

## 7.6.2 Procedural law questions

## a) Conversion into deposit under the Budapest Treaty

T 39/88 (OJ 1989, 499) affirmed the principle that one important purpose of R. 28 EPC 1973 (R. 31 EPC) is to make the availability of the deposited organisms independent of any consent by the depositor. The board observed that the proper way of bringing a deposit originally filed for another purpose (here a US application) into line with the requirements of the EPC system was to formally convert the deposit into a deposit under R. 28 EPC 1973 (in the case of a deposit made on the basis of a special agreement between the EPO and the depositary institution) or into a deposit under the Budapest Treaty (which automatically covered R. 28 EPC 1973), as the case might be (see also T 239/87, T 90/88, T 106/88).

In T 2068/11 a lactobacillus strain had originally been deposited with a Japanese depositary institution that was not recognised under the Budapest Treaty and not listed by the EPO. The board ultimately decided that this deposit's conversion after filing of the European patent application had been too late; the application could not refer to the international deposit (application refused).

## b) Late submission of deposit number

According to R. 28(1)(c) EPC 1973, the application had to state the depositary institution and the file number of the deposited biological material. In G 2/93 (OJ 1995, 275) the Enlarged Board of Appeal held that the provisions of R. 28 EPC 1973 were subordinate to the requirements of Art. 83 EPC 1973. The indication of the file number (accession number) of a culture deposit in a patent application was substantive because, under the EPC, it was instrumental in enabling a person skilled in the art to carry out the invention. The Enlarged Board therefore held that, contrary to the ruling in J 8/87 (OJ 1989, 9), the information concerning the file number could not be submitted after expiry of the time limit set out in R. 28(2)(a) EPC 1973 (i.e. sixteen months after the date of filing of the application or, if priority is claimed, after the priority date).

As for the term "publication" within the meaning of R. 28(2)(a), second part of sentence, EPC 1973 in the context of a European application filed as an international one, see T 328/04.

See T 227/97 (OJ 1999, 495) for the board's decision that reestablishment of rights may be available for the time limit set by R. 28(2)(a) EPC 1973 and R. 13bis.4 PCT.

## c) Biological material deposited by a person other than the applicant

The board in T 2266/10 concluded that the information submitted met the requirements of R. 31(1)(d) EPC. In T 1338/12 and T 2542/12, by contrast, the boards refused applications on the basis that the declarations at issue had not been submitted in time.