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**D E C I S I O N**  
**of 23 November 1994**

**Case Number:** T 0678/90 - 3.2.3

**Application Number:** 85201219.4

**Publication Number:** 0168901

**IPC:** E04D 13/035

**Language of the proceedings:** EN

**Title of invention:**  
A ventilating hatch

**Intervener:**  
E.M.B. Metallbau and Brandschutztechnik GmbH

**Headword:**  
-

**Relevant legal provisions:**  
EPC Art. 105

**Keyword:**  
"Intervention of the assumed infringer"  
"Fees"  
"Reimbursement"

**Decisions cited:**  
G 0001/04, J 0014/85, J 0033/86, T 0678/90, T 0073/88,  
T 0934/91, T 0027/92, T 0153/93

**Catchword:**  
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Case Number: T 0678/90 - 3.2.3

**D E C I S I O N**  
**of the Technical Board of Appeal 3.2.3**  
**of 23 November 1994**

**Intervener:**

E.M.B. Metallbau und Brandschutztechnik GmbH  
Rudolf-Diesel-Straße 6  
4240 Emmerich (DE)

**Representative:**

Stark, Walter, Dr.-Ing.  
Moerser Straße 140  
D-47803 Krefeld (DE)

**Composition of the Board:**

**Chairman:** C. T. Wilson  
**Members:** F. Brösamle  
J. Van Moer

## Summary of Facts and Submissions

- I. With a letter dated 27 November 1991, the firm E.M.B. Metallbau and Brandschutztechnik GmbH (Intervener) gave notice of intervention in the appeal proceedings then pending under case number T 678/90. The appeal was against the decision of the Opposition Division dated 10 May 1990, rejecting the three oppositions filed against European patent No. 0 168 901.
- II. The intervention was filed in response to a summons from the Düsseldorf Regional Court in connection with proceedings for infringement of European patent No. 0 168 901 instituted against the Intervener on 18 October 1991. At this time the appeal proceedings were already pending. The notice of intervention contained a request to debit from the account of the representative a total of DM 1700,- for the official opposition and appeal fees.
- III. The Board issued its decision T 678/90 in respect of the substantive matters of the appeal on 27 April 1992. At this time the intervention had still not been brought to the attention of the Board.
- IV. With letters dated 17 November 1992, 7 February 1994 and 18 April 1994, the Intervener protested that his intervention had not been addressed in the substantive decision, and requested redress. With letters dated 3 March 1993, 16 March 1994, and 9 May 1994, the legal member of the Board referred to the question of admissibility of interventions during appeal proceedings, then pending before the Enlarged Board of Appeal, (G 1/94 OJ EPO 1994, 787 of 11 May 1994 confirmed the admissibility of such interventions), and

to the question of what possibilities, if any, there might be for further prosecution of the admissible intervention.

- V. In a letter dated 31 October 1994 the Intervener withdrew his opposition (intervention) and requested the reimbursement of both fees.

### Reasons for the Decision

1. Having dealt with the substantive matters raised in the appeal of the Opponents with the decision T 678/90 of 27 April 1992, the present decision relates only to the question of reimbursement of fees requested by the Intervener.
2. The refund of fees is never a matter of discretion under the EPC, the Implementing Regulations and the Rules. If there is to be a refund, it is a matter of right, either because the fee paid was never due or because the service for which it was paid cannot be provided owing to some legal impediment or because there is express provision for repayment (J 14/85, OJ EPO 87, 047, paragraph 6 of the Reasons for the Decision, J 33/86, OJ EPO 88, 084, Headnote and paragraph 2 of the Reasons for the Decision, and T 27/92, not to be published, paragraph 2 of the Reasons for the Decision).
3. The substantive matter settled in the Decision T 678/90 of 27 April 1992 cannot be considered to have become **res judicata** with respect to the Intervener since he did not participate as a party in the proceedings. This consideration is irrespective of the fact that he had basically taken over a case which was dealt with in the decision, having been previously presented by one of the Opponents who later withdrew his opposition.

However, the Board must also take into account such decisions as T 73/88 OJ EPO 92, 557, paragraph 1.2 of the Reasons for the Decision, which express the opinion that there is only one opposition proceedings in connection with any one patent, and that similarly there is only one appeal proceedings possible from this single opposition proceedings. It would appear to follow that only one decision on the same substantive matters can be taken. Moreover, the jurisprudence of the Boards of Appeal make clear that their decisions are final, see for example T 934/91 OJ EPO 94, 184, and T 151/93 of 21 February 1994, not to be published. The Board is not aware of any decisions of the Board of Appeal, allowing further prosecution on matters forming the subject of an issued decision.

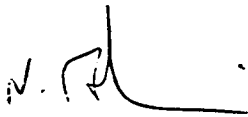
4. Under these circumstances the Board considers the fact that its Decision T 678/90 of 27 April 1992 was issued before it could consider the grounds and arguments of the Intervener, to be an impediment preventing the Board from providing the service for which the fees were paid, namely an examination of the intervention in the appeal proceedings, with the Intervener participating as a party to the proceedings.
5. The question, therefore, left open in the Enlarged Board of Appeal decision G 1/94, whether only an opposition fee or additionally/alternatively an appeal fee was due to comply with Article 105(2) EPC, can also be left open here since the Board is of the opinion that no fees at all should be retained in respect of the subject intervention.

**Order**

**For these reasons it is decided that:**

The reimbursement of fees to the sum of DM 1700,-, is ordered to Patentanwalt Dr.-Ing. Walter Stark, Moerser Straße 140, D-47803 Krefeld.

The Registrar:



N. Maslin

The Chairman:



C. T. Wilson