

patentee affirmed that the results reported had been obtained, a board was likely to accept that the patentee had done enough to shift the burden of proof to the opponent who would then have to provide a repeat of the experiment in order to convincingly demonstrate that the protocol did not, in fact, work as stated.

#### h) Common general knowledge of the skilled person

In T.2070/13, as to the burden of proof, serious doubts were set out concerning whether the skilled person's common general knowledge would be sufficient to enable him to carry out the invention. As a consequence, the burden of proof shifted to the patentee. The mere assumption that anti-adherence of the claimed groups of compounds was known, and the reference to post-published D16 referring to a particular bacterial non-adhesion, was not convincing evidence that could discharge the respondent (patentee) from its burden of proof.

#### i) Violation of the laws of physics

In T.967/09 the board was satisfied that opponent III had substantiated, by means of verifiable facts, serious doubts that the patent did not disclose the invention as defined in claim 1 in a manner sufficiently clear and complete for it to be carried out by the skilled person. These doubts were considered not to be convincingly rebutted by the appellant (patent proprietor). Accordingly, the board considered that respondent (opponent III) had discharged its burden of proof in this respect. Therefore the patent, in respect of the subject-matter of claim 1, was insufficiently disclosed. T.1842/06 sets out various evidential requirements under Art. 83 EPC, especially those applicable in ex parte proceedings. It states that if an examining division or board objects that the description's disclosure is insufficient, it bears the burden of proving that. If an invention is "revolutionary" (e.g. linked to the "memory of water"), reversing this burden of proof may be justified if the claimed invention's feasibility and reproducibility does not appear sufficiently plausible on the basis of the application. Doubts might arise for example merely because a technical effect that is **a priori contrary to the laws of physics** is not adequately substantiated by experimental results.

In T.518/10 the appellant (patent proprietor) argued that the burden of proof that an extract comprising compound (II) could be obtained from aquatic or marine biomass, in particular krill, did not shift to the appellant. The patent in suit provided at least one way as to how such an extract could be obtained. Furthermore, the extraction of compound (II) from krill was not against the laws of physics as argued by the respondents (opponents). The board was not convinced and stated that in the present case, assertion of the appellant was against the prevailing technical opinion. The respondents provided evidence that compound (II) could not be obtained when working according to the general method described in the patent. By their experimental reports, the respondents conclusively showed that, by following the extraction method described in the patent in suit, it was not possible for the skilled person to obtain the claimed extract comprising compound (II). Since this fact was neither disproved by documents filed by the appellant nor refuted by the appellant's counter-arguments, the board concluded that the ground of Art. 100(b) EPC was made out.