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**Datasheet for the decision  
of 13 October 2009**

**Case Number:** J 0012/08 - 3.1.01

**Application Number:** 04821030.6

**Publication Number:** 1700094

**IPC:** G01M 3/22

**Language of the proceedings:** EN

**Title of invention:**

Anastomotic leak testing apparatus

**Applicant:**

Leiboff, Arnold R.

**Headword:**

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**Relevant legal provisions:**

EPC Art. 109, 111

EPC R. 103

Act revising the European Patent Convention 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 European Patent Convention of 29 November 2000

**Relevant legal provisions (EPC 1973):**

EPC R. 67

**Keyword:**

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**Decisions cited:**

J 0010/07

**Catchword:**

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Case Number: J 0012/08 - 3.1.01

**DECISION**  
of the Legal Board of Appeal 3.1.01  
of 13 October 2009

**Appellant:** Leiboff, Arnold R.  
5 Perigee Drive  
Stony Brook  
NY 11790 (US)

**Representative:** Luchs, Willi  
Luchs & Partner AG  
Patentanwälte  
Schulhausstrasse 12  
CH-8002 Zürich (CH)

**Decision under appeal:** Decision of the Receiving Section of the  
European Patent Office of 26 November 2007.

**Composition of the Board:**

**Chairman:** B. Günzel  
**Members:** P. Mühlens  
M-B. Tardo-Dino

## Summary of Facts and Submissions

- I. European patent application No. 04821030.6 was filed as an International patent application under the PCT on 15 September 2004 and entered the European phase on 18 April 2006. As the renewal fee for the third year had not been paid in due time, a notice of loss of rights pursuant to Rule 69(2) EPC was sent to the applicant. As a consequence, the applicant requested re-establishment of rights and paid the respective fee together with the renewal fee and the additional fee for late payment. By a decision dated 26 November 2007, the Receiving section refused the request for re-establishment of rights.
  
- II. By letter dated 31 January 2008, the applicant lodged an appeal against that decision, paid the appeal fee and submitted by letter of 20 March 2008 the grounds of appeal. However, by letter of 20 October 2008, received at the EPO on the same day, he withdrew the application and requested reimbursement of the appeal fee.
  
- III. By a communication dated 16 June 2009, the Board noted that the appeal proceedings were discontinued as a consequence of the withdrawal of the application and that there was no legal basis in the EPC to refund the appeal fee. The applicant/appellant did not reply to the Board's communication.

## Reasons for the Decision

1. The appellant has withdrawn his application by letter of 20 October 2008. Consequently, the appeal proceedings are discontinued and terminated without a decision as to the substance. However, the appellant's request for reimbursement of the appeal fee remains to be decided.
  
2. Only Rule 67 EPC 1973 can be considered as legal basis for such reimbursement. Rule 103(1)b) EPC which was introduced by the EPC 2000 is concerned with withdrawal of an appeal before filing the statement of grounds of appeal. That is not the case here.

Rule 67 EPC 1973 has now become Rule 103(1)a),(2) EPC, with the same content but slight editorial amendments. Rule 67 EPC 1973 is however, still applicable in the present case.

The application was filed and entered into the European phase before the entry into force of the revised EPC (EPC 2000) on 13 December 2007. According to Art. 7(1) of the Act revising the European Patent Convention of 29 November 2000, the revised convention shall apply to applications filed after its entry into force, unless otherwise decided by the Administrative Council of the European Patent Organisation. The respective decision of the Administrative Council of 28 June 2001 contains an explicit list of amended articles to be applied also to pending cases. Furthermore, amended Rules are applicable to pending cases if they are linked to an amended article contained in the list. (see J 10/07, OJ EPO 2008, 567, point 7 of the reasons).

Rule 103(1)a) EPC is linked to Articles 109 and 111 EPC which have remained unchanged as to the substance, with only minor editorial amendments. Both Articles are not mentioned in the decision of the Administrative Council. Consequently, Rule 67 EPC 1973 is applicable in the present case.

3. Under Rule 67 EPC 1973, reimbursement of the appeal fee shall be ordered where the Board of Appeal deems an appeal - at least partially - to be allowable, if such reimbursement is equitable by reason of a substantial procedural violation. These conditions are not met, as the appeal proceedings are discontinued and the Board will not render a decision as to the substance.
4. As a consequence, the request for reimbursement of the appeal fee has to be refused.

## **Order**

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

The request for reimbursement of the appeal fee is refused.

The Registrar:

The Chairwoman.

S. Fabiani

B. Günzel