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**Datasheet for the decision
of the Enlarged Board of Appeal
of 5 July 2012**

Case Number: R 0014/11
Appeal Number: T 0291/08 - 3.3.10
Application Number: 01918923.2
Publication Number: 1268388
IPC: C07C 51/47
Language of the proceedings: EN

Title of invention:

Method of removing organic iodides from organic media

Patentee:

Celanese International Corporation

Opponent:

BP Chemicals Limited

Headword:

Objection under Rule 106 EPC/Celanese International

Relevant legal provisions:

EPC Art. 112a(2)(c)(4), 113(1), 123(2)
EPC R. 104, 106, 109(1), 124(1)
Vienna Convention Art 31.1, 32

Keyword:

"Petition for review - clearly inadmissible"
"Failure to have raised an objection within the meaning of
Rule 106 EPC - yes"
"Request for remittal or postponement does not qualify as such
an objection"
"No separate objection raised - no deviation by this Board
from R 4/08 and established jurisprudence"

Decisions cited:

G 0009/93, R 0003/08, R 0004/08, R 0007/08, R 0008/08,
R 0011/08, R 0006/09, R 0009/09, R 0001/10, R 0009/10,
R 0017/10, R 0002/11, R 0003/11, R 0007/11, R 0010/11,
T 0291/08

Catchword:

-



Case Number: R 0014/11

D E C I S I O N
of the Enlarged Board of Appeal
of 5 July 2012

Petitioner: Celanese International Corporation
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Decision under review: Decision of the Technical Board of Appeal
3.3.10 of the European Patent Office of
13 January 2011.

Composition of the Board:

Chairman: C. Rennie-Smith
Members: B. Günzel
W. Sieber

Summary of Facts and Submissions

I. The petition for review concerns decision T 291/08 of 13 January 2011 of Technical Board of Appeal 3.3.10 to set aside the decision of the opposition division and to revoke European patent Nr. 1 268 388 entitled "Method of removing organic iodides from organic media". The petitioner and patent proprietor Celanese International Corporation filed the petition by fax on 11 August 2011 and paid the petition fee on the same date. The petition is based on the ground in Article 112a(2)(c) EPC, namely that a fundamental violation of Article 113(1) EPC occurred in the appeal proceedings.

II. The previous proceedings can be summarized as follows:

The patent related to a method of removing organic iodides from a non-aqueous organic medium by utilizing a catalyst system. The opposition division maintained the patent in amended form on the basis of the patentee's main request. It considered claim 1 of the main request to be novel and inventive. D6, mentioned in the patent as background art (paras. 8 and 21), was considered to be the closest state of the art. D8, D9 and D10, all referred to in D6 and disclosing catalysts falling within the ambit of claim 1, were specifically mentioned by the opposition division in its discussion of inventive step.

In its statement setting out the grounds of appeal the opponent introduced additional documents D11 to D13. However, the opponent/appellant principally argued that claim 1 was obvious in view of D6 and D8. D6 was

considered as closest prior art. Documents D11 to D13 were mainly cited to demonstrate what the skilled person would expect when reading D6. Obviousness of claim 1 in view of common general knowledge and from a combination of D6 and D2 were also discussed by the appellant.

In its reply to the grounds of appeal the petitioner submitted a new main request and four auxiliary requests. It addressed the points raised by the appellant, i.e. common general knowledge, the documents newly submitted by the appellant and the disclosure of D6, which was considered to be the closest prior art, and then the combination of D6 and D8 and of D6 and D2. Finally, the relevance of other documents cited in the proceedings was also briefly discussed.

In an annex to the summons (posted on 27 September 2010) to oral proceedings to be held on 13 January 2011, the Board's rapporteur addressed problems potentially arising from the principle of *reformatio in peius* and from Article 123(2) EPC. Furthermore, under the heading "Inventive step" he pointed out that the parties should be prepared to discuss which document, probably among D2, D6 and D8, represented the closest prior art and thus the starting point for the assessment of inventive step.

In response thereto, on 9 December 2010, the petitioner filed amended sets of claims. However, the main request corresponded to auxiliary request 1 filed with its reply. The petitioner addressed the issue of *reformatio in peius*, the late filed documents D11 and D12 justifying the new amendments made to the claims and

submitted, briefly, that in view of the new claims it was even less justified to single out D8 from the catalysts discussed in D6 (i.e. D2, D7, D8, D9, D10, GB 2 112 394 and EP 0361 785) as particularly relevant in the context of D6. The issue raised in the communication as to which document represented the closest state of the art was not addressed.

In the oral proceedings, the Board informed the parties that it considered D8 as being the closest prior art. In the reasons for its decision the Board sets out in detail why this is so, by referring to a number of arguments brought forward by the petitioner against this view in the oral proceedings.

III. In a communication dated 4 May 2012 accompanying the summons to oral proceedings the Enlarged Board of Appeal informed the petitioner of its provisional view that the petition was clearly inadmissible.

IV. The petitioner's arguments as put forward in writing and in the oral proceedings before the Enlarged Board can be summarized as follows:

Arising from the Board's decision to raise a completely fresh objection at the oral proceedings based on D8 as closest prior art document, a fundamental violation of Article 113 EPC occurred. When this objection was raised by the Board in the oral proceedings, the petitioner requested remittal to the opposition division or, alternatively, postponement of the oral proceedings to provide it with an adequate opportunity to respond. While remittal was refused, the Board granted a 30 minute adjournment for the petitioner to

review D8 and consider the new line of argument advanced by the Board. The petitioner accepts that remittal is discretionary, but refusing postponement and granting only a 30 minute adjournment to review D8 and consider the new line of argument advanced by the Board was, however, clearly insufficient time for the petitioner to prepare a response to the new attack. At the very least consultation with inventors or other technical staff from the client company would have been required in order for a meaningful response to the new inventive step attack to be formulated. This conduct of proceedings violated the petitioner's right to be heard since the Enlarged Board has established that the right to be heard means an adequate opportunity to be heard (R 9/10). Furthermore, by raising of its own motion a completely new attack based on D8 as closest prior art, which had never been considered before in the proceedings, in particular not by the appellant/opponent, the Board had conducted the proceedings in a way which violated its duty to treat the parties equally fairly and conduct the proceedings in a neutral manner.

In the oral proceedings, the petitioner objected to the procedural defect of the Board raising a new line of argument at the oral proceedings. This was clear from the petitioner's letter of 4 August 2011 objecting to the minutes of the oral proceedings before the Board as being completely inadequate as a record of the oral proceedings and from point 3 of the reasons on page 6 of the decision, where the Board discusses the issue of remittal. Accordingly the requirements of Rule 106 EPC are met.

The Enlarged Board's preliminary view, as expressed in its communication, that the petition appeared to be clearly inadmissible for failure to have raised an objection in respect of the procedural defect during the appeal proceedings within the meaning of Rule 106 EPC, is not correct.

The fundamental reason for introducing the review process was to improve the judicial relief available in proceedings before the EPO. This consideration should be at the forefront of any decision on a petition filed under Article 112a EPC. In the present case the decision under review contains an intolerable deficiency in that the petitioner's right to be heard under Article 113(1) EPC was violated as a result of specific actions taken by the Board during oral proceedings. The fact that the petitioner objected to these actions is evident from the written decision and the petitioner's account of events.

The clear intent of Rule 106 EPC is to prevent abuse of procedure. In the present case there was no abuse of procedure in the filing of the present petition because the petitioner had a legitimate and communicated grievance with the conduct of the appeal proceedings. Since it is the whole purpose of Article 112a EPC to determine whether Article 113(1) EPC was violated, the Enlarged Board of Appeal must *ex officio* consider whether the petitioner's concerns are valid.

The conclusion in the earlier review decision R 4/08, with which the Enlarged Board's interpretation of Rule 106 EPC is in line, was also incorrect. That interpretation that an objection within the meaning of

Rule 106 EPC is a procedural act which is additional to and distinct from other statements, in particular arguing or even protesting against the conduct of the proceedings, is overly strict. It is not derivable from a strict literal interpretation of Rule 106 EPC. Nor has the purpose of the provision - to prevent abuses - been taken into account. Despite stating that the "nature and purpose" of Rule 106 EPC had been considered, decision R 4/08 places no support on the *travaux préparatoires* or any other authority that might influence the interpretation of the Rule. In a case such as the present where the "arguing and protesting against the conduct of the proceedings" is inextricably linked to the procedural defect complained of, it does not make sense to require a distinct objection in order for Rule 106 EPC to be fulfilled. If a separate procedural step is required, then the Board is, in effect, required to consider the same point a second time, something which clearly cannot have been intended when Rule 106 EPC was drafted. For the Board to change its stand simply because it was aware on the second occasion that Rule 106 EPC was relevant would amount to the purpose of Rule 106 EPC being a means of putting additional pressure on the Board to decide an issue in a party's favour.

Legal certainty as to whether the substantive decision of the Board of Appeal is open to review pursuant to Article 112 (a) EPC, as stated in R 4/08, is not an issue arising under Rule 106 EPC. According to the *travaux préparatoires*, preserving legal certainty for third parties is achieved by the short two-month time limit set in Article 112(a)(4) EPC. Furthermore, it is questionable whether the strict interpretation of

Rule 106 EPC adopted by the Enlarged Board in fact contributes to legal certainty. The fact that Rule 106 EPC expressly provides a circumstance in which a petition can still be filed if no objection has been raised means that the absence of an objection under Rule 106 EPC is not sufficient to put the public on notice that no petition is possible.

While, according to decision R 4/08 the minutes can normally be referred to as a basis for what was said and to support an allegation that an objection under Rule 106 EPC was, or was not, raised, R 4/08 does not deal with a situation deviating from the norm, such as the present case, where the minutes do not contain the essentials of the oral proceedings and the statements of the parties as required by Rule 124 (1) EPC. In the present case, the petitioner did not accept that the minutes accurately reflect the essentials of the oral proceedings. Furthermore, in the present case, the written decision issued by the Board on 1 June 2011 supports the petitioner's position that a valid Rule 106 objection was raised, since the petitioner objected to the new line of argument advanced by the Board for the first time during the oral proceedings and requested remittal to the opposition division or postponement of the oral proceedings so that it had an adequate opportunity to respond. The Board understood exactly what the petitioner meant because in its reasoning supporting the refusal of the request for remittal or postponement, the Board commented that "thus, the right to be heard under Article 113(1) EPC was not violated". Hence, the requirement that the objection under Rule 106 EPC must be "such that the Board and any other parties are able to recognize that

the decision of the Board is challenged as being potentially open to review" was clearly fulfilled in the present case. Furthermore, in the present case, the petitioner has presented evidence in the form of its account of the key aspects of the oral proceedings in its letter of 4 August 2011 and in its petition and in the sworn statements of the petitioner's representatives filed in reply to the Enlarged Board's communication. As evidenced by these statements, the new argument raised by the Board was objected to during the oral proceedings and this objection was never removed, the consequence being that it still stood following resumption of the proceedings after the 30 minute adjournment. It is clear that the Board was still aware of the petitioner's objection. There was no good reason for the Board to presume that it had been removed.

In the oral proceedings before the Enlarged Board the petitioner's representative admitted that she had not expressly raised an objection under Rule 106 EPC after the Board had decided to refuse its request for remittal or postponement and only granted a 30 minute interruption. The reason she had not done so was that, at the time, she was unaware of decision R 4/08. It was however clear, that the petitioner's objection against the Board raising a new argument based on D8 as closest prior art had not been withdrawn. It was also clear that the Board was aware that this objection still stood and that the petitioner regarded its right to be heard as being violated.

- V. Oral proceedings were held on 5 July 2012 at the end of which the Enlarged Board of Appeal announced its decision.
- VI. The petitioner requested that the Enlarged Board sets aside decision T 0291/08 and that proceedings are resumed before the Board of Appeal.

Reasons for the decision

1. The petition concerning Board 3.3.10's decision revoking the petitioner's European patent was filed and reasoned in time, the prescribed fee was paid in time and the petitioner is adversely affected by the impugned decision.
2. The decisive issue in the present case is whether in the appeal proceedings the petitioner has raised an objection in respect of the procedural defect within the meaning of Rule 106 EPC.
 - 2.1 The petitioner admits that during the appeal proceedings it did not raise an express objection under Rule 106 EPC. The petitioner is, however, of the opinion that by the way in which it expressed itself in the oral proceedings, it raised an implicit objection, fulfilling the requirements of Rule 106 EPC, when that Rule is interpreted correctly.
 - 2.2 Rule 106 in conjunction with Rule 109(1) EPC define the admissibility requirement that the petitioner must have raised an objection in respect of the procedural defect during the appeal proceedings.

2.3 The procedural defect within the meaning of Article 112(a)(2)(c) EPC identified in the petition is that a fundamental violation of Article 113(1) EPC occurred. According to the petitioner, the fundamental violation of Article 113(1) EPC arises from the Board's decision to raise a completely fresh objection at the oral proceedings based on D8 as the closest prior art and maintain that objection without giving the petitioner an adequate opportunity to respond. The petitioner had asked for remittal or postponement. Both were refused and the Board only granted a 30 minute interruption of the oral proceedings. While it is accepted by the petitioner that remittal is discretionary, the Board's refusal to grant postponement violated the petitioner's right to be heard. The petitioner's objection against the Board's raising of an entirely new argument in the oral proceedings had never been withdrawn and the Board was aware that the petitioner regarded its right to be heard as being violated by the Board's refusal of a postponement.

2.4 According to the petitioner, the Enlarged Board's interpretation of Rule 106 EPC, following decision R 4/08, requiring an objection which is distinct from and additional to any requests relating to or protests against the conduct of the proceedings by the Board, is overly strict and unjustified. In particular, the interpretation given by the Enlarged Board in its communication, that an objection within the meaning of Rule 106 EPC is an objection raised after the procedural defect has arisen, is incorrect. Rule 106

EPC only speaks of an objection "in respect of" the procedural defect.

- 2.5 In its decision R 4/08 of 20 March 2009 the Enlarged Board for the first time considered in detail the meaning to be given to the admissibility requirement in Rule 106 EPC that an objection in respect of the procedural defect must have been raised during the appeal proceedings. In that decision the wording and nature and purpose of the requirement to raise such an objection were all considered.

In point 2.1 of the reasons of the decision the Enlarged Board concluded:

"Firstly, the objection must be expressed by the party in such a form that the Board of Appeal is able to recognize immediately and without doubt that an objection pursuant to Rule 106 EPC - that is one which is additional to and distinct from other statements, in particular arguing or even protesting against the conduct of the proceedings or against an individual procedural finding ... - is intended by the party concerned. This is a precondition for the Board to have been able to react immediately and appropriately by either removing the course of the objection or, as provided in Rule 106 EPC, by dismissing it. It therefore ensures for the parties and the public at large, legal certainty as to whether the substantive decision of the Board of Appeal is open to review pursuant to Article 112(a) EPC. This is one of the evident purposes of the obligation to raise objections under Rule 106 EPC.

Secondly, for the same reasons the objection must be specific, that is the party must indicate unambiguously which particular defect of those listed in paragraph 2 (a) to (c) of Article 112a and Rule 104 EPC it intends to rely on."

2.6 The principles developed in that decision have thereafter become established jurisprudence of the Enlarged Board of Appeal and have been applied in numerous cases since including (this not being an exhaustive list) R 7/08 of 22 June 2009, point 2 of the Reasons; R 8/08 of 19 May 2009, points 1.2.1 and 1.2.2 of the Reasons; R 6/09 of 3 June 2009, point 6 of the Reasons; R 9/09 of 22 March 2010, point 1.5 et seq. of the Reasons; R 1/10 of 22 February 2011, point 6.2 et seq. of the Reasons; R 17/10 of 15 June 2011, point 2.1 - 2.3 of the Reasons; R 2/11 of 23 November 2011, point 2.1 of the Reasons; R 3/11 of 16 December 2011, point 3.1 of the Reasons; R 7/11 of 5 October 2011, point 2.1 of the Reasons; R 10/11 of 9 November 2011, point 3.1 of the Reasons.

Of these decisions, decisions R 9/09 and R 1/10 specifically concerned the refusal of a requested postponement. Decision R 8/08 concerned the refusal of a requested remittal. In decision R 3/08 of 25 September 2008, given prior to decision R 4/08, the Enlarged Board had already ruled that the requirements of Rule 106 EPC had clearly not been met in a situation in which, after a petitioner's request for postponement of the oral proceedings, the petitioner had not raised any objection against the Board's communication not to postpone the oral proceedings (see point 1.4 of the Reasons). In decisions R 17/10 (see point 2.3 of the

Reasons) and R 8/08 (see point 1.2.2 of the Reasons), the Enlarged Board emphasized that a - procedural - request or criticism cannot be qualified as an objection within the meaning of Rule 106 EPC before the Board has reacted to the request or criticism. An objection under Rule 106 EPC cannot be formulated prematurely, this meaning that it cannot be formulated before a procedural defect has come into existence. The same rationale is also apparent from decision R 6/09 (see point 6 of the Reasons) where, in order to explain why Rule 106 EPC was not fulfilled, the Enlarged Board observed that no objection was raised "after" hearing the Board's definition of a certain term. In view of the weight and consistency of this jurisprudence the petitioner's argument - that its objection against the Board raising the new line of argument based on D8 and its request for remittal or postponement already qualify as an objection within the meaning of Rule 106 EPC - does not hold good.

- 2.7 This established jurisprudence is also fully in line with the wording of Rule 106 EPC. Rule 106 EPC places an obligation on the objecting party to raise its objection under certain conditions, one of them being that the objection must be "in respect of the procedural defect". The wording of Rule 106 EPC thus requires the presence of a procedural defect as a precondition for raising an objection in respect of that defect. However, as long as the Board has not taken any decision on a procedural request of the party, there is no procedural defect to which the party can object. Therefore, as has been established in the jurisprudence, an objection under Rule 106 EPC is a procedural act which has to be performed after the

procedural defect has arisen in the proceedings. Nothing else can be derived from the use of the term "in respect of" in the English version of Rule 106 EPC, since Rule 106 speaks of an objection in respect of "**the**" procedural defect and not in respect of "a" procedural defect. The same is also clear from the German and French versions of Rule 106 EPC requiring in the German version that "**der** Verfahrensmangel beanstandet wurde" and, in the French version, that an objection was raised "à l'encontre **du** vice de procédure".

2.8 In the view of this Enlarged Board any deviation from the firmly established jurisprudence would require "very clear reasons for not following the earlier interpretation" (see G 9/93 OJ EPO 1994, 891, see point 6 of the Reasons). In points 2.8.1 to 2.8.4 below the Enlarged Board considers the petitioner's reasons for not following the interpretation of Rule 106 EPC in R 4/08.

2.8.1 First, the petitioner argued that, according to the Vienna Convention on the Law of Treaties ("Vienna Convention"), the purpose of a provision has to be taken into consideration for its interpretation. The *travaux préparatoires* reveal only that the purpose of Rule 106 EPC is to prevent abuse of procedure. It submitted that the Enlarged Board's reasoning in decision R 4/08 as to the purpose Rule 106 EPC is intended to serve, in particular its reliance on the issue of legal certainty, is not supported by the *travaux préparatoires* or any other authority that might influence the interpretation of the Rule.

According to Article 31.1 Vienna Convention, 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. The preparatory work and the circumstances of the conclusion of the treaty are mentioned in Article 32 Vienna Convention as a supplementary means of interpretation, in order to confirm the meaning resulting from the application of Article 31 or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure or leads to a result which would be manifestly absurd or unreasonable. It follows from these provisions, in particular from the only supplementary character of the preparatory work as a means of interpretation, that the meaning of the terms "in the light of the object and purpose of the Treaty" in Article 31 EPC is not simply tantamount to any purposes of the legislator as identified in the preparatory documents. What is addressed in Article 31 Vienna Convention is the objective purpose of the norm concerned which is to be determined in such manner as is derivable from the context of the norm and the object of the treaty. Hence, in accordance with the Vienna Convention, the Enlarged Board is perfectly entitled to define the objective purpose of Rule 106 EPC on the basis of the ordinary meaning of its terms considered in the context and in the light of the object and purpose of the provisions in question, without any need to identify an explicit basis for such an interpretation in the preparatory documents to the EPC.

2.8.2 Second, the petitioner's criticism of the Enlarged Board's statement in R 4/08 that Rule 106 EPC ensures,

for the parties and the public at large, legal certainty as to whether the substantive decision of the Board of Appeal is open to review pursuant to Article 112(a) EPC, is not justified.

The petitioner's argument that since, according to the *travaux préparatoires*, the interest of preserving legal certainty was the reason for providing a two-month time limit for filing a petition under Article 112(a)(4) EPC, legal certainty has no relation to Rule 106 EPC, is unsound. The use of legal certainty in the context of one provision in the *travaux préparatoires* is no ground for not using it as a reason to interpret another provision - there is simply no valid connection between the two propositions.

2.8.3 Third, the petitioner's argument that, since Rule 106 EPC expressly provides for a situation in which a petition can still be filed even though no objection under Rule 106 EPC has been raised during the appeal proceedings, the absence of an objection is not sufficient to tell the public that no petition is possible, is also unsound. As the words "except where" in Rule 106 EPC demonstrate, the situation that an objection could not be raised during the appeal proceedings is considered to be quite literally an exception. Hence, if anything, this exception, aimed at not denying justice to a petitioner who could not raise an objection during the appeal proceedings, confirms the importance of the general rule enshrined in Rule 106 EPC that the right to file a petition presupposes that notice of the defect has been given during the appeal proceedings, so that every person involved in the proceedings or inspecting the file is

made aware of the possibility that the Board's decision, although final, might still be challenged based on a ground for review in accordance with Article 112a EPC. As the Enlarged Board rightly put it in decision R 4/08, legal certainty for the parties and the public at large is one of the evident purposes of the general rule enshrined in Rule 106 EPC.

2.8.4 In the present Enlarged Board's view, R 4/08 and the later decisions following it have also rightly emphasised the legal nature of an objection pursuant to Rule 106 EPC as being a procedural act and not just a submission. It must, like any other procedural act, be clear and precise. Therefore, as the Enlarged Board stated in decision R 4/08 (see point 2.1 of the Reasons), this procedural act must be in such a form that the Board of Appeal is able to recognize immediately and without doubt that an objection pursuant to Rule 106 EPC is raised, so that the Board is put in a position to perform its further duty under Rule 106 EPC, i.e. either to accede to it or to dismiss it and thereby to create a clear basis allowing the parties and the public to determine whether the ensuing substantive decision of the Board of Appeal is open to review pursuant to Article 112(a) EPC.

2.8.5 As a result, the Enlarged Board finds that none of the reasons advanced by the petitioner justify departing from the established jurisprudence regarding the requirements which raising an objection must fulfil in order to qualify as an objection within the meaning of Rule 106 EPC as justified.

2.9 As a second line of argument, the petitioner submitted that the facts of the present petition are different from R 4/08 so that R 4/08 did not create a precedent for the present decision.

2.9.1 First, the Enlarged Board notes that like any other decisions of boards of appeal those of the Enlarged Board of Appeal in review cases do not have the legal nature of creating a precedent in the sense that the Enlarged Board would have to show in which respect a later decision differs from an earlier one in order to be legally justified. Such differences are normal and the usefulness of case-law is not confined to similar or identical facts but lies in the principles or guidance (such as interpretation of legislative provisions) which, whether the facts are similar or not, can be extracted from earlier cases (see R 11/08 of 6 April 2009, point 11 of the Reasons).

The petitioner refers to the Board's reference in decision R 4/08 to the fact that the minutes of the oral proceedings did not contain any statement of the petitioner meeting the criteria set out for an objection within the meaning of Rule 106 EPC. According to the petitioner this statement refers to the normal situation that the minutes can be referred to as the basis for what was said and to support an allegation that an objection under Rule 106 EPC was, or was not, raised. However, R 4/08 could not deal with a situation deviating from the norm such as the present case where the minutes did not contain the essentials of the oral proceedings and the submissions of the parties as required, a fact which had been objected to in the petitioner's letter of 4 August 2011.

This perceived difference is irrelevant for the present case. For the purpose of the present decision the Enlarged Board accepts the petitioner's submission that it objected to the new line of argument advanced by the Board for the first time during the oral proceedings and requested remittal or postponement to the opposition division which were refused. In the present case the decisive point as to which, as has been explained above, the Enlarged Board does not accept the petitioner's view, is that the petitioner's procedural behaviour did not qualify as an objection within the meaning of Rule 106 EPC.

- 2.9.2 The petitioner also submitted that, as was evidenced by point 3.3 of the decision under review, by the Board's own admission it was able to recognize that the petitioner challenged the decision of the Board as being potentially open to review. In this respect, the Board notes that the passage cited by the petitioner only refers to the petitioner's request for remittal. The present petition is, however, not based on a violation of the petitioner's right to be heard for failure to remit the case but - rightly - only on the Board's refusal to grant postponement. Therefore, the cited passage of the decision under review does not support the petitioner's conclusion that on the Board's own admission the Board had understood that the decision of the Board was challenged by the petitioner as potentially open to review because the Board had refused the petitioner's request for postponement and only granted a 30 minute interruption.

2.9.3 Further, the petitioner submitted that the present case can be distinguished from R 4/08 in that in the present case the petitioner has presented evidence in the form of its account of the key aspects of the oral proceedings in its letter of 4 August 2011 and the two sworn statements filed in response to the Board's communication. Evidence could also be found in the written decision which is framed in the words of the Board itself. However, for the reasons indicated in paragraph 2.9.1 above, this difference, if any, is irrelevant.

2.9.4 Finally, the petitioner made the criticism that the Enlarged Board seems to require, as a valid Rule 106 EPC objection in this case, a separate objection raised by the petitioner after the refusal to remit. To which the Board observes that, subject only to the proviso that (on the petitioner's own admission) its objection could not have been based on the refusal to remit but would have had to be based on the refusal to postpone the oral proceedings, that is precisely what the petitioner should have done in order to fulfil the requirements of Rule 106 EPC.

The Enlarged Board cannot accept the petitioner's arguments about the inextricable link between the original objection and the procedural defect. As the petitioner itself submitted, when a party objects to a Board's conduct of oral proceedings and requests some form of relief, the Board has two possibilities: it can either grant it or refuse it. If it is granted, there can be no procedural defect to the detriment of the requesting party. It is only if it is refused that there may be a procedural defect. This shows clearly

why the established jurisprudence following decision R 4/08 is justified and there is no such inextricable link as the petitioner argues.

Further, the fact that, as the petitioner puts it, the same argument has to be raised twice is not convincing. All that is required from a party when the Board has refused its procedural request is to state that it regards its right to be heard as violated, since it is the very purpose of Rule 106 EPC to give the Board a chance to correct such an error, if any, before a decision is based on it and thereby to avoid unnecessary petitions for review being filed.

Order

For these reasons it is decided unanimously that:

The petition is rejected as clearly inadmissible.

The Registrar:

The Chairman

P. Martorana

C. Rennie-Smith