

situation might have changed, for example through the accession of new contracting states, or as a result of more recent legislation in the contracting states.

The board in *ex parte* case T 1473/13 (stay of proceedings – pending complaints before the German Federal Constitutional Court (FCC) regarding a possible lack of judicial independence of the members of the boards of appeal) was of the opinion that the case law (T 833/94, T 74/00, T 517/14) meant that a board was not required to make investigations of its own on a party's case but could still do so where it deemed it appropriate, at least in *ex parte* cases. The appellant had made assertions without providing details and/or explanations as to, for example, whether the FCC had jurisdiction under German constitutional law over acts of the EPO relating to Germany, and, if so, what the scope of that jurisdiction was and what powers were vested in the FCC to exercise it. The board considered it appropriate to cover the essentials of this point of law of its own motion. This was because if the German FCC did not have jurisdiction over acts of the EPO boards of appeal, any further discussion of the fourth auxiliary request would be moot.

5.2. Shifting the burden of proof

5.2.1 General

Once a party has submitted conclusive proof of its allegations, it has complied with the requirement of the burden of proof. The evidence need not prove the facts with absolute certainty in order to be deemed conclusive; it suffices that it proves that they are highly probable. If a party has discharged its burden of proof, the counterparty seeking to refute the conclusively established facts by way of counter-arguments bears the burden of proving the alleged facts (T 1162/07; see also T 270/90, OJ 1993, 725). In T 109/91 the board held that the burden of proof might shift constantly as a function of the weight of the evidence, i.e. if a party provided enough evidence to demonstrate a fact to the conviction of the board, the mere allegation of the contrary by the other party is not convincing (confirmed e.g. in T 525/90, T 239/92 and T 838/92).

In *ex parte* proceedings, when the applicant challenges *prima facie* evidence concerning a fact, i.e. the nominal publication date of a document, and submits evidence to displace such *prima facie* evidence, the burden of proof shifts to the examining division to establish that the document was "made available to the public" within the meaning of Art. 54(2) EPC on that date (see T 929/94 with reference to T 750/94, OJ 1998, 32). According to T 128/87 (OJ 1989, 406), a party presenting a cheque to the EPO bore the burden of proof for its receipt by the EPO. However, if the party furnished sufficient proof that a certain document had been filed, such evidence shifted to the EPO the burden of providing a greater weight of evidence to the contrary (T 770/91 and J 20/85, OJ 1987, 102). The more recent case T 538/09 addressed this issue of burden of proof and standard of proof in its analysis of T 750/94 and T 151/99.

In *ex parte* case T 545/08 the board said that it is a general principle that, when the examining division raises objections, the burden of proof lies initially with it. This means that objections must be reasoned and substantiated, and must show that, on the balance