

In T. 892/94 (OJ 2000, 1) the board held that the right to be heard of a party absent from oral proceedings as expounded in G. 4/92, could, in appropriate circumstances, be surrendered by a party. The respondents'/patentees' declaration, before the oral proceedings that they would take no further part in the proceedings could only be construed as an unequivocal decision to surrender, voluntarily, their rights according to Art. 113(1) EPC and to no longer to avail themselves of the opportunity to present their comments on any objections, facts, grounds or evidence which could be introduced into the proceedings by the appellants or the board and which could turn out to be decisive.

In T. 191/98 the board referred to G. 4/92 and considered that the respondent (patentee), when informing it of its non-appearance, should have expected that the board would decide in substance on the patent in its granted form, taking into account any piece of evidence filed by the appellant (opponent) and arguments based on that evidence, including a line of argument further developed during the oral proceedings.

2.7.3 Non-attendance at oral proceedings before the boards – Article 15(3) RPBA 2020

The introduction of Art. 11(3) RPBA 2003 (Art. 15(3) RPBA 2020) superseded the findings of G. 4/92 for the non-attendance at the oral proceedings before the boards (T. 706/00). For cases in which the applicant files amended claims in appeal proceedings after the oral proceedings have been arranged and then does not attend them, see chapter V.A.5.5.4a) "Absence of applicant (patent proprietor) from oral proceedings". The appellant can reasonably expect that during the oral proceedings the board will consider the objections and issues raised in its communication. By not attending the oral proceedings, the appellant effectively chooses not to avail itself of the opportunity to present its observations and counter-arguments orally but instead to rely on its written case (Art. 15(3) RPBA 2020; see e.g. ex parte cases J. 15/10, T. 1625/06, T. 628/07; see also T. 55/91). As quoted in T. 991/07, the explanatory notes to then Art. 11(3) RPBA (CA/133/02, dated 12 November 2002) state that Art. 15(3) RPBA 2007 (Art. 15(3) RPBA 2020) "does not contradict the principle of the right to be heard pursuant to Art. 113(1) EPC since that Article only affords the opportunity to be heard and, by absenting itself from the oral proceedings, a party gives up that opportunity."

a) Ex parte proceedings

In T. 991/07 the board decided, with reference to Art. 15(3) and 12(2) RPBA 2007 (now Art. 15(3) and 12(3) RPBA 2020), that it could base its decision on objections which would be new to the appellant, but which could not be communicated to it due to the fact that the appellant was not present at the oral proceedings, without infringing the appellant's right to be heard (Art. 113(1) EPC). The board observed that in line with established case law (cf. e.g. decisions T. 823/04 and T. 1059/04; see also T. 1704/06, T. 532/09, T. 1278/10 – all ex parte cases), the appellant who decided not to attend oral proceedings had nonetheless had the opportunity to do so and that the requirements of Art. 113 EPC were thus met. A further justification for such an approach was that a party who filed substantive amendments to its case and then deliberately absented itself from oral proceedings in order to avoid any adverse decision being reached would infringe the general principle that it is incumbent on both the EPO and users of the European patent system to act in