

Internal distribution code:

- (A) [-] Publication in OJ
- (B) [X] To Chairmen and Members
- (C) [-] To Chairmen
- (D) [-] No distribution

**Datasheet for the decision
of 1 April 2022**

Case Number: T 0727/19 - 3.2.04

Application Number: 11772975.6

Publication Number: 2632311

IPC: A47J31/44, A47J31/46

Language of the proceedings: EN

Title of invention:

BEVERAGE MACHINE FOR DIFFERENT SPATIAL ENVIRONMENTS

Patent Proprietor:

Société des Produits Nestlé S.A.

Opponent:

Koninklijke Douwe Egberts BV

Headword:

Relevant legal provisions:

EPC Art. 19(2), 21(1), 24, 111(1)

RPBA 2020 Art. 11

EPC R. 103(1)(a), 113(1)

Guidelines for examination Part E, Chapter X (version November 2016), Part E, Chapter XI (version November 2018)

Keyword:

Justified suspicion of partiality (yes)
Substantial procedural violation - (yes)
Remittal - fundamental deficiency in first-instance proceedings (yes) - re-examination of the case ab initio
New composition of the first-instance department ordered
Prohibition of reformatio in peius (no)
Reimbursement of appeal fee - (yes)

Decisions cited:

G 0005/91, T 0077/99, T 0190/03, T 2475/17

Catchword:

1. The Guidelines, Part E, Chapter XI, set out the procedure whereby the reasons of a responsible superior's decision rejecting a challenge to the impartiality of a division can be appealed. This procedure does not make the responsible superior's decision formally appealable (Reasons 2.3 and 2.4)
2. The unexplained omission of the reasons of the responsible superior's decision from the final decision of the division justifies the suspicion of partiality and constitutes a substantial procedural violation (Reasons 2.9 and 2.15)
3. The principle of the prohibition of "reformatio in peius" is not applicable where a case is to be remitted to a division in a new composition because of a suspicion of partiality (Reasons 5.5 and 5.6)



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 0727/19 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 1 April 2022

Appellant: Société des Produits Nestlé S.A.
(Patent Proprietor) Entre-deux-Villes
1800 Vevey (CH)

Representative: Vossius & Partner
Patentanwälte Rechtsanwälte mbB
Siebertstrasse 3
81675 München (DE)

Respondent: Koninklijke Douwe Egberts BV
(Opponent) Vleutensevaart 35
3532 AD Utrecht (NL)

Representative: Boulton Wade Tennant LLP
Salisbury Square House
8 Salisbury Square
London EC4Y 8AP (GB)

Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
2 January 2019 concerning maintenance of the
European Patent No. 2632311 in amended form.**

Composition of the Board:

Chairman A. de Vries
Members: T. Bokor
C. Kujat

Summary of Facts and Submissions

- I. The appeal by the proprietor lies from the interlocutory decision of the opposition division of the European Patent Office, concerning maintenance of the European Patent No. 2 632 311 in amended form pursuant to Articles 101(3) (a) and 106(2) EPC.

Overview of the proceedings before the opposition division

- II. During first oral proceedings before the opposition division on 4 July 2017, the proprietor sought to defend the patent as granted and on the basis of auxiliary requests 1-13. Auxiliary request 1 comprised independent claims 1, 2 and 17. The opposition division found the main request to be sufficiently disclosed (Article 100(b) EPC), but not novel over D1. Thereafter claims 1 and 17 of auxiliary request 1 were found to infringe Article 123(2) EPC. The proprietor filed auxiliary request 1A, where claim 1 was amended to take into account the findings of the opposition division. The request was admitted and its allowability discussed, including the issue of added subject-matter for claims 1 and 14. Following the deliberation on the discussed issues, the opposition division came to the conclusion that the amendments in claims 1 and 2 led to an extension of subject-matter under Article 123(2) EPC, claims 1 and 14 were also not novel, and that at least one of these objections applied to all requests, see the minutes of the oral proceedings before the opposition division issued on 27 July 2017, item 12.1. The proprietor argued that the objections under Article 123(2) EPC were new and requested an opportunity to comment. The division accepted that objections against claim 2 were new, and the oral proceedings were then

adjourned (minutes, item 13.1). An interlocutory decision was not announced.

- III. The opposition division issued summons on 28 July 2017 for a second oral proceedings to take place on 4 October 2017. In an annex to the summons the division summarised the proceedings and the findings of the division on the main and auxiliary requests 1 and 1a. It informed the parties that at least the issue of added subject-matter for claim 2 of the auxiliary request 1a would be discussed at the second oral proceedings. The parties were invited to make submissions until 4 August 2017.
- IV. In reply to these summons, the proprietor in their telefax of 2 August 2017 objected to the opposition division due to suspected partiality (hereafter: first impartiality objection). They argued that the raising of an objection *ex officio*, the overall conduct of the oral proceedings, and the short time limit given in the summons to the second oral proceedings demonstrated that the division was trying to dispose of the case quickly and demonstrated the partiality of the division. The proprietor requested that the members of the opposition division (in the following referred to as the "original division") be replaced and that the opposition be examined by a new opposition division *ab initio*, and that a new date for the second oral proceedings be set. They also requested a separately appealable decision in respect of the impartiality objection. In subsequent letters of 4 August 2017 and 18 September 2017 the proprietor repeated the objections and the requests, and gave further arguments.

- V. The opponent responded with letter dated 23 August 2017 and argued that the suspicion of partiality was unfounded, and that they would request an award of costs against the proprietor if the proceedings were to be delayed due to the re-constitution of the division.
- VI. The opposition division cancelled the summons for 4 October 2017. It stated in a communication of 4 January 2018 that the objection against the members of the division had been brought forward to the director, and that the director had considered the challenge of impartiality not allowable. The communication further stated that "*the written and signed reasoned decision of the director will be attached to the final decision of the opposition procedure*".
- VII. A summons to a second oral proceedings for 9 November 2018 was issued on 16 April 2018. In the attached communication the opposition division informed the parties that the first member and the chairperson had been replaced. Further, they stated that certain conclusions reached by the former opposition division on the main request, auxiliary request 1 and auxiliary request 1a were shared by the division (in the following referred to as the "recomposed division") such that these points would not need to be re-opened.
- VIII. In reply, the proprietor in their letter of 18 May 2018 raised a further impartiality objection (hereafter: second impartiality objection) against the recomposed opposition division and requested their replacement. They argued that there was no room for a reorganisation of the division without good reasons, and in the absence of good reasons the proprietor can rightly

suspect the partiality of the division, all the more, as the recomposed division appeared unwilling to treat the whole case again and thus showed prejudice.

- IX. In the communication of 10 September 2018, the opposition division forwarded to the parties the signed decision of the responsible director OCFD, Directorate 1051 TH. The decision gave reasons why two members of the original division had been replaced, and stated that given the new composition the recomposed division will re-hear all issues discussed before the original division. The decision held that the recomposed opposition division was impartial (page 3, item 7: "*there are no prima facie evidence that could lead to the conclusion that the "new" Opposition Division can be qualified as being partial*"). The decision also indicated that it would be annexed to the final decision (of the opposition division), and concluded with the statement "An appeal may be filed against this decision".
- X. The impartiality objection against the recomposed division and the request for its replacement were repeated in the proprietor's letter of 9 October 2018. They argued that the communications of the recomposed division demonstrated its partiality. The proprietor also argued that the scheduling of the second oral proceedings contravened Rules 115(1) and 116(1) EPC, and these procedural violations further underlined the biased attitude of the recomposed division.
- XI. Second oral proceedings before the recomposed opposition division were held on 9 November 2018. The division concluded that the patent as amended according to auxiliary request 8c and the invention to which it related met the requirements of the EPC. The

interlocutory decision of the opposition division was issued on 2 January 2019, and the director's decision on the second impartiality objection (see point IX. above) was annexed. A decision on the first partiality objection (see point VI. above) was not annexed.

The parties' submissions in the appeal proceedings

XII. The proprietor as appellant argued as follows:
The procedure was tainted with multiple procedural violations. The decision of the director on the first impartiality objection was not annexed to the appealed interlocutory decision, thus the decision of the director remained unreasoned. This itself amounts to a substantial procedural violation. The partiality of the original division was apparent from the conduct of the proceedings, and the objection of suspicion of partiality against the original division was maintained. Given the overlap in the composition of the original and the recomposed division, the recomposed division also must be considered partial. The suspicion of partiality against the recomposed division was also supported by the conduct of the proceedings by the recomposed division, in particular their unwillingness to take up again the issues discussed before the original division. The bias of the original and the recomposed division would also be perceived as such by an objective observer. The lack of reasons for the director's decision in respect of the first impartiality objection was not only a procedural violation and a violation of the right to be heard, but also confirmed the suspicion of partiality. All these circumstances objectively demonstrated the bias of the division and justified remittal to an entirely new opposition division.

The provisions of Rules 115(1) and 116(1) EPC were not followed, and no reasons were given for auxiliary request 6b, which were further procedural violations.

- XIII. The opponent as respondent argued as follows:
While the reasons of the director for the decision on the first impartiality objection were missing from the public file, no more reasons could have been expected against the mere allegations by the proprietor.
Otherwise the conduct of both the original and the recomposed division was correct, and an objective observer would not have seen any bias against the proprietor. Equity dictated that there should not be any remittal.
- XIV. In preparation for oral proceedings the Board issued a communication dated 20 October 2021 setting out its provisional opinion on the relevant issues. In the opinion of the Board, neither a remittal nor a reimbursement of the appeal fee appeared justified, as the procedural errors, if any, did not appear substantial.
- XV. Oral proceedings were duly held as a videoconference on 1 April 2022. In the oral proceedings the Board explained that after reconsideration of the facts, the lacking reasons of the director's decision in respect of the first impartiality objection appeared decisive for the case, essentially for the reasons given in the present decision. The Board's decision was announced at the end of the oral proceedings.

Requests

- XVI. The appellant proprietor requests that the decision under appeal be set aside to the extent that the patent

has been limited by the interlocutory decision and the case be remitted to a newly constituted Opposition Division to this extent, as main request. Auxiliarily they request to maintain the patent as granted or in an amended form on the basis of one of the auxiliary requests 1 to 11 filed with the grounds of appeal dated 13 May 2019. They also request the reimbursement of the appeal fee.

XVII. The respondent opponent requests the dismissal of the appeal, and in particular the refusal of the request for remittal.

Reasons for the Decision

1. The appeal is admissible.
2. *Substantial procedural violation: lacking reasons of the director's decision in respect of the first impartiality objection*
 - 2.1 According to the Guidelines 2016, Part E, Chapter X, the following procedure is to be followed for an objection which is raised in writing (i.e. not during the oral proceedings).

*"Any challenge to impartiality must be submitted to the competent division, which will forward it to the immediate superior of the members of the division (Rule 11(1)) along with the statement of the member(s) concerned on the facts and circumstances put forward by the party. **The immediate superior will decide on the challenge.** If the challenge to impartiality has been raised in written proceedings and has been considered allowable, the concerned member(s) of the division is/are replaced. If the challenge has been considered either inadmissible or not allowable, **the reasons are***

issued in writing. These reasons are part of the final decision and will be appealable with it." (emphasis by the Board).

- 2.2 According to the file, both the first and second impartiality objections were found not allowable. However, the proprietor maintained both objections in the appeal, so that the Board has the power and the duty to review the director's findings on the two objections, following G 0005/91, Headnote 2. This finding of the Enlarged Board appears to be reflected in the procedure foreseen in the Guidelines as well. Nor has this been disputed by the parties.
- 2.3 The statement in the Guidelines that the reasons of the Director's decision "will be part of and appealable together with the final decision" is easy to misunderstand. The communications of the division and the director's decision state that the written reasons will be attached to the final decision, and that the director's decision will be appealable together with the final decision. Formally, there is no legal basis for an appeal against the the director's decision rejecting an objection against a member of the opposition division (G 0005/91, Headnote 2). Such a decision is not appealable as a formal legal act, because it is not encompassed by Article 21(1) EPC in conjunction with Article 19(2) EPC. Accordingly, a distinction must be made between the **reasons** being appealable and the **decision** being appealable, even if the distinction is marginal concerning the substantive outcome, i.e. a review of the division's composition. The director is not a member of the Division, so that there is also no legal basis for "incorporating" the director's decision in the final decision of the opposition division. This is why a distinction must be

made between the procedural act of the appointment of the members of the division (or the rejection of a challenge to the composition) by the director, and the factual circumstances which may point to a partiality of one or more members of the division. This latter, i.e. the factually established real (subjective) partiality or the objectively perceivable suspected partiality may become an appeal ground against the final decision of the opposition division, as found in G 0005/91, effectively providing an appeal against the composition of the division.

- 2.4 In that light, the procedure set out in the Guidelines must be seen to instruct the responsible superior, i.e. the director and the opposition division to annex the director's decision to the final decision, so that a board of appeal can take this into account as forming part of the factual circumstances of the case, when deciding on the question of the suspected partiality of the division in the course of an appeal. However, it remains that the reasons of the director's decision cannot formally become part of the reasons of the impugned decision, because these reasons are not given by the members of the division. At most they can be considered to be part of the facts and submissions, and the opposition division can simply refer to them, instead of providing their own reasons why the impartiality objection was not allowed. In this manner it would appear more appropriate to state that the director's decision will be part of the file and as such will be part of the facts of the case. The possibility to appeal the reasons of the director's decision does not derive from the fact that it has been annexed to the final decision, but from the fact that the reasoned decision becomes available to the parties at the latest with the final decision.

- 2.5 The decision and the communications issued by the opposition division or the director's decision do not explicitly refer to the cited chapter of the Guidelines, but the procedure followed by the division and the director is consistent with it, apart from the missing reasons. The procedure was also followed for the second impartiality objection, as apparent from the (second) decision of the director sent to the parties on 10 September 2018 and also attached to the final decision of the division (see points IX and XI above).
- 2.6 These provisions of the Guidelines were still in place in the November 2018 version (Part E, Chapter XI), i.e. applied to the opposition proceedings already from the first impartiality objection and also at the time of the issuance of the interlocutory decision. There were minor changes ("immediate superior" became "responsible superior"), but these did not affect the duty of the responsible superior to give reasons in respect of a not allowed impartiality objection (challenge) and the duty of the division to include these reasons in the final decision.
- 2.7 There was agreement between the parties and the Board that the appealed decision contained nothing that could have been considered to be the reasons corresponding to the decision of the director that the first impartiality challenge was not allowable, referred to in the communication of 4 January 2018 (see points IV and VI above). More importantly, there is no record of any such reasons on file. The communication of 4 January 2018 contained no recognisable reasons, and absent the director's name and signature it could also not qualify formally as a decision (Rule 113(1) EPC). The second decision of the director (see points IX and

XI above) did not contain any reasons which could have been understood to be the reasons of the first decision.

2.8 On this basis, the Board must establish that the Guidelines have not been followed, so that a procedural error occurred. As set out below, the Board considers that this error amounts to a substantial procedural violation.

2.9 In the present case, the effect of the procedural error cannot be separated from the underlying cause of the procedure itself, namely the first impartiality objection. More importantly, the error also directly affects the second impartiality objection, i.e. the question of the suspected partiality of the recomposed division.

2.10 The proprietor argued that the suspicion of partiality of the recomposed division is based on their handling of the case, because of the unwillingness of the division to re-hear all issues. Furthermore, the common second member also carried over the suspicion of partiality from the original division to the recomposed division.

2.11 It is settled case law that a suspicion of partiality must be judged not only on the basis of a proven subjective partiality, but also on the basis of an "objective" test according to which it is to be examined whether the circumstances of the case gave rise to an objectively justified fear of partiality (CLBA 9th Edition 2019, Chapter III J.1.4, following T 0190/03). The Board holds that the circumstances of the present case do give rise to such an objectively justified fear.

2.12 The proprietor maintained its partiality objection against the recomposed division right until the end of the first-instance proceedings. These were specifically addressed in writing shortly before the second oral proceedings (proprietor's letter of 9 October 2018) and also taken up in the second oral proceedings (point 1.3 of the minutes). Thus the recomposed division must have been fully aware of the objection against it. Given that the objection was partly based on the overlap between the original and the recomposed division, the recomposed division also must be presumed to have known the circumstances of the first impartiality objection. It goes without saying that the finally deciding body, here the recomposed division, would be expected to know the whole first-instance proceedings, even those parts where they were not personally involved. There is no reason to assume that this was not so in the present case. Indeed, the final decision explicitly refers to the first impartiality objection (page 2, point 10) and the director's decision on it (page 2, point 14).

2.13 It also must be assumed that the division knew the Guidelines, and their obligation to attach the decisions on the impartiality objections. To know and to apply the Guidelines is an inherent obligation of the division, and the attaching of the reasons in respect of the second impartiality objection indicates that the division indeed knew this obligation.

2.14 In this light, the Board neither sees good reason nor is it aware of any explanation, why the reasons on the first impartiality objections were not attached. The Board accepts that there may be plausible explanations for the missing reasons, such as a simple oversight on the part of the division. It is also possible that the

director's full decision was not available to the division for some reason, perhaps the reasons were later not put on paper in view of the changed composition. But even in this case the decision should have at least mentioned why the reasons of the first decision was not attached.

2.15 Be that as it may, the mere possibility of plausible and acceptable explanations cannot change the fact that there is no certainty on this issue. In the absence of a reliable explanation for the missing reasons it has to be accepted that an objective observer would not be able to exclude that the reasons were knowingly omitted by the recomposed division and possibly for reasons in connection with the impartiality objections. This in turn means that there is a justified suspicion of partiality of the recomposed division on the part of the proprietor.

2.16 The opponent argued that in fact no more reasons could have been expected, so that there was no real detriment to the proprietor. The Board is not convinced by this argument. The communication of 4 January 2018 explicitly stated that reasons would be given. Furthermore, as the proprietor pointed out, at least reasons similar to those given by the opponent in defence of the original division could have been given in the director's decision as well. Apart from that, the omission of the reasons is also a genuine detriment to the proprietor. The Guidelines foresee that such reasons may form the basis of an appeal against the composition of the division. If they are not provided to the party at the latest with the final appealable decision, the party's right to appeal is also affected, in the sense that it will not be able to argue against reasons that are unknown to it. In addition, the

party's right to be heard can also be seen to be infringed if reasons are lacking, as argued by the proprietor.

2.17 The opponent also argued that the conduct of both divisions was faultless, and nothing in their conduct would have led an objective observer to suspect bias of the divisions against the proprietor. The Board agrees that apart from the missing reasons, on the face of it the remaining facts as derivable from the file were unlikely to either prove a subjective bias of the members of the division, nor were they likely to lead to an objective suspicion of bias. However, under the objective test it is not sufficient to establish that the majority of the facts speaks against a bias. A single fact in itself can also be sufficient to establish a suspicion. It is inherent in the notion of suspicion that it need not be proven conclusively. It is sufficient if the suspicion cannot be convincingly rebutted. The Board agrees with the opponent that there must be a minimum threshold for finding a justified suspicion, and a merely subjective suspicion of a party, even if supported by some facts, does not automatically lead to the recognition of a justified suspicion. However, the Board finds that in the present case the procedural error explained in point 2.8 does pass this threshold.

2.18 In sum, the Board holds that the suspicion of partiality of the recomposed division must be seen as justified, and the proprietor's request for remittal to a completely new division must be allowed, as set out below. In view of this finding, the question of the partiality of the original division, or the question whether the missing reasons violate the proprietor's right to be heard can be left undecided. The same

applies to the various other substantial procedural violations raised by the proprietor. This was also accepted by the proprietor in the oral proceedings.

3. *Remittal*

3.1 According to Article 11 RPBA 2020, a board shall not remit a case to the department whose decision was appealed for further prosecution, unless special reasons present themselves for doing so. As a rule, fundamental deficiencies which are apparent in the proceedings before that department constitute such special reasons.

3.2 The opponent requested and argued for non-remittal. They submit that the remittal would unduly prolong the proceedings and the uncertainty about the patent, also for third parties. The Board accepts that this consequence of the remittal is indeed undesirable, but as the proprietor pointed out, this is inherent in any remittal and cannot be the sole decisive criterion. The Board considers that a remittal is practically unavoidable where it has been established that the deciding body may have been partial. As explained further below, the decision in such a case must be considered void, meaning that no legally effective first instance proceedings took place. This would effectively mean that the parties would be deprived of a legally effective first-instance proceedings if the Board would decide to reject the request for remittal. In the opinion of the Board, such situations are generally to be avoided, in particular where at least one party requests remittal. Thus the Board holds that a remittal is proper in the present case.

4. *Remittal to a newly composed opposition division*

- 4.1 The boards have no formal power to decide the composition of the opposition division. This is the competence of the President of the Office (T 0077/99, Reasons 4). Article 111(1) EPC also cannot be the basis for such a power, because the first-instance organs cannot decide over their own composition either. However, this does not mean that a board cannot order at all that the case should be handled by a recomposed division. As set out by decision T 2475/17, Reasons 3.1.5, while a board normally does not have the power to order a change of the composition of the first-instance body, it is empowered to do so where it concludes that the composition is the real cause of the violation of the right to be heard and that the violation of the right to be heard can only be remedied by a change of composition, i.e. in particular in the case where there is a legitimate concern that one or more members of the first instance body are biased.
- 4.2 These findings are generally approved by this Board. However, T 2475/17 held that such an order by a board was possible only under the conditions as set out above in point 4.1. In the present case it need not be decided if possibly other conditions can also lead to the ordering of a new composition. The Board only adds that it does not seem necessary to establish that a violation of the right to be heard did occur. It is sufficient for ordering the new composition that a justified suspicion of partiality of one or more members of the division can be established. Given that at least formally all three members were jointly responsible for the complete content of the division's final decision, the suspicion of partiality has to be accepted against all three members of the recomposed division.

4.3 The Board also concurs with the finding of T 2475/17, Reasons 3.1.5, that a board does not substitute itself for the President of the Office where a change of the composition is ordered, since the actual composition of the first instance body remains with the President or the body to which the President has delegated its powers. This is also consistent with the non-appealable character of the director's decisions on the composition, as explained above in point 2.3. The order of the board is limited to the fact that the composition is to be changed so that the right of the parties to a fair and lawful trial is ensured. It is left to the competent body (the responsible superior as the Guidelines put it) to decide who is to replace the members of the division. This is also reflected in the present order of the Board, making it clear that the composition of the division is not set aside immediately when the Board's decision is announced, but only when the responsible superior orders the change, implementing the Board's order.

5. *Extent of the remittal*

5.1 The appellant requests that the case be remitted to the extent that the patent has been limited by the interlocutory decision. They argue that such a remittal is possible because of the principle of the prohibition of the *reformatio in peius*, this being a general and overriding principle of law.

5.2 The Board considers that such a remittal with a limited extent as requested is not possible in the present case. Instead, the whole case must be re-heard *ab initio*.

5.3 Firstly, there is the formal problem that the appealed decision has a single, indivisible legal effect, namely the maintenance of the patent in the limited form which the proprietor wishes to retain as a minimum result of the appeal. It is clear that the Board cannot simultaneously set aside this legal effect and at the same time order it to be maintained. Thus the Board takes it that the proprietor expects the Board to instruct the division not to go beyond the maintained request through the reasons of the Board's decision. Even this appears problematic, but this question need not be decided, as the underlying substantive issues pose a more serious problem.

5.4 The main thrust of the proprietor's case is the assertion that the original and the recomposed divisions were partial, and this was the reason why a remittal to a completely new division was requested. As explained above, the Board accepted this argument and recognised an objectively justified suspicion of partiality and as a consequence, the necessity for a remittal to a new division. As it is clear from G 0005/91, Reasons 3, this follows from the analogous application of the principles underlying Article 24 EPC, even if this article is formally not applicable to the first-instance departments of the EPO. So when a member or a whole division is to be replaced following an objection, the replacement is an expression of the principle that nobody should decide a case in respect of which a party may have good reasons to assume partiality. As the Enlarged Board observed, this principle is also a general principle of law, similarly to the argued "reformatio in peius" principle.

5.5 The Enlarged Board also held in G 0005/91, Reasons 6, that the impartiality of an opposition division constitutes a procedural violation, namely a violation in respect of the composition of the division, normally rendering the decision void. The present Board sees no reason to deviate from this assessment of the Enlarged Board. From this it follows that the whole decision has to be considered void, i.e. has to be set aside, also including the decision on the maintained request of the proprietor. Indeed, it is at the core of any impartiality objection that the deciding person or body should be replaced not because a wrong decision was made, but because the person or body should not have decided at all. Thus the condition that certain parts of the decision should not be set aside on remittal is in fundamental contradiction with the main argument of the appellant that the decision is to be set aside because of a suspicion of partiality.

5.6 The Board accepts that this might appear as a conflict of two generally recognised principles of law. However, in its view, the principle of the impartial members of the deciding panel not so much contradicts, but rather precludes the application of the principle of the prohibition of the "reformatio in peius" for the reasons explained above. The Board also points to the case law on the application of this principle, according to which it is not absolute. Reference is made to CLBA V.A.3.1.3 and V.A.3.1.8.

6. *Reimbursement of the appeal fee*

6.1 As the Board deems the appeal allowable, and the reimbursement is equitable by reason of a substantial procedural violation, the Board orders the requested reimbursement of the appeal fee, Rule 103(1)(a) EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted for further prosecution to an Opposition Division to be re-constituted in a new composition pursuant to Article 19(2) EPC replacing all members.
3. The appeal fee is reimbursed.

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated