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**Datasheet for the decision
of 16 October 2025**

Case Number: T 1283/22 - 3.4.03

Application Number: 14197126.7

Publication Number: 2905794

IPC: H01H1/025, H01H1/22

Language of the proceedings: EN

Title of invention:

Static contact support for circuit breaker and circuit breaker thereof

Patent Proprietor:

Siemens Aktiengesellschaft

Opponent:

Eaton Industries GmbH

Headword:

Circuit Breaker

Relevant legal provisions:

EPC Art. 52(1), 54, 84, 113(1), 116

EPC R. 117

OJ EPO 2020, A 121

OJ EPO 2020, A 122

CA79/20

OJ EPO 2020, A 135

14. BayIfSMV

15. BayIfSMV

Keyword:

Novelty - main request and auxiliary requests I-VI (no) -
auxiliary request VIII (yes)

Claims - clarity - auxiliary request VII (no)

Decisions cited:

G 0003/14, G 0001/21, G 0002/21, T 0423/22

Catchword:

While the amending of Rule 117 EPC may have been occasioned by a particular situation (in this case the pandemic), the wording of Rule 117 EPC does not limit its application to a pandemic or similar exceptional situation. It thus applies irrespective of whether the situation which occasioned its amendment persists or not (Reasons 2.3.2 (a)).

The board is not aware of any statement by the Enlarged Board in G 1/21 that would be even indirectly - let alone directly - applicable to hearing a witness. (Reasons 2.3.2 (e)).



Beschwerdekammern

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Case Number: T 1283/22 - 3.4.03

D E C I S I O N
of Technical Board of Appeal 3.4.03
of 16 October 2025

Appellant: Siemens Aktiengesellschaft
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 16 March 2022
revoking European patent No. 2905794 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman T. Häusser
Members: M. Stenger
T. Bokor
M. Papastefanou
E. Mille

Summary of Facts and Submissions

- I. The patent proprietor's appeal concerns the opposition division's decision to revoke European patent EP 2 905 794 B1.
- II. In the contested decision, the opposition division concluded that the subject-matter of claim 1 of the main request and of auxiliary requests I, III, IV, V, VI and VIII was not new over a prior use, namely the sale of the circuit breaker devices PKTZM0-20, -25 and -32 by the opponent. Auxiliary request II was not admitted under Rule 80 EPC, and the subject-matter of claim 1 of auxiliary request VII was found to be unclear.
- III. In the process of reaching these conclusions, the opposition division had postponed the oral proceedings twice, due to the COVID pandemic situation and the proprietor not giving its consent to the oral proceedings being held by videoconference.

Oral proceedings, including the hearing of a witness, were eventually held before the opposition division by videoconference on 20 October 2021.

At the beginning of these oral proceedings, the proprietor requested that the oral proceedings by videoconference be adjourned and that the oral proceedings be held and the witness be heard in person on the premises of the EPO. In addition, at around 20.15 hrs, the proprietor requested that the oral proceedings be adjourned because of the physical and psychological strain on all participants after having been working for almost 12 hours. At around 20.45 hrs,

the proprietor requested again that the proceedings be adjourned.

The opposition division rejected these requests. It subsequently accepted the submission of auxiliary request VIII. Ultimately, it revoked the patent at the oral proceedings. The oral proceedings ended at 22.20 hrs.

IV. Oral proceedings before the board were held on 16 October 2025 in mixed mode in view of the appellant's request for the oral proceedings to be held in person on the premises of the EPO (letter dated 30 December 2024) and the respondent's request for them to be held by videoconference (letter dated 10 December 2024).

V. With respect to the public prior use E4 of motor protective circuit breakers PKZM0-20, -25, -32 comprising a static contact support, reference is made to the following set of exhibits/documents (see also the labelling set out in the contested decision in points 2.2, 4, 6 and 16 of the Summary of Facts and Submissions):

E4-1 Extract of a catalogue for motor protective circuit breakers PKZM01, PKZM0, PKZM4, PKE, pages 7/4-75

E4-2 Letter from Eaton to Konradin Druck GmbH dated 19.2.2010 - order for printing catalogues

E4-3 "NB Bestellung 4505905167" - confirmation of payment

E4-4 Letter from Eaton to Konradin Druck GmbH dated 19.2.2010 - order for shipment

E4-5 Invoice from Konradin Druck GmbH dated 26.3.2010

- E4-6 Technical drawing of the contact angle dated 26.6.2008
- E4-7 Technical drawing of the contact angle dated 12.11.2009
- E4-8 Affidavit from Mr Günter Baujan
- E4-9 Protocol dated 28.2.2000, Moeller GmbH
- E4-10 Hauptkatalog Industrie 2010 (first and last pages of the catalogue)
- E4-11 Hauptkatalog Industrie 2010 (last page of the catalogue)
- E4-12 Invoice dated 4.12.2012
- E4-13 Technical drawing of the complete basic body ("Grundkörper E4-13a, komplett") dated 10.12.2008 and two enlarged tables of the drawing E4-13b
- E4-14 Technical drawing of the contact element module dated 5.12.2007
- E4-15 Technical drawing of a single extinguishing plate dated 15.3.2005
- E4-witness Minutes of the hearing of the witness on 20 October 2021 by videoconference

VI. In addition, the following documents are referred to:

D11 Decision of the President of the European Patent Office dated 10 November 2020 concerning the modification and extension of the pilot project for oral proceedings by videoconference before opposition divisions; OJ EPO 2020, A121

D15 Notice from the European Patent Office dated 10 November 2020 concerning oral proceedings before examining and opposition divisions, and consultations, by videoconference; OJ EPO 2020, A122

D16 Document CA/79/20 submitted to the Administrative Council of the European Patent Organisation

D19 Notice from the European Patent Office dated 17 December 2020 concerning the taking of evidence by videoconference by examining and opposition divisions; OJ EPO 2020, A135

D20 "Vierzehnte Bayerische Infektionsschutzmaßnahmenverordnung (14. BayIfSMV)" of 1 September 2021

D21 "Zoom-Fatigue" - publication of the "Institut für Arbeit und Gesundheit der Deutschen Gesetzlichen Unfallversicherung"

D24 to D26 "Wöchentlicher Lagebericht des RKI zur Coronavirus-Krankheit-2019 (COVID-19)" of 14 October 2021, 21 October 2021 and 28 October 2021

D27 "Fünfzehnte Bayerische Infektionsschutzmaßnahmenverordnung (15. BayIfSMV)" of 23 November 2021

D29 Instructions to candidates concerning the conduct of the European qualifying examination (version from December 2023)

VII. At the end of the oral proceedings before the board, the appellant-proprietor (henceforth: the appellant) requested:

a) that the decision under appeal be set aside and that the opposition be rejected (main request);

b) on an auxiliary basis, that the patent be maintained as amended on the basis of one of auxiliary requests I

to III (filed on 28 January 2020), IV-VII (filed on 17 August 2021) or VIII (filed during the oral proceedings before the opposition division on 20 October 2021);

c) that the following two questions be referred to the Enlarged Board of Appeal under Article 112(1)(a) EPC:

1. Do the principles laid down in Enlarged Board of Appeal decision G 1/21 also apply to oral proceedings before a department of first instance of the EPO (opposition division, examining division, Legal Division, Receiving Section), that is, is the conduct of oral proceedings before a department of first instance of the EPO in the form of videoconference compatible with the EPC, in case not all parties have given their consent to the conduct of oral proceedings in the form of a videoconference?

2. If the answer to the first question is "Yes", does this also apply if it is necessary to take evidence, i.e. to hear a party, witness or expert, or to carry out an inspection?

d) that the case be remitted to another opposition division for new oral proceedings to be held and the witness to be heard again, due to multiple procedural violations.

In view of the result of the discussion with respect to the novelty of claim 1 of auxiliary request VIII, the appellant further requested:

e) that the case be remitted to the opposition division.

VIII. At the end of the oral proceedings before the board, the respondent-opponent (henceforth: the respondent) requested:

a) that the appeal be dismissed and the patent not be maintained either according to the main request or according to one of the auxiliary requests;

b) that the case be remitted to the opposition division if the board concludes that the prior use E4 does not belong to the state of the art or that the claimed subject-matter according to any request is new over E4; and

c) that the board reject the request for questions to be referred to the Enlarged Board of Appeal.

IX. The features of the independent claims of the main request and auxiliary requests I to IV are all included in claim 1 of auxiliary request V. In view of the board's final decision, it is sufficient here to set out the wording of claim 1 of auxiliary request V and the lower-ranking requests.

X. Auxiliary request V, claim 1

Claim 1 of auxiliary request V is worded as follows (labelling (A), (B), etc. added by the board):

(A) *A circuit breaker, characterized in that it comprises:*

(B) *a moving contact assembly (20), comprising a moving contact support (22) and a moving contact (24) disposed on the moving contact support (22); and*

(C) a static contact assembly (10), comprising a static contact support (12) and a static contact (14) disposed on the static contact support (12) and capable of contacting the moving contact (24),

(D) wherein the static contact support (12) comprises:

(D1) a base layer (122) for transferring current passing through the circuit breaker; and

(D2) a reinforcing layer (124), which is superposed on the base layer (122) and can provide the base layer (122) with structural support,

(E) wherein the reinforcing layer (124) can attract an arc produced between the moving contact and the static contact in the circuit breaker into an arc extinguishing mechanism of the circuit breaker,

(F) wherein the reinforcing layer (124) is superposed on the base layer (122) by a process for combining two metals,

(G) wherein the side of the static contact support (12) which is close to the moving contact assembly (20) is the base layer (122), while the side of the static contact support which is remote from the moving contact assembly (20) is the reinforcing layer (124),

(H) and wherein the static contact (14) is connected to the base layer (122).

XI. Auxiliary request VI, claim 1

Claim 1 of auxiliary request VI differs from claim 1 of auxiliary request V in that feature (G) is replaced by feature (G_{VI}) as follows (additions with respect to feature (G) underlined by the board):

(G_{VI}) wherein the side of the static contact support (12) which is close to the moving contact assembly (20) is the base layer (122), which extends along the

complete static contact support (12), while the side of the static contact support which is remote from the moving contact assembly (20) is the reinforcing layer (124), which extends along the complete static contact support (12),

XII. Auxiliary request VII, claim 1

Claim 1 of auxiliary request VII differs from claim 1 of auxiliary request VI in that feature (A) is replaced by feature (A_{VII}) as follows (additions with respect to feature (A) underlined by the board):

(A_{VII}) A micro circuit breaker, characterized in that it comprises:

XIII. Auxiliary request VIII, claim 1

Claim 1 of auxiliary request VIII differs from claim 1 of auxiliary request V in that, at the end, it comprises feature (I) as follows:

(I) , wherein the base layer (122) is made of copper metal, wherein the reinforcing layer (124) is made of steel, wherein the ratio of the thickness of the base layer to the thickness of the reinforcing layer is 1 - 2.5 : 1

XIV. The appellant's main arguments

(a) Decision G 1/21 also applied to first-instance oral proceedings, and a *fortiori* to witness hearings. This should be clarified by the questions to be referred to the Enlarged Board of Appeal. The first-instance oral proceedings should therefore

have been held in person as requested by the appellant.

- (b) The opposition division committed several substantial procedural violations with respect to Article 3 of the President's decision to modify and extend the pilot project for oral proceedings (D11); points 14 and 17 of the "Notice from the European Patent Office dated 10 November 2020 concerning oral proceedings before examining and opposition divisions, and consultations, by videoconference" (D15); point 9 of the "Notice from the European Patent Office dated 17 December 2020 concerning the taking of evidence by videoconference by examining and opposition divisions" (D19); and, in relation to auxiliary request III, Article 113(1) EPC.
- (c) The different parts of E4 did not relate to the same product and thus the same "prior use". E4 was therefore not prior art under Article 54(2) EPC.
- (d) E4 did not anticipate the novelty of claim 1 of the main request or any of auxiliary requests I to VIII.

XV. The respondent's main arguments

- (a) Even in view of the reasons given in G 1/21 as to why a request for oral proceedings in person could be refused, the opposition division was right to refuse the appellant's request in this regard.
- (b) The alleged procedural violations committed by the opposition division did not have any impact on its decision.

(c) The different parts of E4 related to the same product, in particular as explained by the witness.

(d) E4 disclosed all the features of claim 1 of each of the main request and auxiliary requests I to VIII, the subject-matter of which was therefore not new.

Reasons for the Decision

1. The appeal is admissible.
2. Conduct of oral proceedings and taking of evidence by videoconference; questions to be referred to the Enlarged Board of Appeal
- 2.1 The appellant's relevant submissions

The appellant submitted that it had never given its consent to the oral proceedings being held and the witness being heard by videoconference. Instead, it had requested that both be done in person. The opposition division should have granted these requests.

Although G 1/21 ruled that oral proceedings held by videoconference met the requirements of Articles 113(1) and 116 EPC, it also set out that oral proceedings with the parties present in person were the "gold standard" and that a request in this regard could be refused only for case-specific reasons that prevented the parties from being present (see point 49 of the Reasons). Furthermore, although G 1/21 mainly related to oral proceedings before the boards of appeal, it also addressed the submissions of the President of the EPO with respect to first-instance oral proceedings, which were therefore also subject to the findings of G 1/21.

Hearing witnesses was similar to holding oral proceedings. Thus, the findings of G 1/21 should apply here too, and *a fortiori* because hearing witnesses entailed some additional requirements, for example ensuring that witnesses are not influenced by other people while giving their evidence, which was easier to control in person than by videoconference.

At present, the examining and opposition divisions do not apply the findings of G 1/21. Instead, they do the opposite and give priority to the Guidelines for Examination in the EPO, under which requests for oral proceedings in person can only be granted if there are serious reasons for doing so.

Questions 1 and 2 to be referred to the Enlarged Board of Appeal concerned the question of whether the departments of first instance of the EPO had to apply the findings of G 1/21 to the conduct of oral proceedings and the hearing of witnesses. Thus, the questions concerned a point of law of fundamental importance.

In addition, the appellant's request to hold oral proceedings in person in the case in hand had been refused even though, under the regulations of the competent Bavarian authorities that were valid at that time (see D20 and D27), meetings of the size of oral proceedings - even when taking into account the hearing of a witness - could be held in person on the premises of the EPO in Munich. The reasons relating to the containment of the pandemic on the basis of which the Administrative Council had amended Rule 117 EPC to allow oral proceedings by videoconference were therefore no longer valid on the date of the oral proceedings before the opposition division.

Refusing this request was thus contrary to the findings of G 1/21.

Moreover, in the case in hand, document E4-1 was highly relevant for the decision. However, since the oral proceedings were held by videoconference, neither the appellant nor the opposition division had the opportunity to inspect an original catalogue, extracts from which were allegedly shown in E4-1. Hence, in view of the high standard of proof "beyond reasonable doubt", E4-1 could not be taken into consideration. In addition, point 17 of the Notice from the European Patent Office dated 17 December 2020 concerning the taking of evidence by videoconference by examining and opposition divisions (D19) clarified that an inspection would not be carried out by videoconference where the taking of evidence concerned the haptic feel, texture, handling experience or any other feature that could not be properly transmitted by videoconference. In the case of a product catalogue such as E4-1, the features necessary to assess its originality cannot be properly transmitted by videoconference. Moreover, according to point 18 of the President's proposal submitted to the Administrative Council in the document CA/79/20 (D16), an imbalance between parties when an object is to be inspected can be avoided if the inspection takes place in the presence of all parties. Furthermore, the witness was an employee of the respondent and was therefore completely dependent on the respondent and had been actively involved in the preparation of the opposition.

This case-specific procedural situation provided serious reasons for not hearing the witness by videoconference, in line with points 4 and 22 of D16.

In any case, the highest standards - as applied, for example, to the European qualifying examination (D29) - should have been applied to ensure that the respondent could not influence the witness while he was giving his evidence.

Moreover, hearing the witness was crucial for filling in the gaps in E4, and if the opposition division had heard the witness in person, it is probable that the division would have reached a different conclusion. Hence, questions 1 and 2 to be referred to the Enlarged Board of Appeal with respect to whether the findings of G 1/21 applied to the conduct of oral proceedings and the hearing of witnesses during first-instance proceedings were also crucial for the opposition division's decision.

The request to hold the oral proceedings in person could not have been submitted any earlier than at the beginning of the oral proceedings before the opposition division because D20 only entered into force shortly before the scheduled date for the oral proceedings. The late filing of this request was justified, and so the opposition division should have granted it despite its late filing.

2.2 The respondent's relevant arguments

The possible reasons for refusing a request for oral proceedings to be held in person, as listed under point 49 of G 1/21, included measures for containing the pandemic situation, for instance travel restrictions. While D20 may have allowed the oral proceedings themselves to be held, it did not indicate that the pandemic situation was over, which, in view of D24 to D26, was not the case. On the contrary,

section 3 of D20 set out pandemic-specific rules for meetings in person.

In any case, both D20 and D27 were valid in Bavaria only, but the EPO also had to consider other regulations, for instance in the Netherlands due to the EPO site in The Hague, or with respect to patent attorneys travelling to and from EPO sites - in the case in hand from North-Rhine-Westphalia to Munich and back.

The opposition division thus had good reasons for refusing the appellant's request for in-person oral proceedings.

Since the appellant's request for in-person oral proceedings would still have been refused even if the findings of decision G 1/21 with respect to the "gold standard" of oral proceedings had been applied, i.e. this would not have had an impact on the contested decision, there was no reason to refer questions 1 and 2 to the Enlarged Board of Appeal.

Irrespectively, the appellant should have requested that the oral proceedings be held and the witness be heard in person much earlier than at the beginning of the oral proceedings before the opposition division. It should have done so at least immediately after D20 had entered into force, i.e. about six weeks before the date of the oral proceedings.

Similarly, the issues as regards inspecting E4-1 and ensuring that the respondent could not influence the witness while he was giving his evidence should have been raised much earlier. However, the appellant did not react to the summons for the witness to attend a hearing by videoconference for about nine months.

2.3 The board's findings

2.3.1 Format of the oral proceedings

This board agrees that decision G 1/21 does make some general statements that can be taken to apply to proceedings before the examination and opposition divisions as well as to appeal proceedings. These include the statements that in-person oral proceedings should be the default option, that parties can only be denied this option for good reasons (Reasons 45) and that a corresponding decision should not be influenced by administrative issues (Reasons 49).

However, G 1/21 explicitly restricted its order not only to appeal proceedings (see also Reasons 16) but, more importantly, to cases where circumstances specific to the case impair the parties' ability to attend in-person oral proceedings (Reasons 49). For the case of a general emergency, in particular a pandemic, G 1/21 lists a number of such circumstances which do not only refer to the holding of oral proceedings themselves. Instead, as pointed out by the respondent, the circumstances listed also cover travel restrictions and, more generally, health-related measures aimed at preventing the spread of the disease.

It is true, as submitted by the appellant, that under the Bavarian regulations in force on the date of the oral proceedings (D20), meetings of the size of oral proceedings with the hearing of a witness - and thus the oral proceedings in question - could have been held in person.

However, this does not mean that the pandemic situation was generally considered to be over, as also demonstrated by D24 to D26. Rather, as submitted by the respondent, D20 itself lists many different provisions

all aimed at preventing the spread of the disease. The board notes that this is also the case for D27, which entered into force shortly after the oral proceedings before the opposition division took place.

In addition, the board notes - in line with the respondent's submissions - that in any case the EPO had to consider regulations on a larger geographical scale than D20, which related only to Bavaria, in particular with respect to travel restrictions. Therefore, even if it were accepted, for the sake of argument, that D20 indicated that the pandemic situation was considered to be over in Bavaria, this did not mean that the pandemic situation would have had to be considered over for the purposes of EPO proceedings, specifically oral proceedings. The appellant's expectation that the EPO would have been obliged to permit in-person oral proceedings as soon as the pandemic situation showed some improvement in Bavaria was plainly not realistic.

Thus, the circumstances listed in G 1/21 that could justify not holding oral proceedings in person persisted on the date of the oral proceedings in question.

Hence, on the date of the oral proceedings before the opposition division, it would have been justified to overrule a party's request for in-person oral proceedings in appeal proceedings, even if any such request had been submitted in good time. Therefore, even if it were accepted, for the sake of argument, that the findings of G 1/21 applied to first-instance oral proceedings, the opposition division's decision to refuse the appellant's request for oral proceedings in person would have been justified anyway, as submitted by the respondent.

2.3.2 Hearing of the witness by videoconference

(a) Rule 117 EPC

Rule 117 EPC, as in force when the (last) summons to oral proceedings and the order to take evidence by hearing the witness were sent out (11 February 2021), explicitly refers to the possibility of hearing a witness by videoconference.

While, as submitted by the appellant, the amending of Rule 117 EPC may have been occasioned by a particular situation (in this case the pandemic), the wording of Rule 117 EPC does not limit its application to a pandemic or similar exceptional situation. It thus applies irrespective of whether the situation which led to it being amended persists. Therefore, the opposition division acted in accordance with the formally valid legal provisions that explicitly allowed the witness to be heard by videoconference.

Hence, hearing a witness by videoconference was already in conformity with the EPC at the time the order to take evidence was sent out, and even more so on the date on which the oral proceedings took place.

(b) D19 and D16

As pointed out by the respondent, point 17 in combination with point 14 of D19 explicitly concerns the taking of evidence by inspecting objects. It refers in particular to cases where the taking of evidence concerns the haptic feel, texture, handling experience or any other feature that cannot be properly transmitted by videoconference. The board does not see

how these aspects would be relevant in the case of a catalogue like E4-1, as the appellant did not at any time assert that the catalogue might have been a forgery; it merely made an abstract, general argument that a videoconference did not allow evidence to be properly examined. In any case, point 17 of D19 does not refer to the hearing of witnesses. As also noted by the respondent, the appellant had not asked to be able to inspect objects, for instance to inspect the original rather than the photocopy of E4-1, before the oral proceedings.

The board notes that point 18 of D16 referred to by the appellant also relates to the inspection of objects. The hearing of witnesses is in fact referred to in points 19 to 21 of D16, which explicitly mention hearing a witness by videoconference.

Thus, for the case in hand, neither D19 nor D16 required oral proceedings to be held and the witness to be heard in person on the premises of the EPO.

(c) Witness as an employee of the respondent

The fact that the witness was an employee of the respondent and was involved in the opposition proceedings is a matter of evaluation of evidence. The board notes, as submitted by the respondent, that the opposition division did take these facts into account when evaluating the evidence (contested decision, point 4.3.1 of the Reasons).

Contrary to the appellant's submissions, however, the board is not aware of any convincing reason why these facts would generally render the hearing of a witness by videoconference unsuitable.

(d) D29

With respect to D29, the board cannot see how instructions for a completely different procedure - here the European qualifying examination - would have a bearing on the case in hand.

(e) G 1/21

The board is not aware of any statement by the Enlarged Board in G 1/21 that would be even indirectly - let alone directly - applicable to hearing a witness. As already pointed out by the board in its communication under Article 15(1) RPBA, G 1/21 examines parties' procedural rights, such as the right to be heard, and examines the definition of oral proceedings for the purposes of Article 116 EPC. Its statement concerning the "gold standard" (Reasons 45) has to be taken in that context. The procedural situation of a witness is not comparable with that of the parties. As the witness is presumed to be unaffected by the outcome of the proceedings, their position in the proceedings is neutral. The witness has no rights in the proceedings to be ruled on by the body before which they appear (apart from their general right to dignity and the like during their participation and in particular while they are giving evidence). The purpose of hearing the witness is to obtain from them any relevant technical information, including any further information about them that may support (or undermine) the veracity of their statements.

(f) General remarks

As the board understands it, the appellant is arguing that any witness statements made during a

videoconference that may leave room for doubt are inherently unsuitable as evidence, given that their veracity cannot be judged in the same way as at an in-person hearing. Therefore, in the case in hand, the witness statement should also be disregarded. This argument essentially boils down to the frequently raised yet fundamentally flawed reasoning that some evidence submitted by a party is not sufficiently convincing for the purposes of "up-to-the-hilt" proof, since better evidence is conceivable.

The proposition that a witness statement is inherently unsuitable as evidence unless the witness is heard in person is also plainly inconsistent with the principle of free evaluation of evidence. As the Enlarged Board set out in G 2/21, Reasons 27 to 34, this principle applies in proceedings before the EPO (Reasons 33) and implies that there are no formal rules excluding any admissibly raised evidence (Reasons 30). In the case in hand, this would mean excluding the offered witness statement because the witness was heard by videoconference. This argument by the appellant would effectively imply the formal rule - without any basis in the EPC - that a witness statement could only serve as evidence if the witness is heard at an in-person hearing.

The board does not question that, in principle, witness statements must not be influenced in any way that may distort the truth, i.e. the facts sought to be proven with the witness. However, this is nothing more than an ideal that is practically impossible to achieve, regardless of whether the witness is heard by videoconference or in person. For example, it is utterly unimaginable that there would not be any contact or general exchange of technical information

between a witness and the party offering them. It is to be presumed that the party talked to the witness and established that they are indeed suitable to give evidence in respect of the facts the party is seeking to prove. Thus, any expectation that the witness would take part in the proceedings with absolutely no idea about the subject of the proceedings and the relevant technical issues is wholly unrealistic, irrespective of how the witness is heard, i.e. by videoconference or in person.

In summary, the board sees no reason why hearing witnesses by videoconference would be unsuitable or incompatible with the Convention.

2.3.3 Conclusion with respect to the format of the oral proceedings and the hearing of the witness by videoconference

In view of the above, the board is of the opinion that, contrary to the appellant's submissions, there were no serious reasons that would have required the opposition division to grant the appellant's late-filed request to hold the oral proceedings and hear the witness in person on the premises of the EPO.

The opposition division's discretionary decision (see decision G 1/21, Reasons 50) to refuse the request for the oral proceedings by videoconference to be adjourned and for the oral proceedings to be held and the witness to be heard on the premises of the EPO is not at odds with decision G 1/21. Decision T 0423/22 (see Reasons 2.3 with sub-points), which was also cited - and strongly criticised - by the appellant, arrived at the same conclusion, albeit in consideration of other aspects of this question. From the above it follows

that the question of whether the principles laid out in G 1/21 also apply to a department of first instance can be left open. The above conclusions were reached on the assumption that G 1/21 is binding for the departments of first instance but would apply *a fortiori* if this were considered not to be the case. Thus, the opposition division's conduct of the proceedings was correct, irrespective of whether the principles laid out in G 1/21 also apply to an EPO department of first instance.

The board notes that this finding is also not affected by whether or not these requests by the appellant are to be considered late filed. The question of whether the requests should have been granted if filed earlier can be left open.

2.3.4 Questions to be referred to the Enlarged Board of Appeal

According to the decision of the President of the EPO (D11) and the notice of the EPO (D15) dated 10 November 2020, oral proceedings before opposition divisions are - by default - to be held by videoconference and may be held on the premises of the EPO if - and only if - there are serious reasons for not holding them by videoconference, as submitted by the appellant.

This could be considered to be in conflict with the above-mentioned statements by the Enlarged Board of Appeal (see point 2.3.1), as submitted by the appellant when requesting that questions 1 and 2 be referred to the Enlarged Board of Appeal under Article 112(1)(a) EPC.

However, it follows from the above (see point 2.3.3) that the board can answer the question with respect to the opposition division's refusal to hold the oral proceedings and hear the witness in person even without further guidance from the Enlarged Board of Appeal. What is more, the board considers that decision G 1/21, relied on by the appellant, and the settled case law of the boards of appeal gives sufficient guidance for the case in hand. Thus, a decision on the case in hand does not require another decision of the Enlarged Board of Appeal for ensuring the uniform application of the law or for settling a point of law of fundamental importance (Article 112(1)(a) EPC). The appellant's request for questions to be referred to the Enlarged Board of Appeal is therefore refused (see also Case Law of the Boards of Appeal of the EPO (CLBA), 11th edition, 2025, V.B.2.3.3).

3. Alleged substantial procedural violations

3.1 The appellant's relevant submissions

3.1.1 EPO rules with respect to how to hold oral proceedings and hear witnesses by videoconference

According to D15, points 16 and 17, if the members of the division are participating remotely from different locations, i.e. if the members are not present together in one location, the participants of the oral proceedings should be informed of this before the oral proceedings are formally opened. The opposition division did not do so in this case, constituting a procedural violation of Article 3 of the President's decision to modify and extend the pilot project for oral proceedings (D11). Having the members participate from different locations prevented the division from

deliberating in person and thus had an impact on the outcome of the oral proceedings.

In addition, the opposition division presented documents to the witness via the screen sharing functionality instead of by providing a link to the document in the European Patent Register or sending the document by email. This constituted a procedural violation of point 9 of the "Notice from the European Patent Office dated 17 December 2020 concerning the taking of evidence by videoconference by examining and opposition divisions" (D19).

Furthermore, the documents shared by the opposition division had already been marked up and were presented by selectively zooming in. This constituted at least unconscious influencing of the witness while also depriving the witness of a view of the entirety of each individual document.

3.1.2 Excessively prolonged oral proceedings

Holding oral proceedings for about 12 hours was an unreasonable burden, and holding them by videoconference led to a particular burden known as "Zoom fatigue", as evidenced by D21.

German employment law had to be taken into account at least for Mr K., who was an employee of the appellant. In Germany, employees were not permitted to work more than 10 hours per day. This statutory protection provision had thus been violated, and if Mr K. had left, the appellant would no longer have been represented by an employee. This would have been a disadvantage had auxiliary requests had to be drafted. In addition, according to point 14 of D15, oral proceedings and consultations held by videoconference had to take place on a working day within EPO working

hours. Although these were not specified, 20.00 hrs was certainly beyond them, as indicated by the lights automatically going off for those members of the opposition division who were attending from their offices at the EPO.

Continuing the oral proceedings after that time contrary to the appellant's requests at 20.15 hrs and 20.45 hrs to adjourn the oral proceedings thus constituted a procedural violation of point 14 of D15. In particular, if the oral proceedings had been adjourned, the parties could have presented their arguments differently and a different auxiliary request VIII could have been submitted, which would probably have resulted in a different decision.

In view of the fact that the witness was due to be heard, the opposition division should have scheduled the oral proceedings for two days right from the start.

3.1.3 Interpretation of the pictogram by the chairman of the opposition division

Concerning auxiliary request III, and generally the disclosure in E4 of "a moving contact assembly, comprising a moving contact support and a moving contact disposed on the moving contact support" (feature (B)), the chairman of the opposition division had been the first to interpret the pictogram of E4-1, identifying symbols within the pictogram related to moving contacts. The chairman did so after the opposition division had given its decision on auxiliary request III. The parties thus did not have the opportunity to respond to this interpretation.

Moreover, in response to the request for correction of the minutes, the opposition division had presented a

new explanation of said pictogram, referring, for the first time, to standard DIN 40 900 / IEC 617 as proof of the skilled person's knowledge; this had not been discussed during the course of the oral proceedings. The decision is thus based on facts that are neither part of the grounds for the decision nor part of the minutes.

3.1.4 Conclusion

Thus, there had been a number of procedural violations which were all detrimental to the appellant. In the overall context of the oral proceedings, this amounted to a violation of the right to be heard (Article 113(1) EPC) which justified the remittal of the case to an opposition division in which the members were replaced.

3.2 The respondent's relevant submissions

3.2.1 EPO rules with respect to how to hold oral proceedings and hear witnesses by videoconference

D15, point 17, did not define the manner in which the participants of the oral proceedings had to be informed if the members of the division were participating remotely from different locations. The fact that the members were visible on screen in different tiles could thus be regarded as a piece of information in this regard. In any case, not informing the parties that the members were participating from different locations did not have any impact on the decision itself.

Presenting documents to the witness using the screen sharing function was appropriate since it ensured that all participants of the oral proceedings were referring

to the same document (or the same part of the document). Selectively zooming in on a document was merely equivalent to referring to a specific part of that document, on which the witness could then freely comment.

The opposition division did not influence the witness either consciously or unconsciously; it took great care not to ask suggestive questions, as evident, for example, from page 22 of E4-witness.

3.2.2 Duration of the oral proceedings

The opposition division could not have foreseen the lengthy procedural discussions at the beginning of the oral proceedings relating to the appellant's request for the oral proceedings to be held in person. There was thus no reason for the division to have scheduled the oral proceedings for two days.

The appellant had been represented by a number of people. Thus, even if one of them had had to leave due to German regulations, the appellant would still have been represented.

3.3 The board's findings

3.3.1 EPO rules with respect to how to hold oral proceedings and hear witnesses by videoconference

The opposition division may not have informed the parties explicitly at the beginning of the oral proceedings that they were participating from different rooms on the premises of the EPO and/or from other remote locations.

However, as submitted by the respondent, all the members of the division could not be seen in one single

tile of the Zoom meeting (since, according to the appellant, the lights went off only for those members of the division who were attending the videoconference from their EPO offices). Thus, in line with the respondent's submission, the parties were at least implicitly informed by the opposition division that its members were not participating remotely from a single room. The board therefore doubts that the opposition division actually committed a procedural violation.

Irrespectively, the board is not aware of any impact that the different locations of the opposition division members during the oral proceedings may have had on the result of the oral proceedings. Although, as submitted by the appellant, the division's deliberations will of course have taken place remotely and not in person, the board fails to see how that would impact the result of those deliberations. In any case, the board is convinced that merely failing to inform the parties that the members of the opposition division were in different locations would not have had any impact at all on the result of the deliberations.

Thus, irrespective of whether the fact that the opposition division's members were seen in different tiles of the Zoom meeting is considered to have implicitly informed the parties that the members were participating from different locations, the opposition division did not commit a substantial procedural violation for want of any causality for the final outcome (CLBA, V.A.11.6.2).

As asserted by the appellant, point 9 of D19 may require documents from the file to be presented to a witness in a particular way. The board has no reason to

doubt that the opposition division did not use this stipulated presentation mode in this case. Nevertheless, as submitted by the respondent, the advantage of presenting a document to a witness by using the screen sharing function is that all the participants of the oral proceedings know exactly which document - and which part of that document - is being discussed. In addition, this manner of presenting a document is, in the board's view, almost entirely equivalent to the manner in which a document would be presented during an in-person witness hearing. The board is not aware how this could have impacted the decision in a way that would have been undoubtedly detrimental for the appellant but not for the respondent. The board is therefore convinced, for this reason alone, that this manner of presenting the documents to the witness at least did not represent a substantial procedural violation.

Similarly, as submitted by the respondent, selectively zooming in on and marking up certain parts of the shared documents before or while sharing them with the witness and the parties is self-evidently the same as pointing out selected parts of paper documents and letting a witness comment freely upon them when the witness is giving evidence on the premises of the EPO with the division and the parties present. In the board's view, this did not constitute unduly influencing the witness, either explicitly or implicitly. The board notes that, as pointed out by the respondent, the opposition division generally took care to ensure that the witness was not asked any suggestive questions (page 22 of E4-witness). The board is therefore convinced that selectively zooming in and marking up certain parts of the shared documents before or while sharing them with the witness

and the parties did not represent a substantial procedural violation.

3.3.2 Duration of the oral proceedings

The board is aware that point 14 of D15 stipulates that oral proceedings held by videoconference are to take place on a working day within EPO working hours. As pointed out by the appellant, however, these working hours are not specified. The board notes that even before the pandemic, oral proceedings held with the parties present on the premises of the EPO frequently continued until late in the evening to avoid adjourning the oral proceedings and thus even more prolonging the proceedings.

Irrespectively, the board does not generally approve of the practice of holding excessively long oral proceedings, whether in person or by videoconference. It is undisputed that oral proceedings from 9.00 hrs until late in the evening are a burden for all parties involved. As submitted by the appellant with reference to D21, this may be the case even more so when the proceedings are conducted by videoconference.

In the case in hand, however, as set out by the opposition division (decision, point 5.2 of the Reasons) and pointed out by the respondent, adjourning the oral proceedings at the point in time in question would have led to the proceedings - which were already protracted because oral proceedings had been cancelled twice before - being delayed even further by more than six months.

In that respect, the board is not aware how German employment law would restrict the discretion of the

divisions of the EPO concerning the conduct of oral proceedings. In addition, as noted by the respondent, even if Mr K. had left early, the appellant would still have been represented by professional representatives. Irrespectively, the board notes that Mr K. did not leave.

In any case, the length of oral proceedings was the same for all parties. Thus, none of the parties was at a particular disadvantage.

In view of the circumstances in their entirety, the board is of the opinion that the division, in deciding not to adjourn the oral proceedings, did not exercise its discretion in a manifestly wrong manner. Rather, in seeking to prevent the proceedings from being unnecessarily prolonged even further, the division appears to have taken into account not only the interests of the appellant but also the rights and legitimate expectations of the respondent and the public with regard to legal certainty.

Therefore, the board holds that the opposition division did not commit a substantial procedural violation in this case.

3.3.3 Interpretation of the pictogram

As submitted by the appellant, the chairman of the opposition division may have been the first to inform the parties of the interpretation of the pictogram shown in E4-1. However, this does not go beyond the *de facto* obligation of any opposition division of the EPO to try to understand the disclosure of any evidence submitted to it (in this case by the respondent). Not informing the parties of certain conclusions about the

disputed disclosure until later is not objectionable in itself either, as set out further below.

Moreover, according to page 6 of E4-witness, the chairman referred to E4-1, which showed a circuit diagram of the motor protective circuit breakers, when presenting a conclusion - not a decision - of the opposition division. In addition, according to E4-witness, the appellant subsequently not only had the opportunity to contest the chairman's explanation of the pictogram but did indeed do so.

More generally, but still concerning the argument that the appellant had no opportunity to comment specifically on the interpretation of the pictogram of E4-1, the board refers to the settled case law of the Enlarged Board of Appeal in petition proceedings, according to which parties have no general expectation that a board will inform them in advance of all the details of its decision. The same principle applies to decisions of the examining and opposition divisions (CLBA, V.B.4.3.5).

In view of the circumstances in their entirety, the chairman's interpretation of the pictogram was thus merely an explanation of the division's view on certain issues which the division had already established during the discussion of auxiliary request III, if not earlier. The explanations given by the chairman presumably even contributed to procedural efficiency, generally helping the parties to focus their arguments in order to discuss the outstanding auxiliary requests.

Concerning the reply to the request for correction of the minutes, the board notes that the issues raised by the appellant were that the chairman had explained the

symbols representing a "Schaltschloss" and a "Handhabe" and that the opposition division's knowledge went beyond the common knowledge of the skilled person. However, the opposition division only referred to the standard DIN 40 900 / IEC 617 - which certainly had to be regarded as part of the common general knowledge - in reply to the appellant.

Moreover, the opposition division did not refer to that standard in the contested decision - it merely mentioned that the interpretation of the pictograms and the electrical circuit on page 4/7 of catalogue E4-1 was part of the common general knowledge of the skilled person dealing with circuit breakers.

Thus, the opposition division did not violate the appellant's right to be heard under Article 113(1) EPC when interpreting the pictogram.

3.3.4 Conclusion

In view of the circumstances in their entirety, the board holds that the alleged procedural violations by the division - namely the (mere formal) non-compliance with the applicable provisions on holding oral proceedings by videoconference, the forcing of the parties to participate in excessively long oral proceedings or the chairman's interpretation of parts of the prior art - cannot be deemed substantial procedural violations.

4. Public prior use E4

4.1 The appellant's relevant arguments

4.1.1 Sphere of influence

The witness, as an employee of the respondent, fell completely within the sphere of influence of the respondent. The highest standards should thus be applied when evaluating his statements, and the slightest inconsistencies should be sufficient to discount E4, which consisted of very old documents, as prior art.

4.1.2 Same dates

Each of E4-6, E4-13 and E4-14 indicated the same date for each of the three steps of the preparation, verification and final approval of the document. It was unrealistic that these three steps were all performed on the same day. This applied to each of the three documents.

The witness had explained that these steps could take longer than one day but that the three dates on the sheets were all generated while the documents were being prepared and thus, in reality, corresponded to the date on which the documents were generated. However, this would mean that the dates are not correct, casting doubt on the veracity of the content of the documents.

4.1.3 E4-6/-7 versus E4-13/-14

The parts shown in the different drawings of E4 related to different product generations. In particular, at the time of E4-6 and E4-7, a "Lichtbogenkammer" with a higher number of extinguishing sheets (nine) than shown in E4-13 and E4-14 (four) was used. Combining E4-6/-7 with the parts shown in E4-13/-14 would form a combination of elements and groups of different products which, according to the witness, was never used in the PKZM0-20/-25/-32 products.

4.1.4 Rib on/groove in contact angle

Another inconsistency between E4-6 and E4-14 was evident from the rib/groove for guiding the arc. E4-6 showed the rib on the U-shaped part 139 to be a strip above the contact 142 on the outside, whereas E4-14 showed a thin groove on the inside. These documents thus related to different products and did not correspond to a single public prior use. It was not clear which of these documents corresponded to the public prior use alleged by the respondent.

4.1.5 Different revisions

The various drawings were inconsistent in that valid and invalid versions were mixed together and in that they related to a number of different revisions, the sequence of which was unclear. For instance, E4-7 corresponding to revision "J" was dated 12 November 2009, whereas E4-13 corresponding to later revision "M" was dated earlier than E4-7, namely 10 December 2008. This was not properly explained by the witness. It was thus not clear beyond any doubt what exactly was disclosed and when.

4.1.6 Invoice E4-12

Invoice E4-12 did not specify any version or revision, and it was not clear to which product invoice E4-12 corresponded or how it related to the other parts of E4.

4.1.7 Late filing of E4-13/-14

Documents E4-13 and E4-14 had been filed at a later stage rather than with the notice of opposition. Other aspects like the moving contact support 152 had only been introduced later by the witness during the hearing, and some aspects, like the interpretation of the pictogram, had even been introduced by the chairman of the opposition division, who had previously been with the respondent's predecessor company.

In summary, the public prior use had not been sufficiently substantiated with the notice of opposition and therefore should not be accepted by the board.

4.2 The respondent's relevant submissions

4.2.1 Same dates

The reason why the same date was printed three times on each document was properly explained in E4-witness at the bottom of page 27. It was only the approval of a document that was performed on one day; the whole process of generating a document could take longer.

4.2.2 E4-6/-7 versus E4-13/-14

Each part of the motor protective circuit breaker, as identified by its GZ number, had its own sequence of revisions, as explained on page 28 of E4-witness. The revisions of E4-7, E4-13 and E4-14 thus could not be compared with each other. Only E4-6 and E4-7 could be compared because they corresponded to two subsequent revisions - I and J - of the technical drawing of contact angle 139. The approval date of the later revision J (E4-7, 12 November 2009) was later than the approval date of the earlier revision I (E4-6, 26 June 2008). Thus, there was no contradiction.

4.2.3 Rib on/groove in contact angle

The presence of the rib for leading the arc on the outside of the contact angle 139 that was visible (though not clearly) in the side view of E4-6, and the groove shown on the inside of the contact angle 139 in the technical drawing of E4-14, were not contradictory, with both E4-6 and E4-14 showing the same product. In any case, the important part of E4-14 was not its main technical drawing but the table on the top right indicating that the PKZM0-20, -25 and -32 circuit breakers included an arc extinguishing chamber 144. E4-14 also explained differences with respect to the number of extinguishing sheets. As visible under the "U" of the word "Ungültig", circuit breakers for smaller currents had fewer extinguishing sheets.

4.2.4 Late filing of E4-13/-14

E4-13 and E4-14 had been filed merely as evidence that the motor protective circuit breaker disclosed in E4-1 to E4-12 comprised an arc extinguishing chamber. Claim 1 as granted was directed to a static contact support and did not comprise any arc extinguishing mechanism. At the time the notice of opposition was filed, therefore, it had not been necessary to submit E4-13 and E4-14 to prove the public prior use. It only became necessary to provide evidence of an arc extinguishing mechanism when auxiliary request III was filed, since claim 1 of that request was directed to a circuit breaker and therefore comprised the arc extinguishing mechanism, as explained in the reply to the grounds of appeal on page 17. In addition, E4-13 and E4-14 had been filed rather early by letter dated

12 May 2021 - more than five months before the oral proceedings.

Moreover, in the notice of opposition, it had already been argued in relation to claim 5 that E4 disclosed a movable contact arranged on a movable contact support. The witness was therefore not the first to raise this argument.

4.3 The board's finding

4.3.1 Sphere of influence

The board is aware, as was the opposition division, that the witness is an employee of the respondent. However, this alone does not mean that his statements are generally not credible. The credibility of each statement individually has to be checked, as part of the evaluation of evidence, and in view of point 4.3.1 of the Reasons of the contested decision, the board is convinced that the opposition division was aware of this and acted accordingly.

4.3.2 Same dates

The board concurs with the respondent that the explanation given by the witness as to why the three dates on each of E4-6, -7, -13 and -14 are the same is convincing (see E4-witness, page 27, last paragraph). In the board's view, and contrary to the appellant's submission, the statement that technical drawings are prepared beforehand in a first step and then, in a second step and after some checks have already been performed, sent and formally verified and approved in one day need not give rise to any doubts concerning the veracity of the drawings.

4.3.3 E4-6/-7 versus E4-13/-14

The board notes that E4-6 and E4-7 do not disclose any arc extinguishing mechanism at all. However, each of these documents relates to the same range of products of the PKZM0 series, as apparent from the tables in their respective top right corners. These different products differ from each other in part. According to the witness, the differences concern, for instance, the number of extinguishing sheets in the arc extinguishing chamber ("Lichtbogenkammer"), which is lower for smaller current ranges (see E4-witness, page 18, last paragraph), in line with E4-14, as pointed out by the respondent (text under the term "Ungültig": "Bei Lichtbogenkammer: -05 Löschbleche um 50% reduziert"). The extinguishing chamber with the number -05 is used in product PKZM0-1,6, while another extinguishing chamber (with the number -06) is used in products PKZM0-20, -25 and -32 (see the table in the top right corner of E4-14). In summary, while E4-14 and possibly E4-13 may disclose the use of only four extinguishing sheets for low-current products, these documents do not contain any evidence that the high-current products PKZM0-20, -25 and -32 also comprised only four extinguishing sheets.

According to E4-6 and E4-7, there are also differences with respect to the material used for the contact angle 139 depending on the current range (see the table in the top right corners, specifications of the "Stanzstreifen"). This is also in line with the witness's statements (see E4-witness, page 5, last paragraph).

However, the board cannot identify any differences or inconsistencies between any of technical drawings E4-6,

E4-7, E4-13 and E4-14 concerning the products PKZM0-20, -25 and -32, i.e. the products which can be operated at higher currents.

4.3.4 Rib on/groove in the contact angle

As pointed out by the appellant, the contact angle 139 as shown in the side views of E4-6 and E4-7 has a rib on its outer (contact) side, while E4-14 shows a groove on the inner side of the part of the contact angle 139 that is close to the contact.

However, the board notes that in the rear views of E4-6 and E4-7, a groove on the inner side is also visible in addition to the rib on the outer/contact side that is visible in the side views, and in the top views of E4-6 and E4-7, both a rib on the outer side and a groove on the inner side of the contact angle 139 are visible.

Moreover, the drawings of the assembled contact element module which can be seen in E4-14 under the word "Ungültig" likewise show, in addition to the groove, a rib on the outer side of the contact angle.

Thus, in line with the respondent's submissions, the rib visible in the side views of E4-6 and E4-7 and the groove visible in the main drawing of E4-14 are not evidence that the products shown are different. Considering E4-6, E4-7 and E4-14 together and taking into account the witness's statement, the board concludes that the rib and the groove present in all the products shown in these documents are created together by impressing the "Stanzstreifen" (see E4-witness, page 21, antepenultimate paragraph, "Prägung", and E4-14, label "139 ... eingedrückt/*impressed*" in the main technical drawing). Thus, the board is convinced

that there is no apparent contradiction in the drawings concerning this detail.

4.3.5 Different revisions

As submitted by the appellant, the various drawings that are part of E4 may relate to a number of different revisions which were not all valid at the same time.

However, the opposition division found that the witness could fill in any gaps in the chain of evidence (contested decision, point 4.3.3 of the Reasons). In view of E4-witness (see in particular from the antepenultimate paragraph on page 9 to the first paragraph of page 10, and page 28, first paragraph to page 29, first paragraph with respect to the versions and revisions), the board agrees.

Specifically, the board concurs with the respondent that the revisions indicated in the documents in the same field as the GZ document number in the bottom right (for instance, revision "J" in E4-7 in the same field as the document number GZ-1210-0160-0139-00) concern only the part indicated by the document number, i.e. the contact angle 139 in the case of E4-6 and E4-7 (see the indication "Kontaktwinkel kompl." in the field above the field containing the document number). Thus, as submitted by the respondent, the revisions of documents E4-6 and E4-7 on the one hand and either of E4-13 and E4-14 on the other hand (which relate to the base body and the contact module, respectively) concern different parts of the motor protective circuit breaker and are therefore not comparable.

As submitted by the respondent, however, the revisions of documents E4-6 and E4-7, which relate to the same

part, namely the contact angle 139, can be compared. E4-6, which bears the earlier date (26 June 2008), also has the earlier revision indicator "I", whereas E4-7, which bears the later date (12 November 2009), has the later (subsequent) revision indicator "J". This is consistent with the witness's statements.

The board therefore cannot discern any inconsistencies with respect to the different versions and revisions of the parts of the motor protective circuit breaker shown in documents E4-6, -7, -13 and -14.

4.3.6 Invoice E4-12

E4-1 indicates article number 072730 for product PKMZ0-0,16 and article number 046989 for product PKZM0-25 (top part of the table, first and penultimate entries). These article numbers correspond to the article numbers indicated in the invoice E4-12 on page 3 for products PKZM0-0,16 and PKZM0-25 (first two items on page 3). The board is therefore convinced that E4-12 provides evidence that these products were actually sold and invoiced with a billing date of 4 December 2012.

The board also sees no reason to doubt that the technical information about these products contained in E4-6, E4-7, E4-13 and E4-14 is correct.

4.3.7 Late filing of E4-13 and E4-14

As submitted by the appellant, E4-13 and E4-14 were not filed with the notice of opposition. However, claim 1 as granted only refers to an arc extinguishing mechanism. It does not specify that the claimed static contact support comprises the arc extinguishing mechanism mentioned in that claim; it merely specifies

a property of the claimed reinforcing layer with respect to an arc extinguishing mechanism of this kind being external to the claimed static contact support.

The board notes that claim 5 as granted is directed to a circuit breaker and thus comprises an arc extinguishing mechanism with the property defined in claim 1. In principle, therefore, the respondent could have already presented evidence for the presence of an arc extinguishing mechanism of this kind in its notice of opposition. Instead, the respondent made a novelty objection with respect to claim 5 as granted in view of E4-1 to E4-12, without elaborating on the arc extinguishing mechanism (see page 11, penultimate paragraph of the notice of opposition).

However, the contested patent as a whole, including claim 5 as granted, does not disclose any details concerning the arc extinguishing mechanism referred to. The respondent thus had no reason to provide more details. In addition, the board is convinced that at the priority date of the contested patent, arc extinguishing mechanisms were generally present in motor protective circuit breakers, at least in those for high-current applications.

This situation changed with the appellant's letter dated 28 January 2020 sent in reply to the opposition division's summons to oral proceedings. With this letter, the appellant filed auxiliary request III, all claims (including claim 1) of which were directed to a circuit breaker and thus comprised an arc extinguishing mechanism. In addition, in this letter, the appellant explicitly submitted that E4-6 and E4-7 said nothing about an arc extinguishing mechanism (last paragraph of section 3.1) and that the alleged prior use did not

disclose an extinguishing mechanism (last paragraph of section 4.3).

The board therefore holds that the respondent's filing of documents E4-13 to E4-15 and the accompanying arguments are to be regarded as an elaboration of an objection already made with the notice of opposition as a reaction to the new situation created by the appellant's letter dated 28 January 2020 and the annexed auxiliary requests.

On a more general level, the board notes that, as a rule, it is not forbidden to submit evidence later in opposition proceedings. For instance, the hearing of a witness and the facts stated by the witness as evidence inevitably lead to new facts appearing in the file after the time limit for filing the opposition, even though the offer to hear the witness may have been mentioned in the notice of opposition.

Moreover, E4-13 to E4-15 are highly relevant, as pointed out by the respondent, since they are referred to in the opposition division's reasoning as to why the subject-matter of claim 1 as granted is not new (point 7.1 of the Reasons of the contested decision).

In view of the above, the opposition division correctly admitted these documents, and their admission did not contravene the principle that a party making an objection normally has to prove its case when raising the objection.

4.3.8 Conclusion

The board is thus convinced that at least motor protective circuit breaker PKZM0-25 (as listed in the invoice E4-12 dated 4 December 2012), with the features

disclosed for that product in the set of documents E4, was made available to the public before the priority date claimed for the contested patent (7 January 2014).

5. Auxiliary request V, claim 1 - novelty over E4

5.1 The appellant's main arguments

5.1.1 Alleged late-filed fact

While the witness was giving evidence, he identified - for the first time in the whole proceedings - elements 152 in E4-13 and E4-14 as representing moving contacts. This assertion was a late-filed fact which had to be disregarded.

5.1.2 Feature (B)

E4 did not directly and unambiguously disclose feature (B), i.e. a moving contact assembly comprising a moving contact support and a moving contact.

5.1.3 Feature (C)

The static contact of feature (C) could be regarded as corresponding to contact 142, but this contact was not shown in E4-13 and E4-14. Feature (C) was thus at least not disclosed in its entirety directly and unambiguously either.

5.1.4 Feature (G)

The term "side" of an object implied that the "side" included the corresponding outer surface of the object. The "Kaltband" disclosed in E4 consisted of a three-layer structure with the sequence 55% copper/40% steel/

5% copper. That is, the "**side** of the static contact support which is remote from the moving contact assembly" at the position where the contact angle was closest to the moving contact assembly was the 5% copper layer and not the reinforcing layer.

Moreover, the contact angle of E4 was U-shaped.

Therefore, the outer surface remote from the moving contact assembly was also copper - in this case the 55% copper layer - at the position where the contact angle was remote from the moving contact assembly, i.e. the other arm of the "U".

Thus, irrespective of the position on the contact angle of E4 for which the expression "side of the static contact support which is remote from the moving contact assembly" of feature (G) was assessed, the outer surface of this side always consisted of copper.

In contrast, the contested patent related to a two-layer structure in which the side remote from the moving contact assembly, including its outer surface, consisted of the reinforcing layer, i.e. of steel.

5.2 The respondent's relevant arguments

5.2.1 Alleged late-filed fact

The fact that a moving contact was disclosed in E4 had already been addressed in the notice of opposition on page 11 with respect to claim 5. The witness merely needed to confirm this during his hearing (see E4-witness, page 22), by mentioning a silver contact on the moving contact support 152. This fact was thus not late filed.

5.2.2 Feature (B)

A moving contact support 152 was visible in E4-13. According to the witness (page 22 of E4-witness), this was provided with a silver contact similar to the static contact 142.

5.2.3 Feature (C)

The static contact 142 was visible in E4-14, directly above the "U" of the word "Ungültig". In addition, the reference sign 139 with which the contact angle in the main drawing of E4-14 was labelled corresponded to part 139 shown in E4-6 and E4-7, which clearly showed the static contact 142.

5.2.4 Feature (G)

The term "side" was not defined in claim 1. Thus, it had to be considered equivalent to the term "layer", as found by the opposition division.

Therefore, the "side of the static contact support which is remote from the moving contact assembly" was actually that layer of the two claimed functional layers of the static contact (i.e. either the base layer or the reinforcing layer) that was remote from the moving contact assembly. Moreover, since its position was defined with respect to the moving contact assembly, the layer sequence had to be considered at the position where the static and the moving contact assemblies were closest to each other, i.e. essentially where the contacts were arranged.

At that position, the 55% copper layer was arranged directly beneath the static contact 142 and thus close to the moving contact assembly as defined in claim 1. At that position, the 40% steel layer was further away from the static contact 142 and the moving contact

assembly and was thus remote from the moving contact assembly.

It was irrelevant that the 40% steel layer was additionally covered by a thin 5% copper layer; the purpose of this copper layer was only to prevent corrosion, as explained by the witness (E4-witness, page 10, penultimate paragraph).

Irrespectively, claim 1 did not exclude the possibility that the reinforcing layer consisted of two sub-layers. That is, even if the "side" of the static contact support was regarded as necessarily comprising the corresponding outer surface of the static contact support, feature (G) was still disclosed in E4.

5.3 The board's finding

5.3.1 Alleged late-filed fact

The witness may have identified parts 152 in E4-13 and E4-14 as representing moving contact supports for the first time during the oral proceedings before the opposition division.

However, as already explained in the order to take evidence sent out on 11 February 2021, the purpose of taking evidence by hearing the witness was *inter alia* to obtain information on the technical features of the alleged prior use relating to the motor protective circuit breakers PKZM0-20/-25/-32.

These circuit breakers are shown in E4. Thus, the fact that the parts 152 were identified as representing moving contact supports while the witness was giving evidence cannot be considered a late-filed fact.

Rather, it has to be regarded as an additional statement supporting previously made objections (i.e. supporting an objection that had already been made in

the notice of opposition). Thus, contrary to the appellant's submission, the board sees no reason to disregard this identification of the claimed moving contact support.

5.3.2 Feature (A)

E4 relates to a motor protective circuit breaker (see e.g. heading of E4-1) and thus discloses feature (A).

5.3.3 Feature (B)

E4-13 discloses moving contact supports 152 provided with moving contacts made of silver, as explained by the witness (E4-witness, page 22, antepenultimate paragraph, "... da ist entsprechend auch ein Silberplättchen drauf, ...") and submitted by the respondent.

In addition, the board is not aware of any motor protective circuit breaker that does not comprise a moving contact mounted on a moving contact support, i.e. a moving contact assembly. Thus, irrespective of when and by whom the corresponding parts were first identified in E4, all the products referred to in that document disclose such moving contacts.

Hence, E4 discloses feature (B).

5.3.4 Feature (C)

As submitted by the respondent and contrary to the appellant's submissions, a static contact 142 is visible in E4-14 (without reference sign) under the letter "U" of the word "Ungültig" and is also shown on the contact angle 139 in E4-6 and E4-7. According to

the witness, the static contact 142 is capable of contacting the moving contact ("Silberplättchen") of the moving contact assembly (E4-witness, page 22, fourth and third paragraphs from the bottom).

Together, these two elements thus form a static contact assembly as defined in feature (C), which is therefore disclosed in E4.

5.3.5 Features (D), (D1), (D2)

The contact angle 139 of the motor protective circuit breaker PKZM0-25 includes a multi-layer (55% copper/40% steel/5% copper) static contact support, comprising a base layer of copper (the 55% copper layer) for transferring current passing through the motor protective circuit breaker and, superposed on the base layer, a reinforcing layer comprising steel (in the form of the 40% steel layer). Due to the inherent mechanical properties of steel, the reinforcing layer provides the base layer with structural support (see E4-6/-7, table on the top right, line specifying "Band 2", as well as page 10 of E4-witness, antepenultimate and penultimate paragraphs).

E4 thus also discloses features (D), (D1) and (D2).

5.3.6 Feature (E)

Due to the inherent magnetic properties of steel, the 40% steel layer can attract into its arc extinguishing mechanism an arc produced between a moving contact on the element 152 and a static contact 142 on the contact angle 139 in the motor protective circuit breaker, as also explained by the witness (page 10 of E4-witness, antepenultimate paragraph, "... aber Hauptsache kommt

dann diese 40 % Stahl, die drinnen sind, die dienen dem Magnetismus oder der Stromlöschung").

E4 therefore also discloses that product PKZM0-25 comprises feature (E).

5.3.7 Feature (F)

The contact angle 139 is a "Kaltband" (E4-6; see also pages 10 to 11 of E4-witness). Its reinforcing layer (40% steel) is superposed on its base layer (55% copper) by a process for combining two metals (page 11 of E4-witness, antepenultimate paragraphs 3 and 4, "Soviel ich weiß, wird das unter hohem Druck, werden diese Komponenten Kupfer und Eisen zusammengewalzt", as well as page 12, paragraph 3).

The product PKZM0-25 disclosed in E4 thus also comprises feature (F).

5.3.8 Feature (G)

The board concurs with the opposition division that the side of the static contact support (12) which, according to feature (G), is "close to the moving contact assembly" is the side of the static contact support (12) on which the static contact is disposed. The board also concurs with the opposition division that, due to the form of the contact support, the side "remote from the moving contact assembly" is not unambiguously - and thus not clearly - defined. The board further concurs with the opposition division's assessment that feature (G) is not to be assessed under Article 84 EPC as per G 3/14 since it is based on claim 6 as granted. Instead, it has to be interpreted in the most meaningful way, which, in the

case in hand, implies a "local view" at the position of the static contact 142 (contested decision, points 13.2 and 13.3). Thus, the board concurs with the respondent's interpretation.

The opposition division further found that the term "side" was also unclear since the two sides of the static contact support had been referenced but not defined previously. In its view, the term "side" therefore also had to be interpreted and, in this case, was equivalent to the term "layer" (last paragraph of point 13.2 of the Reasons of the contested decision). The respondent concurred with that interpretation.

Although the term "side" may not have been explicitly defined in claim 1 before feature (G), in the board's view this is not necessary because feature (G) itself contains definitions of the two "sides", which are mentioned as being two sides of the static contact support.

In the board's view, and as submitted by the appellant, a "side" of an object will normally be understood as comprising the corresponding outer surface of that object. A "side" thus cannot be sandwiched between other sides, in contrast to a "layer", which can be an intermediate layer sandwiched between two other layers. Thus, the board does not agree with the opposition division's and respondent's interpretation of the term "side" and adopts the appellant's instead.

However, although the "side" of an object is normally understood as comprising the corresponding outer surface of that object, in the board's view it is not restricted to that outer surface. Rather, it may comprise a part - possibly a substantial part - of the

volume of that object adjacent to the outer surface of the side in question. In addition, the term "side" does not exclude the possibility that this part of the volume consists of a number of elements, for instance, as submitted by the respondent, of two sub-layers.

Thus, contrary to the respondent's submissions, although the 5% copper layer at the outer surface cannot be disregarded when assessing novelty (the copper layer's purpose for preventing corrosion being irrelevant in that context), it follows from the above that the 40% steel layer and the 5% copper layer of the "Kaltband" of the product PKMZ0-25 disclosed in E4 may be interpreted as corresponding, together, to the reinforcing layer (124). The 55% copper layer of that product may be regarded as corresponding to the base layer (122).

In this interpretation, the arrangement of these layers on the sides of the static contact support at the position of the static contact 142 corresponds to the arrangement defined in feature (G), which is therefore also disclosed in E4.

5.3.9 Feature (H)

The static contact 142 is connected to the 55% copper layer corresponding to the base layer (see E4-6) of claim 1.

Hence, feature (H) is also present in the motor protective circuit breaker PKMZ0-25 disclosed in E4.

5.3.10 Conclusion

It follows from the above that the subject-matter of claim 1 of auxiliary request V is not new within the

meaning of Articles 52(1) and 54(1) and (2) EPC in view of the motor protective circuit breaker PKMZ0-25 disclosed in E4.

6. Main request and auxiliary requests I to IV, claim 1 - novelty over E4

As mentioned above, claim 1 of auxiliary request V comprises all the features of claim 1 of each of the main request and auxiliary requests I to IV. This was not disputed by the parties. Therefore, irrespective of the issue of the admittance of auxiliary request II, the subject-matter of these claims is not new (Articles 52(1) and 54(1) and (2) EPC) either.

7. Auxiliary request VI, claim 1 - novelty over E4

The 55% copper layer, the 40% steel layer and the 5% copper layer of the static contact support 139 all extend along the entire static contact support (see E4-6 and E4-witness, top of page 12), as submitted by the respondent and contrary to the appellant's argument that this was not the case for all three layers. Hence, the products disclosed in E4 also disclose feature (G_{VI}). Thus, the subject-matter of claim 1 of auxiliary request VI is not new (Articles 52(1) and 54(1) and (2) EPC) either.

8. Auxiliary request VII, claim 1 - clarity

The added term micro in the expression "micro circuit breaker" in feature (A_{VII}) refers to the circuit being relatively small. However, it does not define a clear limitation. As submitted by the respondent, it is not even clear from the patent as a whole whether it is the

size of the circuit breaker or its maximum allowed current that is relatively small.

As submitted by the appellant, the expression "miniature circuit breaker" or "mcb" may be used in a commercial context for relatively small circuit breakers. However, this expression differs from that present in the claim and in itself does not imply any clear restriction with respect to the size or maximum current of the circuit breakers referred to. The second paragraph on page 1 of the original description also referred to by the appellant does not define the term more clearly either; it merely explains what may happen in any circuit breaker when the moving and the static contacts are joined or separated.

Hence, as set out by the opposition division, the expression "micro circuit breaker" is a relative and unclear expression. Claim 1 of auxiliary request VII thus contravenes the requirements of Article 84 EPC.

9. Auxiliary request VIII, claim 1 - novelty over E4

9.1 Thickness ratios

Contrary to the appellant's submissions, the board finds it difficult to imagine that the percentages indicated in E4-6 for the three layers of the static contact support 139 would refer to anything other than their thicknesses, e.g. their volume, weight or density. The board notes that the densities of copper and steel are, within certain limits, well defined and would not need to be indicated.

Therefore, the thickness ratio of the 55% copper (base) layer and the combined 40% steel/5% copper (reinforcing) layer of the contact angle (i.e. the

static contact support) disclosed in E4 is 1.222 to 1 (i.e. 55/45), which is in the range defined in feature (I).

Incidentally, the board notes that even if the percentages indicated in E4 referred to the volume or the weight of the 55% copper and the combined 40% steel/5% copper layer, the thickness ratio defined in feature (I) would also be fulfilled, since these two layers have an equal width and the densities of copper and steel are similar to each other (8.96 g/cm^3 for copper compared with 7.87 g/cm^3 for steel).

9.2 "made of"

However, the formulation "wherein the reinforcing layer (124) is made of steel" in feature (I) excludes the possibility that the reinforcing layer (124) itself consists of two sub-layers of which one is made - or consists - of a material that is not steel.

As set out above with respect to auxiliary request V (see point 5.3.8 above), the board considered that the combination of the 40% steel layer and the 5% copper layer corresponded to the reinforcing layer of claim 1.

Hence, the subject-matter of claim 1 of auxiliary request VIII differs from E4 in that the reinforcing layer is "made of" steel.

9.3 Conclusion

It follows from the above that the subject-matter of claim 1 of auxiliary request VIII is new over E4 (Articles 52(1) and 54(1) and (2) EPC).

10. Remittal of the case to the opposition division

The respondent requested that the case be remitted to the opposition division for the other novelty attacks and the inventive-step attacks to be examined.

The appellant also requested remittal to the opposition division for the outstanding issues in relation to auxiliary request VIII to be examined.

Since a number of other novelty attacks as well as inventive-step attacks were submitted during the first-instance proceedings but are not part of the contested decision, the board concurs with the parties that a remittal is justified under the circumstances of the current case and grants their request for it to be remitted to the opposition division. The appellant's auxiliary request for the postponement of the proceedings is thus moot.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division for further prosecution.

The Registrar:

The Chairman:



S. Sánchez Chiquero

T. Häusser

Decision electronically authenticated