

4.3. Standard of proof

Even though different concepts as to the standard of proof have developed in the case law of the boards, they all have in common that a judgement is to be made on the basis of the application of the principle of free evaluation of evidence.

The EPO standard of proof is generally the balance of probabilities. By way of exception, the standard of proof of the balance of probabilities is shifted to a standard of proof beyond reasonable doubt mainly in opposition where only the opponent has access to information (evidence) concerning, for example, an alleged public prior use.

Of note in particular are some relatively recent decisions containing lengthy observations on the standard of proof and the previous case law on this, namely: T 2451/13 on the meaning of "beyond reasonable doubt" and T 545/08 on the meaning of "balance of probabilities" in the boards' case law; the latter decision, the board considered the matter in the general context of the law of evidence, concluding that a probability as low 51% would not suffice.

See also T 2466/13, in which it was likewise found that there was no need to decide on the applicable standard of proof. In the same vein, see T 768/20 and T 660/16 citing in particular to T 545/08 (points 8 and 11 of the Reasons).

4.3.1 General – "Balance of probabilities"

The EPO departments decide on the issues that arise before them on the basis of the evidence adduced by the parties. Their decisions need not, and in most cases cannot, be based on absolute conviction, but instead are to be arrived at on the basis of the overall balance of probabilities, in other words on the footing that one set of facts is more likely to be true than the other. If the result of the boards' evaluation of the evidence is such as to persuade them one way or another, then the **balance of probabilities** standard is met. This standard applies particularly in opposition appeal proceedings where the boards of appeal are called upon to reach a conclusion on the basis of the overall balance of probabilities, as distinct from "beyond all reasonable doubt" or "absolute conviction" (on the latter concept, refer to the more recent case T 2451/13). Each of the parties must therefore seek to prove facts alleged by it to that degree of proof (see e.g. T 182/89, OJ 1991, 391; T 270/90, OJ 1993, 725; T 859/90; T 109/91; T 409/91, OJ 1994, 653; T 1054/92 of 20 June 1996; T 296/93, OJ 1995, 627; T 326/93; T 343/95; T 363/96). The standard of balance of probabilities applies also in decisions issued in ex parte proceedings (T 381/87, OJ 1990, 213; T 69/86; T 128/87, OJ 1989, 406; T 939/92, OJ 1996, 309; T 545/08 on internet publications).

When an issue of fact is being examined and decided by the EPO on the balance of probabilities, **the more serious the issue** the more convincing must the evidence be to support it. If a decision on such an issue may result in refusal or revocation of a European patent, for example, in a case concerning alleged prior publication or prior use, the available evidence in relation to that issue must be very critically and strictly examined. A European patent should not be refused or revoked unless the grounds for refusal or