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**Datasheet for the decision
of 19 January 2024**

Case Number: T 0480/21 - 3.4.01

Application Number: 11866858.1

Publication Number: 2715738

IPC: G21F5/12, G21F9/36, G21F5/14,
G21F9/22, G21F5/005, B09B3/00

Language of the proceedings: EN

Title of invention:
FILLING DEVICES, SYSTEMS AND METHODS FOR TRANSFERRING HAZARDOUS
WASTE MATERIAL INTO A SEALABLE CONTAINER

Patent Proprietor:
AUSTRALIAN NUCLEAR SCIENCE AND
TECHNOLOGY ORGANISATION

Opponent:
Finnegan Europe LLP

Headword:
Failure of debit order / Australian Nuclear Science and
Technology

Relevant legal provisions:

EPC Art. 99(1), 112(1) (a)

RFees Article 5

Point 5.5 Arrangements for Deposit Accounts (ADA)

EPC R. 134(5)

RPBA 2020 Art. 13

Keyword:

Extension of payment period - (yes); Opposition deemed to have been filed - (yes)

Referral to the Enlarged Board of Appeal - admitted, not allowed

Decisions cited:

T 0858/18

Catchword:

1. Extension of the period for paying the opposition fee was provided under point 5.5 ADA. The evidence strongly suggested that the inability to file the debit order was due to a malfunction of the EPO's Online Filing software, which, in this case, was attributable to the EPO.

2. The request for referral to the Enlarged Board of Appeal posed questions on issues that are part of the appeal case. Hence, the request was not an amendment to the appeal case.



Beschwerdekammern
Boards of Appeal
Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 0480/21 - 3.4.01

D E C I S I O N
of Technical Board of Appeal 3.4.01
of 19 January 2024

Appellant: AUSTRALIAN NUCLEAR SCIENCE AND
(Patent Proprietor) TECHNOLOGY ORGANISATION
New Illawarra Road
Lucas Heights
New South Wales 2234 (AU)

Representative: Maiwald GmbH
Elisenhof
Elisenstraße 3
80335 München (DE)

Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on refusing
European patent application No. 11866858.1
pursuant to Article 97(2) EPC.**

Composition of the Board:

Chair P. Scriven
Members: T. Petelski
D. Rogers

Summary of Facts and Submissions

- I. The appeal is of the Opposition Division's decision by which the opposition was deemed not to have been filed (Article 99(1) EPC).
- II. The Opposition Division took the view that:
- (a) the opposition fee was not validly paid within the regular period of opposition;
 - (b) the conditions for extension of the payment period under point 5.5 of the Arrangements for Deposit Accounts (ADA) did not apply, because none of the means for making a payment was unavailable on 22 May 2019;
 - (c) Rule 139 EPC was not applicable for correcting a debit order submitted in the wrong format.
- III. On appeal, the putative opponent (in the following, simply *opponent*) requested that the decision be set aside and the opposition deemed to have been filed. The opponent also requested that the patent be revoked.
- IV. In addition to the evidence submitted before the Opposition Division, the opponent filed a second witness statement from Nicholas Fox. He was also offered as a witness to the events surrounding the filing of the debit order.

V. The proprietor, as respondent, requested that the appeal be dismissed.

VI. In a letter filed after the Board had arranged to hold oral proceedings, the proprietor conditionally requested referral to the Enlarged Board of Appeal for answering the question of

... whether further reasons not being mentioned in the respective provisions can be applied, or whether the provisions have to be interpreted narrowly.

VII. During oral proceedings before the Board, the proprietor did not maintain the previous request for referral, but instead requested that the following three questions be referred to the Enlarged Board:

1) For extending a payment to in [sic] accordance with 5.5 ADA, a service must not be available at the EPO. Can the EPO, in the sense of its Notice of 18 January 2018 (OJ 2018, A25, item 1), be made responsible for unsuccessful filing using software issued by the EPO ("software of the EPO"), if the servers at the EPO were fully operational?

2) If question 1 is answered to the affirmative, may a user make use of an outdated, earlier version of the software of the EPO if the EPO recommends using an updated, later version?

3) If question 1 or question 2 is answered to the affirmative, who needs to provide proof for the software of the EPO being responsible for the unavailability of the service at the EPO? What proof needs to be provided to show that the software of the EPO is responsible for the unsuccessful filing?

VIII. The following pieces of evidence form the basis of this decision:

A1: "Acknowledgement of receipt" dated 22 May 2019, 15:48 (CEST)

A2: "Empfangsbescheinigung" dated 22 May 2019, 17:47 (CEST)

A3: List of unavailabilities of the EPO services; <https://www.epo.org/service-support/availability-of-online-services/2019.html>; extracted from the internet on 7 November 2019

A5: "Problems with Online Filing", copy of internet page: <https://www.epo.org/service-support/availability-of-online-services/2019/20190426.html>

A6: "Online Filing software - new update now available", copy of internet page: www.epo.org/service-support/updates/2019/20190426.html

A7: e-mail sent by Mr. N. Fox to support@epo.org, dated 23 May 2019

A8: "DocuSign - Understanding digital signatures" Internet printout

All: "Second witness statement of Nicholas Russell Philip Fox" from 12 June 2021; filed on 14 June 2021

"Witness statement of Nicholas Russell Philip Fox"; received and signed on 17 July 2019; without label

"Witness statement of Sarah Cole" from 11 July 2019; received on 17 July 2019; without label

"EPO Online Filing User guide Software-version 5.11 / 2018-10-01"; available for download under https://docs.epoline.org/onlinefilingdocs/version5/2018/OnLineFiling_v5.11_UserGuide_EN_20181001.pdf; without label; in the following referred to as "EPO online filing user guide"

"Notice of opposition" received by fax at the EPO on 22 May 2019, including a cover sheet, a cover letter, and form 2300E

Opponent's letter to the EPO of 23 May 2019

Reasons for the Decision

The submission of the opposition

1. The opponent attempted, on the last day of the opposition period, to file a notice of opposition using EPO Online Filing software. This transmission failed.
2. The opponent then filed the notice of appeal by fax, including a copy of the online opposition form 2300E, still on the last day of the opposition period. The fax comprised a request for debiting of a deposit account, for the payment of the opposition fee. The EPO did not carry out this request.
3. A further, successful request for payment of the opposition fee was made on the day after the expiry of the opposition period, using the EPO online payment system via web payment.
4. The opponent suggested the following alternatives:
 - the online filing on the last day of the opposition period had not actually failed, so that the debit request it contained was valid;
 - point 5.5 ADA provided for an extension of the payment period; and
 - the filing of the debit order by fax could be corrected as an obvious error under Rule 139 EPC.
5. For the reasons set out below, the Board is persuaded that the online filing of the debit request, on the last day of the opposition period, did fail, but that

there is indeed a remedy under point 5.5 ADA.

6. This decision does not address the opponent's suggested remedy under Rule 139 EPC.

Legal provisions on the payment of the opposition fee

7. Article 99(1) EPC reads:

Within nine months of the publication of the mention of the grant of the European patent in the European Patent Bulletin, any person may give notice to the European Patent Office of opposition to that patent, in accordance with the Implementing Regulations. Notice of opposition shall not be deemed to have been filed until the opposition fee has been paid.

8. The payment of the opposition fee is governed by Article 5 RFees. It can be made, by bank transfer; by credit card; or by debiting of a deposit account held with the EPO, as governed by ADA (Supplementary publication 5, OJ EPO 2017). Point 5.1.2 ADA specifies:

The debit order must be filed in an electronically processable format (XML) via one of the following:

- EPO Online Filing or the EPO Case Management System (CMS), using EPO Forms 1001E, 1200E, 2300E or 1038E;

- the EPO Online Filing software or PCT-SAFE, CMS and ePCT using the PCT fee calculation and payment feature;

- Online Fee Payment in Online services.

9. Paragraph 5.1.3 ADA adds:

Debit orders submitted in any other way, e.g. on paper, by fax, via the web-form filing service or using a different format such as a PDF attachment, are invalid and thus will not be carried out.

10. The legal consequence of filing a debit order in a non-accepted format is set out in point 5.4.2 ADA:

If a debit order is submitted via a non-accepted means of filing or in an invalid format, the date of receipt will not be regarded as the payment date. If this means that a time limit for paying a fee has expired, the party to the proceedings may make use of any of the legal remedies available under the EPC or the PCT.

The payment date

11. The opponent's first argument is that the debit order must have been received at the EPO within the opposition period, and was thus filed in an electronically processable format within the meaning of point 5.1.2 ADA, for the following reason:

- (a) A digital signature could only be validated if the receiver had received the entire signed document, as was shown by A8.
- (b) In the present case, the digital signature on form 2300E, which included the debit order, had been validated using the Online Filing software. Only after a successful validation did the notice receive the status "ready to send" and only then could the transmission of the notice of opposition be started. The successful validation of the digital signature was also evidenced by form 2300E, a copy of which had been sent to the EPO by fax on 22 May 2019. A fully filled form was generated by the Online Filing software only after a successful validation of the signature.
- (c) This meant that the entire form 2300E, including the debit order in an electronically processable format, must have been received by the EPO during the validation of the digital signature, in agreement with point 5.1.2 ADA.

12. However, the Board is not persuaded by this argument. According to the EPO online filing user guide, the user is informed of a successful transmission of the complete opposition form, including the payment information (see page 247 of the user guide), only after a successful transmission to the EPO server (point 5.3.1 on page 107). The appearance of an error message without confirmation of the transmission means that form 2300E, including the debit order, was not validly submitted to the EPO (see point 4.6 on page 42). A successful digital signature alone, irrespective of what data might be exchanged with the EPO server,

does not mean that the debit order was received by the EPO.

13. Hence, the Board has no reason to deviate from the Opposition Division's finding that the the debit order was not received at the EPO in an electronically processable format (XML) within the regular opposition period until 22 May 2019, but only in the form of a fax.
14. The payment made on the following day came too late (points 5.1.2, 5.1.3, and 5.4.2 ADA).
15. Without a remedy, the legal consequence would be that the notice of opposition would be deemed not to have been filed (Article 99(1) EPC).

Extension of payment period under point 5.5 ADA

16. The first sentence of point 5.5 ADA provides a safeguard, to protect the users of the EPO's electronic filing systems against possible unavailability of electronic communication. It reads:

If a payment period expires on a day on which one of the accepted means of filing debit orders under point 5.1.2 is not available at the EPO, the payment period is extended to the first day thereafter on which all such means as are available for the type of application concerned can be accessed again.

17. The safeguards available are explained in a "Notice from the EPO dated 18 January 2018 concerning the

safeguards available under the EPC and the PCT in case of unavailability of means of electronic communication" (OJ EPO 2018, A25), in the following referred to as "Notice Concerning Safeguards".

18. The third paragraph of point 1 reads:

For reasons of legal certainty, the present notice clarifies the safeguards in place if, exceptionally, a means of electronic communication is unavailable for reasons attributable to the EPO.

19. Point 7 reads:

A means of electronic communication may exceptionally be unavailable for reasons other than those indicated above (e.g. a malfunction). Although the burden of proving receipt lies with the party alleging submission in time, the EPO will look into any alleged unavailability of a means of electronic communication. A user in doubt as to whether a document was properly transmitted is recommended to contact EPO Customer Services. The user will suffer no adverse consequences if it is confirmed that the unavailability was attributable to the EPO. However, to be sure of avoiding any adverse consequences, it is also advisable, as a precautionary measure, to request the legal remedy available.

20. The opponent requested an extension of the period for payment of the opposition fee under the first sentence

of point 5.5 ADA, in their letter to the EPO of 23 May 2019.

The proprietor's view

21. The proprietor was of the opinion that the means of redress under 5.5 ADA was not applicable, for the following reasons.
22. Payment of the opposition fee within the nine months opposition period (Article 99(1) EPC) was a strict regulation with very limited exceptions (Rule 134 EPC and point 5.5 ADA). Exceptions were generally to be interpreted narrowly, and especially so in this case. This meant that the mere possibility that filing problems were attributable to the EPO was not sufficient for an extension of the payment period under 5.5 ADA. Rather, the opponent had to produce convincing evidence that the error was at the EPO. This, the opponent had not done.
23. A1 and A2 proved that means for filing online debit orders were available, at the EPO, for the opponent's representative, on 22 May 2019. Further, 22 May 2019 was not included in the list of days of unavailability of the EPO online services published by the EPO (A3). Had the unavailability been at the EPO, meaning on the premises of the EPO or its servers, more users would have experienced problems, and the 22 May 2019 would have been included in the list A3 of temporary unavailability. Hence, for these reasons alone, an extension under point 5.5 ADA was not applicable.
24. Even if the functioning of the software on the opponent's computer were to be attributed to the EPO,

and if, despite the evidence to the contrary, there actually was a malfunction of the Online Filing software, it was the opponent who had to provide evidence for that. However, the opponent had not properly documented the problems they had encountered, for example, by using screenshots. They did not, therefore, lift the burden of proof from their shoulders.

25. The software version 5.0.11.172, used by the opponent for the online filing, was outdated and no longer recommended on 22 May 2019. The EPO had indicated, in A5, that there were problems with this version. These problems were fixed in the recommended, updated version 5.0.11.174, published by the EPO in A6, approximately one month before the attempted online filing. The use of outdated and faulty software was a failure of the opponent, which was not attributable to the EPO.

26. The opposition was filed by a licensed patent attorney, who was well aware that there was no remedy for missing the strict deadline for paying the opposition fee. Therefore, utmost care should have been taken, which, in addition to using the latest, recommended software, meant:
 - (a) filing well in time, and not after EPO office hours on the last day of the payment period, when the EPO Customer Service was not available;

 - (b) using alternative means of payment, if one means did not work. The opponent should have used a credit card or CMS payment, as suggested under point I.1.2 in the supplementary publication 5 of OJ EPO 2017 ("If a system breakdown occurs at the

payer's end, another payment method should be used").

27. The decisions not to do these were made by the opponent. Attributing the problems resulting from the opponent's lack of care to the EPO would be inappropriate. It would dilute the strict regulations on the opposition period, if the exceptional conditions of point 5.5 ADA were interpreted so broadly that every problem encountered during online filing could be attributed to the EPO.
28. The proprietor cited T 0858/18 to demonstrate the strict application of the deadline for filing an opposition. In that case, the notice of opposition was deemed not to have been filed, simply because the last pages of a fax were received after midnight.
29. The proprietor added that the principles of proportionality and of protection of legitimate expectations applied not only to the opponent, but also to the proprietor, who must be able to rely on strict enforcement of the opposition period. Also, the consequence of the missed payment was not disproportionately severe for the opponent, because there was still the option of starting national nullity proceedings.

The Board's assessment of the evidence

30. The key question is whether the evidence provided by the opponent is sufficiently strong to persuade the Board that the failure to transmit the debit order via the Online Filing software on the evening of 22 May 2019 was "at the EPO". If so, point 5.5 ADA

would apply and the payment period would be extended, at least until the next day, when payment was made. If not, the payment period would not be extended.

31. To answer the question, the events associated with the unsuccessful filing have to be examined. The events are evidenced by two witness statements of the opponent's representative, Nicholas Fox, and by one statement by his legal assistant, Sarah Cole. The statements are consistent with each other, with the content of the letter sent to the EPO on 23 May 2019, and with the information provided on Form 2300E, which is part of the notice of opposition sent to the EPO on 22 May 2019. The proprietor did not challenge the credibility of these statements, and the Board has no reason to doubt them.
32. In the afternoon of 22 May 2019, the entire notice of opposition, including the debit order, was loaded successfully into the EPO's Online Filing program. The program was installed on Ms Cole's computer in the office of the opponent's representative, which was used for filing oppositions. Mr Fox and Ms Cole were both very experienced in using the Online Filing software, and had never encountered a similar problem in the past.
33. The experience of Mr Fox and Ms Cole, the fact that the computer was equipped with the EPO's software for filing oppositions, and the fact that the software was used successfully in the past, suggest that the general setup and the operation of the software was correct.
34. The Online Filing software used was version 5.0.11.172 (see A7). Although the EPO advised the use of the newer version 5.0.11.174 (see A6), the older version was

still officially approved, according to the then applicable Guidelines for Examination, edition 2018, point D-III.3.2, and the Office Journal (OJ) EPO 2017, A59. Article 1(1) of the latter reads:

Electronic filings in accordance with Article 5 of the above-mentioned decision dated 10 November 2015 must be made using version 5.09 (build 5.0.9.148) or later releases of the EPO Online Filing software.

35. Even the later published Guideline editions of 2019 and 2021 still referred to the same OJ EPO 2017, A59. If software versions mentioned were no longer accepted means of filing on 22 May 2019, there would have been a publication to that effect in the Office Journal before that date, and an update to the Guidelines. In the absence of any such publication or change, the Board does not follow the Opposition Division in their conclusion that the opponent did not use an accepted means of filing.
36. Hence, the Online Filing software version 5.0.11.172, which was used by the opponent on 22 May 2019, was an accepted means of filing at that time.
37. After the successful uploading of the notice of opposition, it was digitally signed by Mr Cole, and received the status "ready to send" (see the EPO online filing user guide, page 106). After re-entering his PIN, Mr Fox initiated the sending of the notice to the EPO (pages 106 to 107). The software then indicated that the transmission was in progress. After 15 to 20 minutes, instead of the expected confirmation of a successful transmission (page 107), an error message indicated a missing signature. Mr Fox then repeatedly

tried to re-sign and re-send the notice, each time with the same result.

38. The fact that the Online Filing software was successfully used to upload and sign the notice of opposition is proven by the fax sent to - and received by - the EPO on 22 May 2029. Pages 40 to 46 of the fax are a printout of EPO Form 2300E, generated by the Online Filing software after it has been electronically signed (see the automatically generated signature on pages 45 and 46 of the fax).
39. A faulty internet connection is unlikely, given that, firstly, the attorney's office had successfully used electronic filing to submit other documents to the EPO using the Case Management Service (CMS) on the same afternoon (see A1 and A2); secondly, emails were successfully sent and received; and, thirdly, the subsequent sending of the notice of opposition by electronic fax also worked correctly.
40. Point 7 of the Notice Concerning Safeguards recommends that the EPO Customer Service be contacted to confirm whether the EPO is attributable for any unavailability of electronic communication. The opponent did so on 23 May 2019, to report the malfunction (Enquiry number 666719), and, at the request of EPO Customer Services, provided additional information by email (see A7). EPO Customer Services did not reply to this.
41. Thus, the following has been established:
 - (a) The software was most likely installed on a system that was set up properly.

(b) The Online Filing software was working properly until the last step of transmission to the EPO.

(c) The software was operated by highly experienced users.

(d) The internet connection to the EPO was most likely working at the day and time in question.

(e) The version of the Online Filing software used was accepted for such use, but was known to have problems.

42. Given this, the Board is persuaded that it is far more likely that the cause of the malfunction was in the Online Filing software, whether on Ms Cole's computer or elsewhere.

43. The final question, then, is whether a malfunction of the software meant that the means of filing a debit order by online filing was not available "at the EPO", within the meaning of point 5.5 ADA.

44. A partial answer is given under points 1 and 7 of the Notice Concerning Safeguards, under point 17. One such safeguard is provided by point 5.5 ADA.

45. Point 1 of the Notice Concerning Safeguards states that the safeguards are intended for cases in which electronic communication is unavailable "for reasons attributable to the EPO". Point 7 additionally refers to the example of a "malfunction" and states that "The user will suffer no adverse consequences if it is confirmed [by the EPO Customer Service] that the unavailability was attributable to the EPO".

46. Hence, "at the EPO" in point 5.5 ADA means the same as "attributable to the EPO".
47. The Online Filing software, in various versions, are accepted means of filing a debit order (point 1 ADA). This software is issued and maintained by the EPO. The Board has no doubt that the general functioning or malfunctioning of the software is attributable to the EPO, in the sense of points 1 and 7 of the Notice Concerning Safeguards.
48. The EPO's Online Filing software is intended to be installed on users' electronic systems. If the software supplied by the EPO contained some bug, the effect of which was that any attempted filing between 09:15 and 09:17 on Tuesdays would inevitably fail, that fault would be attributable to the EPO, even though the software was not running on an EPO machine or on EPO premises. The responsibility of the EPO is not limited to its premises and servers.
49. It is difficult to draw a sharp line, where the responsibility of the EPO for a malfunction ends. The Board agrees with the proprietor that the mere possibility that the malfunction is attributable to the EPO is not enough. In the present case, however, the evidence strongly suggests that the software was correctly installed and used on compatible electronic systems. This means that the malfunction was most likely attributable to the EPO. Consequently, the means of filing a debit order using the Online Filing software was not available "at the EPO" within the meaning of point 5.5 ADA.
50. Hence, the payment period was extended under the first sentence of point 5.5 ADA to at least the next day,

23 May 2019. On that day, the payment was successfully made.

51. This means that the opposition was validly filed (Article 99(1) EPC).
52. This result does not constitute a disproportionate protection of the opponent's legitimate expectation to be able to rely on safeguards in the event of malfunction of the EPO's software, as opposed to the proprietor's legitimate expectation of legal certainty. The proprietor was aware that a notice of opposition had been sent by fax in due time and should have been aware of the possibility of an extension of the payment period under point 5.5 ADA.
53. In T 0858/18, which was cited by the proprietor, the Board found that a notice of opposition sent by fax was to be deemed to have been filed outside the opposition period, because the last pages of the fax were received at the EPO after midnight on the last day of the opposition period. This has no bearing on the present case, because there was no unavailability of a means of filing. It therefore misses the crucial point of the present case.

Referral to the Enlarged Board of Appeal - admission

54. During oral proceedings before the Board, the proprietor requested that three questions be referred to the Enlarged Board. The request was based on Article 112(1) (a) EPC.
55. The opponent argued that the request was an amendment to the appeal case, which should not be admitted into

the proceedings, under Article 13 RPBA. First, there were no exceptional circumstances for its late filing, as the questions only related to issues that had been raised prior to the Board's preliminary opinion. Therefore, the request could and should have been filed earlier. Second, there was no divergent case law on the application of point 5.5 ADA, nor was it a fundamental point of law relating to the EPC, nor did it affect a large number of cases. Therefore, the request was, prima facie, not suitable for referral to the Enlarged Board, and should not be admitted for that reason, too.

56. The three questions concern whether, and under what circumstances, a malfunction of software provided by the EPO is attributable to the EPO.
57. The issues addressed by the questions were central points of discussion during the opposition and the appeal proceedings, in particular in relation to the EPO's Online Filing software. The three questions were part of the appeal proceedings, and not amendments to it. The questions must, at least in part, be answered, in order to decide the present case.
58. The Board thus considers this request to have questions on issues of the appeal case referred to the Enlarged Board is not an amendment to the appeal case within the meaning of Articles 12 and 13 RPBA.
59. Consequently, the request for referral is admitted in to the proceedings in order for the Board to consider it.
60. Article 112(1)(a) EPC, final sentence requires the Board to state, in its final decision, the reasons for

rejecting a request for referral.

61. The Board is of the view that such reasons should, in principal, be substantive. This is because a point of law of fundamental importance, or else the uniform application of law, is potentially at stake. Such matters should not be dismissed lightly. Rather the Board should show why these matters are not at stake.

Referral to the Enlarged Board - allowability

62. According to Article 112(1)(a) EPC, the Board shall refer a question to the Enlarged Board of Appeal, if it considers that a decision is required to ensure uniform application of law, or if a point of law of fundamental importance arises.
63. This case is not about a uniform application of law. The parties did not indicate that there was any conflicting case law on the application of point 5.5 ADA, and the Board is not aware of any.
64. Irrespective of whether the questions concern a point of law of fundamental importance, a decision by the Enlarged Board is not required to decide the present case, since the Board can answer all three of the proprietor's questions without difficulty, insofar as they are relevant.

Question 1)

65. The first question is about whether the EPO can be held responsible for unsuccessful filing using software

issued by the EPO, if the EPO's servers were fully operational.

66. This question is broader than necessary. In the present case, it is sufficient to answer the question of whether the means of filing a debit order by online filing was not available at the EPO, within the meaning of point 5.5 ADA, if the reason for not being able to file the debit order lay in a malfunction of the Online Filing software issued by the EPO. And this on the assumption that the software was correctly installed and used on a compatible electronic system of the user, and that the server at the EPO was fully functional.
67. This question was answered in the affirmative in the above points 43. to 50. In short, in the present case, the reason for the inability to file a debit order lay in the Online Filing software, and was attributable to the EPO, within the meaning of point 5.5 ADA.

Question 2)

68. The second question is about whether a user may make use of an outdated software version, if the EPO recommends the use of a later version.
69. This question is also formulated more broadly than necessary. In the present case, it is sufficient to answer the question of whether the Online Filing software version 5.0.11.172, which was used by the opponent, was an officially accepted means of filing a debit order on 22 May 2019, despite the reported problems with this version (see A5), and despite the EPO's advice to update to a newer version 5.0.11.174 (see A6).

70. This question has been answered in the affirmative under above points 34. to 36. In short, all versions 5.0.9.148 and later of the Online Filing software were officially accepted means of filing a debit order, including version 5.0.11.172 used by the opponent.

Question 3)

71. The third question consists of two parts.
- (a) Who needs to provide proof that the Online Filing software was responsible for the unsuccessful filing of the debit order?
- (b) What proof needs to be provided to show that?
72. Re part (a): a party that alleges a fact bears the burden of proving that allegation (see Case Law of the Boards of Appeal, 10th edition, III.G.5.1.1, first paragraph). In this case, it is the opponent who has to show that the Online Filing software was responsible for the unsuccessful filing of the debit order. Point 7 of the Notice Concerning Safeguards says the same thing.
73. Re point (b): in proceedings before the EPO, any kind of evidence is admissible. The parties may freely choose the evidence they wish to submit. This derives from Article 117(1) EPC (see Case Law of the Boards of Appeal, 10th edition, III.G.2.1 and 2.3).
74. The Board evaluates the probative value of the evidence by applying the principle of free evaluation of

evidence (see Case Law of the Boards of Appeal, 10th edition, III.G.4.1).

75. It was in this manner that the Board reached its above conclusion, see points 31. to 40. above.

Consequence

76. The Board can answer all three of the proprietor's questions, insofar as they are relevant to the present case. The Board has no difficulty in answering the questions, and there is no contradictory or diverging case law. Therefore, a decision of the Enlarged Board is not necessary for the Board to decide upon the point of law that has arisen.
77. The proprietor argued that the answers to their questions were not only important for the present case, but concerned a point of law of fundamental importance, possibly affecting a large number of cases. And although there was no divergent case law regarding the answers to the questions, there was divergence insofar as the exception under point 5.5 ADA could be interpreted far more narrowly.
78. The answers might arguably be of fundamental importance, and even relevant to a large number of cases. However, the Board does not consider that a compelling reason to refer the case to the Enlarged Board, considering that the Board could answer the questions without difficulty.
79. Consequently, the Board rejects the proprietor's request, and does not refer the three questions to the Enlarged Board (Article 112(1)(a) EPC).

Conclusion

80. The opposition fee was paid outside the regular opposition period. However, the payment period, under the first sentence of point 5.5 ADA, was extended at least until the following day due to a software malfunction that, in this case, is attributable to the EPO with a high degree of probability. As the payment was made on the following day, the opposition is deemed to have been filed in time.

Order

For these reasons it is decided that:

- The decision under appeal is set aside.
- The Board admits the request to submit three questions to the Enlarged Board, filed at the oral proceedings, into the proceedings.
- The Board declines to refer these three questions to the Enlarged Board.
- The opposition is considered to be filed in time.
- The case is remitted to the Opposition Division for further prosecution.

The Registrar:

The Chair:



D. Meyfarth

P. Scriven

Decision electronically authenticated