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**Datasheet for the decision
of 30 June 2008**

Case Number: J 0009/07 - 3.1.01

Application Number: 04257544.9

Publication Number: 1808699

IPC: G01N 35/10

Language of the proceedings: EN

Title of invention:

Clinical laboratory apparatus

Applicants:

1. KABUSHIKI KAISHA TOSHIBA
2. Toshiba Medical Systems Corporation

Opponent:

-

Headword:

Priority period and re-establishment/TOSHIBA

Relevant legal provisions:

EPC:

Art. 66, 122

R. 136

EPC 1973:

Art. 1, 2(2), 66, 87(1), 87-89, 112(1)(a), 122(5)

R. 38, 84a, 85

Act revising the EPC of 29 November 2000:

Art. 7

**Decision of the Administrative Council of 28 June 2001 on the
transitional provisions under Article 7 of the Act revising
the EPC of 29 November 2000:**

Art. 1

PLT:

Art. 13(2)
R. 14(4)

Vienna Convention on the Law of Treaties:

Art. 31, 32

UK Patents Act 1982:

R. 97

Keyword:

"Request to refer a question to the Enlarged Board of Appeal -
rejected"
"Request for re-establishment of rights with respect to the
priority period - not admissible"

Decisions cited:

G 0005/83, G 0001/86, J 0015/80, J 0005/81, J 0018/86,
J 0013/05

Catchword:

Article 122 (5) EPC 1973 has to be interpreted in accordance
with its proper wording and that wording leaves no doubt or
ambiguity that restitutio in integrum with respect to the time
limit referred to in Article 87 (1) EPC 1973 has been excluded
by the legislator.



Case Number: J 0009/07 - 3.1.01

D E C I S I O N
of the Legal Board of Appeal 3.1.01
of 30 June 2008

Appellant

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Decision under appeal:

**Decision of the Receiving Section of the
European Patent Office of 3 January 2007**

Composition of the Board:

Chairman: B. Günzel
Members: W. Sekretaruk
M.-B. Tardo-Dino

Summary of Facts and Submissions

- I. This is an appeal against the decision of the Receiving Section dated 3 January 2007 by which the request for re-establishment of rights with respect to the period laid down in Article 87(1) EPC 1973 was rejected and it was decided that the priority claim in respect of the Japanese patent application JP 2003-402805 was not valid under Article 87(1) EPC 1973.
- II. European patent application 04257544.9 was filed on 3 December 2004, claiming priority from Japanese application P2003-402805 of 2 December 2003.
- III. After being informed by the Receiving Section that the filing date of the previous application for which priority was claimed did not fall within the year preceding the date of filing of the European patent application, the appellant requested re-establishment of rights with respect to the twelve-month priority period.
- IV. On 3 January 2007 the Receiving Section rejected the request for re-establishment of rights and decided that the priority claim in respect of the Japanese patent application JP 2003-402805 of 2 December 2003 was not valid under Article 87(1) EPC 1973.
- V. In this decision it held that the request for re-establishment of rights with respect to the priority period was not admissible because Article 122(5) EPC 1973 explicitly excluded the time limit referred to in Article 87(1) EPC 1973 from the provisions relating to re-establishment of rights. No conflict could be seen between Article 122(5) EPC 1973 and Article 2(2) EPC

1973. Article 122(5) EPC 1973 was applicable before the grant of the European patent, whereas Article 2(2) concerned the European patent after grant. Additionally it was noted that under Article 2(2) EPC 1973 the possibility existed of making rules for the European patent in the Convention that were different from the laws of the Contracting States.

There also was no contradiction with Article 66 EPC 1973, because Article 66 EPC 1973 did not imply the application of the national law of a designated state. Article 122 EPC 2000 and Rule 85b(1) EPC 2000 were not applicable. The same was true for Article 13(2) and Rule 14(4) PLT.

VI. The applicants (appellant) lodged an appeal on 6 March 2007. Payment of the appeal fee was recorded on the same day.

VII. In its statement setting out the grounds of appeal, received at the EPO on 15 May 2007, the appellant submitted that

- a literal interpretation of Article 122(5) EPC 1973 lead to a result which was manifestly absurd or unreasonable and therefore contravened Articles 31 and 32 of the Vienna Convention on the Law of Treaties;
- Article 122(5) was in conflict with Article 2(2) EPC 1973 or Article 66 EPC 1973; and
- Article 122(5) EPC 1973 lead to unjustifiable hardship.

On 7 March 2008 the appellant filed additional written submissions in which it set out further arguments. These

arguments were summarized in the oral proceedings (see point X. below).

VIII. In its communication dated 15 April 2008 the Board addressed these issues. It came to the preliminary conclusion that contrary to the argument of the appellant the Boards of Appeal are bound by the EPC and have no power to excuse an applicant from complying with the time restriction imposed on applicants by Article 87 EPC 1973 in a way that would be contrary to the express exclusion provided for in Article 122(5) EPC 1973.

IX. In view of the comments made by the Board the appellant requested that the following question be referred to the Enlarged Board of Appeal:

"Where a European patent application is filed that designates only a state or states where restitutio in integrum of the priority date is allowable under national law of that designated state or the national law of those designated states, should the proper interpretation of Article 122(5) EPC 1973 allow restitutio in integrum of the priority date for the European patent application?"

X. During the oral proceedings on 30 June 2008 the appellant essentially submitted the following:
It was common ground between the Board and the appellant that re-establishment of rights could not be granted in the face of an express exclusion in the European Patent Convention. But this was not the case here. In fact there was room for interpretation of Article 122(5) EPC 1973 in favour of the appellant. The guiding principle in the preamble of the EPC was that cooperation between

the states of Europe should be strengthened. By implication this also included cooperation between the member states and the EPO. According to the commentary of Singer there should as a consequence be some flexibility within the express provisions of the EPC which should be interpreted in the light of the Preamble to the EPC 1973, the Vienna Convention on the Law of Treaties and also the TRIPS agreement which constitute a useful indicator of modern trends. In relation to related issues of interpretation there was room for the development of a convergent interpretation of the national and the European laws. As regards Article 1 EPC 1973 it should be noted that the European system does not replace the national systems. The latter should rather be regarded as a supplement to the former. Article 122 EPC 1973 is a provision in a complex field. It would be too easy simply to state that if someone breaks the rules there is a penalty - and the penalty in this case is the loss of the priority right. Rather, Article 122 EPC 1973 can be regarded as a mechanism to mitigate this penalty. It introduces the element of justice and fair treatment into the proceedings before the EPO and balances the need for legal certainty. In the case law of the Enlarged Board of Appeal there is an example that shows that such an interpretation of Article 122 EPC 1973 is in fact possible. Article 122(1) EPC 1973 is explicitly directed to an applicant and a proprietor. This is a list that includes two types of persons, but in fact does not exclude others. Following that line of argument the Enlarged Board of Appeal decided in G 1/86 that this non-exclusive list does not exclude an opponent and so extended the provision to include opponents. One of the reasons for this decision was to protect a party from an irretrievable loss of

rights. The loss of a priority right was an even more serious situation, because there was no remedy for that at all.

In contrast, an opponent had a remedy for the loss of the right to file an opposition: he had the possibility of taking legal action in the various national courts. Having this in mind the Enlarged Board of Appeal stressed the importance of the availability of a central means of redress, saying that if such an interpretation were possible, it would serve the interests of justice. It would lead to a manifestly unreasonable result if on the one hand the desirability of an opponent having a central means of redress could be met by the remedy of *restitutio in integrum* but on the other the far more important priority right could not. Article 32 paragraphs (a) and (b) of the Vienna Convention on the Law of Treaties could be considered as useful indicators for what to do when the literal meaning lead to a manifestly unreasonable result or left the meaning obscure: the wording had to be interpreted in a way that lead to a reasonable result.

Although Article 2(2) EPC 1973 referred to a granted patent the prosecution history was an inherent part of a granted patent and the priority date was part of its history. Article 66 EPC 1973 supported the fact that the priority date was fundamental for a patent.

Article 122(5) EPC 1973 could only be interpreted properly when the history of the EPC was taken into account. During the discussions concerning this question there were different views: some states wanted the supremacy of justice and so were in favour of *restitutio in integrum* but the majority voted for the construction that lead to greater legal certainty. In the following years there had been a shift in that balance away from

legal certainty to substantial justice, a shift that was evidenced by the EPC 2000 and national laws. Article 122(5) EPC 1973 was an umbrella-type provision that did not deal with all the details and which left room for manoeuvre. It did not say what should happen in relation to any particular Contracting State. As this area was not legislated for, it could be developed by the jurisprudence of the EPO. There was no express wording forbidding restitutio in integrum in this very particular scenario: only one state was designated in the application and this state allowed re-establishment of rights on a national level. The only reasonable way to develop the jurisprudence was in a cooperative way that was in line with the national law of the only designated state.

XI. The appellant requested that the decision under appeal be set aside and the case be remitted to the examining division for further prosecution.

Reasons for the decision

1. The appeal is admissible.
2. Applicability of EPC 1973

On 13 December 2007 EPC 2000 entered into force.

Article 7 of the Act revising the EPC of 29 November 2000 reads:

"(1) The revised version of the Convention shall apply to all European patent applications filed after its

entry into force, as well as to all patents granted in respect of such applications. It shall not apply to European patents already granted at the time of its entry into force, or to European patent applications pending at that time, unless otherwise decided by the Administrative Council of the European Patent Organisation."

Article 1 of the Decision of the Administrative Council of 28 June 2001 on the transitional provisions under Article 7 of the Act revising the European Patent Convention of 29 November 2000 reads in its point No. 1. (in parts):

"In accordance with Article 7, paragraph 1, second sentence, of the Revision Act, the following transitional provisions shall apply to the amended and new provisions of the European Patent Convention specified below:

1. Articles 14 (3)-(6) ... 61,67... 86, 88 ... 120,123 ... shall apply to European patent applications pending at the time of their entry into force"

Article 87 is not contained in this listing. As a consequence Article 87 EPC 1973 applies to the present case.

Article 1 of the said decision of the Administrative Council reads in its point No.5 (in parts):

"Articles 121 and 122 shall apply to European patent applications pending at the time of their entry into force ..., in so far as the time limits for requesting

further processing or re-establishment of rights have not yet expired at that time."

3. According to point No. 5 of Article 7 it has thus to be examined whether at the time of entry into force of the EPC 2000 the time limit for requesting re-establishment of rights had already expired. This can only be determined on the basis of the provisions applicable before the entry into force of the revised provisions. (For a request for re-establishment in respect of a priority period this may be of relevance because under Rule 136(1), second sentence, EPC a request for re-establishment in respect of the priority period must be filed within two months of expiry of that period). Under Article 122(2), first sentence, EPC 1973 any request for re-establishment of rights must be filed in writing within two months of the removal of the cause of non-compliance with the period. The cause of non-compliance was removed in February 2005 at the latest with the receipt of the information from the Receiving Section that the European patent application had not been filed within the twelve-month period for claiming priority on the basis of the previous Japanese application. Thus, when the EPC 2000 entered into force on 13 December 2007 the two-month period for requesting re-establishment of rights had long since expired.
4. Consequently the provisions to be applied in this case are those of the EPC 1973. This was not disputed by the appellant.
5. According to Article 87 EPC 1973 an applicant for a European patent enjoys a right of priority during a period of twelve months from the date of filing of the

- first application. European patent application 04257544.9 was filed on 3 December 2004, claiming priority from Japanese application P2003-402805 of 2 December 2003. This means that the appellant did not observe the time limit ending on 2 December 2004.
6. Concerning this non-observance the appellant request re-establishment of rights.
 7. This request is not admissible. According to Article 122(5) EPC 1973 the provisions on restitutio in integrum are not applicable to the time limits referred to in Article 87(1) EPC 1973.
 8. The boards of appeal are bound by the EPC and have no power to excuse an applicant from complying with the time restriction imposed on applicants by Article 87 EPC 1973 in a way that would be contrary to the express exclusion provided for in Article 122(5) EPC 1973. This is in line with the case law of the Boards of Appeal which has been established since 1980.
 9. In case J 15/80 (OJ EPO 1981,213, point 3 of the reasons) it was decided that the provisions of Articles 87 to 89 and Rule 38 EPC 1973 together formed a complete, self-contained code on the subject of claiming priority for the purpose of filing a European patent application. This code was, and had been designed to be independent e.g. of the Paris Convention. It formed part of the system of law common to the Contracting States which was established for the grant of patents for inventions: cf. Article 1 EPC 1973.

10. In case J 18/86 (OJ EPO 1987,356) it was added in point 4 of the reasons that the EPC was a treaty between the Contracting States. Its Preamble stated that the Contracting States were "DESIRING that (the protection of inventions) may be obtained in those States by a single procedure for the grant of patents ...". Article 1 EPC 1973 stated that "A system of law, common to the Contracting States, for the grant of patents for invention is hereby established". Clearly such a system of law included both procedural and substantive law. Thus prima facie the EPO provided a system of procedural law which was common to the Contracting States.

In point 10, paragraph 2 of the reasons, the Board said that it had carefully considered Rule 97 of the UK Patent Rules 1982, and the relevant provisions of the UK Patents Act 1977, under which UK Rule 97 was made. There was no doubt that if UK Rule 97 was read in isolation, its wording was broad enough to cover a European patent application "sent to the UKPO by posting it in the United Kingdom". However, the fact that its wording was broad enough to cover, and was apt to cover, the facts of that case, did not mean that as a matter of law it should be so applied. Authority for applying UK Rule 97 to a European patent application had to be derived from the EPC. In the judgement of that Board there was nothing in the relevant provisions of the EPC, set out above, which admitted of the possibility of applying a provision of any national law (such as UK Rule 97) to the determination of the date of filing of a European patent application.

11. The Board cannot accept the arguments of the appellant.

The appellant argues that the wording of Article 122(5) EPC 1973 leaves room for interpretation and a strict literalistic interpretation would lead to a result which is manifestly absurd or unreasonable and therefore would contravene Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

12. In its "Preliminary Observations" in case G 5/83 (OJ EPO 1985,60) the Enlarged Board of Appeal said that when interpreting the European Patent Convention, Articles 31 and 32 of the Vienna Convention on the Law of Treaties should be applied.

Articles 31 and 32 read in full:

"Article 31: General rule of interpretation

1. 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.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32: Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, 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:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable."

13. It follows from Article 31 of the Vienna Convention that the EPC should 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 the treaty's object and purpose.
- Taking this into account, the only conclusion to be reached is that Article 122(5) EPC 1973 has to be interpreted in accordance with its proper wording, and as to this there is no doubt or ambiguity about whether the provisions allowing restitutio in integrum are applicable to the time limit referred to in Article 87

(1) EPC 1973. On the contrary, their applicability has been expressly excluded by the legislator. That constitutes the main difference between this case and the case cited by the appellant. In case G 1/86 (OJ EPO 1987,447) a list consisting of the applicant and the proprietor, which was considered to be non-exclusive, was seen as not a priori excluding an opponent altogether. This line of reasoning cannot be transferred to a situation where a special procedural step is explicitly excluded from restitutio in integrum by the legislation. This situation leaves no room for a different interpretation, even in very narrow circumstances.

14. This literal interpretation does not lead to a result that is manifestly absurd or unreasonable. When considering the possibility of re-establishment of rights the legislator has to find a balance between legal certainty and substantial justice.

A consideration of these values can properly lead to an exclusion of the possibility of requesting re-establishment of rights from certain time restrictions in EPC 1973, in particular concerning the period during which it is possible to claim a priority. This is because legal certainty about the priority date is deemed to be so important that there should be no alteration of this date after the publication of the application, even in cases where a human error has exceptionally occurred.

This legislative aim still finds itself reflected in the revised provisions on re-establishment in respect of the priority period. By contrast to the general

definition of the period for filing a request for re-establishment starting to run from the removal of the cause of non-compliance with the period, Rule 136(1) EPC, second sentence, provides that a request for re-establishment of rights in respect of the priority period shall be filed within two months of expiry of that period. Thereby, it is ensured that - even if in such cases it will not always be possible to decide on re-establishment before the publication of the application - third parties are at least made aware that a priority right might still be allocated to the application.

The amendment to the law providing for re-establishment of rights with respect to the time limit for claiming priority in EPC 2000 thus does not show that the previous law was manifestly unreasonable or absurd because the guiding principle of the EPC 1973 as regards legal certainty for third parties about the priority date after publication of the application is still reflected in the EPC 2000. Therefore, the fact that re-establishment of rights with respect to the priority period is now allowed as a matter of principle, does not justify an interpretation going against the express wording of the applicable provisions of the EPC 1973.

15. The same applies to the appellant's objection based on the TRIPS Agreement. The appellant has not substantiated in what respect an interpretation following the express wording of Article 122 (5) EPC 1973 would have to be considered as a breach of the principles of protection set out in the TRIPS agreement

and therefore the Board does not pursue this issue further.

16. A different conclusion cannot be drawn from the interpretation of the Preamble to the European Patent Convention in Singer/Stauder, 3rd edition, English version 2004, Vol. 1, Preamble, paragraphs 8 and 9. It is not in doubt that the Preamble is relevant to the interpretation of the EPC or that another relevant source for the purposes of interpretation is the TRIPS Agreement. There also may be cases where help in finding the best solution to a problem under the EPC can be found in the case law of the national courts of the Contracting States.

17. In this respect the Enlarged Board of Appeal in G 5/83, loc.cit, point 6 of the reasons, said:

"In the interpretation of international treaties which provide the legal basis for the rights and duties of individuals and corporate bodies it is, of course, necessary to pay attention to questions of harmonisation of national and international rules of law. This aspect of interpretation, not dealt with by the provisions of the Vienna Convention, is particularly important where, as is the case with European patent law, provisions of an international treaty have been taken over into national legislation. The establishment of harmonised patent legislation in the Contracting States must necessarily be accompanied by harmonised interpretation. For this reason, it is incumbent upon the European Patent Office, and particularly its boards of appeal, to take into consideration the decisions and expressions of opinion

of courts and industrial property offices in the Contracting States."

18. None of the above, however, constitutes a sound basis for applying an article of the EPC in a way which goes against its express wording.
19. Article 122(5) EPC 1973 is not in conflict with Article 2(2) EPC 1973 or Article 66 EPC 1973. The argument that Article 122(5) EPC 1973 is contrary to Article 2(2) or Article 66 EPC 1973, because German national law allows restitutio in integrum as regards the period within which claiming priority is possible, is not correct.
20. According to Article 1 EPC 1973 the EPC establishes a system of law common to the Contracting States for the grant of patents for inventions. This common system of law is applicable to all European patent applications irrespective of which Contracting States have been designated in the European patent application. Although in general a high degree of harmonization between the EPC and national laws is desirable and has indeed been achieved, differences between national legislation and the EPC are not excluded by Article 2(2) or Article 66 EPC 1973 in this regard. The fact that re-establishment of rights is not possible for the priority period under the EPC does not alter the effect of the European patent in the Contracting States under Article 2(2) EPC 1973 or the principle enshrined in Article 66 EPC 1973 that a European patent application which has been accorded a filing date has, in a designated Contracting State, the same effect as a corresponding application filed in that state.

21. Save to the extent that the EPC expressly provides otherwise, the EPO is not allowed to take into consideration with respect to the designated state concerned a specific national legal provision which would be more favourable for the applicant than the provisions of the EPC. This is because this would have the consequence of giving European applications an unequal treatment as regards the requirements for grant depending on which state or states have been designated, contrary to Article 1 EPC 1973. It would also go against the principle of the unity of the application enshrined in Article 118 EPC 1973 since, if a more favourable national provision was to be applied in relation to the designated state concerned, distinguishing between a case in which the designated state concerned is the only one designated and a case in which further states have been designated as well would appear arbitrary and unjustifiable.

22. Article 2(2) EPC 1973, which was mentioned by the appellant, deals with the effects of the European patent once it has become a national patent and part of the national legal system. This article says nothing about the treatment of European patent applications by the EPO and there is no legal basis for a comparison to be made between the requirements for grant of a European application and those of a national application.

23. Article 66 EPC 1973 provides that a European patent application will be equivalent to a regular national filing, with the priority claimed, where appropriate. This article equally only concerns the rights derivable

from a European patent application in the designated Contracting States and not the conditions for grant by the EPO, including any priority rights. For European patent applications these conditions are governed exclusively by the EPC. Article 66 EPC 1973 does not mean, by a kind of a contrario reasoning, that a specific regulation concerning the right of priority in a particular national law will be applicable to the European application as far as this particular state is concerned. It only expresses the idea that if a priority has been validly claimed for the European application, the priority date is taken into account in the same way as for a national application when determining its effects in the designated Contracting States.

24. Thus, both these articles relate to the effects of either a European patent or a European patent application in the national legal system, with the intention that, as regards these effects, a certain degree of harmonization can be reached unless the EPC permits certain specific national provisions to be taken into consideration (see in this respect the proviso in Article 2(2) EPC). They cannot lend support for disregarding a provision of EPC concerning the grant procedure.

25. For the sake of giving a complete answer to the appellant's arguments (see in this respect points 8., 13. and 14. above), the Board wishes to add that in its view Article 122(5) EPC 1973 does not lead to unjustifiable hardship. Whether the application of an article may under certain circumstances impose unjustifiable hardship relates to the principle of

proportionality. When introducing the possibility of re-establishment of rights a legislator has to find a balance between legal certainty and substantial justice. The search for such a balance can - as explained above - lead to the exclusion of certain time restrictions from the possibility of requesting re-establishment of rights as foreseen in EPC 1973.

26. No different conclusions can be drawn from the decision of the Board in case J 13/05 of 3 August 2006 cited by the appellant. The cited paragraph reads:

"However, the Federal Administrative Court expressly refrained from answering the question whether delivery services which, unlike the German postal service, have no monopoly must be treated as equivalent to the latter service. Moreover, it can be inferred from that court's judgment (*ibid.*, p. 3, end of point 16) that, even under Community law, exceptions to the legal consequences of a failure to observe time limits on account of "force majeure" may be made only if they are provided for in Community law. Moreover, whilst Article 122(5) EPC expressly rules out re-establishment in respect of a priority period which has not been observed, the whole point of introducing Rules 84a and 85 EPC was to prevent hardship ensuing from the application of that article. The appellant has not submitted any argument to the effect that the drafters of the EPC have failed to comply with any obligation to prevent unjustifiable hardship arising from the exclusion under Article 122(5) EPC or that there are special circumstances which mean that, despite the failure to comply with the requirements of Rules 84a and 85 EPC, an unjustifiable prejudice will be suffered

in this particular case, in breach of the principle of proportionality."

27. First, in the cited passage, decision J 13/05 simply notes that under the Community law referred to by the appellant an exception to the legal consequences of a failure to observe a time limit requires a basis in the law. The same applies under the EPC.
28. Second, the cited passage from J 13/05 must be read in context, which is that the Board was merely refuting the appellant's arguments based on the decisions of the German Federal Administrative Court cited by the appellant in favour of its position.
29. In order to ensure uniform application of the law or if an important point of law arises the Board of Appeal should refer any question to the Enlarged Board of Appeal if it considers that a decision is required for these purposes (Article 112(1)(a) EPC 1973). In the view of the Board none of these conditions is fulfilled. With its decision the Board does not propose to deviate from a decision of the Enlarged Board of Appeal or another Board of Appeal. Furthermore it does not consider that a decision of the Enlarged Board of Appeal is required because an important point of law has arisen. It is of the opinion that the point of law to be decided upon can be answered by reference to the EPC without leaving the Board in any doubt (see J 5/81, OJ EPO 1981, 213, point 11. of the reasons).

Order

For these reasons it is decided that:

1. The request to refer a question to the Enlarged Board of Appeal is rejected.
2. The appeal is dismissed.

The Registrar:

The Chairman:

S. Fabiani

B. Günzel