

during any ensuing appeal. The Legal Board held that the examining division had been wrong not to decide on this auxiliary request. It noted that auxiliary requests were filed in case the main request was refused; they then took its place and had to be dealt with in the **same decision**. The course taken by the examining division was at odds with procedural economy, and might also oblige the applicant to appeal twice. This amounted to a substantial procedural violation (see also J.1/80). The Legal Board referred the matter back, without considering the merits, for the division to decide on the two requests together, the examining division being the "competent department" within the meaning of Art. 122(4) EPC 1973.

6.3. Parties to re-establishment proceedings and the right to be heard

In T.552/02 the board held that the response to be given to the application for re-establishment was of the utmost importance for the respondents, as it affected the actual admissibility of the appeal and hence the reviewability of the opposition division's decision to revoke the patent in suit. From this the board deduced that it would be a breach of Art. 113(1) EPC 1973 to take a decision concerning the interests not only of the appellants but also of the respondents without giving the latter an opportunity to present comments (see also T.1561/05).

6.4. Concurrent request for interruption of proceedings

In J.../87 (= J.902/87, OJ 1988, 323) the Legal Board decided that, in accordance with R. 90 EPC 1973 (R. 142 EPC), which the EPO must apply of its own motion, the legal incapacity of an applicant or his representative has the effect of interrupting proceedings and, where appropriate, the one-year time limit referred to in Art. 122(2) EPC 1973 (now R. 136(1) EPC).

In T.315/87 of 14 February 1989 the board stated that, in case a request for interruption was filed together with a request for re-establishment, preference should be given to the application of Art. 122 EPC 1973, under which less severe impairment could also be grounds for re-establishment of rights. The question of any interruption of proceedings under R. 90 EPC 1973 could be left open provided that all the losses of rights which had occurred could be overcome by restitutio in integrum.

In J.9/90 the Legal Board of Appeal held that for R. 90(1)(b) EPC 1973 (interruption of proceedings because of insolvency) to be applied in the light of Art. 60(3) EPC 1973 (unchanged) and R. 20(3) EPC 1973 (R. 22(3) EPC), the applicant entered in the Register of European Patents and the insolvent person (here, a limited company) had to be **legally identical**. However, the fact that the persons involved were not identical did not necessarily rule out re-establishment of rights under Art. 122 EPC 1973. Someone who was only indirectly affected by an event, such as insolvency, could be "unable" within the meaning of Art. 122(1) EPC 1973. In such a case however the persons so affected had to prove that they had exercised all the due care that could have been expected of them in the circumstances of such an insolvency.