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Datasheet for the decision of 6 August 2019

Case Number: T 2018/17 - 3.5.01

Application Number: 03729695.1

Publication Number: 1472636

IPC: G06F17/60, G07F19/00

Language of the proceedings: EN

Title of invention:
METHOD AND APPARATUS FOR A PRIVATE AND SECURE PAYMENT SYSTEM USING A WIRELESS DEVICE

Applicant:
Singhal, Tara Chand

Headword:

Relevant legal provisions:
EPC Art. 116(1), 113(1), 133(2)
EPC R. 111(2), 103(1)(a)
RPBA Art. 11
Notice from the EPO dated 18 December 2008 concerning oral proceedings before the EPO (OJ 2009, 68)

Keyword:
Oral proceedings - substantial procedural violation (yes)
Reimbursement of the appeal fee (yes)
Remittal to the department of first instance (yes)

Decisions cited:
G 0007/93, T 1102/03, T 0699/06

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Beschwerdekammern

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Case Number: T 2018/17 - 3.5.01

D E C I S I O N
of Technical Board of Appeal 3.5.01
of 6 August 2019

Appellant: (Applicant)	Singhal, Tara Chand P.O. Box 5075 Torrance, CA 90510 (US)
Representative:	Viering, Jentschura & Partner mbB Patent- und Rechtsanwälte Am Brauhaus 8 01099 Dresden (DE)
Decision under appeal:	**Decision of the Examining Division of the European Patent Office posted on 14 March 2017 refusing European patent application No. 03729695.1 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman	W. Chandler
Members:	Y. Podbielski
	A. Wahrenberg

Summary of Facts and Submissions

I. The appeal was filed by the applicant (appellant) against the decision of the examining division posted on 14 March 2017 refusing European patent application 03729695.1.

II. The appellant requested that the decision under appeal be set aside and a patent be granted on the basis of a main request or one of auxiliary requests 1-14 filed with the statement setting out the grounds of appeal dated 20 July 2017. In the grounds of appeal the appellant also stated that *"In addition to all requests, it is suggested to remit the case to the examining division for further examination, and furthermore order reimbursement of the appeal fee pursuant to Rule 103(1) EPC."* Oral proceedings were requested as an auxiliary measure.

III. In its preliminary opinion dated 21 February 2019 the Board indicated that a substantial procedural violation appeared to have occurred in the proceedings before the examining division and that it was inclined to remit the case to the examining division for further prosecution. The appellant was invited to clarify its position as regards remittal.

IV. By letter dated 18 April 2019 the appellant expressed its agreement with a remittal of the case to the examining division for further prosecution and requested a decision in the written procedure on the issue of the substantial procedural violation as well as reimbursement of the appeal fee.

V. The facts relevant to this decision are as follows:

(a) The appellant resides in the United States and must be represented in proceedings before the EPO (Article 133(2) EPC).

(b) The examining division issued a summons dated 4 July 2016 to attend oral proceedings on 15 February 2017. Following a request by the appellant, the oral proceedings were to take place by video-conference and a new summons was sent on 3 October 2016 to reflect this.

(c) On 14 December 2016 the appellant filed a new main request and six auxiliary requests.

(d) By letter dated 8 February 2017 the representative informed the EPO that they were resigning from representation of the application.

(e) On 9 February 2017 the EPO sent, by email, an invitation to give notice of appointment of a professional representative, dated 14 February 2017, inviting the appellant to do so within two months of notification of this communication. The invitation also stated that "*Please note that Oral Proceedings are scheduled for 15.02.2017" and* added *"IMPORTANT: Please note that the above mentioned two months period for appointment of a professional representative does not extend or prolong time limits already set by the EPO or currently applicable to the above mentioned application under the EPC. It neither provides reason for postponing a valid set date for Oral Proceedings…".*

(f) On 13 February 2017 the EPO received a letter from professional representatives informing the EPO that

they had taken over representation of the application in question.

(g) By letter dated 14 February 2017 the appellant requested postponement of the oral proceedings by two weeks as the new representative had only taken over representation on 13 February 2017, i.e. two days before the scheduled oral proceedings. The new representative had thus not sufficient time to prepare for the oral proceedings and could also not participate practically, as the oral proceedings had been scheduled as a video conference with the former representative where the new representative simply could not participate. Short submissions were made on the merits of the case.

(h) On 15 February 2017 oral proceedings in the form of a videoconference were held in the absence of the appellant. The decision to refuse the application was announced at the end of the oral proceedings.

VI. The appellant's arguments relevant to the decision can be summarised as follows:

(a) The examining division unfairly denied the appellant's request to postpone the oral proceedings by two weeks. Even if the new representative had been able to attend the oral proceedings, they would not have had enough time to prepare for them in view of the fact that they had only taken over representation two days prior to the oral proceedings. As there was a duty of the appellant to be represented, its right to be heard had been violated by the refusal of the examining division to change the date for oral proceedings.

(b) The fact that the appellant had submitted a new main request and six auxiliary requests on 14 December 2016 was immaterial to the request for postponement, as the new representative had not been involved in the preparation of these requests. Similarly, the fact that the new representative made some arguments on the merits of the case in its letter dated 14 February 2017 was no sign that there was enough time to prepare for the oral proceedings - the arguments had simply been forwarded by the new representative and he had not been involved in elaborating on these.

(c) The examining division failed to reason why the reasons provided in the letter dated 14 February 2017 were not valid reasons for postponing the oral proceedings.

Reasons for the Decision

1. The appellant essentially argues that the examining division committed a substantial procedural violation within the meaning of Rule 103(1)(a) EPC by not granting its request for postponement of the oral proceedings by two weeks.

2. The EPO's practice regarding changing the date for oral proceedings before the departments of first instance is set out in the Notice from the EPO dated 18 December 2008 concerning oral proceedings before the EPO (OJ 2009, 68, hereinafter "the Notice"). Accordingly, oral proceedings will be cancelled and another date fixed if the party concerned can advance serious reasons which justify the fixing of a new date.

3. The wording of the Notice makes it clear that the decision of the department of first instance is of a discretionary nature. Firstly, the Notice identifies serious reasons on the basis of which a party may request a change of the date for oral proceedings (point 2.3). The division entrusted with the case thus has a discretion whether or not to allow it (see also T 699/06, Reasons 3 with regard to parallel provisions applying to the boards). Secondly, the Notice only provides a list of what "may be" serious reasons for requesting a change of the date for oral proceedings. This wording makes it clear that the list is non-exhaustive. Thus, if a reason is not listed in the Notice, the division needs to consider whether it amounts to a "serious reason" to request a change of date. When exercising such discretion, all the circumstances of the case have to be taken into account (T 1102/03, Reasons 2, with regard to parallel provisions applying to the boards).

4. According to established case law, a board should only overrule the way in which a department of first instance has exercised its discretion if the board concludes that it has done so according to the wrong principles, or without taking into account the right principles, or in an unreasonable way (see G 7/93, Reasons 2.6, and the decisions cited in Case Law of the Boards of Appeal, 8th edition, IV.E.3.6).

5. The requirement for decisions to be reasoned (Rule 111(2) EPC) also applies to discretionary decisions taken by a department of first instance. Thus, there must be a logical chain of reasoning which led to the conclusion reached by the relevant department (Case Law of the Boards of Appeal, 8th edition, III.K.4.2.1).

6. The reasons given by the examining division for not postponing the oral proceedings are: (i) in a communication inviting the appellant to appoint a professional representative within two months it was stated that this time period did not provide a reason for postponing a set date for oral proceedings; (ii) the reasons put forward in the appellant's letter dated 14 February 2017 were no valid reasons for postponement of the oral proceedings under the EPC Guidelines; (iii) the appellant had enough time to prepare for the oral proceedings as it had submitted an amended main request and six auxiliary requests on 14 December 2016; (iv) the oral proceedings could have been attended by the appellant ("via video-conference or in presence with the newly appointed representative"), especially in view of the arguments made in the appellant's letter of 14 February 2017 which show that the appellant had time to prepare for the oral proceedings.

7. Points (i) and (ii) above are mere statements of fact. They provide no reasoning why the appointment of a new representative is not regarded by the examining division as a serious reason for changing the date for oral proceedings. Such a reasoning needs, however, to be given if a division relies on it (see point 3 above). Having failed to do so, the only reasoning left with regard to the exercise of discretion is that under points (iii) and (iv).

8. Point (iii) is difficult to follow. The request that the oral proceedings take place at least two weeks later than scheduled was based on the argument that the new representative had only been appointed two days prior to the oral proceedings and had thus insufficient time to prepare for them. The examining division

answered this by reference to requests filed by the previous representative. The Board does not consider the examining division's answer to contain a logical chain of reasoning as it pays no regard to the material fact that the representative had changed.

9. Point (iv) has been added by the examining division "for the sake of completeness", suggesting that it is not needed for the decision's reasoning. However, the Board considers it in any event. The reference in point (iv) to the possibility of the appellant attending the oral proceedings, which had been scheduled to take place by video-conference (see summons dated 3 October 2016), with the new representative neither provides an answer to the appellant's argument that the new representative could not participate in the oral proceedings by video-conference as these had been scheduled with the former representative, nor is there any reasoning why the mere fact that a representative made some arguments in favour of the requests on file should amount to sufficient time to prepare for the oral proceedings. No consideration has been given to the length of time between the representative's appointment and the date for oral proceedings, nor to the issue of what effect delaying the oral proceedings by two weeks or more would have on procedural economy.

10. In these circumstances, the Board takes the view that, when considering the reasons given in the decision under appeal, the examining division exercised its discretion in an unreasonable way. This led to the oral proceedings being held in the absence of the new representative. The decision to refuse the application was taken without the possibility of the appellant to present its arguments orally contrary to the provisions of Article 113(1) together with Article 116(1) EPC.

11. In view of the above there is a causal link between the procedural violation and the decision under appeal, and thus a substantial procedural violation. This has led to the appeal being filed and the Board regards it as equitable to reimburse the appeal fee.

12. The Board does not consider that there are any special reasons for not remitting the case to the examining division under Article 11 RPBA and the appellant agrees to a remittal. Therefore, the case is to be remitted to the examining division for further prosecution so that oral proceedings before the examining division are scheduled before a decision is taken by that division.

Order

For these reasons it is decided that:

The decision under appeal is set aside.

The case is remitted to the Examining Division for further prosecution.

The appeal fee is reimbursed.

The Registrar: The Chairman:

T. Buschek W. Chandler

Decision electronically authenticated