

Internal distribution code:

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

**Datasheet for the decision
of 4 November 2025**

Case Number: T 0758/23 - 3.5.01

Application Number: 18903227.9

Publication Number: 3596693

IPC: G06Q90/00, G06Q99/00,
A63G31/00, C02F103/00,
C02F103/42, E04H4/00, E04H4/12,
C02F1/00, C02F1/50, E04H3/10,
E04H4/14

Language of the proceedings: EN

Title of invention:
A PUBLICLY ACCESSIBLE URBAN BEACH ENTERTAINMENT COMPLEX WITH A
CENTERPIECE MAN-MADE TROPICAL-STYLE LAGOON AND METHOD FOR
PROVIDING EFFICIENT UTILIZATION OF LIMITED USE LAND

Applicant:
Crystal Lagoons Technologies, Inc.

Headword:
Tropical lagoon II/CRYSTAL LAGOONS

Relevant legal provisions:
EPC Art. 109(2), 111(1)
RPBA 2020 Art. 11

Keyword:

Article 109(2) EPC - requirement for remittal without comments
(no - an internal note added to the electronic file of a
related case)

Remittal to the department of first instance (yes)

Procedural irregularity that raises serious concerns (yes -
replacement of the whole examining division for no apparent
reasons at the stage of interlocutory revision)

Decisions cited:

J 0032/95, T 1097/92, T 0704/05, T 0160/09

Catchword:

[W]hile reviewing the documents in the electronic file in related case T 759/23, the Board became aware of an internal note not visible to the public, acting as some sort of votum discussing the appeal. It was added six weeks after the grounds of appeal (see point V of the facts). This was in the three-month period in which the examining division had to consider whether to grant interlocutory revision in that case. The note analysed the allowability of the refused request and drew negative conclusions on the persuasiveness of the appellant's arguments. It also addressed aspects and evidence not mentioned in the decision or the grounds of appeal. For example, the note analysed documents which the examining division did not use in their reasoning. Subsequently, the case was remitted to the Board.

The Board notes that the composition of the examining divisions at the stage of interlocutory revision was identical in both cases, that the claimed subject-matter is closely related, and that both decisions raised a similar objection under Article 56 EPC. On that basis, the Board judges that there is a sufficiently close connection between the two cases to conclude that the internal note in case T 759/23 was intended to serve as a sort of votum for the assessment of inventive step in the present case as well. (See point 5 of the reasons)

It is clear that this internal note containing comments and conclusions on the substance of the case violates the requirement to remit the case "without comment". In particular, by providing comments on the merits after issuing the decision, the examining division went beyond the role assigned to it under Article 109(2) EPC and thereby undermined the devolutive effect of the appeal. The Board judges that this procedural flaw constitutes a substantial procedural violation justifying a remittal to the examining division for further prosecution (Article 111(1) EPC and Article 11 RPBA). (See point 6 of the reasons)

Moreover, this case has another connected peculiarity in that, four days after filing the grounds of appeal and by the time the internal note was drafted, the entire examining division had been replaced. An identical replacement took place at the same time in case T 759/23, with the compositions of the examining division, both before and after the replacement, being the same. It thus appears that the internal note, which is unsigned, was drafted by one of the new members of the examining division to assist the other two members in deciding whether to rectify the decisions in case T 759/23 and in this case.

Thus, this note as well as the whole procedure under Article 109 EPC did not even serve the purpose of an interlocutory revision which is to allow for a rectification of the contested decision by the examining division that has taken this decision, but rather represented a complete re-examination of the file. (See point 9 of the reasons)

[T]he arbitrary replacement of the examining division is not supported by a reasonable interpretation of the Guidelines for Examination. The Board considers that this interpretation should not be expanded to include arbitrary "necessary steps". Just because the President of the Office or any delegatee has the power to do something does not mean that they should do it. It may legitimately be expected of an Office that decides on the grant of significant rights to applicants that procedural steps are not exercised arbitrarily. Rather, such steps should be subject to reasonable safeguards in order to avoid the perception that they are exercised for reasons unrelated to the purpose of the procedure - here, to check whether it is immediately apparent from the reasons given in the grounds of appeal that the decision cannot stand. (See point 15 of the reasons)



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

Case Number: T 0758/23 - 3.5.01

D E C I S I O N
of Technical Board of Appeal 3.5.01
of 4 November 2025

Appellant: Crystal Lagoons Technologies, Inc.
(Applicant) 2 Alhambra Plaza, Penthouse 1B
Coral Gables FL 33134 (US)

Representative: Patentanwälte Olbricht Buchhold Keulertz
Partnerschaft mbB
Neue Mainzer Straße 75
60311 Frankfurt am Main (DE)

Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 8 November 2022
refusing European patent application No.
18903227.9 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman W. Chandler
Members: W. Zubrzycki
C. Schmidt

Summary of Facts and Submissions

- I. This is an appeal against the decision of the examining division to refuse the European patent application No. 18 903 227.9 for added subject-matter (Article 123(2) EPC) and lack of clarity and inventive step (Articles 84 and 56 EPC). The examining division held that the main request did not meet these requirements. They did not admit the auxiliary request into the proceedings under Rule 137(3) EPC.

- II. The notice of appeal and the statement setting out the grounds of appeal were filed on 2 January 2023 and 3 March 2023 respectively. The appellant requested that a patent be granted on the basis of the requests on which the decision was based or a text "finally decided by the Board", or alternatively, the case be remitted to the examining division for further prosecution.

- III. The routine check of internal Form 2701, dated 24 April 2023, confirmed that the decision was not rectified and the case was transmitted to the boards of appeal. During this routine check, the Board established that the examiners' signatures on the form did not match the names of the examiners who issued the decision.

- IV. As the Board became aware from internal databases, on 7 March 2023, i.e. four days after filing the statement of grounds, all members of the examining division were replaced, one of the newly appointed examiners being a director. Form 2701 bears the signatures of the newly appointed members.

- V. The Board became aware that on 19 April 2023, an extensive internal note was added to the non-public part of the electronic file of appeal case T 759/23, that part being visible to the Board. The internal note contained a complete analysis of the application underlying case T 759/23. That case is likewise assigned to the appellant and relates to a similar matter. Furthermore, it also involved a replacement of the examining division, with the original and newly appointed divisions being identical in composition.
- VI. In the communication accompanying the summons to oral proceedings, the Board referred to a communication accompanying the summons in case T 759/23 in which it set out its preliminary opinion that the presence and content of the internal note and the replacement of the examining division were out of line with the correct procedure for interlocutory revision laid down in Article 109 EPC and could constitute procedural violations, and invited the appellant to provide comments on those points. Furthermore, the Board stated that, given the similarity of the cases, it tended to consider that the internal note stored in the electronic file of case T 759/23 also applied to the present case, giving rise to similar concerns.
- VII. In a letter dated 17 October 2025, the appellant filed a new set of requests, including *inter alia* a request that the appeal be referred back to the original examining division or to a newly constituted and unbiased examining division for a decision on interlocutory revision. The appellant also provided comments on other procedural issues raised by the Board.

- VIII. In a communication dated 28 October 2025, the Board addressed the clarity and admissibility of these requests.
- IX. In a letter dated 31 October 2025, the appellant submitted further comments concerning their requests.
- X. Oral proceedings were held by videoconference on 4 November 2025 jointly with oral proceedings in case T 759/23. During the oral proceedings, the appellant confirmed their request that the appeal be referred back to the original examining division or to a newly constituted and unbiased examining division for a decision on interlocutory revision. At the end of the oral proceedings, the Chairman announced the decision.
- XI. Concerning their remittal request, the appellant essentially argued as follows:

The presence of the internal note constituted a procedural error resulting in a disadvantage for the appellant. The new examining division which decided not to grant interlocutory revision had not been involved at all in the examination proceedings and was therefore not in a position to review all relevant aspects of the decision to the same extent as the original examining division would have been. Since it was "likely" that the original examining division would have granted interlocutory revision, it had to be assumed that its replacement by a newly constituted examining division resulted in a legal disadvantage for the appellant.

Reasons for the Decision

Article 109(2) EPC - remittal "without comment"

1. Article 109(1) EPC provides the procedural mechanism of interlocutory revision in the case of admissible and well-founded appeals for allowing an examining division, or other departments of first instance, to rectify their decision and resume examination without referring it to a competent Board of Appeal.
2. If the decision is not rectified within three months of receipt of the statement of grounds, the appeal shall be remitted to the Board of Appeal "without comment as to its merit" (Article 109(2) EPC). This therefore expressly precludes the examining division from providing reasons for not granting interlocutory revision, see e.g. T 0704/05 - *Developer/SHARP*, reasons, point 5.3.
3. Decision J 32/95 (*Power of examining division to refuse reimbursement of appeal fee/GENERAL MOTORS*; OJ EPO 1999, 713) gave some explanation of the purpose and intent of this provision. It stated that interlocutory revision under Article 109 EPC can be seen as a narrow exception to the devolutive effect of an appeal, namely that once an appeal against a decision of the department of a first instance has been filed, the power to deal with the issues involved in the appeal passes to the appeal instance, see reasons, point 2.3.3.

This narrow exception, introduced in the interest of procedural efficiency, limits the remaining powers of the department of first instance to the rectification of its decision and leaves it with no competence to

take any action other than that. The requirement for the lack of comments laid down in Article 109(2) EPC reflects this fundamental procedural principle. In the words of the Board in J 32/95 (in English translation): *"According to Article 109(2) EPC, if the department of first instance does not rule that the decision taken must be corrected, it is not even entitled to make any comment as to the merits of the appeal."*

4. The Guidelines for Examination at section E-XII.7.2 (Version March 2023) expressly confirm the requirement for the lack of comments, stating that *"This means that the department of first instance does not address any comments of substance to the board."* This section further adds that *"Internal notes made by division members about the merits of the appeal are kept in the non-public part of the dossier and are not sent to the board of appeal."*

Consequently, any notes or comments by the division should not be visible either to the public or to the board. In fact, the board normally sees only two non-public forms; Form 2701 (mentioned in point III of the facts), which merely confirms that the decision is not rectified and is signed by all members of the examining division, and Form 2703, which is addressed specifically to the board merely informing it that the appeal is remitted.

According to EPO's Internal Instructions relating to the administration of the procedure dealt with in section C-I.1.1 of the Guidelines for Examination, the term "dossier" refers nowadays to the electronic file. However, it is not clear to the Board whether it is in fact possible to keep documents in the non-public part of the electronic file that a board cannot see. If it

is not possible, then it seems that the Guidelines for Examination should be amended to provide some guidance to avoid this problem.

5. This is relevant to the present case as while reviewing the documents in the electronic file in related case T 759/23, the Board became aware of an internal note not visible to the public, acting as some sort of *votum* discussing the appeal. It was added six weeks after the grounds of appeal (see point V of the facts). This was in the three-month period in which the examining division had to consider whether to grant interlocutory revision in that case. The note analysed the allowability of the refused request and drew negative conclusions on the persuasiveness of the appellant's arguments. It also addressed aspects and evidence not mentioned in the decision or the grounds of appeal. For example, the note analysed documents which the examining division did not use in their reasoning. Subsequently, the case was remitted to the Board.

The Board notes that the composition of the examining divisions at the stage of interlocutory revision was identical in both cases, that the claimed subject-matter is closely related, and that both decisions raised a similar objection under Article 56 EPC. On that basis, the Board judges that there is a sufficiently close connection between the two cases to conclude that the internal note in case T 759/23 was intended to serve as a sort of *votum* for the assessment of inventive step in the present case as well.

6. It is clear that this internal note containing comments and conclusions on the substance of the case violates the above-mentioned requirement to remit the case "without comment". In particular, by providing comments

on the merits after issuing the decision, the examining division went beyond the role assigned to it under Article 109(2) EPC and thereby undermined the above-mentioned devolutive effect of the appeal. The Board judges that this procedural flaw constitutes a substantial procedural violation justifying a remittal to the examining division for further prosecution (Article 111(1) EPC and Article 11 RPBA).

7. The Board realises that the situation in the present case is unfortunate. The appealed decision, although not necessarily itself flawed, has to be taken again because of the procedural violation that occurred only after its issuance.
8. The Board is aware of decision T 1097/92 - *Interlocutory revision/ENICHEM*, which dealt with a similar situation, namely that, after the lodging of an appeal, the examining division recorded minutes of a telephone consultation with the appellant, violating the requirement for the lack of comments under Article 109(2) EPC. In that case, the Board found that, although this circumstance could have justified remittal of the case to the examining division, it was nevertheless appropriate, in the interest of procedural economy, to refrain from remittal and to examine the appeal itself, see reasons, points 2.2.3 and 2.4.
9. However, this Board considers that the violation of procedure set out in Articles of the EPC, here the requirement for the lack of comments under Article 109(2) EPC, should prevail over considerations of procedural economy.

Furthermore, in the present case the appellant has expressly requested that the case be referred back,

i.e. remitted, to the department of first instance, thereby waiving interest in the Board deciding the case on its merits. Admittedly this was for a decision on interlocutory revision, but the Board sees no other means of remedying this substantial procedural violation than to remit the case to the examining division in its entirety for further prosecution.

Moreover, this case has another connected peculiarity in that, four days after filing the grounds of appeal and by the time the internal note was drafted, the entire examining division had been replaced. An identical replacement took place at the same time in case T 759/23, with the compositions of the examining division, both before and after the replacement, being the same. It thus appears that the internal note, which is unsigned, was drafted by one of the new members of the examining division to assist the other two members in deciding whether to rectify the decisions in case T 759/23 and in this case.

It follows from the general remarks at section E-XII.7.1 of the Guidelines for Examination (Version March 2023) and the example at section E-XII.7.4.1 that, in a case like this where no amended claims were filed on appeal, the examining division's analysis should, in principle, be limited to examining, in light of the grounds of appeal, whether the decision was correct in substance. However, this minimal analysis is evidently more difficult for a new examining division who are not at all familiar with the file. This would lead to the requirement for such an extensive note.

Thus, this note as well as the whole procedure under Article 109 EPC did not even serve the purpose of an interlocutory revision which is to allow for a

rectification of the contested decision by the examining division that has taken this decision, but rather represented a complete re-examination of the file.

Replacement of whole examining division

10. The replacement of the whole examining division at the appeal stage is unusual. Generally, Form 2701 is signed by the examiners who issued the decision.
11. The replacement of members of the examining division has been discussed in a few decisions of the boards. In particular, in T 160/09 - *Layered Architecture/ERICSSON* the Board set out and discussed the possible relevant legal basis for such replacement.

They appeared to consider at point 11 that the power to determine replacement of members of the examining division stemmed from the "necessary steps", including the adoption of internal administrative instructions, that the President of the Office had to take to ensure the functioning of the Office under Article 10(2)(a) EPC. These powers could be delegated under Article 10(2)(i) EPC. They considered that since Rule 12(1) EPC 1973 stated that examining divisions are grouped together administratively to form directorates, this meant that the President delegates decisions about administrative matters regarding the examining divisions, including the replacement of members, to the directorates. It appears that Rule 9 EPC 2000, which replaced Rule 12 EPC 1973 does not mention "directorates" explicitly any more, so that part of this reasoning is less relevant. Nevertheless, it appears that the Board considered that the power delegated from the President to a directorate was the

basis for an examiner to be appointed or replaced and no further evidence was necessary.

The Board went on to discuss whether the Guidelines for Examination (Version June 2005) gave any guidance on this matter. They referred to sections C-VI.1.2 and 1.3, concerning allocation of the application and the definition of the examining division and concluded that they gave no guidance as to the basis or detail of the delegation or the procedure to be followed. It appears that the content of these sections does not exist in the subsequent Guidelines for Examination, including the version of March 2023 that was in force at the time of the examining division's replacement in the present case, so these considerations do not seem particularly relevant any more.

Thus, it appears that at the time of decision T 160/09 there was no guidance about the procedure for replacing examiners of the division.

12. The Guidelines for Examination of March 2023 do however contain some guidance that appears not to have been present at the time of that decision.

Firstly, section C-VIII.1 (Work within the examining division: General remarks) states:

"If the specific circumstances (e.g. sickness) so require, an application may be reallocated to another examiner/examining division. The director is responsible for deciding whether the dossier is to be fully reallocated to a new examining division or whether a single member of the division is to be replaced."

Secondly, section E-XII.7.1 (Interlocutory revision: General remarks) states:

"In either case, whether the appealed decision is rectified or the appeal is remitted to the board, a decision issued by the examining or opposition division may be signed only by the examiners belonging to the division at the time of signature. If an examiner is absent for a long period or has left the department, a new member must be appointed to the division."

The first of these passages indeed suggests that the director can replace the whole examining division. However, this possibility is not mentioned in the second passage which refers to the specific case of interlocutory revision.

13. Putting all this together, it seems that the President can delegate "necessary steps" to the directorate. A "necessary step" in the course of examination in general might be replacing a single member or the whole division due to sickness, retirement or reorganisation.

It seems reasonable that a necessary step during interlocutory revision would generally be a more restricted replacement of a single member, due to sickness or having left the department, given that the duration of this procedure is much shorter than the whole of the examination and the members who decided the case are more likely to still be available. The Board cannot see any other circumstance that would require replacing the whole examining division at the appeal stage, and none is apparent from the file in the present case.

14. Moreover, common sense alone dictates that examiners who issued the decision are in the best position to efficiently assess whether it should be reversed. Appointing a completely new examining division, if they are still available, can only degrade efficiency, as it necessitates that three new members familiarise themselves with the case from scratch.

15. In view of the above considerations, the arbitrary replacement of the examining division is not supported by a reasonable interpretation of the Guidelines for Examination. The Board considers that this interpretation should not be expanded to include arbitrary "necessary steps". Just because the President of the Office or any delegee has the power to do something does not mean that they should do it. It may legitimately be expected of an Office that decides on the grant of significant rights to applicants that procedural steps are not exercised arbitrarily. Rather, such steps should be subject to reasonable safeguards in order to avoid the perception that they are exercised for reasons unrelated to the purpose of the procedure - here, to check whether it is immediately apparent from the reasons given in the grounds of appeal that the decision cannot stand.

16. The appellant's view that the new examining division was not in a position to review all relevant aspects of the decision to the same extent as the original examining division would have been and thus was less likely to grant, although speculative, illustrates one of the concerns to which such an arbitrary departure from established procedural practice may give rise.

17. A final unfortunate conspicuity is the fact that one of the newly appointed examiners was a director. Since, as

mentioned above, the director appears to decide on divisions' replacements, it could be perceived badly if they place themselves in a position to reverse issued decisions, without a known good reason.

18. In light of the above considerations, in the Board's view, all replacements of examiners should be made public and any deviation from the narrow and clearly defined reasons for replacement mentioned in the Guidelines for Examination should be kept to a minimum.

With a view to avoiding similar situations in the future, it therefore appears advisable that the part of Form 2701 which includes an indication whether the decision is rectified and the examining division's signatures should be public. It also appears advisable to adapt this form such that the names of the examiners are printed, and not only indicated by handwritten signatures, as is now the case.

Additionally, it seems advisable to provide an explanation for each replacement, preferably in a public part of the electronic file, in order to dispel potential concerns.

19. As regards the present case, since it is to be remitted to the examining division, it would, in view of the above considerations, be desirable that it be processed by the original examining division, insofar as possible.
20. Finally, the Board tends to believe that at least some of the above considerations apply to the replacement of examiners or an examining division at any time during the examination of an application. The Board is aware that recently the lack of transparency in this regard

has attracted attention, with several open letters from stakeholders both within and outside the Office. These letters criticised more apparent situations where, after a negative communication or decision, a newly appointed examining division directly proceeded to grant a patent.

Order

For these reasons it is decided that:

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

The Registrar:

The Chairman:



T. Buschek

W. Chandler

Decision electronically authenticated