

A board may admit a statutory declaration as evidence even if it is signed by an opponent's senior manager. It is then to be considered in accordance with the principle of free evaluation of evidence (T 64/13).

In T 2057/13 the affidavit in respect of the contents of priority document P1, filed for the first time by the patent proprietor in reply to the board's communication under Art. 15(1) RPBA 2007, was not admitted. The affidavit was written by one of the inventors named in P1 and an employee of the appellant-patent proprietor. The board had to assess the contents of P1 in an impartial manner from the perspective of an independent skilled person.

In T 505/15 the opposition division had considered the witness to be credible and the board had no reason to depart from this assessment. The appellant (patent proprietor) attempted to cast doubt on the witness's credibility by referring to the fact that she was an employee of the appellant (opponent) and that there was a bonus element to her remuneration. The board took the view that bonus payments were not unusual and, according to the witness, had for years not related to a project concerning the alleged public prior use. In the board's view the **discrepancies** pointed out by the appellant (proprietor) did not call into question the reliability of the overall assertions made by the witness.

In J 10/04 the Receiving Section had doubted the credibility of sworn statements given by a legal assistant. It had not invited her to be heard in person as a witness because this would not have led to a different evaluation of the evidence. The Legal Board held, first of all, that a sworn statement was a form of evidence with a high probative value, especially if it was given, as in the case in point, in the knowledge that wilfully false statements were punishable under the applicable law. Strong reasons were therefore needed to disregard this kind of evidence, for example a set of circumstances making the statement very unlikely. If the Receiving Section had considered the circumstances described in the statement very unlikely, it ought to have heard the witness personally in order to evaluate her credibility (ruling applied in e.g. T 1100/07).

See also T 2338/13, a special case in which the doubt about the relationship between the opponent and a witness had implications for the applicable standard of proof; conversely, in T 734/18 (in which the supplier had business ties to the patent proprietor and the opponent) the board could not see the similarities with T 2338/13 cited by the patent proprietor in support of its request for a higher standard of proof to be applied on appeal than the opposition division applied (see in this chapter, III.G.4.3.2 "Public prior use").

b) Evaluation of evidence by the department of first instance – review

The scope of the boards' competence in this regard has been expressly discussed in a number of recent decisions, for example T 1418/17 (see below), from which the board in the more recent T 1604/16 diverged, holding that boards had the power to review contested decisions in full, including not only the points of law but also the facts.

The board in T 2565/11 overturned the evaluation of evidence made by the department of first instance because the opposition division erred as regards the underlying facts and