

Cancelled flight? This is not the end of the...case

Dr. Mariusz Kondrat and Anna Kalawska of KONDRAT & Partners discuss missed deadlines through extenuating circumstances and the remedy procedure at the EPO.

Disputes settled by the EPO can drag on for years. These are years of arguments, strategies and misunderstandings. Each party fights to the end, because there are usually big sums hidden behind patents. Usually, at the end of the opposition or appeal proceedings, the parties are summoned to oral proceedings, in which an unending dispute is arranged in a single day. Imagine, however, a black scenario in which, due to extraordinary circumstances, the opportunity to participate in the oral proceedings is excluded. Does it have to be equal to the defeat?

EPO gives the parties, as well as their representatives, tools, thanks to which it is possible to save such a situation: a request for the postponement of oral proceedings. According to the EPO's Guidelines for Examination, Part E, Chapter III, 7, this request is allowable only if the party concerned can advance serious reasons which justify the fixing of the new date. The request to fix another date must be filed as soon as possible after the grounds preventing the party concerned from attending the oral proceedings have arisen. It must be accompanied by a sufficiently substantiated written statement indicating these reasons.



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Underspecified wording – serious reasons – raises doubts as to its designations. EPO's Guidelines give us only an open catalogue of situations in which the postponement of the proceedings is possible. This may include, for instance, a serious illness, the marriage of the person whose attendance in oral proceedings is relevant or even business trips which have been firmly booked before notification of the summons to oral proceedings. As for circumstances not mentioned in the Guidelines, they must be considered by the Office each time.

As all know, discretion brings conflicts; it is difficult to assess whether a given circumstance comprises a serious reason to postpone the proceedings or not. The case, which is the subject of this article, ended successfully for the appellants, whose representative, due to the canceled flight, did not reach the oral proceedings.

The circumstances of the case, which may set a new direction in the interpretation of the Guidelines, are presented below.

The appellants, patent proprietors, filed an appeal against the decision of the Opposition Division to revoke their patent in suit. In the proceedings before



Résumés

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the Opposition Division, the parties were summoned to oral proceedings to be held on 10 November 2015 in Munich. As both parties of the dispute have their places of business in Poland, they were forced to plan a relatively long journey early enough.

On the day before the oral proceedings, the appellants' representative encountered extraordinary difficulties.

On 9 November 2015, a strike broke out at the Warsaw airport from which he was supposed to fly to Munich. Although his flight was cancelled around 4.30 a.m., the representative did not find out until a few hours later, during the attempt to check in. He immediately made an effort to contact the EPO.

However, he managed to reach the Office only around 1.45 p.m. By 3.00 p.m. he had several phone calls with the first examiner, during which he was assured that – after submission of the written, well substantiated, request for postponement – that would be possible.

Unfortunately, despite assurances of the first examiner, on 10 November 2015, 9.00 a.m., oral proceedings took place before the Opposition Division in the appellants' representative absence and in the presence of the opponent's representative, two accompanying persons and a member of the public. In the course of the proceedings the members of the Opposition Division received a copy of the request at 9.45 a.m., that was discussed with the opponent and finally refused by the Opposition Division. As a result, the patent was ultimately revoked.

Opposition Division, using the subjective opinions of the representative of the opponent, two accompanying persons and a member of the public, stated that the canceled flight is not a serious reason in the sense of EPO's Guidelines. On the example of one of the accompanying persons, who flew to Munich from Krakow, stated that it was possible to get to the oral proceedings from other cities close to Warsaw.

Alternatively, representatives should go to the airport despite the strike and to attempt to rebook or even go to Munich by car, which would have taken some 10 hours, as confirmed by Google Maps and also by the member of the public, who stated that they had come by car. In short, in the Opposition Division's opinion the appellants' representative could have arrived at the hearing, what required only a reasonable effort.

Not only was the Opposition Division's decision unreasonable, but the appellants had also been misled by the EPO in that the formalities officer had assured the appellants' representative in several telephone conversations that the oral proceedings would be postponed.

After filing an appeal, the Boards of Appeal ruled. In its decision, it complied with all the allegations of the appellants, in particular to request that the decision under appeal be set aside and that the case

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be remitted to the Opposition Division for further prosecution. According to Boards of Appeal's decision, the Opposition Division exercised its discretion in an unreasonable way and moreover did not take all relevant factors of the particular circumstances of the case into account, that is substantial procedural violation”.

Boards of Appeal admitted that it was not reasonable of Opposition Division to rely only on statements made by persons associated with the opponent attending the oral proceedings and by an unidentified member of the public in assessing the circumstances of the case.

In its opinion, the Opposition Division did not consider the fact that the appellants' representative had contacted the Office by telephone at latest at 1.45 p.m. on 9 November, and that thereafter several telephone conversations between the representative and the formalities officer took place.

Moreover, Opposition Division ignored the evidence submitted with the written request which clearly shows that the appellants' representative had made a reasonable effort to find alternative travel means, and it cannot be held against it that it filed the written request only after having made such an effort and after having collected evidence thereof. In connection with the above, it was unreasonable to draw the conclusion that the request for postponement was filed late.

According to the Board, it is not reasonable to expect the appellants' representative to take the car



on the afternoon of the day before the oral proceedings by referring to Google Maps for a total (net) driving time of 8-10 hours, as the Opposition Division did.

Conclusion

The Boards of Appeal's decision referred to above is extremely important for the interpretation of the EPO's Guidelines and the abovementioned possibilities of postponement of oral proceedings. It signals a very positive tendency of breaking the bureaucratic approach of offices and replacing it with a more... human touch. Let us hope that it will be maintained and extended to the activity of all institutions dealing in dispute resolution.

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