

had not filed any evidence in support of its case and relied in its arguments on mere allegation. At the oral proceedings too, the appellant had merely referred to its written submissions, and thereby chosen not to submit arguments countering the position expressed by the board in the communication (Art. 15(1) RPBA) sent in preparation for those oral proceedings.

### 9.3. Burden of proof on the opponent – special cases

In T. 347/15 the board endorsed the case law on evidence (Art. 83 EPC) and, having found that the application did not contain detailed information about how to put the invention into practice, applied the reasoning given in T. 491/08. In the case in hand, the opponent (appellant II) would have had to perform a large number of costly tests to prove that the invention could not be carried out, whereas a single example from appellant I (patent proprietor) would have been enough to prove that it could. The board concluded that appellant II (opponent) had discharged its burden of proof by submitting comprehensible and plausible arguments giving rise to serious doubts about whether the skilled person could carry out the invention as claimed. That meant it had then been up to appellant I (proprietor) to prove the contrary, i.e. that the invention could be carried out, but it had failed to do so. In particular, the board found that, owing to the lack of information in the patent, carrying out the invention went beyond the usual know-how of the skilled person.

In T. 970/16 (use of the cellulase in laundering process), the board stated that the opponents, which indeed did not file themselves any evidence, discharged their burden of proof by relying on the available evidence X29 (experimental report filed by the patent proprietor) and by plausibly arguing that common general knowledge would not enable the skilled person to realize the disputed benefits. The required technical effect was due in the present case to a hypothetical mechanism not yet being part of common general knowledge as stated in the patent. The skilled person, in view of the unsuccessful results of X29, would be obliged to start a research program.

### 9.4. Taking account of doubts

An appellant (opponent) is not required to prove that carrying out the invention is inherently impossible; it need only adduce understandable arguments casting doubt on whether the invention can be carried out over the whole scope of the conferred protection on the basis of the patent specification and, if necessary, common general knowledge (T. 809/13).

The board in T. 1299/15 observed that it was established case law that the opponent (here: appellant) bore the burden of proving an alleged lack of enablement. However, since the patent specification did not describe any embodiment, the appellant in this case could not take such an embodiment as a basis for proving the lack of enablement; instead, it could only invoke a lack of **plausibility** in support of its case. Having done precisely that, it had shifted the burden of proving the contrary to the patent proprietor (respondent) and, that being the case, the board ultimately decided that the **doubts** had to go that party's detriment. (See also T. 805/17 on the burden of proof and means of evidence in a case where a patent contained so little information that it was considered insufficient even in combination with the skilled person's common general knowledge – dental