

In T.1666/16, the appellant (opponent), relying on T.131/03 and T.740/01, argued that since the angle of repose (PVDF resin powder) was an unusual parameter in the context of PVDF resins, it would be legitimate to reverse the burden of proof and require the patent proprietor, who had chosen to rely on an unusual parameter as the sole distinguishing feature over the powder disclosed in example 4 of D1, to demonstrate that this parameter was not fulfilled by that powder in D1. The board decided that T.131/03 and T.740/01 were based on the same rationale, namely that when it had been established that there was a **strong presumption** that claimed subject-matter defined by an unusual parameter was inherently disclosed in the prior art, the patent proprietor could not merely claim the benefit of the doubt and had to demonstrate that the chosen parameter-based definition distinguished the claimed subject-matter from the prior art. In T.1666/16, however, the appellant had not failed to show that the unusual parameter was inherently disclosed in the prior art and there was therefore no justification for reversing the burden of proof.

e) Impact of a lack of information in the patent

In T.100/15, the board agreed with the patent proprietor's argument that the burden of establishing insufficiency of disclosure lay with the opponent in inter partes proceedings. However, when a patent did not give any information on how a feature of the invention could be put into practice (in this case, the controlled cooling), and the opponent had plausibly argued that common general knowledge would not enable the skilled person to do so, it was for the patent proprietor to demonstrate otherwise.

In T.1299/15, the board held that under established case law the opponent (in this case, the appellant) bore the burden of proving an alleged lack of reproducibility. However, since the patent specification did not describe any embodiment for the adjustment device, the appellant was unable to do so on the basis of such an example and instead could only base its case on attacking the device's **plausibility**, which was it then did. That shifted burden of proving the contrary to the patent proprietor (in this case the respondent).

f) Evidence where serious doubts drawn from the patent itself

In T.1846/10 the board observed that example 5 of the patent provided verifiable facts which raised **serious doubts** that the invention could in fact be carried out by the average person skilled in the art without undue experimentation or inventive skills by following the guidance provided in the patent. Under these circumstances, no additional experimental evidence from the appellant (opponent) was required as it could rely on the evidence provided by the patent itself. The board concluded that the appellant had discharged its burden of proof.

g) Disputing an experimental protocol

In T.792/00 the board found that if the patent contained only an example with a hypothetical experimental protocol, and if this example was to be relied on for showing sufficiency, then the burden of proving that this protocol worked in practice as stated lay with the patentee. Evidence that a variation of the protocol worked was unlikely to be enough. However, if the example contained a complete experimental protocol and the