

the absence of the appellants (opponents) did not conflict with the opinion of the Enlarged Board of Appeal in G 4/92. The board stated that the respondent's (patentee's) restrictions to the claims removed objections already raised by the appellants. In such a situation the appellants could not have been taken by surprise, because they had to expect that the respondent would try to overcome all objections. The submission of auxiliary requests was clearly not a "fact" within the meaning of G 4/92 (see also T 771/92, in which the board held that the submission of restricted claims was neither a fact nor could it be evidence). In cases T 912/91, T 202/92, T 856/92, T 890/92, (see also T 673/06 and T 235/08), which were based on similar facts, the board also concluded that Art. 113(1) EPC had been satisfied.

In T 1448/09 refusal of the European patent application was based on the common general knowledge as illustrated by document D3. That stance was first taken in the oral proceedings before the examining division, which the appellant did not attend. According to G 4/92, arguments could be presented at any time, even during oral proceedings in the absence of a party, but the same did not apply to new facts forming the basis for a decision. A reference to the common general knowledge could be presented as an argument, but the existence of that knowledge was a matter of fact. If its alleged existence was disputed, the facts relevant in that regard had to be established. That meant that the party against which this knowledge was cited had to have the opportunity to dispute or accept it. In the case in hand, the appellant had neither been aware of the examining division's invocation of the common general knowledge nor of the existence of document D3 until the decision was announced. This violated the appellant's right to be heard on the relevance of document D3 and, by extension, on the existence of the invoked common general knowledge.

In T 1049/93 the board held that, where a duly summoned respondent (opponent) chooses not to attend oral proceedings, a board can still consider prior art which might be an obstacle to the maintenance of the patent in suit. The opportunity to be heard is offered by summoning the parties to a hearing before the board. If the respondent chooses not to avail himself of this opportunity, his right to be heard is exhausted to the extent that it concerns facts and arguments in support of his position. G 4/92 should not be construed as extending or prolonging the rights of a voluntarily absent party.

In case T 414/94 the board stated that there was no general prohibition on amending requests during a party's absence from oral proceedings. An absent party (here, the opponent) must expect reactions of the opposing party (here, the patentee) within the legal and factual framework of the case established prior to oral proceedings, and the possibility of decisions taking account of, and being based on, such reactions.

In T 501/92 (OJ 1996, 261) the board ruled that if a new ground for allowing the appeal based upon the file record (here, the patentee's failure to file a formal request to maintain the patent) was raised by the appellant (opponent) for the first time during oral proceedings from which the respondent (patentee) was voluntarily absent, it would be contrary to Art. 113(1) EPC and the principles underlying G 4/92 to allow the appeal on the basis of this new ground without giving the respondent an opportunity to comment.