incapacity of the representative (no)
Interruption of review proceedings under Article 112a EPC (no)
Opponents status as parties to appeal proceedings (yes)
Fresh case on appeal (no)
Legal Board of Appeal competent to review decisions by
Enlarged Board of Appeal (no)
Referral to Enlarged Board of Appeal required (no)

Decisions cited:

G 0005/83, G 0004/92, G 0001/97, J 0005/81, J 0020/85,
J 0900/85, J 0901/86, J 0007/99, J 0007/16, J 0012/19,
T 0501/92, T 0854/12, T 1010/13, T 2136/16, T 1389/18

Catchword:

The list of events, i.e. grounds, prompting interruption of
proceedings under Rule 142(1)(c) EPC is exhaustive.

External, practical and one-off kind of events (inter alia
heavy snow, cancelled flights and failed communication) do not
constitute "legal incapacity of the representative" under Rule
142(1)(c) EPC.



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Case Number: J 0007/20 - 3.1.01

D E C I S I O N
of the Legal Board of Appeal 3.1.01
of 3 September 2021

Appellant: Easy Sanitary Solutions B.V.
(Patent proprietor) Braakstraat 17-19
7581 EZ Losser (NL)

Representative: Clarkson, Paul Magnus
P.O.Box 29720
2502 LS Den Haag (NL)

Respondent: Group Nivelles NV
(Opponent 1) Ambachtsweg 14
3890 Gingelom (BE)

Representative: Griebeling, Onno
Octrooibureau Griebeling BV
Sportweg 10
5037 AC Tilburg (NL)

Respondent: Kessel AG
(Opponent 2) Bahnhofstraße 31
85101 Lenting (DE)

Representative: Grünecker Patent- und Rechtsanwälte
PartG mbB
Leopoldstraße 4
80802 München (DE)

Decision under appeal: **Decision of the Legal Division of
20 February 2020 to reject the patent
proprietor's request for interruption of the
proceedings before the Enlarged Board of Appeal**

Composition of the Board:

Chair W. Sekretaruk
Members: C. Almberg
 B. Müller

Summary of Facts and Submissions

Framework of the appeal proceedings

- I. The appeal is against the decision of the Legal Division of 20 February 2020 to reject the request of Easy Sanitary Solutions B.V. that the proceedings which the Enlarged Board of Appeal ("the Enlarged Board") concluded on 4 February 2019 by rejecting the petition be deemed interrupted.
- II. Appellant Easy Sanitary Solutions B.V. ("the proprietor") requests that the appealed decision be set aside and that the proceedings before the Enlarged Board be deemed interrupted as of 3 February 2019. If this request is not allowed, the proprietor requests referral of the three questions filed on 25 May 2021 to the Enlarged Board. Furthermore, the proprietor seeks clarification on whether the opponents are parties to these appeal proceedings.
- III. Respondent Group Nivelles NV ("opponent 1") requests that the appeal be dismissed, while seeking confirmation that practical circumstances preventing a party and/or its representative from meeting a time limit or arriving at oral proceedings on time, travel problems in particular, do not qualify as "legal incapacity" within the meaning of Rule 142 EPC. Furthermore, opponent 1 requests that the proprietor's request for referral to the Enlarged Board of the three questions filed on 25 May 2021 be rejected.
- IV. Respondent Kessel AG ("opponent 2") requests that the appealed decision be set aside and that the proprietor's request that the proceedings before the

Enlarged Board be deemed interrupted as of 3 February 2019 be allowed.

The relevant procedural background

- V. The proprietor was granted a European patent subsequently opposed by opponents 1 and 2. The Opposition Division revoked the patent.

- VI. The proprietor appealed the revocation decision, and requested maintenance of the patent. Opponents 1 and 2 requested dismissal of the appeal. The proprietor replaced its authorisation to an association of representatives, NLO, with that to an individual of the association, Mr. Clarkson ("the representative"). Technical Board of Appeal 3.2.03 ("the Technical Board") dismissed the appeal.

- VII. The proprietor petitioned for review of the dismissal decision and requested remittal of the case to the Technical Board with the instruction to allow the case to be heard before the Opposition Division. The proprietor argued its right to be heard had been violated in oral proceedings before the Technical Board.

- VIII. The Enlarged Board summoned the proprietor to oral proceedings. According to the accompanying preliminary views, the petition had to be rejected as clearly inadmissible and clearly unallowable.

- IX. In response, the proprietor argued its petition case further and announced the representative's intention to attend the hearing. Opponent 2 filed observations.

- X. Oral proceedings were scheduled to start at 10:30 hours on 4 February 2019. The representative did not appear. In the course of the day, beginning at 10:22 hours, employees of his association informed the Enlarged Board, by telefax and telephone, that he would not attend due to cancelled flights; there was however no request for postponement of the hearing.
- XI. The Chair opened the oral proceedings at 12:30 hours and closed them at 12:48 hours, after having announced the unanimous rejection of the petition as clearly inadmissible (for want of a Rule 106 EPC objection).
- XII. Later that day, the representative informed the Enlarged Board by telephone that he had tried to contact Mr. Cremona by telephone the whole day, and had also sent him an email, unaware of Mr. Cremona's recent retirement from the duty as the Enlarged Board's registrar. The representative's office then forwarded to the Enlarged Board the email, originally sent at 7:53 hours, which indicated his non-attendance at oral proceedings due to cancelled flights, and his wish to have the hearing rescheduled.
- XIII. In response to the minutes of the oral proceedings, the proprietor detailed a series of unfortunate events labelled as *force majeure - inter alia* heavy snow, cancelled flights and the sudden retirement of the registrar - that prevented the representative from attending the hearing and effectively communicating with the Enlarged Board. The proprietor considered the inability of the representative to constitute legal incapacity of the proprietor under Rule 142(1)(a) EPC. The proprietor requested that the Enlarged Board reconsider the petition, deem any decision as not having been taken and reschedule a hearing.

- XIV. By communication, the registrar of the Enlarged Board explained that the email of 7:53 hours sent to the retired Mr. Cremona's personal mailbox could not be brought to the attention of the Enlarged Board and that, also, this was not an official means of communication and thus lacked legal force. Furthermore, the requests could not be acceded to since the matter of the Enlarged Board's decision became *res judicata* as soon as the decision was announced.
- XV. In response, the proprietor argued its case further and requested reconsideration. Opponent 1 submitted its view on the concept of legal incapacity in particular.
- XVI. After the Enlarged Board had dispatched its decision rejecting the petition for review in writing, the proprietor directed itself to the Legal Division and "request[ed] interruption of the proceedings" with effect from the day prior to the hearing before the Enlarged Board, while referring to its last two submissions to the Enlarged Board (mentioned in points XIII and XV above).
- XVII. Following the exchange of two communications from the Legal Division and two more submissions by the proprietor, the Legal Division issued the appealed decision.
- XVIII. On the basis of the facts put forward in those five submissions (dated 25 February, 6 May, 10 July, 6 August and 5 November 2019), the proprietor argued, in the statement of grounds of appeal, mainly as follows.

In the absence in the EPC of a definition of "legal incapacity", the general principles applicable in the individual member states must be taken into account to

fill the void (Article 125 EPC). As shown in the two memoranda, the provisions in Dutch and German law corresponding to Rule 142(1)(c) EPC are interpreted narrowly. However, they are explicitly balanced against other provisions relating to, for instance, postponement of a hearing and reinstatement after a decision by default. Rule 142(1)(c) should thus be interpreted broadly.

It is wrong to presume that incapacity must be persistent. Significant duration in view of the proceedings under consideration would be a more appropriate criterion.

In the current case, the representative's incapacity lies primarily with the sudden retirement of the one person designated within the Boards of Appeal to communicate with him, the Enlarged Board's registrar. The Legal Division should have considered the whole situation by which the proprietor's representation was effectively impeded by a lack of effective communication.

Any situation that prevents a party from presenting its case before the Enlarged Board, the review by which is the last legal remedy available, represents an obstruction of the legal process before a body which itself has recognised the binding nature of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (ECHR). The impediment of the representative *de facto* led to a dead-end in terms of legal remedies. Thus, the proprietor was deprived of its last right to be heard. This amounts to legal incapacity.

XIX. Opponent 1 responded chiefly as follows.

As opposed to the original case on legal incapacity of the proprietor, the appeal concerns legal incapacity of the representative, and should be dismissed for this reason alone.

At any rate, legal incapacity relates not to external circumstances forming a hindrance for the representative, but to the representative himself or herself as a person. The proprietor is effectively arguing that a missed appointment is sufficient proof that the representative was incapacitated. If so, every representative who is late for oral proceedings could request that these be held again.

Since neither Rule 142 EPC nor any other remedy under the EPC applies to the current case, the travel problems were at the proprietor's risk.

XX. In its preliminary opinion, the Legal Board of Appeal ("the Legal Board") tended not to view the appeal case as new. It interpreted "legal incapacity" as depending on the mental state of the representative, and found the facts of the current case to be completely different in nature.

XXI. In the oral proceedings of 11 May 2021, the proprietor announced that, alternatively to its interruption request, it would file a request for referral of a question to the Enlarged Board. In the course of the hearing, the parties were all discussing Rule 142(1)(c) EPC. There was disagreement about its applicability, more precisely, whether it could and should be interpreted broadly or by analogy to the facts of the case. In sum, the parties pleaded as follows.

XXII. According to the proprietor, Rule 142(1)(c) EPC applies to the facts of the case when broadly interpreted. At any rate, the events listed in it, death or legal incapacity of the representative, are not exhaustive and were never intended to be. Unlike in G 1/97, it lies within the scope of the EPC to remedy this manifest injustice. Rule 142(1)(c) was consistently interpreted narrowly in the case law only because there was no need to interpret it otherwise.

If, alternatively, there is a *lacuna* in the EPC, Article 125 EPC should be applied to fill it, taking into account related Dutch and German legal principles.

In any case, Rule 142(1)(c) EPC should be applied by analogy. It is quite telling, as stated in T 1807/05 in the context of oral proceedings held by videoconference during the pandemic, that standard board practice is to adjourn the proceedings if no satisfactory Internet connection can be established.

The EPO must act in good faith and has a duty to warn parties of any impending loss of rights, as prescribed in J 13/90. In the current case, it was reasonable to expect the Enlarged Board's registrar to ask about a request for postponement of oral proceedings when in contact with employees of the representative's association.

XXIII. Opponent 1 asserted that only two events could be the basis for interruption under Rule 142(1)(c) EPC, death or legal incapacity of the representative. The legislature had left the interpretation to be carved out at the European level. This had indeed taken place; legal incapacity relates to mental state, i.e. something serious, more than being ill, wholly

unrelated to external circumstances like those in the current case. This definition of "legal incapacity" relating to mental state is acceptable and workable. In the view of opponent 1, there is no need to go further.

XXIV. While recalling its own activities to have this patent revoked, opponent 2 argued as follows.

The matter had become purely procedural, relating to events that could happen again and again, potentially affecting its own representatives. There was thus a concern about the future.

Because of the snowfall in the run-up to the hearing, more than 240 flights to and from Munich were cancelled. It was even difficult to get home from work by car. Hence, it was surprising how the Enlarged Board acted.

When the applicant or proprietor dies or is legally incapacitated, the representative must apply for an interruption (Rule 142(1)(a) EPC). If the sufferer is instead the representative, there is no application requirement (Rule 142(1)(c) EPC). This illustrates that everything relies on the representative.

Despite the intention with Rule 142(1)(c) EPC to provide an interruption when somebody can not act, the inability seen in the current case is not mentioned. This gap in the EPC should be filled through either a broad or an analogous interpretation of that rule.

XXV. At the end of the discussion, the Chairman announced that the proceedings would be continued in writing and

that the proprietor was allowed two weeks from the date of those oral proceedings to file the question it envisaged for referral to the Enlarged Board.

XXVI. In the written proceedings following the oral proceedings of 11 May 2021, the proprietor filed questions for referral to the Enlarged Board in case the interruption request was not allowed. According to the proprietor, there is a point of law of fundamental importance for which a referral would appear justified and necessary. In particular, the precise scope of Rule 142 EPC and the ability of the EPC to deal with aspects of *force majeure* not strictly related to the observation of time limits appear to be unclear. The three questions filed read as follows.

Q1: Is the meaning of the terms "death or legal incapacity" in Rule 142(1)(c) EPC restricted to the situations in which the representative concerned is actually declared dead or in an unfit mental state of persistent nature or are the terms to be interpreted to include other e.g. analogous situations in which the representative concerned is unable to do the work required of such representative at the material time due to *force majeure*, whereby the legal representation of a party is impeded?

Adjacent to the first question, the proprietor pleaded, in sum, along these lines: The EPC gives no clear definition of "death or legal incapacity". It is questionable whether the "reasonable basis" referred to in J 900/85 for developing the EPO's own standards is the only basis for interpretation of this term. Recourse to supplementary means of interpretation under Article 32 of the Vienna Convention on the Law of Treaties of 23 May 1969 (VCLT), in addition to the

travaux préparatoires of the EPC, appear appropriate since the term is both ambiguous and obscure, and a narrow interpretation could lead to manifestly absurd or unreasonable results. Interpretation by analogy appears appropriate.

Q2: Are the grounds for interruption of proceedings that are listed in Rule 142(1) EPC intended to be exhaustive? If not exhaustive, will proceedings before the European Patent Office be interrupted in a situation where, through no fault of a party, that party's legal representation is impeded due to *force majeure*?

In relation to the second question, the proprietor argued mainly that the wording of Rule 142(1) EPC is imperative but not in itself exhaustive and that the *travaux préparatoires* state clearly that there may be numerous reasons for interruption.

Q3: If the terms "death or legal incapacity" are interpreted restrictively and the grounds for interruption of proceedings listed in Rule 142(1)(c) EPC are exhaustive, taking into account amongst others the principle of due process as protected in Article 6 of the European Convention on Human Rights, what remedies do exist under the EPC in a situation where, through no fault of a party, that party's legal representation is impeded due to *force majeure* and a loss of rights ensues without a time limit vis-à-vis the European Patent Office having been missed?

Regarding the third question, the proprietor pleaded in particular as follows. The EPC provides for numerous remedies where, in spite of all due care taken, an applicant or a proprietor is unable to observe a time limit (Article 122 and Rule 134(5)). This is evidence

of an intended robust system with adequate safeguards meeting the obligations of the member states. The current case is, however, evidence that fundamental rights such as the right to a fair trial can be lost without a time limit having been missed.

Given the fundamental importance and the judicial nature of the review procedure under Article 112a EPC and Article 32 of the Agreement on Trade-Related Aspects of Intellectual Property Rights of 15 April 1994, any absence of suitable provisions to deal with circumstances of *force majeure* appears to be in conflict with Article 6(1) ECHR.

In the unlikely event that no remedy is provided under Rule 142 EPC, it remains to be determined whether any other provision applies such as Article 125 EPC. If no such provision exists elsewhere under the EPC there may be a G 1/97-situation, i.e. a *lacuna* and a need for an appeal to the legislature. Consideration and affirmation by the Enlarged Board of such a shortcoming would then appear appropriate.

XXVII. In response, opponent 1 pleaded essentially as follows.

The EPO provides no remedy for missing oral proceedings due to unforeseen events. The legislature has chosen a procedural system with some repair mechanisms, not solutions to each and every problem. These mechanisms, e.g. further processing and re-establishment (Articles 121 and 122 EPC), relate to time limits (and failure to observe them), and they are subject to fee payment and other conditions. Furthermore, and in contrast, not attending oral proceedings has no direct legal consequences, which are instead brought about by the EPO's decision, taken after the merits of the case have

been discussed with the parties in written proceedings. Oral proceedings are in fact subject to a *lex specialis*: if a party duly summoned does not appear, oral proceedings may continue in its absence (Rule 115(2) EPC and Article 14(4) Rules of Procedure of the Enlarged Board of Appeal, RPEBA). Continuation of oral proceedings in the absence of a duly summoned party is not in conflict with Article 113(1) EPC or Article 6(1) ECHR.

Rule 142(1)(c) EPC is not a suitable legal basis here and leaves no room for the interpretation sought by the proprietor. It provides for the very drastic measure of bringing the entire proceedings to a halt. Not simply because a representative misses a time limit but only because the person concerned is no longer capable of representing parties. This is confirmed by Rule 142(3) EPC, under which the proceedings shall be resumed when the EPO has been informed of the appointment of a new representative. On the representative's own account of the events of 4 February 2019, he repeatedly attempted to contact the EPO by telephone. Apparently, he was in a suitably fit state to represent the proprietor at that time. If being hindered by unforeseen events triggered the mechanism of Rule 142(1)(c), absurd scenarios could follow, e.g. when a representative is caught in a traffic jam for an hour.

No decision by the Enlarged Board is required since the Legal Board is in a clear position to decide itself based on the normal meaning of existing EPC provisions, and on existing case law. Therefore, and to avoid prolonged uncertainty caused by a referral, the request for referral should be rejected.

As regards Q1, opponent 1 argued that "death or legal incapacity" are intended only for very exceptional situations relating to the legal capacity of the person of the representative, not as a generous and general excuse for cases where re-establishment (Article 122 EPC) is available, or even when it is not.

Regarding Q2, opponent 1 stressed that interruption is an exception to the general system. Therefore, Rule 142(1)(c) EPC must be interpreted narrowly. It follows that the list in this provision is exhaustive.

Concerning Q3, opponent 1 argued as follows. The EPC does not conflict with the ECHR by allowing oral proceedings to continue in the proprietor's absence. Furthermore, the non-attendance of the proprietor was not punished by a consequential loss of rights. The proprietor's loss of rights was caused by the Enlarged Board's decision, which was based on grounds on which the proprietor had already had an opportunity to comment. Further still, the question is much too broad.

XXVIII. In the oral proceedings of 3 September 2021, the proprietor, in addition to its previous submissions, pleaded essentially as follows.

The way oral proceedings are dealt with here and in the future, in particular whether appropriate safeguards are applied or put in place, is a point of law of fundamental importance.

The latest submission by opponent 1 is compelling and interesting. Still it fails to explain why, in this case, there would be no point of law of fundamental importance and no need to hear the Enlarged Board. While in its submission the legal situation is in

effect painted as an *acte clair*, contradictions appear. Opponent 1 suggests that Q1 is easily answered in that "death and legal incapacity" should be interpreted restrictively and, with regard to Q2, that the list in Rule 142(1)(c) EPC is exhaustive. Yet, opponent 2 would admit "coma" as falling within the scope of this provision.

XXIX. In the same oral proceedings, opponent 1, further argued mainly as follows.

Coma is just an example of a state of mind that could qualify as "legal incapacity" under Rule 142(1)(c) EPC. Rules providing exceptions do not have to say "exclusive". On the contrary, the nature of a closed list of exceptions is exclusivity. Being drunk is not comparable, as stressed in the written submissions.

XXX. At the end of the oral proceedings of 3 September 2021, the Chairman announced the Legal Board's decision.

Reasons for the Decision

Status of the opponents in these appeal proceedings

1. If this appeal were successful, the decision of the Enlarged Board would have no legal effect, as it would have been handed down while the proceedings were interrupted (cf. T 1389/18). Thus, the appeal proceedings may adversely affect the legal position of the opponents. They are therefore considered parties to these proceedings (cf. J 12/19, reasons 2.2.3 and 2.3).

Factual basis

2. The course of events in connection with oral proceedings before the Enlarged Board as put forward by the proprietor was contested by neither the opponents nor the Legal Division. The Legal Board accepts these events as facts for the purpose of the current decision.

Admissibility of the appeal

3. The appeal is admissible as it meets the requirements of Articles 106 to 108 and Rules 99 and 101 EPC.

Subject and extent of the review

4. With a view to determining the extent of this review, the Legal Board notes that, in the appealed decision, the Legal Division rejected the proprietor's "request for interruption" of the proceedings whether based on the alleged legal incapacity of the proprietor (Rule 142(1)(a) EPC) or of the representative (Rule 142(1)(c) EPC). Thus, both grounds were assessed and rejected.
5. However, any procedural request or statement made by a party acting in proceedings before the department of first instance must be repeated on appeal to remain procedurally effective (see Case Law of the Boards of Appeal, CLBA, 9th ed., V.A.1.1, and T 501/92, reason 1.1). Such a request or statement can be made, in particular, in the statement of grounds of appeal (Rule 99(2) EPC).
6. In these appeal proceedings, the proprietor adduces certain events in asserting legal incapacity of the representative (Rule 142(1)(c) EPC, but not of the

proprietor (Rule 142(1)(a) EPC; statement of grounds of appeal, points 7 and 8). Thus, the Legal Board reviews the appealed decision and examines the appeal as regards the former ground but not the latter.

7. Opponent 1 submits that the proprietor's current case, i.e. the alleged incapacity of the representative under Rule 142(1)(c) EPC, is different from the case before the Legal Division, i.e. the alleged incapacity of the proprietor under Rule 142(1)(a) EPC, and that this is reason alone to dismiss the appeal.
8. The Legal Board agrees with opponent 1 in so far as, in the submissions considered by the Legal Division, the proprietor argued legal incapacity mainly of the proprietor (Rule 142(1)(a) EPC). But in the last submission (out of five), the proprietor relied, in the Legal Division's interpretation (appealed decision, points 2 and 2.1), on legal incapacity of the representative (Rule 142(1)(c) EPC).
9. Therefore, the Legal Board does not see the proprietor's asserting legal incapacity of the representative (Rule 142(1)(c) EPC) on appeal as a fresh case. This view is unaltered by the fact that it was the Legal Division that first addressed this matter when, in the communication to which the proprietor's last submission was a reaction (point 6), it *ex officio* excluded any applicability of Rule 142(1)(c) EPC.
10. Furthermore, and importantly, the Legal Board is not competent to review decisions by the Enlarged Board including when taken in review proceedings under Article 112a EPC (see Articles 21(1) and 106(1) EPC *e contrario*).

Similarly, the Legal Board would not be in a position to assess whether those oral proceedings were fair within the meaning of Article 6(1) ECHR.

By the same token, it is not the task of the Legal Board to judge actions, or possible omissions, by the Enlarged Board's former or current registrar, including any related lack of effective communication with the registrar's office, or rule on the application of the principles of good faith and reasonable expectations pertaining to the events surrounding the proprietor's non-attendance at the hearing before the Enlarged Board.

Legal incapacity of the representative

11. Pursuant to Rule 142(1)(c) EPC, proceedings before the EPO shall be interrupted in the event of the death or legal incapacity of the representative of an applicant for or proprietor of a patent, or of his being prevented for legal reasons resulting from action taken against his property from continuing the proceedings.

Interruption follows automatically, if the relevant conditions are met (see T 854/12, reason 1.1.1).

12. These appeal proceedings hinge on the interpretation of this provision, in particular the notion of legal incapacity of the representative.
13. Under the established case law of the Boards of Appeal, legal incapacity of the representative relates to the mental state and rationality of the representative. The mental state from which such incapacity can be derived has to be such that the representative is so totally or nearly totally unable to take rational decisions that

all its professional duties, and not just an isolated case, are affected. To assess the representative's mental state, a reliable medical opinion is indispensable (see e.g. J 7/99, reasons 3 and 3.2, and J 7/16, reasons 2.2 and 2.3; cf. J 900/85, reason 11).

14. The proprietor challenges this, in its view, too narrow interpretation of "legal incapacity", and suggests, in this respect, recourse to supplementary means of interpretation under Article 32 VCLT.
15. The Legal Board disagrees.
16. It is true the principles set out in Articles 31 (general rule of interpretation) and 32 VCLT are to be applied to the interpretation of the EPC (cf. G 5/83, reasons 1 to 4 and CLBA, 9th ed., III.H.1). However, in the application of these principles to the current case, the Legal Board concludes differently than does the proprietor.
17. Under Article 31(1) VCLT, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Already from the wording of this provision it is clear that the treaty text itself is the primary basis for treaty interpretation. This meaning, i.e. the primacy of the text, was confirmed by the International Law Commission of the United Nations that drafted and adopted the VCLT, and proposed it to the General Assembly (see Yearbook of the International Law Commission, 1966, Vol. II, pages 217 to 223).

The very essence of the textual approach prescribed in Article 31(1) VCLT is that the treaty text must be presumed to be the authentic expression of the intentions of the parties to the treaty, and that the elucidation of the meaning of the text, rather than an investigation *ab initio* of the supposed intentions of the parties, constitutes the object of interpretation (see *ibid.*, in particular, points (11), (12), (18) and (19)).

18. Mindful thereof, the Legal Board notes that the criteria for interruption of proceedings under Rule 142(1)(c) EPC are framed, word for word, as a closed list of triggering events (i.e. grounds):
- death of the representative;
 - legal incapacity of the representative;
 - prevention of the representative for legal reasons resulting from action taken against his property from continuing the proceedings.

Force majeure is not mentioned.

19. In stark contrast to Rule 142(1)(c) EPC is the legislature's exemplifying framing of the safeguard provision in Rule 134(5) EPC regarding extension of periods, the list of events of which is expressly left open-ended by the use of the markers "such as" and "or other like".
20. Moreover, as argued by opponent 1, Rule 142(1)(c) EPC stands out for providing the exceptional, very drastic measure of bringing the entire proceedings to a halt.
21. Based on the above reasoning, the ordinary meaning of the list of interruption-triggering events appearing in Rule 142(1)(c) EPC, as framed and as contextually

understood, must be that the list is exhaustive. It follows that any other events, including any encompassed by the notion of *force majeure*, fall outside the scope of this Rule.

22. With respect to the listed event of relevance to the current case, the legal incapacity of the representative, the proprietor rightly pointed out that this notion is undefined in Rule 142(1)(c), and in the EPC at large (cf. J 900/85, reason 6). It has however been defined by the case law (see reason 13 above). For the purposes of settling the current case, it should be assessed whether, as suggested by the proprietor, this definition is too narrow.
23. The restrictive definition carved out in the case law is, in the view of this Legal Board, supported by the language of the provision itself and the context alike. As similarly argued by opponent 1, proceedings interrupted under Rule 142(3) EPC, if resumed, are resumed either with a newly appointed representative (see preamble) or the applicant or the patent proprietor (see point (a)). Nothing in the text suggests that the legislature would have envisaged, let alone intended, the EPO resuming the proceedings with the representative the legal incapacity of whom caused the interruption (Rule 142(3) EPC *e contrario*).
24. Furthermore contextually, the event at issue, legal incapacity of the representative, re-appears once in the EPC, as a ground in Rule 154(2)(a) for the deletion, *ex officio* by the EPO, of the entry of a particular professional representative from the list of such representatives. Also here is *force majeure* not mentioned. Given the monopoly status of listed professional representatives, de-listing is another

very drastic measure (see Article 134(1) and (5) EPC; cf. Article 134(8) concerning legal practitioners).

25. The coincidence, in both cases alongside death of the representative, of exactly the same event as a ground for two very serious procedural occurrences relating to the work of a professional representative, suggests an intention of the legislature that "legal incapacity of the representative", as a notion under the EPC, not only carries basically one meaning (cf. J 901/86, reason 5), but also that this meaning be as exceptional in nature as are the measures it prompts or may prompt.
26. As a result, when thus construing "legal incapacity of the representative" in Rule 142(1)(c) EPC specifically according to the principles of Article 31(1) VCLT, the ordinary meaning of this notion concurs indeed with the jurisprudence to date (see reason 13 above). Therefore, this Legal Board adheres to the established case law.
27. As a consequence, the Legal Board sees no reason to have recourse to supplementary means of interpretation to confirm the meaning resulting from the application of Article 31(1) VCLT (Article 32 VCLT, preamble, first option).
28. Nor does the Legal Board see a reason to resort to supplementary means of interpretation to determine the meaning of the notion (Article 32 VCLT, preamble, second option). As opposed to the proprietor, and as evident above, the Legal Board finds the ordinary meaning of "legal incapacity of the representative" neither ambiguous nor obscure (Article 32(a) VCLT). Nor does an interpretation of this notion under the general rule of interpretation (Article 31 VCLT) lead to result

which is manifestly absurd or unreasonable (Article 32(b) VCLT).

29. On the contrary, the Legal Board agrees with opponent 1 that absurd cases could follow in case unfortunate, unforeseen events would generally constitute legal incapacity and trigger the radical mechanism of Rule 142(1)(c) EPC. The example of a representative temporarily caught in a traffic jam is not unthinkable.

30. The potential scale of the "broad" or "analogous" interpretation advocated by the proprietor and opponent 2 is a factor that must be considered; all parties to these proceedings agree that unfortunate, unforeseen events, such as those having affected the representative, may come to affect any representative, and the Legal Board is of no other opinion. In the proprietor's words, the issue "can potentially occur in almost any case" (submission of 6 May 2019, page 1). Opponent 2 assumes these events "could happen again and again" (point XXIV above). In the Legal Board's view, these considerations weigh heavily against giving the term "legal incapacity of the representative" the broad interpretation sought by the proprietor.

31. On the basis of the above reasoning, the Legal Board can but firmly note that the mental state of a representative and the total or near total inability to take rational decisions are something completely different to the external, practical and one-off kind of events - *inter alia* heavy snow, cancelled flights and failed communication - adduced by the proprietor as hindering the representative in the current case. These events do not constitute "legal incapacity of the representative".

32. In conclusion, the clear contrast in nature between, on the one hand, the events adduced by the proprietor and, on the other, the mental state and rationality of the representative, excludes the application of Rule 142(1) (c) EPC to the current case. Given this contrast there is also no room for an application of this rule by analogy to those events for this reason alone.

On the alleged absence of procedural provisions

33. The Legal Board concurs with the observation of opponent 1 that the EPC legislature has provided a procedural framework with some safeguards and repair mechanisms, but not solutions to every possible problem. The existing safety-nets, e.g. further processing of the European patent application (Article 121 EPC) and re-establishment of rights (Article 122 EPC), relate to time limits, and failure to observe them, and they are subject to further conditions such as fee payment.
34. The idea of the proprietor and opponent 2 that there is a gap, or *lacuna*, in the law, if Rule 142(1) (c) EPC is not applicable to the current case, is not convincing. No such void appears in relation to the case at hand.
35. On the contrary, continuation of oral proceedings and reliance on the duly summoned but absent party's written case is expressly and specifically sanctioned in the legal framework of the EPC (see Article 23(4) EPC, Rule 115(2) EPC, Article 14(4) RPEBA, Article 15(3) RPBA 2020 and Article 15(3) RPBA 2007).
36. Importantly, the standards embedded in these provisions do observe the principle of the right to heard under Article 113(1) EPC. In turn, Article 113(1) EPC, which

affords the opportunity to be heard, is of fundamental importance for ensuring a fair procedure between the EPO and parties conducting proceedings before it (see T 1010/13, reason 1, and CLBA, 9th ed., III.B.2.7.3.b and V.A.4.5.3, G 4/92, reason 2, and J 20/85, order, reason 4(a)). Against this backdrop, the Legal Board sees no gap in the EPC in respect of the right to a fair trial under Article 6(1) ECHR as regards continuation of oral proceedings and reliance on the duly summoned but absent party's written case.

37. Consequently, there is no lack of procedural provisions in the EPC which would prompt application of Article 125 EPC, as suggested by the proprietor.

Referral of questions to the Enlarged Board

38. The three questions put forward by the proprietor can, in the parts of relevance to deciding the current case (cf. T 2136/16, reason 8.3) without a doubt be answered on the basis of the EPC (cf. J 5/81, reason 11).

In essence, these answers are as follows (including references to detailed reasoning).

Q1: The events adduced by the proprietor in the current case, whether labelled as an analogous situation, *force majeure* or something else, are not to be interpreted as "death or legal incapacity" within the meaning of Rule 142(1)(c) EPC (see, in particular, reasons 18, 21 to 26 and 31 above).

Q2: The list of events, i.e. grounds, for interruption of proceedings in Rule 142(1)(c) EPC is exhaustive (see, in particular, reasons 17 to 21 above).

Q3: With respect to the events adduced by the proprietor in the current case, neither does *force majeure* provide a remedy nor is there a gap in the EPC in respect of the right to a fair trial under Article 6(1) ECHR (see, in particular, reasons 18, 21, 23, 24 and 33 to 37; cf. reason 10).

39. As a final remark, the current case does not give reason to believe there is a need for the Enlarged Board to launch any discussion *de lege ferenda*, as it did in G 1/97.
40. In summary, a referral to the Enlarged Board is not required (Article 112(1)(a) EPC).

Order

For these reasons it is decided that:

1. The request for referral to the Enlarged Board of Appeal of the three questions filed on 25 May 2021 is rejected.
2. The appeal is dismissed.

The Registrar:

The Chair:



C. Eickhoff

W. Sekretaruk

Decision electronically authenticated