

In J 10/02 the appellant argued that where an appeal was lodged against a decision to suspend grant proceedings, the provisions of R 13 EPC 1973 appeared to be in conflict with those of Art. 106(1) EPC 1973, and that the provisions laid down by an article had to prevail over those of a rule. If the suspension of the grant proceedings were maintained, in spite of the pending appeal, this would amount to a serious procedural violation. The board, however, pointed out that the suspensive effect of an appeal served to provide an appellant with provisional legal protection in the sense that no action should be taken to implement the decision of the department of first instance in order not to deprive the appeal of its purpose. However, if the grant proceedings were continued and the appellant were to arrive at a definitive end to the grant proceedings in its favour, this would be more than the appellant could achieve if it succeeded with the appeal under consideration.

### 3.1.2 Opening of proceedings before a national court

According to T 146/82 (OJ 1985, 267), suspension had to be ordered if satisfactory proof of the opening of relevant proceedings before a national court was given to the EPO by a third party, provided that the European patent application had not been withdrawn or was not deemed to have been withdrawn.

In J 6/03 the Legal Board held that R 13(1) EPC 1973 referred to proceedings which resulted directly, i.e. generally and automatically, in decisions mentioned in Art. 61(1) EPC 1973. The provision was therefore not applicable in respect of decisions of courts of third states (here, Canada).

In J 14/19, the Legal Board observed that R 14(1) EPC (R 13(1) EPC 1973) did not specify when national proceedings were deemed to have been instituted. The issue of when they became pending was therefore to be assessed under the procedural law of the country whose courts had been asked to take a decision within the meaning of Art. 61(1) EPC (see also J 2/14, T 1138/11). Art. 8 of the Protocol on Recognition 1973 supported this interpretation. It provided that, if proceedings based on the same claim to a grant of a European patent and between the same parties were brought before different courts, the court to which a later application was made had to decline jurisdiction in favour of the court to which an earlier application had been made. Which court had been applied to first had to be determined on the basis of when proceedings had become pending.

In J 36/97 the Legal Board, with reference to Art. 9(2) of the Protocol on Recognition of 5 October 1973, stated that neither the jurisdiction of the national court whose decision was to be recognised nor the validity of such decision may be reviewed by the boards of appeal (see also J 8/96, J 10/02, J 14/19). When and how legally relevant civil proceedings were opened in a contracting state was likewise determined by national law (J 7/00).

In J 9/06 the Legal Board pointed out that, according to G 3/92 (OJ 1994, 607), only the courts of the contracting states had jurisdiction to decide claims to entitlement to the right to the grant of a European patent (see also J 14/19). It was not possible for the EPO, nor was it its function in the context of the examination of a request to suspend proceedings under R 13 EPC 1973, to examine whether the subject-matter disclosed in a European