

opposition division had changed between the oral and written decision; see e.g. T 960/94, T 862/98, T 2175/16 and T 2348/19.

In T 900/02 a number of procedural irregularities had occurred after the oral proceedings before the opposition division, including a delay of over three years before despatch of the written decision (in fact, two decisions were issued, in different compositions). The board followed T 390/86 and T 862/98 and held that if for any reason, (even quite acceptable and understandable reasons such as illness or retirement), the same three members were not available, then the parties were to be offered new oral proceedings.

1.3.3 Composition of opposition division includes those who have taken part in proceedings for grant contrary to Art. 19(2) EPC

Art. 19(2), first and second sentence, EPC refers to the participation of members of the opposition division at **every stage** of the grant proceedings, not only to their involvement in the final decision (T 476/95). If only one examiner took part in the prior proceedings, that examiner may not be chairman in the subsequent opposition proceedings under Art. 19(2) EPC (T 939/91). It is established case law (T 251/88, T 939/91, T 382/92, T 476/95, T 838/02, T 825/08, T 1349/10, T 1700/10, T 234/11) that an improper composition of the opposition division is a substantial procedural violation.

In T 1788/14 the opposition division's decision had been taken in a composition that differed from the examining division only in that a new chairman had been appointed. The board regarded this to be a substantial procedural violation.

In T 382/92 the board held that in cases of a breach of Art. 19(2) EPC it follows from the lack of jurisdiction of the department of first instance that the impugned decision is void ab initio (see also J 38/97).

1.3.4 Remittal after breach of Article 19(2) EPC

Where the composition of an opposition division is in breach of Art. 19(2) EPC, this is deemed to be a substantial procedural violation that can warrant reimbursement of the appeal fee and remittal of the case (established case law, see T 251/88, T 939/91, T 382/92, T 476/95, T 838/02, T 825/08, T 1349/10, T 1700/10, T 135/12, T 285/11).

In T 838/02 the chairman of the opposition division ought to have been excluded as he had participated in the grant proceedings, yet he had been in place when the patent was revoked. The board held that it was immaterial for the purposes of Art. 19(2) EPC 1973 whether or not the opposition division had actually been aware of the circumstances justifying exclusion. If the composition of the opposition division was contrary to Art. 19(2) EPC 1973, the parties should be given the opportunity to comment before the board decided on the remittal of the case.

Although the facts in T 1349/10 were similar, the board distinguished the situation from that in T 838/02, as the patent had been maintained in the opposition proceedings, which meant that the public too was affected by the procedurally flawed decision. The board held